No. 18-530

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This petition raises important issues concerning the Free Exercise Clause, the Establishment Clause, and basic principles of federalism. More specifically, the decision below creates a federal exclusionary rule that supplants governing substantive state law in garden variety trust and property disputes—merely because the parties are religious. The implications of this constitutional decision are profound: The decision violates the Free Exercise Clause and restricts religious liberty by establishing a two-tiered legal regime in which religious parties are denied state substantive rights available to secular parties. No one should be punished or treated unequally for being religious. Yet that is the effect of the decision below on Touro and its congregants—and on religious litigants in future trust and property disputes. Coupled with the important subject matter of this dispute—Touro Synagogue, an enduring symbol of this country's dedication to religious liberty—this case strongly merits review.

Respondent does not dispute that if the petition properly describes the decision below, then this case presents issues well worthy of review. Instead, respondent bottoms its opposition on a mischaracterization of the Court of Appeals' decision. According to respondent, the decision merely applied Rhode Island law and not a federal entanglement exclusionary rule. Opp.1-2. As any reading of the decision below makes clear, respondent is wrong. The panel should have but never referenced or even purported to rely on Rhode Island law as a basis for its decision. Citing *Jones v.*

Wolf and other First Amendment decisions, the panel instead held that because the parties were religious entities, "the First Amendment calls for a more circumscribed consideration of evidence than the trial court's plenary enquiry." Pet.App.9a. The panel went on to fashion an exclusionary rule that has no basis in constitutional law. The result is a federal court-made rule that violates settled First Amendment precedent and conflicts in fundamental ways with what constitutionally should have been the governing law here: Rhode Island charitable trust law.

Once respondent's misreading of the panel's constitutional holding is corrected, respondent offers no meaningful basis to deny review. On the contrary, respondent acknowledges that if the Court of Appeals "veer[ed] away" from neutral principles of Rhode Island law, then the decision below raises the "spectre of special treatment" in contravention of this Court's Free Exercise jurisprudence. Opp.21. The Court of Appeals more than "veer[ed] away" from Rhode Island law. In an unconstitutional extreme, the panel created a new exclusionary approach for religious trust and property disputes, even non-hierarchical ones, that conflicts with this Court's settled precedents. The decision also creates a split with three other federal courts of appeals and eight state supreme courts—yet another basis for granting review.

I. THE DECISION BELOW CREATES A FIRST AMENDMENT EXCLUSIONARY RULE APPLICABLE ONLY TO RELIGIOUS LITIGANTS

Respondent bases its opposition on the proposition that the Court of Appeals merely applied state law and did not fashion an exclusionary standard that treats religious parties differently from secular ones. According to respondent, "The rights and entitlements of the parties were unambiguously determined by state law." Opp.1-2. Respondent's position is undone by a plain reading of the decision below. And as made clear by the amicus brief of the Rhode Island Attorney General, who is charged with administering Rhode Island's charitable trust law, neither respondent's position nor the decision below can be reconciled with what constitutionally should have governed this dispute—Rhode Island charitable trust law.

A. The Panel's Decision

Respondent's opposition reads as if the panel merely applied the parol evidence rule. As respondent would have it, the court reversed the district court's detailed factual findings, without ever holding them clearly erroneous, on the grounds that Rhode Island law "insists on enforcing unambiguous legal instruments as written." Opp.7. Had the panel meant to decide the case on parol evidence grounds or on any other state law principle, the panel could have done so. Yet nowhere does the panel reference or even purport to rely on governing Rhode Island law. In sharp contrast,

the panel improperly reversed the district court's 100+ pages of factual findings on supposed constitutional grounds:

- The panel decision held that "*the First Amendment* calls for a more circumscribed consideration of evidence than the trial court's plenary enquiry into centuries of the parties' conduct by examining their internal documentation that had been generated without resort to the formalities of the civil law." Pet.App.9a (emphasis added).

- The panel determined that this Court's First Amendment decisions restrict the evidence that may be considered in garden variety trust and property disputes between non-hierarchical religious institutions. "In implementing the religion clauses of the First Amendment, the Supreme Court has established a regime of limits on judicial involvement in adjudicating disputes between religious entities situated like the parties before us, when competing property claims reflect doctrinal cleavages." Pet.App.9a.

