No. _____

In The
Supreme Court of the United States

CONGREGATION JESHUAT ISRAEL,

Petitioner,

v.

CONGREGATION SHEARITH ISRAEL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This lawsuit between two independent congregations concerns ownership of Touro Synagogue in Newport, Rhode Island, the country's oldest and perhaps most historically significant synagogue. Petitioner Congregation Jeshuat Israel, which has prayed in Touro Synagogue for over a century, maintained that the Synagogue is held in a charitable trust for its benefit and that the congregation owns a pair of colonial-era silver bells. Respondent Congregation Shearith Israel, a separate congregation in New York City, claimed that it owns the Synagogue and bells absolutely. After a nine-day bench trial in which both parties introduced hundreds of exhibits without objection, the district court ruled in Jeshuat Israel's favor on all issues. The Court of Appeals reversed, holding that the Establishment Clause mandated excluding virtually all the secular evidence submitted by the parties, because that evidence might, potentially, entangle the court in religion. Ignoring that secular evidence, the Court of Appeals decided the case *de novo* based on only four documents—whose secular character was no different from the evidence that the Court of Appeals precluded from consideration.

The questions presented are:

1. In ordinary trust and property disputes does the Establishment Clause preclude courts from considering secular evidence that is relevant and admissible under governing state law, merely because the litigants are religious parties?

QUESTIONS PRESENTED—Continued

2. In ordinary trust and property disputes does excluding secular evidence that is relevant and admissible under governing state law, merely because the litigants are religious parties, violate the Free Exercise Clause by treating religious parties differently from—and here less favorably than—secular parties?

3. In ordinary trust and property disputes may federal courts sitting in diversity disregard governing state substantive law and fashion federal common law, merely because the litigants are religious parties?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Congregation Jeshuat Israel, a Rhode Island corporation with no parent corporation or stock. Respondent is Congregation Shearith Israel.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Congregation Jeshuat Israel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is published at 866 F.3d 53 (1st Cir. 2017), Pet. App. 1a-19a. The order of the United States Court of Appeals for the First Circuit denying the petition for rehearing and rehearing en banc, with one judge dissenting, is published at 892 F.3d 20 (1st Cir. 2018), Pet. App. 142a-154a. The decision of the United States District Court for the District of Rhode Island is published at 186 F. Supp. 3d 158 (D.R.I. 2016), Pet. App. 20a-141a.

JURISDICTION

The opinion of the Court of Appeals was issued on August 2, 2017. Pet. App. 1a. The Court of Appeals denied rehearing and rehearing en banc on June 7, 2018. Pet. App. 142a. On August 20, 2018, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including October 22, 2018. *See* No. 18A174. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals and

district court had jurisdiction pursuant to 28 U.S.C. § 1332(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part: "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof."

STATEMENT OF THE CASE

This case, widely followed both here and around the globe, presents important issues concerning the Establishment Clause and Free Exercise Clause of the First Amendment—and the survival of Touro Synagogue in Newport, Rhode Island, the oldest synagogue in the United States. Underscoring the prominent place of Touro Synagogue in the development of our country's freedoms, just this past term Chief Justice Roberts noted that "Our Presidents have frequently [espoused] the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island that 'happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2417-18 (2018). The synagogue to which President Washington addressed his letter—

Touro Synagogue—remains an active place of worship maintained by an historic congregation: Petitioner Congregation Jeshuat Israel, the only congregation that has prayed in Touro Synagogue for over a century.

Touro Synagogue has stood as a beacon of religious freedom and a manifestation of the protections afforded by the Free Exercise Clause against the unequal treatment of religious parties. And yet if the decision of the First Circuit Court of Appeals is allowed to stand, that legacy will be jeopardized.

Petitioner Congregation Jeshuat Israel ("Jeshuat Israel" or "CJI") and respondent Congregation Shearith Israel ("Shearith Israel" or "CSI"), a separate congregation in New York, asserted garden-variety trust and property claims that were not based on religion. After a nine-day bench trial featuring 871 exhibits, 14 witnesses, and over 2,500 pages of testimony, the district court issued a 105-page decision that relied only on secular evidence and did not in any way interpret or apply religious doctrine or practice. The district court found that, based on "clear and convincing" evidence, Touro Synagogue is held in a charitable trust for the benefit of Jeshuat Israel and that Jeshuat Israel owns certain valuable silver bells and may sell them to endow Touro Synagogue. On appeal, the Court of Appeals for the First Circuit decided the case *de novo* and found that Shearith Israel owns the Synagogue and the bells "free of any trust or other obligation to CJI"—even though Shearith Israel had abandoned its challenge to the charitable trust on appeal.

To reach the opposite conclusion of the district court, the Court of Appeals adopted a novel and mistaken interpretation of the First Amendment. The Court of Appeals held that in trust and property disputes involving religious parties—even in this case, outside the context of hierarchical church or intra-church disputes—the Establishment Clause requires that courts consider only available "deeds, charters, contracts, and the like"—to the exclusion of all other secular evidence that otherwise would be legally cognizable in disputes involving secular parties. Based on this newly fashioned entanglement exclusionary rule, the Court of Appeals chose to consider only four out of 871 admitted exhibits. The Court of Appeals held that the district court was constitutionally barred from considering a voluminous trial record of secular evidence that included (i) party admissions in pleadings, contemporaneous documents, and sworn testimony, (ii) the parties' course of conduct over more than 100 years, (iii) minutes, correspondence, photographs, and other charters and contracts, and (iv) the will first establishing that Touro Synagogue is held in trust—all evidence legally cognizable under Rhode Island law, which the parties agreed and the district court ruled governed the dispute.

The Court of Appeals' exclusionary rule dramatically and improperly expands entanglement doctrine to circumstances where the concerns of the Establishment Clause are not at issue. Excluding secular evidence in secular disputes merely because the parties are religious entities does not further the constitutional

prohibition against the establishment of religion. Instead, it imposes a penalty on the free exercise of religion.

