No. 17-1136

IN THE

Supreme Court of the United States

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA, ET AL.,
Petitioners,

v.

THE EPISCOPAL CHURCH, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR RESPONDENTS IN OPPOSITION

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May 7, 2018

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the decision of the Supreme Court of South Carolina that, under state law, certain property is held in trust.

2. Whether the decision of the Supreme Court of South Carolina warrants review in light of the fact that a majority of that court applied petitioners' preferred legal approach to resolving a church-property dispute and nonetheless ruled against petitioners based on the application of state law to these facts.

RULE 29.6 STATEMENT

Respondents have no parent corporation, and no publicly traded company owns 10% of their stock.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioners ask this Court to take this case to decide whether the First Amendment requires state courts to recognize a trust on *church* property even under circumstances when they would not do so under state trust law. Pet. i. That question is not presented here. The Supreme Court of South Carolina recognized a trust, but only under state law: the court held that, on the particular facts before it, the express trust recited in favor of the national Episcopal Church satisfied the requirements of *South Carolina law*, but only to the extent that parishes had acceded to that trust. *See, e.g.*, Pet. App. 56a (Beaty, C.J.) ("I look no further than our state's property and trust laws"). The court expressly *declined* to hold that the First Amendment compelled the state to recognize a trust imposed by the national church irrespective of state law. That is why the breakaway parishes that had not expressly acceded to the national church's property canon *prevailed* in the decision below.

Thus, contrary to petitioners' characterization of the decision below, the only questions of federal law present in this case were decided *in petitioners' favor*, and the judgment entered against petitioners by the state supreme court rested on state law alone. As a result, there is nothing for this Court to review: because the judgment against petitioners rests on adequate and independent state law grounds, no action of this Court could change the outcome in their favor.

To the extent petitioners now seek to argue that *even if* the state court's judgment rests on state law,

the Constitution requires a ruling in their favor, petitioners failed to preserve that argument in the state courts. Petitioners first raised it in their petition for rehearing to the state supreme court, and that court denied it without reaching the merits. This would be a poor vehicle to take it up in any event: the Court would confront an incomplete record, with the court below fractured not only on rationale but even on facts that could be relevant to disposition of the case on the merits.

Petitioners' unpreserved constitutional argument also lacks merit. In *Jones v. Wolf*, 443 U.S. 595 (1979), this Court held that the Constitution permits States to adopt the "neutral-principles approach" to resolving church property disputes under state law; it did not hold that the Constitution *forbids* States from applying their state trust law in ways that take account of the particular circumstances and relationships presented by hierarchical religious organizations. Indeed, the fact that petitioners can read *Jones* to be consistent with such a result suggests strongly that, if this Court were to take the case on the merits, it should return to the "hierarchical deference" approach articulated in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). The decision below could be affirmed on that alternative First Amendment ground.

JURISDICTION

Petitioners assert jurisdiction under 28 U.S.C. § 1257(a), which gives this Court jurisdiction to review final judgments of the state courts. Petitioners never mention any further proceedings that might impede finality, nor do they invoke any of the im-

plied exceptions to finality set out in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 477-483 (1975). But in a recent filing in another case, they have characterized the decision below as not a final judgment. *See* Omnibus Resp. at 17, *vonRosenberg v. Lawrence*, No. 2:13-cv-587-RMG, ECF No 138 (D.S.C. filed Mar. 31, 2018) ("[R]egardless of whether the Supreme Court grants or denies the petition [for certiorari], the basic fact remains that the existence and scope of [the] trusts" that are at the center of this petition "is currently being litigated in state court proceedings."). In respondents' view, the characterization in the petition is correct and the characterization in the district-court pleading is incorrect: The state supreme court's judgment is final and contemplates no further proceedings, only enforcement of the final judgment. This Court, however, must assess its jurisdiction itself.

STATEMENT

I. The Episcopal Church And Its Diocese Of South Carolina Adopted Rules Requiring That Parish Property Be Held In Trust For The Denomination, And All Of The Petitioner Parishes Agreed To That Rule.

A. The Episcopal Church.

The Episcopal Church (the "Church") is a hierarchical religious denomination. Pet. App. 9a-10a (Pleicones, J.); Pet. App. 32a & n.15 (Hearn, J.); Pet. App. 55a (Beatty, C.J.). Formed in the 18th century, the Church comprises three tiers, with its General Convention at the top, more than 100 regional dioceses in the middle, and thousands of worshipping congregations, or "parishes," at its base. Pet. App.

7a, 9a. As a condition of inclusion in the denomination, dioceses and parishes are required to accede to the Church's governance. Pet. App. 7a, 9a.

The Church's General Convention, comprising most of the Church's bishops and elected representatives from each diocese, has adopted and is responsible for amending the Church's governing documents, its Constitution and Canons and Book of Common Prayer. Pet. App. 8a-9a. Each diocese, in turn, adopts its own Constitution and Canons, which must be consistent with the Church's governing documents. Pet. App. 7a, 15a.

Over the centuries, the Church's General Convention has adopted provisions in its governing documents ensuring that church property will remain subject to the denomination's governance. For example, the Church's canons forbid the "consecration" of a church or chapel building unless the building is "secured for ownership and use by a Parish, Mission, Congregation, or Institution *affiliated with this Church and subject to its Constitution and Canons*." Pet. App. 36a (emphasis added).

