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 Writ Of Certiorari To The Supreme Court Of South Carolina

REPLY BRIEF FOR PETITIONERS

C. ALAN RUNYAN
RUNYAN & PLATTE
2015 Boundary Street, Suite 239
Beaufort, S.C. 29902

C. MITCHELL BROWN
NELSON, MULLINS, RILEY & SCARBOROUGH
1320 Main Street
Columbia, S.C. 29201

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
WILLIAM C. MARRA
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

HENRIETTA U. GOLDING
MCNAIR LAW FIRM
P.O. Box 336
Myrtle Beach, S.C. 29578

Counsel for Petitioners

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RULE 29.6 STATEMENT

The Rule 29.6 Statement in the petition for writ of certiorari remains accurate.

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ARGUMENT

Respondents expressly concede that courts are divided about whether *Jones v. Wolf*, 443 U.S. 595 (1979), permits recognition of a trust on church property even if the alleged trust would not be recognized under a neutral application of the State's ordinary trust and property law. Indeed, they do not meaningfully contest Petitioners' showing that no fewer than 19 jurisdictions are divided over this question. Nor do they dispute that the issue is a substantial and important question of First Amendment law that ought to be resolved by this Court.

Respondents instead devote virtually their entire opposition to arguing that the judgment below rests on an adequate and independent state law ground. But the two lead opinions—upon which the judgment necessarily rests—consciously and expressly distorted or disregarded ordinary principles of state trust and property law on the stated ground that the First Amendment requires courts to do so. Acting Justice Pleicones held that "*Jones* does not require" that trusts on church property "satisf[y] the specific legal requirements in each jurisdiction where the church property is located." App.28a n.11. And Justice Hearn squarely rejected a dissenting Justice's "dogged effort to impose South Carolina civil law at any cost" because, Justice Hearn thought, applying ordinary state law would "run[ ] roughshod over the National Church's religious autonomy …." App.52a n.24. Where, as here, a state court "felt compelled by what it understood to be federal constitutional considerations to construe … its

own law in the manner that it did," this Court "will not treat a normally adequate state ground as independent, and there will be no question about [the Court's] jurisdiction." *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) (quotation marks omitted).

Moreover, Respondents' assertion that Justice Hearn's opinion (joined by Acting Justice Pleicones) rests on an alternative independent state law ground depends *entirely* on a single paragraph where Justice Hearn is actually explaining her *dissent* from a separate ruling in favor of parties who are not before this Court on an issue that is not presented in this petition. Further, Justice Hearn expressly stated in a footnote appended to that paragraph that her analysis does *not* "look[ ] narrowly at state property law" but rather considers that law in light of "the First Amendment freedoms guaranteed by the Constitution." App.49a n.22. There is no "plain statement" that the judgment below rests on state law, *Long*, 463 U.S. at 1041; to the contrary, the lead opinions repeatedly state—and state plainly—that the decision was compelled by the First Amendment in derogation of state property law.

Respondents' remaining arguments against certiorari all lack merit. Four decades after *Jones*, the time has come for this Court to bring order out of chaos and resolve the meaning of the "neutral principles" approach to church property disputes.

I. Respondents Acknowledge That Courts Are Divided Over a Question of Great Importance.

Respondents concede "there is some conflict among state courts … [about] whether federal law mandates a trust when state law would not otherwise recognize one." Resp. 21 (emphases omitted). Indeed, Respondents barely (if at all) attempt to contest our demonstration that 19 jurisdictions are almost equally divided on this question, with 11 jurisdictions applying the "strict" approach and neutrally applying ordinary state law, and eight jurisdictions recognizing a trust in favor of a national church even if the purported trust does not comply with state law.

Respondents also implicitly admit that the meaning of "neutral principles" presents a question of great national importance. They claim our approach "misread[s] … *Jones*," suggesting that 11 jurisdictions are violating this Court's First Amendment caselaw. Resp. 26. They even argue that if our interpretation of *Jones* is correct, "the entire neutral-principles approach would be subject to constitutional doubt" and should be overruled. Resp. 28-29. While we disagree with Respondents' First Amendment analysis, their presentation confirms this case involves constitutional questions of great importance on which the courts are deeply divided.