Even if the establishment of religion were a genuine concern in ordinary trust and property disputes involving parties that happen to have a religious character, this Court previously has set forth a straightforward method of resolving church property disputes that comports with the First Amendment: the "neutral-principles" approach articulated in *Jones v. Wolf*, 443 U.S. 595 (1979). The Court explained that "[n]eutral principles of law" are those "objective, well-established concepts of trust and property law" that are "familiar to lawyers and judges" and have been "developed for use in all property disputes." *Id.* at 599, 603. Under this approach, courts apply secular state law just as they would in cases involving secular parties, while being careful to evaluate religious evidence "in purely secular terms." *Id.* at 604. The First Amendment does not dictate what evidence is legally cognizable in trust and property disputes governed by state law; that is left to the states.

The Court of Appeals' entanglement exclusionary rule not only contradicts the "neutral-principles" approach; it impermissibly restricts religious liberty. This Court has held that "[t]he Free Exercise Clause protect[s] religious observers against unequal treatment." *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 (2017) (internal quotation omitted). "[I]mpos[ing] special disabilities" and "denying a generally available benefit solely on account of religious identity imposes

a penalty on the free exercise of religion." *Id.* at 2019, 2021 (internal quotation omitted). The decision below does just that. In violation of the Free Exercise Clause, the decision establishes a two-tiered legal regime that discriminates against religious parties by denying them the court access and state substantive rights available to identically situated secular parties. For had the parties not been religious entities—and therefore had the Court of Appeals considered all the secular evidence before the district court and not excluded consideration of that secular evidence—then the trial court's decision assuredly would have been affirmed. Put another way, under the panel's newly fashioned entanglement exclusionary rule, the Court of Appeals ruled one way—in favor of Shearith Israel—but had the parties been non-religious entities, then the Court of Appeals almost certainly would have ruled another way—in favor of Jeshuat Israel, as did the district court after considering the full record.

The decision below represents a split with numerous federal courts of appeals and state supreme courts. If allowed to stand and be followed, the decision will fundamentally alter how ordinary disputes involving religious parties are tried and decided, and introduce an element of arbitrariness and cherry-picking by courts as to what secular evidence may be considered or ignored in any particular case. Replacing state law with the Court of Appeals' entanglement exclusionary rule will lead to unfair results and uncertainty in trust and property rights.

And if allowed to stand, the decision will have a profound effect on the historic Touro Synagogue and Jeshuat Israel, the congregation that has prayed at and maintained the Synagogue for over 100 years. The Court should grant the petition and set forth clear guidance as to what the First Amendment does and does not require.

A. Legal Background

1. Establishment and Free Exercise Clauses

The Establishment Clause prohibits the establishment of a state church or religion, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014), as well as government or court preference for any particular "religious doctrine." *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968).

The First Amendment thus "prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Jones*, 443 U.S. at 602. However, "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("*Blue Hull*"). Federal courts apply state "neutral-principles" of law: the "objective, well-established concepts of trust and property law" that are "familiar to lawyers and judges," *Jones*, 443 U.S. at 603, and have been "developed for use in all property disputes." *Blue Hull*, 393 U.S. at 449. The "neutral-principles"

approach is "completely secular in operation" and thus "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603.

"[T]he Free Exercise Clause 'protect[s] religious observers against unequal treatment,'" *Comer*, 137 S. Ct. at 2019 (quoting *Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993)), by prohibiting the "impos[ition of] special disabilities" against parties based on their "religious status." *Lukumi*, 508 U.S. at 533 (quoting *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)). "[D]enying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Comer*, 137 S. Ct. 2019 (citation omitted).

2. Federalism and *Erie*

Federal courts sitting in diversity must apply state law to resolve substantive issues. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Except when required by the Constitution or federal law, federal courts have no power to deviate from state law in resolving state law claims. *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965); *Erie*, 304 U.S. at 78; *see also* U.S. Const. amend. X. Displacement of state law by a federal court is "an invasion of the authority of the state" and "a denial of its independence." *Erie*, 304 U.S. at 79 (internal quotation omitted).

3. Rhode Island Law of Charitable Trusts and Personal Property

Under Rhode Island law, a charitable trust is created by a "manifestation of an intention to create it." R.I. Gen. Laws § 18-9-4. Courts determine the existence of a charitable trust based on the totality of the circumstances, including conduct and statements. *Tillinghast v. Council of Narragansett Pier, R.I., of Boy Scouts of Am.*, 133 A. 662, 663 (R.I. 1926); *Knagenhjelm v. R.I. Hosp. Trust*, 114 A. 5, 8 (R.I. 1921). *See also* Pet. App. 75a-76a. Parties who directly benefit from a charitable trust, including religious organizations, are its beneficiaries. *Wood v. Trustees of Fourth Baptist Church*, 61 A. 279, 282 (R.I. 1905); *Webster v. Wiggin*, 31 A. 824, 827-28 (R.I. 1895). *See also* Pet. App. 124a.

As administrator of charitable trusts, the Rhode Island Attorney General represents the public interest with respect to charitable trusts. R.I. Gen. Laws § 18-9-2. The Attorney General is responsible for and makes rules concerning supervision and enforcement of charitable trusts. *Id.* §§ 18-9-1, 18-9-8. Rhode Island courts accord "great deference" to state agencies "in interpreting a statute whose administration and enforcement have been entrusted to the agency." *Duffy v. Powell*, 18 A.3d 487, 490 (R.I. 2011) (internal quotation omitted).

Under Rhode Island law, possession of personal property creates a presumption of ownership. *Hamilton v. Colt*, 14 R.I. 209, 212 (1883).

B. Factual Background

Built in the 1760s, Touro Synagogue in Newport, Rhode Island is the oldest synagogue in the United States. The 1787 will of Jacob Rodrigues Rivera, one of the original owners of the Synagogue, declared that the Synagogue is held "in trust" for "the Jewish Society, in Newport, to be for them reserved as a Place of Public Worship forever." Pet. App. 47a-48a. Today, Touro Synagogue remains open for public worship, just as its founders wanted.