In 1979, this Court held in *Jones* that states are "constitutionally entitled" (but not required) to adopt the "neutral principles of law" approach to resolving church property disputes. 443 U.S. at 604. Even under that approach, this Court held, "[a]t any time before [a] dispute erupts … the constitution of the general church can be made to recite an express trust in favor of the denominational church … [a]nd the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form." *Id.* at 606.

Later that year, the Church's General Convention responded to *Jones* by adopting Canon I.7(4), commonly known as the "Dennis Canon." Pet. App. 14a. The Dennis Canon provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains [a] part of, and subject to[,] this Church and its Constitution and Canons.

Pet. App. 14a-15a.

"As a number of courts in other states have noted, the Dennis Canon 'merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [the Church].'" Pet. App. 41a (Hearn, J.) (quoting *Falls Church v. Protestant Episcopal Church*, 740 S.E.2d 530, 540 (Va. 2013), cert. denied, 134 S. Ct. 1513 (2014)).

The Dennis Canon is followed by Canon I.7(5), which provides:

> The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

Pet. App. 15a.

B. The Diocese of South Carolina. The Diocese of South Carolina (the "Episcopal Diocese"), covering the eastern portion of the State of South Carolina, has been a diocese of the Church since the Church's formation. Pet. App. 7a. Except for a brief period during the Civil War, the Episcopal Diocese has consistently participated in and complied with the Church's governance. Pet. App. 7a-8a. For example, in 1987, the governing body of the Episcopal Diocese, its "Convention"—which includes representatives from all of the parishes in the Episcopal Diocese—adopted the following provision, mirroring the Church's Dennis Canon:

> All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for [the Church] and the [Episcopal Diocese]. The existence of this trust, however, shall in no way limit the power and Authority of the Parish, Mission, or Congregation existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject to, [the Church] and the [Episcopal Diocese].

Pet. App. 15a n.5.

In 2012, in the wake of disagreement over Church policy, certain dissident leaders of the Episcopal Diocese (the "dissident group") purported to withdraw the Episcopal Diocese and a majority of its parishes from the Church, an action that was contrary to the Church's polity and that the Church regarded as null and void. Pet. App. 25a-26a. That left the remaining

loyal Episcopalians to repopulate the leadership positions of the Episcopal Diocese. Pet. App. 26a. Shortly thereafter, the dissident group filed this lawsuit in state court, representing themselves as the continuation of the Episcopal Diocese even though they were no longer affiliated with The Episcopal Church. They sought declarations that (1) property that historically had been held for the Episcopal Diocese now belonged to the dissidents who had purported to remove the Episcopal Diocese from the Church, and (2) property that historically had been held by or for thirty-six parishes they claimed to have removed from the Church was not subject to trusts in favor of the Church or the Episcopal Diocese (the "parish property claims"). They also sought (3) to enjoin the Episcopal Diocese, reorganized under new leadership, from using the historic official names of the Episcopal Diocese, which they began using themselves. The question presented implicates only the second category of claims – those involving parish property.

C. The Parishes. Thirty-six of the parishes that claim to have withdrawn from the Church joined the present lawsuit on the side of the dissident group. Of those, twenty-nine had acceded in writing to the Dennis Canon after its adoption in 1979; they are petitioners here.[1] Pet. App. 119a n.72; Pet. 15 n.2.

II. A Majority of the Court Below Applied State Law To Hold For Respondents With Respect To 29 Of 36 Parishes.

The Supreme Court of South Carolina produced a fractured decision, with each of the five justices writing separately and different majorities deciding different issues. On the role of the First Amendment, a majority (Chief Justice Beatty and Justices Kittredge and Toal) concurred in petitioners' view that South Carolina's "ordinary trust and property law" (Pet. i) should apply to resolve the dispute, rejecting respondents' contention that, under *Jones*, the First Amendment required deference to the Dennis Canon. But a different majority (Chief Justice Beatty and Justices Pleicones and Hearn) applied "ordinary" South Carolina trust law and held that the parishes that acceded in writing to the Dennis Canon hold their property in trust for the Church and the re-

[1] As Justice Hearn noted, "[t]here is a discrepancy [among the justices] as to the precise number of parishes" that acceded in writing to the Dennis Canon. Pet. App. 45a n.21. Justice Hearn counted twenty-nine (Pet. App. 47a); Justice Toal counted twenty-eight (Pet. App. 103a, 119a n.72). Because the petition implicates only the parish-property claims, it is unclear why two non-parish entities—styling themselves as "The Protestant Episcopal Church In The Diocese of South Carolina" and "The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body"—are included among the petitioners. Pet. ii.

maining Diocese. Two of those Justices, Justice Pleicones and Justice Hearn, each maintained in the alternative that the First Amendment also required that result.[2]

A. "A majority of the Court—consisting of Chief Justice Beatty, Justice Kittredge, and [Justice Toal]—agree[d] … that the Court must … apply longstanding trust law" to resolve the case. Pet. App. 118a n.72 (Toal, J.) *See also* Pet. App. 103a n.65 (Toal, J.) ("A majority of the Court agrees with my analysis up to this point, finding we must apply neutral principles of South Carolina property law to resolve this dispute."). Under the view of that majority, South Carolina law must be applied to resolve church property disputes without regard to the nature of the relationships between the religious parties and entities involved in such disputes. That is precisely the "strict" version of "neutral principles" petitioners argue is constitutionally required. *See* Pet. 2 (the "strict" approach "blinds judges to the religious nature of the parties to the dispute, requiring them to apply the same ordinary state law that would apply to property disputes between any other parties").