Respondents nevertheless argue that this petition does not implicate the split for two reasons. First, they claim the judgment below rests in part "on wholly neutral principles of state law." Resp. 21.

As explained in Part II, *infra*, this argument is simply wrong.

Second, although Respondents acknowledge division over "whether a federal rule may sometimes require recognition of a trust where state law does not," they mischaracterize the petition as simply "second-guessing how state courts formulate state-law rules …." Resp. 22. Not so. We are challenging the "hybrid approach" to *Jones*, which is driven not by state law considerations but rather by the erroneous belief that "the First Amendment require[s] [courts] to recognize a trust in favor of a national church" even if that trust "does not satisfy the rules for forming a trust that state law would require in any other context." Pet. i. *See also* Pet. 25-28. The petition plainly asks this Court to review the federal question on which Respondents concede the courts are divided, not a question about the formulation of state law.

II. The Judgment Below Does Not Rest on an Adequate and Independent State Law Ground.

Respondents' opposition focuses almost entirely on the claim that the judgment below rests on an adequate and independent state law ground. They devote much of their Statement to developing this point, Resp. 8-15, and their lead arguments all depend on this premise, Resp. 15-23. Their argument does not bear scrutiny.

Petitioners seek review of the judgment below that parishes that allegedly acceded to the Dennis Canon hold their property in trust for the national church. Respondents prevailed on this question by a

3-2 majority comprising Acting Justice Pleicones, Justice Hearn, and Chief Justice Beatty. Because the votes of each of these Justices is necessary to sustain the judgment against Petitioners, Respondents must establish that all three joined an opinion containing a "plain statement" that they rely on state law, *Long*, 463 U.S. at 1041, but they cannot establish this premise with respect to any of the opinions.

Respondents claim Acting Justice Pleicones and Justice Hearn identified "three independent bases" for ruling against Petitioners, and they concede that two of those bases *are* based on federal law. Resp. 12. Specifically, they concede that Acting Justice Pleicones "concluded that the First Amendment required the court to" enforce the Dennis Canon, and that Justice Hearn "argued that the court was 'bound' under *Jones* 'to recognize the trust' " declared in that Canon. Resp. 13 (quoting App.42a). Respondents' independent-state-ground argument thus rests *entirely* on their claim that one paragraph from Justice Hearn's opinion shows that the judgment against Petitioners was also based on her conclusion that "South Carolina's doctrine of constructive trusts … impose[s] a trust in favor of the [Church]." Resp. 12 (quoting App.48a). This argument has three fatal flaws, each of which, standing alone, dispositively refutes Respondents' independent-state-ground claim.

First, the very passage cited by Respondents expressly indicates that Justice Hearn "felt compelled by what [she] understood to be federal constitutional considerations to construe … [South

Carolina] law in the manner [she] did." *Long*, 463 U.S. at 1038 n.4 (quotation marks omitted). The cited paragraph includes a footnote, not mentioned by Respondents, in which Justice Hearn criticizes two other Justices on the ground that, in concluding that no constructive trust had been formed, they "answer these questions looking narrowly at state property law, but it *comes at the expense of the First Amendment freedoms guaranteed by the Constitution*." App.49a n.22 (emphasis added).

In the very next paragraph, moreover, Justice Hearn expressly states that the "Court must give effect to this [constructive] trust under the neutral principles approach," App.50a, and she makes clear throughout her opinion (as Respondents do not dispute, Resp. 13-14) that she adopted the "hybrid" neutral-principles approach, *e.g.*, App.30a n.12, 38a, 41a-44a. Indeed, at the outset of her opinion she stated that the "holding does not, as the dissent claims, affect *all* trusts in South Carolina; rather, our holding is limited to ecclesiastical decisions protected by the First Amendment, as will be explained herein." App.30a n.12. And she acknowledged that her "own view of the appropriate application of neutral principles would honor the constitutional mandate to not disturb matters of religious governance in order to maintain religious institutions' independence from state intrusions …." App.52 n.24. Thus, it is clear from her own words that Justice Hearn's "*legal* conclusions were, at the very least, 'interwoven with the federal law,' " *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 172 n.2 (2009) (quoting *Long*, 463 U.S. at 1040), and her "interpretation of state law [was] influenced by

an accompanying interpretation of federal law," *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (quotation marks omitted).