Jeshuat Israel is the party fulfilling this mission. For over 100 years, Jeshuat Israel has been the only congregation worshipping in Touro Synagogue. *Id.* 28a, 127a, 139a. Jeshuat Israel maintains the physical structure, employs a rabbi, and holds regular services that are open to the public. *Id.* 139a.

Jeshuat Israel is the sole Jewish congregation in Newport. *Id.* 129a n.73, 139a. There is no "other congregation standing ready to take its place," which is why the district court found that evicting Jeshuat Israel—relief sought by respondent Shearith Israel—"would undermine the very reason for the trust's existence—public Jewish worship in Newport." *Id.* 135a.

Facing severe financial difficulties and concerned not only for the future of the congregation but also the survival of Touro Synagogue, Jeshuat Israel sought to sell one of two pairs of colonial-era silver bells, which were its only assets of significant value. The proceeds were to be used to create an irrevocable endowment maintaining Touro Synagogue as a public place of

worship for future generations. When Shearith Israel learned in 2012 that Jeshuat Israel was going to sell the bells for several million dollars to the Museum of Fine Arts, Boston—where the bells have been on loan and on display since 2010—Shearith Israel for the first time claimed to own them. After Shearith Israel blocked the sale, Jeshuat Israel brought suit in Rhode Island Superior Court to establish ownership of the bells and to remove Shearith Israel as trustee of the charitable trust holding Touro Synagogue. *Id.* 71a-73a.

Shearith Israel removed the case to the United States District Court for the District of Rhode Island based on diversity of citizenship. Shearith Israel then asserted counterclaims to establish absolute ownership of the bells and Touro Synagogue and to evict Jeshuat Israel from the Synagogue.

C. The Trial Court Decision

The trial court conducted a nine-day bench trial. After an "exhaustive" review of a record consisting of 871 exhibits (8,524 pages)—only one of which was objected to by Shearith Israel, which itself offered 551 of the 871 exhibits—testimony from seven live witnesses (1,443 pages), 12 depositions (1,120 pages), and briefing from the parties and the Rhode Island Attorney General, who appeared as amicus and supported Jeshuat Israel's position on the key issues, the trial court issued a 105-page decision, ruling in Jeshuat Israel's favor on all claims.

Reviewing the "totality" of the record as required by Rhode Island law, the trial court found the evidence "clear and convincing" that Touro Synagogue is held in a charitable trust for the benefit of the "Jewish Society in Newport," which currently is Jeshuat Israel—a conclusion that the Rhode Island Attorney General agreed was proper based on the "overwhelming record at trial." Pet. App. 73a, 76a-78a, 130a; Brief of Attorney General at 7-10, *CJI v. CSI*, No. 12-cv-822 (D.R.I. July 10, 2015), ECF No. 95 ("2015 Attorney General Brief").

The trial court further found that under Rhode Island law "the overwhelming weight of the evidence compels this Court to remove Shearith Israel as trustee" due to a "serious breach of trust" on account of Shearith Israel's misconduct. Pet. App. 123a, 130a-137a.

Concerning the bells, the trial court found that Jeshuat Israel's undisputed possession and control of those objects for over 100 years gave rise to a "strong presumption of ownership" under Rhode Island law, a presumption that Shearith Israel "did not come close to overcoming." *Id*. 95a, 99a-100a.

Critically, in reaching its decision, and as is clear from the opinion itself, the trial court relied only on secular evidence and did not in any way interpret or apply any religious doctrine or practice. The trial court abided by the words with which it began the trial:

> While the two entities here are religious entities, the Court is not resolving a religious dispute. I'm resolving a civil dispute. The Court

> is not applying religious law here. The Court is applying the law of the state of Rhode Island and of this country. To do otherwise, in this Court's opinion, would violate the First Amendment.

Transcript at 7, *CJI v. CSI*, No. 12-cv-822 (D.R.I. Dec. 11, 2015), ECF No. 104.

D. The Court of Appeals Decision

On appeal, Shearith Israel abandoned its challenge to the existence of the trust and its claim to be the absolute owner of Touro Synagogue. In an opinion by Justice Souter, sitting by designation, the Court of Appeals for the First Circuit nevertheless decided the case *de novo*, ignored the trial court's numerous fact findings without determining any to be clearly erroneous, and found that "as between the parties in this case," Shearith Israel is the "fee owner" of Touro Synagogue and the "owner" of the bells, "in each case . . . free of any trust or other obligation to CJI." Pet. App. 18a. Jeshuat Israel's interest in the Synagogue, the Court of Appeals found, is "solely that of a holdover lessee." *Id.* 19a.

To reach the opposite conclusion of the trial court, the Court of Appeals held that in resolving religious property disputes "the First Amendment calls for a more circumscribed consideration of the evidence" and "limited [judicial] involvement," restricting review to "lodestones of adjudication," or only "deeds, charters, contracts, and the like." *Id.* 9a-11a. That approach,

supposedly intended to "keep a court from entanglement," excluded from consideration all other secular evidence, including the "parties' conduct" and "internal documentation," such as "the synagogues' respective records and correspondence"—evidence that the court would have been free to consider had the litigants not been religious entities. *Id.* 8a-9a, 17a.

Applying this interpretation of the First Amendment—which neither party advanced at trial or on appeal—and without even purporting to cite to or apply any state law, the Court of Appeals chose to consider only four of 871 secular exhibits—less than 1 percent of the exhibits—to the exclusion of a voluminous trial record of secular evidence. *Id.* 11a-18a.