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[2] South Carolina has not adopted the principle set out in *Marks v. United States*, 430 U.S. 188, 193 (1977), that the controlling opinion in a fractured decision is the one "taken by those Members who concurred in the judgments on the narrowest grounds." *See State v. Walker*, 166 S.E.2d 209, 210 (S.C. 1969) ("[W]here the members of the court unanimously or by a majority vote reach a decision but cannot, even by a majority, agree on the reasoning therefor no point of law is established by the decision and it cannot be precedent covered by the stare decisi[s] rule.") (internal quotations and citations omitted).

That same majority—Chief Justice Beatty and Justices Kittredge and Toal—held that, under South Carolina trust law, the parishes that did not accede to the Dennis Canon are not subject to trusts. *See, e.g.,* Pet. App. 119a n.72 (Toal, J.) ("[W]ith regard to the … church organizations which did not accede to the Dennis Canon, Chief Justice Beatty, Justice Kittredge, and I would hold that title remains in the … plaintiff church organizations").

Critically, Chief Justice Beatty "look[ed] no further than [South Carolina]'s property and trust laws to determine whether the purported trust created by the Dennis Canon comports with the requirements of either an express or constructive trust." Pet. App. 56a. In his view, the Dennis Canon "standing alone … is not sufficient to transfer title of property or create an express or constructive trust under South Carolina law." Pet. App. 57a (citing and quoting S.C. Code Ann. § 62-7-402(a)(2) (2015)). Accordingly, "the parishes that did not expressly accede to the Dennis Canon cannot be divested of their property." Pet. App. 58a (Beatty, C.J.).

Justices Kittredge and Toal would have found no trust to exist as to any of the parishes—even those that did accede—each for different reasons. Justice Toal opined that neither the Dennis Canon nor the parishes' written accessions could "satisfy the requirements for creating an express trust under South Carolina law" because they did not involve a "transfer of title." Pet. App. 101a-03a. Justice Toal also rejected any possibility of imposing a constructive trust under South Carolina law, as she "would find no 'clear, definite, and unequivocal' evidence of fraud on the part of the plaintiffs in acquiring title to

the properties." Pet. App. 105a-06a (quoting *Lollis v. Lollis*, 354 S.E.2d 559, 561 (S.C. 1987)).

Justice Kittredge joined Justice Toal in large part, Pet. App. 59a n.31, including her conclusion that state-law requirements for creating a trust had not been met. Pet. App. 60a. He also agreed that "the national church could not unilaterally declare a trust over the property of the local churches." Pet. App. 60a. He therefore concluded that no trust was created on the property of the non-acceding parishes. Pet. App. 70a-72a.

Taken together, the decisions of these three justices produced the result that, under South Carolina law, the parishes that did *not* accede to the Dennis Canon are *not* subject to trusts.[3]

B. A different majority—Chief Justice Beatty with Justice Pleicones and Justice Hearn—concluded that the parishes that did accede to the Dennis Canon hold their property in trust for the Church and the Episcopal Diocese. *See, e.g.,* Pet. App. 119a n.72 (Toal, J.) ("[W]ith regard to the … church organizations which acceded to the Dennis Canon, a majority consisting of Chief Justice Beatty, Justice Hearn, and … Justice Pleicones would hold that a trust in favor of the national church is imposed on the property and, therefore, title is in the national church.").

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[3] That same majority also deferred the intellectual-property claims—which, as noted, are not at issue in the petition—to a separate Lanham Act cause of action that is proceeding in federal court. Pet. App. 55a n.28 (Beatty, C.J.); Pet. App. 73a (Toal, J.); *see also* Pet. App. 59a n.31 (Kittredge, J.) (joining Justice Toal in relevant part).

Chief Justice Beatty, "[s]trictly applying neutral principles of" South Carolina law, concluded that the parishes' written accessions were "sufficient to create an irrevocable trust" under South Carolina law. Pet. App. 58a, 59a. He did not rely on the First Amendment or on any other source of federal law for that point.

Justices Pleicones and Hearn, joining each other's decisions, Pet. App. 30a, would have found a trust on the property of each of the 36 plaintiff parishes, regardless of whether a parish acceded in writing to the Dennis Canon. Pet. App. 29a (Pleicones, J.), Pet. App. 54a (Hearn, J.). Their opinions set out three independent bases for that conclusion. *First*, they held that "South Carolina's doctrine of constructive trusts … impose[s] a trust in favor of the [Church]." Pet. App. 48a (Hearn, J.) (citing *Lollis*, 354 S.E.2d at 561). Because the parishes "very clearly held themselves out as being affiliated with the [Church], agreed to be bound by its constitution and canons, attracted new members based on their affiliation with the Episcopal faith, participated in church governance, and in all other ways acted consistently with the [Church's] structure," "[f]or decades, if not longer," "equity requires that a constructive trust [in favor of the Church] be imposed" under state law. Pet. App. 48a-49a (Hearn, J.).[4]

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[4] Justice Hearn applied South Carolina's doctrine of constructive trust in response to the "dissent's assertion there was no writing to create an express trust binding the remaining seven parishes," Pet. App. 48a, but it is clearly her view that the facts giving rise to a constructive trust, Pet. App. 48a-49a, existed with regard to *all* of the parishes. *E.g.,* Pet. App. 32a n.14 ("there can be no question that the individual parishes have been affiliated with the National Church for decades"); Pet.