Second, Justice Hearn's paragraph concerning constructive trusts, upon which Respondents' entire argument depends, does not address Petitioners' claims at all. In this passage, Justice Hearn is explaining her *dissent* from the conclusion of Chief Justice Beatty, Justice Kittredge, and Acting Justice Toal that seven parishes do not hold their properties in trust for the national church because they never acceded to the Dennis Canon. Respondents concede those non-acceding parishes prevailed below and did not join the petition. Resp. 17-18.

Justice Hearn's dissent on this irrelevant issue cannot possibly establish an independent state law basis with respect to separate parts of her opinion explaining the judgment against Petitioners. Although Respondents never acknowledge that they are relying on the dissenting portion of Justice Hearn's opinion, they claim in a footnote that "it is clearly [Justice Hearn's] view" that her constructive trust analysis could also apply to the Petitioner parishes. Resp. 12 n.4. But Justice Hearn never said that, and there is certainly no "plain statement" in her opinion to that effect. Her analysis with respect to the Petitioner parishes turned exclusively on the law of *express trusts*, *see, e.g.*, App.31a, 37a, 41a; Resp. 13-14, and Respondents do not and cannot dispute that Justice Hearn's analysis of that law turned on her interpretation of *Jones*.

Third, even if Respondents had raised a reasonable doubt about whether Justice Hearn's

constructive-trust paragraph can be read to identify an adequate and independent state law basis for the judgment against Petitioners, and they have not, that doubt must be resolved in favor of jurisdiction. *Long* establishes a "presumption" in favor of federal court review, permitting review whenever " 'the adequacy and independence of any possible state law ground is not clear from the face of the opinion ….' " *Florida v. Powell*, 559 U.S. 50, 56-57 (2010) (quoting *Long*, 463 U.S. at 1040-41). Because Justice Hearn's opinion does not clearly identify an adequate and independent state law ground, this Court has jurisdiction.[1]

The Court need not consider whether Chief Judge Beatty relied upon an adequate and independent state law ground because the judgment below cannot be sustained if Justice Hearn's and Acting Justice Pleicones's outcome-determinative votes were based on, interwoven with, or even influenced by, an erroneous view of federal law. In any event, Chief Justice Beatty's state law analysis also "fairly appears … to be interwoven with the

[1] Respondents also refer in passing to Justice Hearn's citation to South Carolina law regarding the "common law default rule of irrevocability." Resp. 16 (quoting App.45a). But this analysis was also plainly influenced by Justice Hearn's view that the "dogged effort to impose South Carolina civil law at any cost," App.52a n.24, "impose[s] a constitutionally impermissible burden on the National Church and violate[s] the First Amendment," App.42a. And even if Respondents were correct that Justice Hearn applied ordinary state law to the question whether trusts could be *revoked*, they do not claim her analysis about the initial *creation* of these express trusts rested on purely state law grounds.

federal law …." *Long*, 463 U.S. at 1040. Although he stated that he would "look no further than our state's property and trust laws," App.56a, his opinion "strongly suggests that [his] underlying interpretation of [state law] would have been different if [he] had realized from the outset that federal law does not insulate" Respondents from the application of ordinary state law. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 154 (1984). As Justice Kittredge explained, the notion that any of the parishes "created a trust in favor of the national church [under ordinary state law] would be laughable." App.61a.

Finally, Respondents suggest that this Court cannot review the state court's decision because a majority below applied the "strict approach" to *Jones*. Resp. 17-18. This argument is wrong because four of the five Justices applied the "hybrid approach" to *Jones*. As explained above, Acting Justice Pleicones, Justice Hearn, and Chief Justice Beatty all applied this approach. And although Justice Kittredge dissented from the judgment against Petitioners on other grounds, he expressly embraced the hybrid approach. App.60a-64a. This argument is also irrelevant: even if three Justices applied the strict approach, at an absolute minimum Justice Hearn and Acting Justice Pleicones did not, and rejecting their interpretation of "neutral principles" would require vacatur of the judgment.