As to the issue of the existence of a charitable trust with Jeshuat Israel as a beneficiary, applying its newly fashioned entanglement exclusionary rule the Court of Appeals excluded from consideration among other secular evidence:

- The 1787 will declaring that Touro Synagogue had been conveyed to Rivera and the two other original owners of the synagogue "in trust Only, to and for the sole Use, benefit, and behoof of the Jewish Society, in Newport, to be for them reserved as a Place of Public Worship forever," which the trial court and Rhode Island Attorney General found was "incontrovertible" and "clear" evidence of the trust under Rhode Island law, *id.* 47a-48a; 2015 Attorney General Brief at 7-8;

- Deeds "in trust" obtained by Shearith Israel in 1894, which the trial court found constituted admissions by Shearith Israel of the existence of the trust, Pet. App. 82a;

- Correspondence, minutes, and a legal opinion obtained by Jeshuat Israel and contemporaneously shared with Shearith Israel in 1945. This material demonstrated that the parties incorporated the distinct language of Rivera's will into one of the four documents that the Court of Appeals considered—a 1945 agreement among Shearith Israel, Jeshuat Israel, and the United States Department of the Interior—to affirm the existence of the charitable trust "with the understanding that," as explicitly phrased by these legal materials, "'Congregation Jeshuat Israel will not be prevented from presenting in any future Legal action the full story of the trusts originally established for the Jewish Society of Newport,'" *id.* 69a-70a, 83a-84a;

- Internal Shearith Israel minutes in which Shearith Israel admitted that it only held the Synagogue in trust, *id.* 84a n.45;

- Unrebutted testimony that Shearith Israel's vice president recognized and acknowledged the existence of the trust, *id.* 84a-85a;

- Unrebutted evidence that Jeshuat Israel is (i) the only congregation that has worshipped in Touro Synagogue for over 100 years and (ii) the only Jewish congregation in Newport, Rhode Island, *id.* 127a, 129a n.73; and

- The position of the Rhode Island Attorney General that Jeshuat Israel is a beneficiary of the charitable trust holding Touro Synagogue. 2015 Attorney General Brief at 10.

In a footnote, the Court of Appeals summarily dismissed and did not consider a 1932 Rhode Island statute explicitly providing that Touro Synagogue is "held in trust for the benefit of the Congregation Jeshuat Israel." The Court of Appeals ignored the statute on the ground that it did not identify the *trustee*, which was irrelevant to the issues on appeal. Pet. App. 17a n.4, 155a. The panel's ultimate ruling that Jeshuat Israel is not a beneficiary of any trust holding Touro Synagogue is fundamentally at odds with the statute. *Id.* 18a, 155a.

As to the bells, the Court of Appeals excluded from consideration among other secular evidence:

- Shearith Israel's admissions in pleadings that Jeshuat Israel's predecessor congregation, not Shearith Israel, was the original owner of the bells, *id.* 96a n.52;

- An 1833 receipt issued by Shearith Israel when taking custody of the bells upon the temporary closing of Touro Synagogue, which the trial court held constituted a bailment contract under Rhode Island law requiring, pursuant to the terms of the receipt, that the bells "be redelivered when duly required for the use of the Congregation hereafter worshipping" in Touro Synagogue, *id.* 52a-53a, 98a, 112a-114a;

- Consistent with the bailment contract, admissions by representative witnesses of Shearith Israel at trial and in deposition that Shearith Israel temporarily obtained the bells only for "safekeeping," *id.* 53a;
- An 1869 inventory showing the bells in Shearith Israel's possession and photographic evidence showing Shearith Israel in fact returned the bells to Newport at the turn of the 19th century, *id.* 63a & n.36, 114a-115a;
- Shearith Israel's engraving "Newport" on the bells, which the trial court found reflected Shearith Israel's recognition that it did not own the bells but only temporarily held them in a bailment, to be returned to the congregation worshipping in Touro Synagogue, *id.* 95a-96a, 114a; and
- Documents and testimony concerning the parties' course of conduct since the 1890s, showing that Jeshuat Israel bore all indicia of ownership while Shearith Israel bore none, including Jeshuat Israel's more than 100 year possession, control and maintenance of the bells, public declarations of Jeshuat Israel's ownership, and Shearith Israel's acquiescence to those declarations. *Id.* 95a, 99a & n.56.

The Court of Appeals did not analyze or even purport to apply any state substantive law in reaching its conclusions. The Court of Appeals did not: (i) consider what evidence is legally cognizable under Rhode Island law in trust or property disputes, (ii) rely on Rhode Island law in analyzing the four documents it

chose to consider, (iii) review the "totality" of the evidence to determine if there was a charitable trust with Jeshuat Israel as beneficiary, as required by Rhode Island law, or (iv) apply a presumption of ownership arising from Jeshuat Israel's undisputed possession of the bells, likewise a requirement under Rhode Island law.

E. Denial of Rehearing

In denying rehearing, the panel issued a "response" that unsuccessfully sought to limit the scope of its First Amendment holdings. The panel reaffirmed that the inquiry must start and, if deemed dispositive, end with "deeds, charters [or] contracts," notwithstanding what other secular evidence may be legally cognizable under state law. The panel stated that its original opinion holds that when "such items of evidence 'and the like are available and to the point . . . they should be the lodestones of adjudication in these cases,'" and consequently it was appropriate here to consider only four of the 871 secular exhibits and ignore more than 99 percent of the secular evidence that had been admitted without objection into the record. Pet. App. 143a.

The panel further stated that its original opinion does not imply "any particular limitation on the scope of admissible evidence in any further litigation brought by a trust claimant *other than CJI*." *Id.* 144a (emphasis added). This statement highlights that the Court of Appeals limited the scope of evidence considered on

appeal merely on account of Jeshuat Israel's religious identity.

Because of Jeshuat Israel's religious identity, the Court of Appeals applied what it deemed "controlling federal law" and not Rhode Island law: "[T]he panel holding of that dispositive character [of the four documents considered by the Court of Appeals] under controlling federal law in this case implies no limitation on the relevance of any rule of Rhode Island law or of any item of evidence that might be raised or offered by a party *other than CJI* in support of a claim to a trust benefit, the possible details of which are not before us." *Id.* 144a-145a (emphasis added).