Second, they opined that the "real and personal property disputes sought to be adjudicated in this civil lawsuit [were] 'question[s] of religious law or doctrine masquerading as a dispute over church property [and] corporate control.'" Pet. App. 27a (Pleicones, J.) (quoting *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 685 S.E.2d 163, 172 (S.C. 2009)).[5] For that reason, they concluded that the First Amendment required the court to defer to and enforce the Church's "Dennis Canon and its diocesan counterpart." Pet. App. 27a-28a (Pleicones, J.) (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10 (1976)). *Accord* Pet. App. 33a (Hearn, J.) (same).

Third, they argued that the court was "bound" under *Jones* "to recognize the trust [the Church] created" because the parties "acted consistently both before and after the enactment of the Dennis Canon … as though the [Church] held a trust interest in the

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App. 36a ("[d]ating back to the early 19th century, churches were built, congregations grew, and members attended services, all with voluntary acceptance of the National Church's governing framework"); Pet. App. 40a ("[r]espondents acted consistently both before and after the enactment of the Dennis Canon … as though the National Church held a trust interest in [parish] property").

[5] As Justice Pleicones noted, the attempted breakaway was motivated by a dispute over church doctrine. *See* Pet. App. 23a n.8 (shortly before the dispute erupted, the Church's General Convention "confirmed the selection of the first openly homosexual bishop in [the Church]. [The bishop leading the dissidents] testified the [dissident group] had become "uncomfortable with the trajectory of the [G]eneral [C]onvention of the Episcopal Church."); *see also* Pet. App. 33a-35a (Hearn, J.).

property at issue," and the Church had "more than met" the "minimal burden" of "taking steps to impose an express trust over church property" by adopting the Dennis Canon "before the dispute erupt[ed]." Pet. App. 40a-42a (Hearn, J.).

But Chief Justice Beatty agreed with only the first of these three alternative holdings—the one under state law. Thus, taken together, the decisions of these three justices produced the result that, under South Carolina law, the parishes that *did* accede to the Dennis Canon *are* subject to trusts.[6]

Justice Toal dissented from that holding; as noted, she would have recognized no trusts at all. Justice Toal confirmed, however, that she parted company with Chief Justice Beatty not on what law to apply, but on how the facts come out *under South Carolina law*: "I do not believe mere accession meets the requirements of South Carolina law for the creation of a trust," Pet. App. 103a n.65, while Chief Justice Beatty "believes all but eight of the plaintiffs acceded to the Dennis Canon in a manner recognizable under South Carolina's trust law." Pet. App. 119a n.72.

Justice Kittredge likewise dissented with respect to the parishes that expressly acceded to the Dennis Canon, but on somewhat different reasoning. He concluded that a parish's express written accession would satisfy the "minimal burden" required for a

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[6] That same majority held, as to the claims for diocesan property—which, as noted, are not addressed in the petition—that the remaining Episcopal Diocese, not the dissident group, was the proper beneficiary of diocesan property at issue, Pet. App. 27a (Pleicones, J.); Pet. App. 54a (Hearn, J.); Pet. App. 58a n.29 (Beatty, C.J.).

hierarchical church to create a trust under *Jones*, Pet. App. 64a, but only a revocable one. Pet. App. 64a-67a. He reasoned that "as a matter of South Carolina law" those parishes "retained the authority to withdraw their accession," which is "precisely what they did." Pet. App. 66a. Therefore, he concluded, they "are no longer bound by it," and they hold title to the parish property. Pet. App. 68a.

REASONS FOR DENYING THE PETITION

I. The Decision Of The State Supreme Court Presents No Reviewable Federal Question.

A. The Decision Against Petitioners Rests On State Law.

This Court "will not review judgments of state courts that rest on adequate and independent state grounds," a limit that "is based, in part, on 'the limitations of [this Court's] jurisdiction.'" *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). Here, the adequate and independent state-law basis for the state court's decision is readily apparent. Chief Justice Beatty, whose vote controlled the result, "look[ed] no further than [his] state's property and trust laws to determine whether the purported trust created by the Dennis Canon comports with the requirements of either an express or constructive trust." Pet. App. 56a. And with respect to the 29 parishes that are petitioners here, Chief Justice Beatty said, "their express accession to the Dennis Canon was sufficient to create an irrevocable trust." *Id.* at 58a.

Justice Hearn, joined by Justice Pleicones, concurred in that much of the result. And they agreed that an irrevocable trust existed, citing "South Caro-

lina Code Section 62-7-602(a)," which applies a "common law default rule of irrevocability" to "trusts created before" 2006. Pet. App. 44a-45a (Hearn, J.). And even in the absence of an express trust, Justice Hearn found that South Carolina's requirements for a constructive trust were satisfied because "these parishes very clearly held themselves out as being affiliated with the National Church, agreed to be bound by its constitution and canons, attracted new members based on their affiliation with the Episcopal faith, participated in church governance, and in all other ways acted consistently with the National Church's structure." *Id.* at 48a.