- Citing *Jones v. Wolf* and other decisions by this Court, the panel concluded that "there is no simple template for locating the line of limited [judicial] involvement" in property disputes between religious parties. Pet.App.10a. According to the panel, to avoid supposed "entanglement" the Court of Appeals had to draw the "line of

> limited involvement," and therefore created a new exclusionary rule—that "deeds, charters, [and] contracts" are the "lodestones of adjudication in these cases"—based on this Court's decisions in *Jones* and *Watson*. Pet.App.10a-11a, 17a.

In analyzing the four documents it considered, the panel made clear that it had excluded from consideration all other evidence. The panel called one document "[t]he third of the significant documents *subject to judicial consideration*." Pet.App.15a (emphasis added). The panel called another "a fourth contract *open to consideration* in harmony with *Jones*." Pet.App.17a (emphasis added).

In a further effort to obscure the constitutional infirmities of the decision below, respondent asserts the panel held that its approach applies regardless of whether the parties are secular or religious. Opp.1, 16, 21-22. On the contrary, the panel declared that its exclusionary rule applies only "in these cases," Pet.App.11a—namely, in "disputes between religious entities" or "religious property disputes." Pet.App.9a, 143a.

Beyond merely ignoring applicable state law, the panel's rule violates Rhode Island charitable trust law in fundamental ways that respondent does not dispute. Respondent does not dispute that under Rhode Island law courts consider the totality of the evidence, including conduct and statements and not just four contracts, to determine the existence of a charitable trust and its beneficiaries. AG Br.12-13; Pet.9. The

panel's exclusionary rule, narrowing consideration to "deeds, charters, [and] contracts," is inconsistent with this principle of state charitable trust law. Respondent likewise does not dispute that under Rhode Island law, once created a charitable trust cannot be terminated or altered by agreement between the trustee and beneficiary—a point forcefully established by the Attorney General. AG Br.14-17. The panel's exclusion of consideration of evidence predating the contracts, including the will first establishing the charitable trust, thus violated Rhode Island law.

B. The Statement on the Petition for Rehearing

Respondent misplaces reliance on the panel's response issued in denying Jeshuat Israel's petition for rehearing. According to respondent, the panel affirmed that its original decision was predicated on state law grounds and did not circumscribe consideration of the full record based on religious identity. Opp.5. To the contrary, the panel reaffirmed its exclusionary rule:

> The rehearing petitioner, CJI, appears to assert at one point (p.8) that the panel opinion holds that in litigation of religious property disputes "the trier-of-fact must consider only 'deeds, charters [and] contracts,' to the exclusion of all other secular evidence." This is an erroneous characterization of the panel opinion, which holds only 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." The holding does not *otherwise* purport to impose any categorical limitation on competent evidence in such cases.

Pet.App.143a (emphasis added). The panel thus affirmed that its original opinion did not create a "categorical limitation on competent evidence" *other than* by requiring that "in these cases," namely, "religious property disputes" between religious institutions, even if non-hierarchical, the inquiry begins and ends with "lodestones of adjudication"—a formulation nowhere found in First Amendment jurisprudence. And although the panel did not use the phrase "entanglement exclusionary rule," that is the stark effect of the decision here and in future cases. *See* Pet.App.144a (acknowledging panel limited "the scope of its review" to four contracts).

The panel likewise affirmed on rehearing that it had applied federal and not state law. Petitioner and the Attorney General cited the panel's failure to apply Rhode Island law. Rehearing Pet.12-18 (Sept. 5, 2017) & AG Rehearing Br.3-9 (Sept. 7, 2017), *CJI v. CSI*, No. 16-1756 (1st Cir.). And the dissent noted that the panel never "discussed long-standing Rhode Island law that could lead to different legal conclusions." Pet.App.145a, 153a. In response, the panel acknowledged that it had applied supposedly "controlling federal law"—and only because Jeshuat Israel is a religious party:

> [T]he panel holding of that dispositive character [of the four documents considered by the panel] *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.

Pet.App.144a-145a (emphasis added).