F. Dissent from Denial of Rehearing En Banc

Dissenting from denial of rehearing en banc, Judge Thompson expressed "concern[] about the precedent that the panel's decision sets for future property disputes between religious entities." Pet. App. 151a. The panel's decision sends "conflicting messages" by holding that "when contracts are available, they should be relied on to the exclusion of other relevant and potentially dispositive evidence such as wills and charters, even though the panel's opinion indicates that these documents can be just as significant as contracts." *Id.* 151a-152a. From "the mountain of secular evidence," Judge Thompson noted, "the panel only picked four contracts to support its conclusion." *Id.* 147a, 153a.

Judge Thompson also noted that the decision "completely omitted any discussion of Rhode Island's extensive case law pertaining to charitable trusts" and disregarded "Rhode Island's law about presumption of ownership" of the bells. The Court of Appeals should have explored "how Rhode Island law, when applied to the mountain of secular evidence available here, would have affected my colleagues' conclusions about whether CSI is holding the property in trust for the benefit of CJI." *Id.* 153a.

Finally, Judge Thompson faulted the panel for engaging in *de novo* review "without declaring, never mind demonstrating, that the trial judge's findings of fact are clearly wrong." *Id.* 146a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ESTABLISHMENT DECISIONS

The Court of Appeals fashioned an entanglement exclusionary rule under which courts must consider only available deeds, charters, and contracts to the exclusion of all other secular evidence that otherwise would be legally cognizable in trust and property disputes involving secular parties. This new rule lacks constitutional foundation and contradicts this Court's precedents.

There is nothing in the Establishment Clause or this Court's jurisprudence requiring the exclusion of otherwise relevant and admissible secular evidence merely because that evidence does not fit into the narrow categories described by the Court of Appeals below. The Court of Appeals' exclusionary rule improperly and unnecessarily expands entanglement doctrine to circumstances where the concerns of the Establishment Clause are not at issue. Excluding secular evidence in secular disputes does not further the constitutional prohibition against the establishment of religion. *See Town of Greece*, 134 S. Ct. at 1818 (Establishment Clause prohibits "establishment of a state church"); *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise. . . ."); *Epperson*, 393 U.S. at 106-07 (First Amendment forbids "the preference of a religious doctrine"). Significantly, the district court's decision parsed the full evidentiary record without even once delving into or deciding issues of religious doctrine or practice.

Yet even if the establishment of religion were a genuine concern in ordinary trust and property disputes that happen to involve religious parties, the only limitations that the First Amendment imposes on the resolution of such disputes is that "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice" and, where applicable, "the Amendment

requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, 443 U.S. at 602. But as *Jones* makes clear:

> Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.

Id. (internal quotation omitted).

The Court of Appeals' entanglement exclusionary rule directly conflicts with the neutral-principles approach articulated in *Jones*. Under that approach, courts apply state secular law "developed for use in all property disputes," just like they would in cases involving secular parties. *Jones*, 443 U.S. at 599, 602-03; *Blue Hull*, 393 U.S. at 449; *see also Episcopal Diocese of Fort Worth v. Episcopal Church*, 422 S.W.3d 646, 650 (Tex. 2013) ("*Fort Worth*") (under neutral-principles approach, courts "decide non-ecclesiastical issues such as property ownership and whether trusts exist based on the same neutral principles of secular law that apply to other entities"), *cert. denied*, 135 S. Ct. 435 (2014); *Graffam v. Wray*, 437 A.2d 627, 635 (Me. 1981) ("[T]he neutral principles of law approach, being essentially secular in its operation, is the method least likely to interfere with the free exercise of religion. By

utilizing neutral principles of law, we may treat religious organizations in the same manner as secular organizations, insofar as the adjudication of a property dispute is concerned.").

Far from excluding "internal" documents, as the panel's decision below requires, *Jones* held that courts applying "neutral principles" may examine such documents provided they are in "legally cognizable form" and "special care [is taken] to scrutinize the document[s] in purely secular terms." 443 U.S. at 604, 606. What evidence is "legally cognizable" in resolving state trust and property claims is determined by state law. *Id.* at 606. For example, as noted commentators have observed, "the course of conduct between the parties would be relevant" so long as that conduct "was made relevant under state law—such as when state law provides that an implied trust can be inferred from the conduct of the parties." Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 326 (2016). The panel here arbitrarily ruled out of bounds course-of-conduct evidence —along with all kinds of other secular evidence—without any reference to what state law provides.

The decision below conflicts with *Jones* by holding that the First Amendment requires circumscribing the record to "lodestones of adjudication," namely "deeds, charters, contracts, and the like," regardless of what evidence may be legally cognizable under applicable state law. Pet. App. 9a-11a. *Jones* merely described these types of documents as *examples* of what evidence may be legally cognizable under state law. Contrary to

the Court of Appeals decision, nothing in *Jones* holds or even suggests that these documents are an exclusive list of admissible evidence. *See Jones*, 443 U.S. at 603 n.3, 606 (evaluating constitutionality of Georgia law and noting that the neutral-principles approach is not inconsistent with *Watson v. Jones*, 80 U.S. 679 (1871), which was decided under federal common law before *Erie*); *see also id.* at 609 ("This Court, of course, does not declare what the law of Georgia is.").

As the Supreme Court of Texas held in ruling that Texas courts are not limited to considering the examples of evidence referenced in *Jones*:

> *Jones* did not purport to establish a federal common law of neutral principles to be applied in this type of case. Rather, the elements listed in *Jones* are illustrative. If it were otherwise and courts were limited to applying some, but not all, of a state's neutral principles of law in resolving non-ecclesiastical questions, religious entities would not receive equal treatment with secular entities. We do not believe the Supreme Court intended to say or imply that should be the case.

Fort Worth, 422 S.W.3d at 652 (citation omitted).