Furthermore, those three justices all cited and applied the seminal South Carolina trust decision, *Lollis*, and determined that the hierarchical church had satisfied its demanding requirement of establishing a trust by "clear, definite, and unequivocal" evidence. Pet. App. 58a (Beatty, C.J.); Pet. App. 48a-49a (Hearn, J., joined by Pleicones, J.). Their reliance on that decision confirms that each of the three Justices who held against petitioners had a rule of decision that rested only on ordinary principles of South Carolina law.

Petitioners thus are flat wrong when they contend (at 18) that the court below did not find that "a trust … had been created under South Carolina trust law." And while they claim that the decision below exemplifies a "hybrid" approach to applying *Jones*, one characterized by application of "special rules of trust and property law" unique to hierarchical church property disputes, Pet. 25, petitioners cannot identify any "special rule" applied by the three Justices who ruled against them. All they have is an assertion,

unaccompanied by citation, that those Justices "resolved this property dispute by deferring to the national church's unilateral claim to Petitioners' properties." Pet. 30. But that is flatly contradicted by Chief Justice Beatty's opinion that the Dennis Canon "does not unequivocally convey an intention to transfer ownership of property to the national church or create an express or constructive trust." Pet. App. 57a-58a. The argument section of the petition (Pet. 18-38) does not mention Chief Justice Beatty's opinion, or cite it even once.

In fact, Chief Justice Beatty, Justice Hearn, and Justice Pleicones—the controlling majority on the point on which petitioners seek review—united on a disposition that relied only on South Carolina's law of trusts. Indeed, because the controlling majority relied on "ordinary principles of state trust and property law," its reasoning is indistinguishable from the cases taking the "strict" approach to *Jones* that petitioners urge as correct.

There accordingly is a fully adequate state-law basis for the judgment of the Supreme Court of South Carolina against petitioners. To be sure, petitioners disagree with how members of the state supreme court resolved the state-law questions. *See, e.g.*, Pet. 15 (contending that Chief Justice Beatty's view of South Carolina trust law was wrong and Justices Kittredge and Toal's was "clearly" right). But that disagreement is not reviewable by this Court because it presents no federal question.

On the federal question that the state supreme court *did* decide, a majority of the court rejected *respondents'* argument that *Jones* requires deference to the Dennis Canon. That is why the breakaway par-

ishes that did not expressly accede to the Dennis Canon prevailed in the court below and did not join the petition. Pet. 15 n.2; *see also* Pet. iii.

Chief Justice Beatty wrote that "in [his] view, the Dennis Canon, by itself, does not have the force and effect to transfer ownership of property as it is not the 'legally cognizable form' required by *Jones*." Pet. App. 57a (citing 443 U.S. at 606). Justice Toal joined Chief Justice Beatty in that view. Pet. App. 99a (Toal, J.) ("the defining language of the *Jones* opinion" is that a trust must be adopted before the dispute begins and be ***'embodied in some legally cognizable form'*** in order to be enforceable under state law") (emphasis in original). Justice Kittredge joined most of Justice Toal's opinion, *see* Pet. App. 59a n.31, and elaborated that even under *Jones* the Dennis Canon had no force or effect with respect to parishes that had not acceded to it, Pet. App. 70a-72a.[7] There accordingly is no truth to petitioners' assertion that the Supreme Court of South Carolina here "thought the First Amendment required it to apply what amounts to a federal common law of trusts." Pet. 19.

B. Petitioners Failed To Preserve Any Argument That The State Supreme Court's State-Law Analysis Violates The Federal Constitution.

Petitioners' constitutional arguments largely rest on mischaracterizing the decision below as resting on federal rather than state law. To the extent peti-

[7] With respect to petitioners (the parishes that *did* accede), Justice Kittredge concluded that they had withdrawn their accession and so were entitled to prevail. Pet. App. 66a-68a.

tioners now argue that the federal Constitution requires judgment in their favor even if (as the state supreme court held) they lose under state law, they failed to raise any such federal argument in the state courts. That failure precludes review in this Court.

This Court can only review a state-court decision when a federal right has been "specially set up or claimed" in the state courts. 28 U. S. C. § 1257(a). "Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision [under] review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citations omitted). A "long line of cases clearly stat[es] that th[is] presentation requirement is jurisdictional," with only a "handful of exceptions." *Id.* at 445.

While petitioners now argue that "the Supreme Court of South Carolina's decision, like other decisions adopting the hybrid approach, violates both the Free Exercise and Establishment Clauses," Pet. 33, petitioners never argued in their merits briefing below that federal law required a decision in their favor. Rather, they expressly argued that the case should be resolved strictly as a matter of South Carolina law, with no First Amendment thumb on the scales. In other words, while petitioners asked the state court to reject *respondents'* federal-law argument that *Jones* requires deference to the Dennis Canon, petitioners raised none of their own. *See, e.g.*, Petitioners' S.C. S. Ct. Br. 27 (filed Aug. 14, 2015). Only after the state supreme court ruled against them *on the basis of South Carolina law* did

petitioners file a rehearing petition seeking to raise their own federal questions. *See* Pet. for Reh'g 5 (filed Sept. 1, 2017) ("this Court's decision has sanctioned an establishment of religion, an abridgement of Petitioner's constitutional rights to freedom of worship, assembly and association, [and] a denial of their rights to the free exercise of their religion …"). That is inadequate to preserve any new federal question for this Court's review.

"Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for rehearing." *Consol. Tpk. Co. v. Norfolk & Ocean View Ry. Co.*, 228 U.S. 326, 334 (1913). "There is an exception to this rule when it appears that the court below entertained the motion for rehearing, and passed upon the Federal question. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies." *Forbes v. State Council*, 216 U.S. 396, 399 (1910) (citations omitted). Here the exception is not satisfied; the state supreme court divided evenly (2-2) on the rehearing petition and as a result held that it was denied. Pet. App. 190a-191a. The court clearly did not "pass[] upon" petitioners' newly-raised constitutional argument. *Forbes*, 216 U.S. at 398.

II. The Decision Of The State Supreme Court Does Not Warrant Review In Any Event.

A. Petitioners Mischaracterize The Division Among State Courts.

Petitioners argue that the decision of the South Carolina court implicates a conflict over whether to

apply a "strict" or a "hybrid" approach to applying "neutral principles of law" under *Jones*. Petitioner misconceives both the decision below and how it relates to decisions of other states. While there is some conflict among state courts, it concerns not how to formulate a state-law rule for church property disputes, but whether *federal* law mandates a trust *when state law would not otherwise recognize one*. The petition does not implicate any conflict, not even petitioners' misconceived one, because a majority of the court below applied the "strict" approach petitioners prefer.

Petitioners say that courts applying the "hybrid" approach "resolve church property disputes by applying special rules of trust and property law that place a thumb on the scale of the national church." Pet. 25. Petitioners contrast this "hybrid" approach with what they call the "strict" approach, which they believe reflects the only correct way to apply this Court's decision in *Jones*. Under the "strict" approach petitioners advocate, courts "resolve property disputes between religious organizations … by applying ordinary principles of state trust and property law." Pet. 21.

As shown above, however, a majority of the state supreme court in this case *applied* the "strict" approach, by relying on wholly neutral principles of state law to find trusts imposed on the parishes that acceded to the Dennis Canon. Petitioners would also have lost if the state court had applied what they characterize as the "hybrid" approach. This case therefore does not implicate any split over the "strict" approach versus the "hybrid" approach.

Furthermore, while there is indeed some division over how to apply this Court's decision in *Jones*, it does not principally concern whether to apply "special" or "ordinary" rules of state law. *That* question rests on second-guessing how state courts formulate state-law rules, which does not create any true split for this Court to resolve. Petitioners' mischaracterization of the Virginia Supreme Court's decision (which this Court declined to review in 2014) is illustrative. The state court rested its decision on established constructive-trust doctrine and resolved it "in a wholly secular manner through the use of neutral principles of law." *Falls Church*, 740 S.E.2d at 542. Yet even though the decision rested entirely on state law, petitioners characterize it as insufficiently "strict" and place it on the "hybrid" side.

Contrary to petitioners' submission, the main divide is not over the formulation of state trust law, but whether a federal rule may sometimes require recognition of a trust where state law does not. That question turns on interpreting this Court's statement in *Jones* that, "[a]t any time before the dispute erupts," a church could "ensure … that the faction loyal to the hierarchical church will retain the church property" by amending "the constitution of the general church … to recite an express trust in favor of the denominational church" and that "civil courts [would] be bound to give effect to th[at] result," so long as it is in a "legally cognizable form," 443 U.S. at 606. As one court recently explained, "most states" will apply such a provision in the constitution of the general church as a matter of First Amendment law, even if that provision does not comply with state-law formalities; "only a few states" have declined to enforce such a provision. *Church of*

God in Christ, Inc. v. L.M. Haley Ministries, Inc., 531 S.W.3d 146, 168 (Tenn. 2017).

But that division does not matter at all in a case like this one, where the national church prevails under state law without the need to draw on the First Amendment to give effect to a provision of the national church's governing documents. Petitioners thus fail to establish a reason for review in this case.

B. The Disagreement In The Court Below Over Facts And The Standard Of Review Marks This Case As A Poor Vehicle For Review.

This case is also an unsuitable vehicle for this Court's review because the record below contains significant "ambiguities … as to the issues sought to be tendered." *Mitchell v. Or. Frozen Foods Co.*, 361 U.S. 231 (1960). As petitioners acknowledged below, Pet. for Reh'g 3-4, the justices of the Supreme Court of South Carolina splintered on both the applicable standard of review and how to apply it to some of the trial court's factual conclusions, creating ambiguities on issues that may be relevant to this Court's determination of the question presented were it to grant the petition.

Justice Pleicones, joined by Justice Hearn, reasoned that, under South Carolina law governing the standard of review, the present suit "sounds in equity" and the state supreme court was therefore "free to take its own view of the facts." Pet. App. 5a & n.1 (Pleicones, J.) (citations omitted); *see* Pet. App. 30a (Hearn, J.) (concurring in Justice Pleicones's opinion). Justice Toal, joined by Justice Kittredge, on the other hand, "strongly disagree[d] with [Justice

Pleicones's] statement of the standard of review" and opined that, under South Carolina principles governing the standard of review, "the action is one at law" and the Court should therefore "defer to the trial court's factual findings unless wholly unsupported by the evidence." Pet. App. 84a-86a & n.55 (internal citations omitted); *see* Pet. App. 59a n.31 (Kittredge, J.) (joining Justice Toal's opinion in relevant part). Chief Justice Beatty did not explain the standard of review that he applied in his opinion. *See generally* Pet. App. 55a-59a. As a result, there is no majority opinion in the case on the standard of review that was appropriate under South Carolina law, and it is therefore difficult to discern which of the trial court's findings stand.