II. THE DECISION BELOW IMPERMISSIBLY RESTRICTS RELIGIOUS LIBERTY

In response to the Free Exercise issues raised by petitioner, respondent contends that the panel "did not treat petitioner any differently because of its religious character." Opp.21. That too mischaracterizes the Court of Appeals' decision.

As shown above, the panel deployed an entanglement exclusionary rule that applies *only* when parties are religious and discriminates against those parties by denying them substantive state rights available to secular parties. By referencing evidence that a party "other than CJI" might raise, the panel upon rehearing acknowledged treating Jeshuat Israel one way—its secular evidence excluded from consideration—merely because it is religious, but asserted that a party, presumably a secular one, "other than CJI" would not face the same exclusionary rule with respect to the same evidence. Pet.App.144a-145a.

Comparing the trial and appellate decisions likewise highlights this unconstitutionally disparate treatment. The district court, applying Rhode Island law,

properly considered the totality of the evidence and circumstances and found what the dissent termed the "mountain of secular evidence" to be "clear and convincing" that Touro Synagogue is held in charitable trust for the benefit of the "Jewish Society in Newport," currently Jeshuat Israel. Pet.12; Pet.App.153a. The Attorney General, charged with administering Rhode Island's charitable trust law, makes the same point here, as he has done at every stage of the proceedings. AG Br.9, 15; R.199. By contrast, because Jeshuat Israel is religious and to avoid supposed "entanglement," the Court of Appeals applied its new federal exclusionary rule to "circumscribe" the record to only four documents and thus found no charitable trustee-beneficiary relationship. Pet.App.8a-19a. This "unequal treatment" violates the Free Exercise Clause by imposing "special disabilities" and a "penalty" on account of religious identity. Pet.5-6, 26-30 (quoting *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019, 2021 (2017)). *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (First Amendment "bars even 'subtle departures from neutrality' on matters of religion"). Respondent offers no defense to the panel's encroachment on Free Exercise rights.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND REPRESENTS A SPLIT WITH FEDERAL AND STATE DECISIONS

The petition establishes that the decision below conflicts not only with this Court's Free Exercise jurisprudence but also with this Court's Establishment and federalism precedents. Pet.20-25, 36-39.

To the extent respondent claims the panel's decision somehow adheres to this Court's Establishment precedents because the district court "entangled" itself in religion, Opp.6-7, respondent is wrong. Pet.12-13. Even the panel acknowledged that the district court was "scrupulous in avoiding any overt reliance on doctrinal precepts." Pet.App.8a. *See Jones v. Wolf*, 443 U.S. 595, 602 (1979) (First Amendment's only limitation in church property disputes is the prohibition against resolving such disputes "on the basis of religious doctrine and practice"). The panel "[n]onetheless" held that the First Amendment requires circumscribing the record to avoid vague yet non-existent "doctrinal tensions" and "doctrinal cleavages." Pet.App.8a-9a. This Court's Establishment decisions do not support such an expansion of entanglement doctrine. Pet.21. It is indeed hard to understand why the district court's consideration of highly probative and indisputably secular evidence, such as respondent's (i) minutes acknowledging that it holds Touro only in trust, (ii) receipt acknowledging that it held the bells only as bailee, and (iii) admissions in trial testimony and public statements that Touro is

held only in charitable trust, somehow "entangle" the court in religion. Pet.14-17.

And to the extent respondent claims, without analysis, that *Jones* requires or even permits the panel's exclusionary "lodestones of adjudication" approach, Opp.7, the petition explains why that misstates *Jones*. Pet.21-26.

The decision below also represents a split with cases from numerous federal courts of appeals and state supreme courts. Pet.32-36. Respondent incorrectly asserts that these courts took the "very same" approach as did the panel. Opp.20-21. In contrast to the decision below, the cases cited in the petition do not hold that either the First Amendment or *Jones* requires excluding from consideration all secular evidence save "deeds, charters, [and] contracts," if the court deems such documents "dispositive." Pet.22-25. On the contrary, and unlike the decision below, those cases considered evidence well beyond "deeds, charters, [and] contracts"—not because those documents were ambiguous, but because conduct, admissions, minutes, and correspondence are legally cognizable to establish a trust under the applicable state law, which, again unlike the decision below, applies to religious and secular parties alike. Pet.22-25, 32-36. The decision below upends state law and thus directly conflicts with the federal and state decisions cited in the petition.