The Supreme Court of Indiana has similarly held that "the [United States Supreme] Court approved the neutral-principles approach as an acceptable means of applying *state property and trust law*," and thus this Court's reference to church constitutions in *Jones* "was *one example* of a means by which parties may be able to express their intent, 'provided it is embodied in some

legally cognizable form' under state law." *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1106 n.7 (Ind. 2012) (emphasis in original) (quoting *Jones*, 443 U.S. at 606), *cert. denied*, 569 U.S. 958 (2013). *See also Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 291 P.3d 711, 722 (Or. 2012) ("*Hope*") (holding that, under *Jones*, recitation of a trust must be "embodied in a legally cognizable form in the state where the controversy arose," and state law thus determines what evidence is "legally cognizable"); *Bishop & Diocese of Colorado v. Mote*, 716 P.2d 85, 100 (Colo.) ("an unduly restrictive rule of evidence" is "not constitutionally mandated" by *Jones*), *cert. denied*, 479 U.S. 826 (1986); McConnell, *supra*, at 345 ("*Jones* does not purport to establish substantive rules that trump ordinary state property and trust laws; rather, it affirmatively encourages courts to apply those laws.").

When, as here, no deference is due to any hierarchical church, the only possible approach recognized as constitutional by this Court is to apply the same neutral principles of state law that apply to secular parties—an approach contradicted by the entanglement exclusionary rule fashioned by the Court of Appeals below.

To the extent this Court finds that *Jones* may be read as supporting and not contradicting the Court of Appeals' rule, which treats religious and secular parties differently, the Court should clarify *Jones* in light of its more recent First Amendment decisions holding that the Free Exercise Clause protects religious

parties against such "unequal treatment." *Comer*, 137 S. Ct. at 2019.[1]

II. THE DECISION BELOW IMPERMISSIBLY RESTRICTS RELIGIOUS LIBERTY AND CONFLICTS WITH THIS COURT'S FREE EXERCISE DECISIONS

The entanglement exclusionary rule created by the decision below impermissibly discriminates against religious parties and violates the Free Exercise Clause, which protects religious parties against "unequal treatment." *Comer*, 137 S. Ct. at 2019.

The First Amendment guarantees that "our laws [are] applied in a manner that is neutral toward religion" and "bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018) (quoting *Lukumi*, 508 U.S. at 534); *see also McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) ("[T]he First Amendment mandates governmental neutrality . . . between religion

[1] Notably, in denying a stay application just months after *Jones*, Justice Rehnquist, a member of the *Jones* majority, held that *Jones* foreclosed a church's argument that "by reason of the fact that they are a church, under the First and Fourteenth Amendments to the United States Constitution they are somehow entitled to different treatment than that accorded to other charitable trusts": "[W]e held only last Term that state courts might resolve property disputes in which hierarchical church organizations were involved in accordance with 'neutral principles' of state law." *Synanon Found., Inc. v. California*, 444 U.S. 1307, 1308 (1979) (Rehnquist, J., in chambers).

and nonreligion.") (internal quotation omitted); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) ("[C]ivil power must be exercised in a manner neutral to religion. . . .").

Inherent in this principle of neutrality is that neither the government nor the courts may discriminate against parties because they are religious. *Comer*, 137 S. Ct. at 2019 (Free Exercise Clause "protect[s] religious observers against unequal treatment") (quoting *Lukumi*, 508 U.S. at 542); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (government may not "prefer[] those who believe in no religion over those who do believe").

Yet that is the exact consequence of the decision below. The Court of Appeals established separate substantive rights for religious parties on one hand and secular parties on the other. That approach results in different substantive outcomes depending on whether or not the parties are of a religious character. If the parties are secular, then state law applies as it would in any diversity action and all admissible evidence is considered. But if the parties are religious, then under the panel's approach courts must apply an entanglement exclusionary rule limiting the inquiry to "lodestones of adjudication" and excluding other secular evidence that is legally cognizable under applicable state law. Here, the panel's approach was outcome determinative, to Jeshuat Israel's severe prejudice.

This two-tiered legal regime discriminates against religious parties by denying them meaningful access to the civil courts and, as occurred in this case,

substantive state law rights, simply because they are religious. As a distinguished commentator noted with respect to the decision below, "if the trial judge is correct, that means the First Circuit assigned the property to the congregation that would not have had legal control if the parties had been nonreligious organizations." Joseph William Singer, *First Circuit resolves dispute over religious real and personal property by reference to formal agreements*, Property Law Developments Blog (Aug. 5, 2017), https://scholar.harvard.edu/jsinger/blog/first-circuit-resolves-dispute-over-religious-real-and-personal-property-reference.

This Court has "repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Comer*, 137 S. Ct. at 2019 (citation omitted). The panel's approach impermissibly limits religious liberty and violates the Free Exercise Clause by subjecting religious entities to "unequal treatment." *Id*. The decision imposes a penalty on free exercise by denying religious parties the full court access and state substantive rights available to secular parties. *Cf. Masterpiece*, 138 S. Ct. at 1732 ("The Commission's disparate consideration of Phillips' case compared to cases of the other bakers suggests" that the Commission violated Free Exercise); *id.* at 1736 (Gorsuch, J., concurring) ("The problem here is that the Commission failed to act neutrally by applying a consistent legal rule.").

The Court of Appeals imposed this penalty without addressing, let alone demonstrating, any interest "of the highest order" for deviating from applicable state law. *Comer*, 137 S. Ct. at 2019 (citation omitted). The Court of Appeals acknowledged that the trial court was "scrupulous in avoiding any overt reliance on doctrinal precepts." Pet. App. 8a. At the same time, the panel never analyzed whether applying Rhode Island law or considering the secular evidence that the panel excluded would have required resolving the dispute "on the basis of religious doctrine and practice"—the only limitation the First Amendment imposes on the resolution of church property disputes outside the hierarchical church context. *Jones*, 443 U.S. at 602-03.