Undoubtedly, the record is clear on certain factual issues. At least a majority of the justices—and in some cases all of them—agreed: (1) that the Church adopted the Dennis Canon, Pet. App. 14a-15a (Pleicones, J.); Pet. App. 38a (Hearn, J.); Pet. App. 57a (Beatty, C.J.); Pet. App. 64a (Kittredge, J.); Pet. App. 79a (Toal, J.); (2) that the Episcopal Diocese adopted a similar counterpart, Pet. App. 15a (Pleicones, J.); Pet. App. 39a & n.19 (Hearn, J.); Pet. App. 79a & n.42 (Toal, J.); (3) that at least some of the parishes acceded to those rules in writing, Pet. App. 54a (Hearn, J.) (29 parishes); Pet. App. 64a (Kittredge, J.) (28); Pet. App. 110a (Toal, J.) (28); and (4) that the Church is hierarchical. Pet. App. 9a (Pleicones, J.); Pet. App. 32a & n.15 (Hearn, J.); Pet. App. 55a (Beatty, C.J.).[8]

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[8] The last of these findings overruled the trial court's finding that the Church "is not organized in a fashion that its governance controls the Dioceses or the parish churches. Authority

While the findings set out above are amply sufficient to support the state supreme court's judgment, if this Court were to grant certiorari, other facts on which no clear majority agreed might become important. For example, petitioners rely on the trial court's finding that "[n]one of the Plaintiff parish churches have ever been members of the [Church]," Pet. 10 (citing Pet. App. 148a), but in Justice Pleicones's view, the record shows that parishes "comprise" the diocese, which in turn "comprise" the Church. Pet. App. 8a. Similarly, the trial court concluded that "there was nothing consensual between [the Church] and the parish churches in the process used to adopt [the Dennis Canon]," Pet. App. 173a-74a, while Justice Hearn believed the record shows that parishes "participated in church governance," Pet. App. 48a (Hearn, J.), and various Justices gave different weight to the fact that the Episcopal Diocese—of which each of the parishes was admittedly a participating member—adopted its own version of the Dennis Canon. Pet. App. 15a (Pleicones, J.) (Diocese adoption of its own Dennis Canon); Pet. App. 39a & n.19 (Hearn, J.) (same); Pet. App. 79a & n.47 (Toal, J.) (same).[9]

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flows from the bottom, the parish churches, up." Pet. App. 154a ¶ 79.

[9] Amicus The Falls Church Anglican's argument that the Church's canons are rendered unenforceable by statements made in annotations to Church's canons, *see* Falls Church Anglican Amici Br. 12-20, has no teeth here, where the outcome turned on the parishes' accession to the Church's canons. In any event, The Falls Church Anglican made that argument in its own litigation, and the court squarely rejected it. *See In re Multi-Circuit Church Prop. Litig.*, 84 Va. Cir. 105, at 66 (Va. Cir. Ct. Fairfax Cty. Jan. 10, 2012), *aff'd sub nom. Falls Church*

There is reason to believe that these and other, similar facts may become important if this Court were considering the question presented. The degree and nature of a local church's relationship to the larger denomination with which it is affiliated has consistently been cited as an important factor in the cases that petitioners describe as demonstrating the "split" they ask this Court to resolve. *E.g., St. Paul's Church, Inc. v. Bd. of Trs. of the Alaska Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541, 544-47 (Alaska 2006) (setting out facts describing relationship between local and denominational church); *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 448-49 (Ga. 2011) (same); *In re Church of St. James the Less*, 888 A.2d 795, 797-800 (Pa. 2005) (same); *Church of God in Christ*, 531 S.W.3d at 150-52 (same). Uncertainty in this case about such facts makes this case an unsuitable vehicle to address the split petitioners describe.

C. Petitioners' Constitutional Arguments Lack Merit.

Petitioners argue that "[t]he strict [neutral principles] approach 'is the *only* approach consistent with the free exercise and nonentanglement principles of the Religion Clauses.'" Pet. 33 (citation omitted) (emphasis added). Even if the court below had not applied the "strict" approach petitioners advocate, petitioners' arguments for reversal would still lack merit: petitioners misread not only *Jones* but multiple lines of this Court's cases, and if this Court were

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v. Protestant Episcopal Church, 740 S.E.2d 530 (Va. 2013), *cert. denied*, 134 S. Ct. 1513 (2014).

to grant certiorari petitioners would also have to deal with substantial alternative arguments for affirmance.