The decision below likewise will lead to unfair and uncertain results. Pet.30-32. The dissent noted that

"the panel only picked four contracts" out of a "mountain of secular evidence" to support its conclusion. The dissent also expressed concern that the panel's decision sends "conflicting messages" with respect to "future property disputes between religious entities." Pet.App.147a, 151a-153a. This concern is warranted. Untethered from settled state law, the decision below opens the door to arbitrary cherry-picking by courts as to which secular evidence to consider in any particular case. As an example of cherry-picking here, respondent points out that it was not a party to the 2001 contract and so the panel relied on that document solely as a party "admission." Opp.10. If the panel could consider that party admission, why could the panel not also consider respondent's admissions in deeds, board minutes, correspondence, and trial testimony, all of which the district court found supported its factual and legal conclusion that Touro Synagogue is held in charitable trust for Jeshuat Israel? Pet.15.

IV. RESPONDENT'S REMAINING ARGUMENTS ARE NO BASIS TO DENY THE PETITION

Respondent contends that the petition should be denied because, it speculates, non-constitutional arguments rejected by the district court and not addressed by the panel would dispose of this case. Opp.23-30. No issue respondent raises would prevent the Court from reaching the panel's constitutional errors. And respondent cites no authority suggesting the Court should deny the petition because reversing those errors may not end the case. This Court frequently

vacates judgments and remands for further proceedings. *See, e.g.*, *Arkansas Game & Fish Comm'n v. U.S.*, 568 U.S. 23, 38, 40 (2012) (reversing Takings Clause decision and holding that state law issues not examined by Federal Circuit were "appropriately addressed to the Court of Appeals on remand"). An erroneous constitutional decision like the panel's that impermissibly limits religious liberty and undermines fundamental constitutional principles should be reviewed. *See Comer*, 137 S. Ct. at 2017, 2019.

Nor does the petition contain errors, as respondent wrongly asserts. Respondent maintains that it is "false" that respondent had "abandoned its challenge to the charitable trust on appeal." Opp.31. On appeal respondent did not challenge the district court's holding establishing a charitable trust, and instead sought a judgment that respondent owns the Synagogue "as charitable trustee." Pet.App.18a.

Respondent contends that it "preserved its objection" to documents beyond the four supposed "lodestones of adjudication." Opp.31. In fact, at trial respondent offered into evidence hundreds of documents excluded from consideration by the panel, and never argued that it was constitutional error for the district court to consider the "mountain of secular evidence" offered by both parties. Pet.11; Pet.App.153a.

Finally, respondent inaccurately contends that the survival of Touro Synagogue as an active place of Jewish worship is not at stake on this petition. Opp.30-31. The district court found that Jeshuat Israel—which

has kept the Synagogue open for public worship for over 100 years—was one "large financial responsibility away from insolvency." Pet.App.28a, 71a-72a, 127a, 139a.[1] The district court also found that "Jeshuat Israel is the only Jewish congregation in the city of Newport" and that respondent "is seeking to evict Jeshuat Israel from Touro Synagogue, without any other congregation standing ready to take its place. This act would undermine the very reason for the trust's existence—public Jewish worship in Newport." Pet.App.135a, 139a. The panel never contradicted these findings. Pet.App.6a-7a.

CONCLUSION

It is ironic that Touro Synagogue, perhaps the Nation's most enduring symbol of religious liberty, is endangered by the panel's misinterpretation of the First Amendment. Rather than allow George Washington's famous letter to Touro—invoked yet again by this Court in *Trump v. Hawaii*—to become a dead letter, the

[1] Counsel of record's firm represented petitioner *pro bono* at trial and through appeal. Transcript at 167, *CJI v. CSI*, No. 12-cv-822 (D.R.I. Dec. 11, 2015), ECF No. 106.

Court should grant the petition and right this constitutional wrong.

Respectfully submitted,

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