Nor did the Court of Appeals apply a "narrowly tailored" approach to limit its incursion into Jeshuat Israel's free exercise. *Cf. Masterpiece*, 138 S. Ct. at 1734 (Gorsuch, J., concurring) ("[W]hen the government fails to act neutrally toward the free exercise of religion, . . . the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored.").

"In avoiding the religious thicket," courts "must be careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others," for "[s]uch a deprivation would raise its own serious problems under the Free Exercise Clause." *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1248 (9th Cir. 1999). By excluding otherwise admissible secular evidence, the decision

below deprives religious parties of the civil protections and rights available to secular parties. The decision "impose[s] special disabilities" against religious parties in violation of free exercise. *Lukumi*, 508 U.S. at 533 (quoting *Smith*, 494 U.S. at 877).

III. THE DECISION BELOW LEADS TO UNFAIR AND UNCERTAIN RESULTS, FUNDAMENTALLY ALTERS HOW CASES INVOLVING RELIGIOUS PARTIES ARE DECIDED, AND REPRESENTS A SPLIT WITH OTHER FEDERAL AND STATE DECISIONS

A. Unfairness and Uncertainty

Replacing state law with the Court of Appeals' entanglement exclusionary rule will lead to profoundly unfair results. Under the decision below, when one or both parties are religious, courts arbitrarily may exclude from consideration secular evidence no matter how compelling that evidence may be and regardless of whether or not that evidence contradicts the limited record upon which the court chooses to rely. That means that courts may ignore, as did the Court of Appeals below, critical admissions, including (i) judicial admissions, (ii) admissions in contemporaneous documents, and (iii) admissions made by party representatives in testimony given under oath.

The decision below will lead to unfair results for another reason. As one distinguished commentator has noted, looking only at "deeds and instruments of trust"—an approach "the Supreme Court certainly has

not required"—"would exclude much of relevance for original understandings" and thus "could produce very unfair results when the crucial transactions had occurred prior to [the] adoption" of such a rule. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1886-87 (1998).

Here, for example, the Court of Appeals reached the conclusion that Jeshuat Israel is not a trust beneficiary only by fashioning a rule that arbitrarily excludes over 99 percent of the secular documentary evidence in the record, as well as all testimony and physical evidence. The Court of Appeals thus blinded itself to "the mountain of secular evidence" upon which the district court based its decision. Pet. App. 153a.

The Court of Appeals' entanglement exclusionary rule also will lead to unpredictable and uncertain results both because it is unmoored from state trust and property law familiar to local practitioners and because it allows courts to cherry-pick arbitrarily which secular documents to consider in any particular case. The parties submitted 871 secular documents spanning from the 18th to the 21st centuries. Yet the Court of Appeals considered only four documents—two from 1903, one from 1945, and one from 2001. As noted in the dissent from denial of rehearing en banc, among other things the Court of Appeals ignored Rivera's will and Jeshuat Israel's charter, and summarily dismissed the 1894 "deed[s] of Trust" and the 1932 Rhode Island statute explicitly stating that Touro Synagogue is "held in trust for the benefit of the Congregation

Jeshuat Israel." *Id.* 147a-151a, 155a. The 1932 statute in particular, the dissent observed, was enacted *after* the 1903 contracts upon which the panel principally relied. *Id.* 148a.

Lastly, the Court of Appeals' entanglement exclusionary rule lends itself to strategic exploitation and gamesmanship. Parties who would benefit from a restricted record may be able to trigger the rule simply by raising a religious argument irrespective of its merit. *See id.* 9a. Not granting religious organizations "recourse to the protections of civil law" to avoid entanglement, however, would "leave religious organizations at the mercy of anyone who appropriated their property with an assertion of religious right to it." *Maktab*, 179 F.3d at 1248.

B. Split with Federal and State Decisions

If permitted to stand, application of the decision below to ordinary trust and property disputes involving religious parties will dramatically alter how those cases are tried and decided.

In *Agudas Chasidei Chabad of United States v. Gourary*, 833 F.2d 431 (2d Cir. 1987), a dispute between a religious corporation and descendants of the Lubavitch Rabbi Schneersohn, the Court of Appeals for the Second Circuit affirmed the district court's holding that sacred manuscripts and religious books originally owned by Rabbi Schneersohn were held in a charitable trust. In addition to "Rabbi Schneersohn's written declarations concerning the library," the Second Circuit

Court of Appeals relied upon "the circumstances under which the library was collected," "appellants' claims regarding the library during the probate of Rabbi Schneersohn's estate," and "actions taken regarding the collection in the years following the [Rabbi's] death." *Id.* at 434. Consideration of such evidence was appropriate because under applicable New York law a charitable trust may be created by "circumstances"—be they "acts or words"—showing that "a trust was intended to be created." *Id.* (internal quotation omitted). The decision below is in conflict with the Second Circuit Court of Appeals, as it would have excluded that evidence and ignored state law.

The Court of Appeals' decision also conflicts with decisions from other federal courts of appeals. Those decisions routinely permit consideration of the parties' conduct, internal documents, and other secular evidence that would be excluded by the decision below in trust and property disputes involving religious parties.

In *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 81-84, 97 (3d Cir. 1996), *cert. denied*, 519 U.S. 1058 (1997), the Court of Appeals for the Third Circuit affirmed application of New Jersey "neutral principles" where the district court considered internal resolutions, testimony, and statements at a church meeting.

In *Church of God in Christ v. Graham*, 54 F.3d 522, 526 (8th Cir. 1995), the Court of Appeals for the Eighth

Circuit similarly applied "neutral principles of Missouri law" to consider the conduct of the parties, including whether the national organization contributed money to acquire the property and whether the local congregation exercised control over that property.

The decision below likewise conflicts with decisions from state supreme courts. In *OPC*, the Supreme Court of Indiana held that in addition to the evidence referenced in *Jones*, "Indiana courts may consider . . . any other relevant and admissible evidence provided they 'scrutinize[ ] the[se] document[s] in purely secular terms' consistent with Indiana law." 973 N.E.2d at 1107 (quoting *Jones*, 443 U.S. at 604). Applying this ruling, the court considered internal church minutes and the parties' conduct to determine ownership of the church property at issue. *Id.* at 1112-13.