This Court has never held that the neutral-principles approach (or any form of it) is constitutionally *required*. To the contrary, for more than a century before *Jones*, this Court had resolved church property disputes solely under the "hierarchical deference" approach, which requires courts to "accept … as final" the decisions of the highest body of a hierarchical church on "questions of discipline … or ecclesiastical rule, custom, or law," recognizing that the local church "is under [the larger denomination's] government and control, and is bound by its orders and judgments." *Watson*, 80 U.S. (13 Wall.) at 726-27. A 5-4 majority in *Jones* held that States at their option "*may* resolve [a dispute over church property] on the basis of 'neutral principles of law'" instead. 443 U.S. at 597 (emphasis added). That is an option, not a requirement; since *Jones* the courts in at least seven states have chosen to apply, or continue to apply, *Watson*'s "hierarchical deference" approach.[10]

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[10] *See Mills v. Baldwin*, 362 So. 2d 2, 5 (Fla. 1978) (embracing "doctrine of *Watson v. Jones*"); *Lamont Cmty. Church v. Lamont Christian Reformed Church*, 777 N.W.2d 15, 29 (Mich. Ct. App. 2009) ("[W]ithout an express trust, the hierarchical method is preferred"); *Heartland Presbytery v. Presbyterian Church of Stanley, Inc.*, 390 P.3d 581, 596 (Kan. Ct. App. 2017) ("[W]e do not find any indication that our Supreme Court desires to repudiate the principle of hierarchical deference that has served the citizens of Kansas well for many years"); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980) ("the courts of this state should defer to the decision of responsible ecclesiastical authorities"); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980) ("In the absence of express trust provisions, … the hierar-

And this Court has continued to rely on *Watson* in other contexts. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 704 (2012). Yet petitioners do not even acknowledge that *Watson*'s "hierarchical deference" approach remains good law.

Indeed, the dissenters in *Jones* argued that the "hierarchical deference" approach should be the only permissible one. *Jones*, 443 U.S. at 610, 618 (Powell, J., dissenting); *see also id.* at 613 n.2 ("neutral principles" approach could unconstitutionally "impos[e] a form of church government and a doctrinal resolution at odds with that reached by the church's own authority"). Responding to that concern, the majority held that the "neutral principles" approach complies with the First Amendment precisely because, under that approach, the simple inclusion of a trust provision in a hierarchical church's governing documents will "ensur[e] . . . that the faction loyal to the hierarchical church will retain the church property." 443 U.S. at 606.

Thus, without that safety valve preserving a hierarchical national church's right to self-governance,

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chical (*Watson*) approach should be utilized in church property disputes in this State"); *Choi v. Sung*, 225 P.3d 425, 431 (Wash. Ct. App. 2010) ("Washington State has adopted the … '*Watson* compulsory deference rule.'") (citations omitted); *Church of God of Madison v. Noel*, 318 S.E.2d 920, 923 (W. Va. 1984) (applying compulsory deference approach); *see also Fonken v. Community Church of Kamrar*, 339 N.W.2d 810, 816 (Iowa 1983) (applying "both the compulsory deference and neutral principles approaches"); *Cumberland Presbytery of the Synod of the Mid-West of the Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 420, 422 (Ky. 1992) (analyzing case under "compulsory deference" and "neutral principles" approaches).

the entire neutral-principles approach would be subject to constitutional doubt. And the neutral-principles approach has engendered considerable debate, whereas the *Jones* dissenters' approach—hierarchical deference—has proved stable and manageable in the jurisdictions that still choose to follow it. Accordingly, if the Court were to grant the petition, it should consider overruling *Jones*, leaving *Watson*'s "hierarchical deference" as the sole permissible approach.

Although no majority of the South Carolina Supreme Court adopted the "hierarchical deference" approach, it clearly could have. Were that approach applied here, respondents would prevail under it. A majority of the court below concluded that the Church is hierarchical, Pet. App. 9a-10a (Pleicones, J.); Pet. App. 32a & n.15 (Hearn, J.); Pet. App. 55a (Beatty, C.J.), and the court unanimously agreed that the Church adopted the Dennis Canon, Pet. App. 14a-15a (Pleicones, J.); Pet. App. 38a (Hearn, J.); Pet. App. 57a (Beatty, C.J.); Pet. App. 64a (Kittredge, J.); Pet. App. 79a (Toal, J.), a "rule, custom or law" governing church property. Hierarchical deference, therefore, would unambiguously require enforcement of the Dennis Canon. Hierarchical deference would provide an alternative, constitutionally-permissible basis for affirming the decision below.

Petitioners' constitutional arguments are flawed in multiple other respects. They argue that "enabl[ing] a national church unilaterally to establish a trust over property titled in a local church" would violate the Free Exercise Clause by "'impos[ing] special disabilities' against local churches" and preventing local churches from "decid[ing] for themselves …matters

of church government." Pet. 35 (citations omitted). But the outcome in this case expressly did *not* turn on "unilateral" action by the denominational church; rather, trusts were imposed only as to the parishes that themselves acceded in writing. And as for churches' ability to "decide for themselves," the Dennis Canon represents just such a decision: the Church adopted it through its representative form of government, and the petitioner parishes acceded to it.

Nor does giving effect to a national church's governing documents violate the Establishment Clause by "always favor[ing] the national church over the local congregation." Pet. 35. Religious individuals and groups are free to organize themselves in whatever governance structure they choose, and likewise to adopt the rules that suit them. Indeed, the case law demonstrates that religious organizations in this country reflect a wide variety of governance structures and rules, set up to govern intra-church relationships "before [a] dispute erupts." *Jones*, 443 U.S. at 606.

In this case, that includes measures like the Dennis Canon—which the Church adopted in 1979—as well as the general hierarchical governance structure of the denomination, which has been on display for all to see since the Church's founding in the 18th century. Petitioners did not just know about the Church's structure and rules; they expressly acceded to the Dennis Canon.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 7, 2018