III. Respondents' Remaining Arguments Lack Merit.

First, Respondents claim we did not argue below, and therefore cannot argue now, that "the federal Constitution requires judgment in [our] favor even if … [we] lose under state law." Resp. 19. This is a strawman. It is true that we never made this argument below, but neither have we presented it here. In this Court, we raise precisely and only the same First Amendment argument that was passed upon below and that Respondents concede we pressed below: we "expressly argued that the case should be resolved strictly as a matter of South Carolina law, with no First Amendment thumb on the scales." Resp. 19.

Second, Respondents suggest the factual record is not adequately developed, Resp. 23, but this argument is baseless. This Court need only decide a pure question of federal law: whether *Jones*' "neutral principles" approach permits courts to recognize an alleged trust in favor of a national church even if that trust does not comply with the ordinary requirements of state law. The factual questions that Respondents claim are unresolved may be relevant to the underlying state law analysis, but they are irrelevant to the question whether the First Amendment requires special rules of trust and property law that favor national churches over disassociating parishes.

Third, Respondents suggest our First Amendment analysis is flawed and that if the Court grants the petition, it should consider overruling *Jones* and totally deferring to the national church's

say-so that it owns parish property, no matter how little basis that claim may have in state law. Resp. 26-30. We have already explained why these arguments lack merit, Pet. 29-38, and some of the country's leading religious liberty scholars have rebutted them as well in their amicus brief supporting this petition, Amicus Br. of 18 Law Profs. Respondents' First Amendment arguments only highlight the extent to which this Court's guidance is urgently needed on a question of surpassing constitutional importance.

Finally, although Respondents concede the judgment below is "final" under 28 U.S.C. § 1257(a), they attempt to inject uncertainty by obliquely suggesting that we do not believe it is final. Resp. 3. In lower courts, we identified two minor state law issues that remain to be decided, but they do not render the judgment below non-final. First, as Respondents concede, there is a discrepancy about whether 28 or 29 parishes acceded in writing to the Dennis Canon. Resp. 8 n.1. That discrepancy appears to arise from a typographical error. App.80a n.49 (listing non-party "Parish of St. Andrew, Mt. Pleasant" as a non-acceding parish rather than "Vestries and Churchwardens of the Parish of St. Andrews"). Where further proceedings exist "only for a ministerial purpose, such as the correction of language in the trial court's judgment … the judgment [below] is final for purposes of" Section 1257(a). *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 216 n.8 (1977). Second, as Respondents also acknowledge, the decision below involved a dispute over property held in trust for the "Diocese," though that dispute is not raised by this petition. Resp. 7.

The controlling vote on the disposition of that property addressed only one trust property, App.58a n.29, and further clarification may be needed regarding other trust properties.

The judgment is thus "[f]inal" within the meaning of Section 1257(a), notwithstanding the presence of these purely state law issues, because the state court "has finally determined the federal issue present in [this] case," and no matter how the state courts resolve any remaining state law matters, "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975); *see also id.* at 480. This Court routinely finds decisions to be final where the federal question has been decided and all that remains are ancillary state law questions of this sort. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 309 n.3 (1987); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 279 n.7 (1980) (plurality); *Radio Station WOW v. Johnson*, 326 U.S. 120, 127 (1945); *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U.S. 362, 371 (1914).

Alternatively, the judgment below is final because "the federal issue has been finally decided in the state courts," and even if we "might prevail on the merits on nonfederal grounds," "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action …." *Cox*, 420 U.S. at 482-83. In these

circumstances, refusing to review the state court decision would "seriously erode federal policy." *Id.* at 483.[2]

CONCLUSION

The petition should be granted.

Respectfully submitted,

C. ALAN RUNYAN
RUNYAN & PLATTE
2015 Boundary Street,
Suite 239
Beaufort, S.C. 29902

C. MITCHELL BROWN
NELSON, MULLINS,
RILEY & SCARBOROUGH
1320 Main Street
Columbia, S.C. 29201

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
WILLIAM C. MARRA
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

HENRIETTA U. GOLDING
MCNAIR LAW FIRM
P.O. Box 336
Myrtle Beach, S.C. 29578

Counsel for Petitioners

May 15, 2018

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[2] Respondents appear to fault Petitioners for not citing *Cox*. Resp. 2-3. But *Cox* simply explained what constitutes a "[f]inal judgment[ ]" for purposes of Section 1257(a), the jurisdictional statute on which we rely. Pet. 6.