The Supreme Courts of Oregon, Alaska, Kentucky, Colorado, and Missouri similarly have held that under the laws of those states courts may consider party conduct when deciding church property disputes. *See Hope*, 291 P.3d at 724 (considering amendments to bylaws and "the relationship between the parties leading up to and following the adoption of the PCUSA constitution"); *St. Paul Church, Inc. v. Bd. of Trustees of Alaska*, 145 P.3d 541, 553-55 (Alaska 2006) (considering "the relationship between St. Paul and UMC as a whole" as evidenced by correspondence and other acts); *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583, 586 (Ky. 1988) (considering that one party "did not regard [an] instrument as having legal effect" and "the autonomy with which St. John's conducted its affairs");

Mote, 716 P.2d at 100 (holding that Colorado courts may consider party conduct); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 473-74 (Mo. 1984) (considering control over property and who contributed money to acquire that property), *cert. denied*, 471 U.S. 1117 (1985).

The decision below further departs from decisions of other federal courts of appeals and state supreme courts in its understanding that *Jones* is "controlling federal law" establishing substantive rules of decision. Pet. App. 144a. Courts of Appeals for the Second, Third, and Eighth Circuits look to state law as the law of decision for state law trust and property claims involving religious parties. *Scotts*, 98 F.3d at 92 (applying New Jersey law in diversity); *Graham*, 54 F.3d at 525 ("The parties agree that Missouri law governs resolution of their property dispute."); *Gourary*, 833 F.2d at 433 ("This diversity action is governed by New York law.").

The Supreme Courts of Texas, Oregon, Indiana, and Colorado likewise have explicitly interpreted *Jones* as permitting the states to apply their own neutral principles of law to trust and property disputes involving religious parties. *Fort Worth*, 422 S.W.3d at 650-51 (remanding for trial court to resolve church property dispute based on "the same [Texas] neutral principles of secular law that apply to other entities"); *Hope*, 291 P.3d at 722 (under *Jones*, recitation of a trust must be "embodied in a legally cognizable form in the state where the controversy arose"); *OPC*, 973 N.E.2d at 1106 ("The lesson of *Jones* is that, subject to the limitations of the First Amendment, states are free to

apply their own 'well-established concepts of trust and property law' to church property disputes.") (quoting *Jones*, 443 U.S. at 602-03); *Mote*, 716 P.2d at 100 ("unduly restrictive rule of evidence" is "not constitutionally mandated").

* * *

Are these cases all incorrectly decided as a matter of constitutional law? Under the panel's decision, the answer is "Yes." Under Supreme Court precedent and a plain reading of the First Amendment, the answer is "No." The Court should review this case so that the important constitutional principles at stake here can be vindicated—and so that Touro Synagogue, the Nation's enduring symbol of religious liberty, may survive and thrive.

IV. THE DECISION BELOW UNDERMINES FEDERALISM AND CONFLICTS WITH *ERIE*

In this diversity action, the decision below disregarded Rhode Island law, which the parties agreed and the district court ruled governed the dispute, in favor of what the panel deemed "controlling federal law"—an evidentiary exclusionary rule that contradicts state law and deprives parties of their state-law rights. *See* Singer, *supra* (noting that the Court of Appeals in this case "substituted its own conception of property law for that in the state of Rhode Island"). The Court of Appeals did not even apply state law when evaluating the limited evidence that the court did consider. The decision below displaces state law and creates federal

common law for ordinary state-law claims involving religious parties. In this fashion, the decision undermines basic principles of federalism and contravenes the *Erie* doctrine.

"Under our federal system, property ownership is not governed by general federal law, but rather by the laws of the several States." *State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-79 (1977). *Jones* makes clear that this principle is not compromised when the parties are religious: "The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones*, 443 U.S. at 602.

The Court of Appeals' displacement of state law constitutes "an invasion of the authority of the state" and "a denial of its independence." *Erie*, 304 U.S. at 79. Federal courts cannot "fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law." *Hanna*, 380 U.S. at 471-72. The decision below thus disrupts "the proper distribution of judicial power between State and federal courts" that lies at the root of modern American law. *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945).

While disregarding state law may be justified when its application violates the Constitution, *see Erie*, 304 U.S. at 78-79; 28 U.S.C. § 1652, the Court of

Appeals never evaluated Rhode Island law or analyzed whether applying Rhode Island law would violate the Constitution. The decision below held that regardless of state law, the First Amendment requires restricting of the record in these types of cases. That cannot be reconciled with *Erie*.

Nor is the decision below consistent with this Court's First Amendment precedents, which neither require nor permit the application of federal common law displacing state trust and property law. *See Jones*, 443 U.S. at 609 ("This Court, of course, does not declare what the law of Georgia is."); *see also Fort Worth*, 422 S.W.3d at 652 ("*Jones* did not purport to establish a federal common law of neutral principles to be applied in this type of case."); *Hope*, 291 P.3d at 722 ("there is no federal law governing the creation of trusts"); McConnell, *supra*, at 345 ("*Jones* does not purport to establish substantive rules that trump ordinary state property and trust laws").

Beyond that, untethering church property disputes from state substantive law gives judges near limitless discretion. *Cf.* McConnell, *supra*, at 340 (noting that approach departing from secular state law to give courts discretion to determine "special weight" for internal church rules "gives judges tremendous flexibility to reach almost any result—making the outcome unpredictable and largely dependent upon the predilections of the judges") (internal quotation omitted). As Judge Thompson noted in dissent below, from "the mountain of secular evidence available here," the

Court of Appeals "only picked four contracts to support its conclusion." Pet. App. 147a, 153a.

CONCLUSION

This case raises important constitutional questions concerning the scope of the Free Exercise Clause, the limits of the Establishment Clause, and the balance between state and federal power. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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