

No. 20-261

In The
Supreme Court of the United States

—◆—
JEFF SCHULZ, et al.,

Petitioners,

v.

THE PRESBYTERY OF SEATTLE, et al.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The Court Of Appeals For The
State Of Washington**

—◆—
**BRIEF FOR THE ANGLICAN CHURCH IN
NORTH AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

—◆—
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QUESTION PRESENTED

In a dispute between a local congregation and its former denomination over ownership of property to which the local congregation holds legal title, does the First Amendment permit courts to apply a rule of absolute deference to assertions of ownership by the denomination?

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**INTRODUCTION AND INTEREST
OF *AMICUS CURIAE*¹**

Churches are voluntary associations. When a person joins a voluntary association, they do so in reliance on neutral principles of law, particularly contract law. 7 C.J.S. Associations §§ 14 & 60; 6 Am. Jur. 2d Associations and Clubs § 5. While they may submit to the rules of the organization, they do not think they are surrendering their civil rights, such as their right to be heard in a court of law or to possess property. 6 Am. Jur. 2d Associations and Clubs § 6. Nor do they expect that the association they voluntarily join can unilaterally assert a right to take away their property, and that they will have no legal recourse. And they especially do not expect that when they explicitly reject any such claim to their property by the voluntary association – as Petitioners did in this case – that courts will simply agree with the voluntary association without inquiry as to whether the association’s actions comport with its contractual rights and obligations or neutral principles of law.

Yet the effect of the rule of blunt deference to denominational hierarchies in matters of church property first stated in *Watson v. Jones*, 80 U.S. (13 Wall.)

¹ Pursuant to Rule 37.3(a), all parties received timely notice of the intent to file this brief and have consented to the filing of this brief. No party’s counsel authored any part of this brief. No party or party’s counsel contributed any money to fund the preparation or submission of this brief. No persons or entity other than *amicus* or its counsel contributed any money to fund the preparation or submission of this brief.

679 (1871) (the “Denominational Deference Rule” or the “Rule”), is that a local congregation that has voluntarily associated with a denomination (and thus is not “strictly independent” in the *Watson* dichotomy) effectively loses its right to challenge the acts of its denominational authorities in secular court under neutral principles of law. In other words, under the Denominational Deference Rule and the decisions of state courts emanating from it, what is impermissible – unconstitutional even – in every other context is not only licit but in fact required when done by church denominations. Of most relevance to the present case, the Rule gives denominations broad authority, enforced by the power of the state, to determine who owns local church property regardless of the facts involved in a dispute over the same or the result that would generally follow under neutral principles of law.

Amicus curiae, the *Anglican Church in North America* (“ACNA”), knows whereof it speaks. The ACNA unites some 100,000 Anglicans in more than 1,000 congregations and twenty-eight dioceses across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized in April 2009 by the GAFCon Primates – leaders of Anglican Churches representing seventy percent of the active Anglicans globally, more than fifty million worshippers. The ACNA’s Constitution and Canons were adopted at its initial Provincial Assembly in June 2009, completing its organization.

A majority of the congregations affiliated with the ACNA are either congregations that were previously affiliated with The Episcopal Church (“TEC”) or new congregations that were formed by individual clergy and congregants who had left TEC. Five ACNA dioceses that were previously affiliated with TEC and more than one hundred ACNA congregations have been drawn into or directly affected by protracted litigation with TEC and dioceses of TEC over the past decade regarding the ownership of congregational or diocesan property upon disaffiliation from TEC.

The significant and entrenched split among state supreme courts over the Denominational Deference Rule articulated in *Watson*, and *Watson*’s forcing of all religious denominations and congregations into its Procrustean bed of either “strictly independent” (i.e., congregational) or hierarchical categories has had a particularly harmful impact upon these ACNA dioceses and congregations. Two ACNA dioceses remain in active litigation against TEC and its affiliates over these very issues. Other ACNA dioceses and congregations, including some that existed well before TEC came into being in the 1780s, have suffered from state supreme courts applying the hybrid approach under *Watson* that the Petition addresses. And still other ACNA congregations have surrendered their property to TEC or a TEC-affiliated diocese upon disaffiliation from TEC simply in order to avoid the substantial financial, spiritual, and practical burdens of defending against the litigation that TEC has routinely initiated against such congregations. Further, a number of

congregations have been chilled from exercising their First Amendment rights to freely associate with ACNA based upon the dictates of religious conscience due primarily to the confused state of the law that will apply to any legal actions initiated by TEC to obtain their congregational property.

The ACNA submits this *amicus curiae* brief to highlight what the concept of disestablishment and its original meaning meant for the ownership and control of church property, how such properties were treated historically, and how the *Watson* Court's Denominational Deference Rule distorted that original meaning and effected changes in certain religious beliefs and practices. The factual basis for the Denominational Deference Rule was flawed *ab initio*, and those flaws have become more apparent with time. This case presents the clearest opportunity in decades for this Court to reconsider the Denominational Deference Rule. For all of these reasons, the Anglican Church in North America respectfully urges that the Petition be granted.

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SUMMARY OF ARGUMENT

At the outset of our republic, early Americans put into place a practice of non-favoritism toward or against religious authorities that reflects what this Court later held – the First Amendment requires that laws “neither favor nor disfavor religion.” *Mitchell v. Helms*, 503 U.S. 793, 813 (2000) (quoting *Agostini v.*

Felton, 521 U.S. 203, 231 (1997)). Many of the former British colonies that rebelled in 1776 had official state-established churches, but between then and the mid-1830s, early Americans unwound the specific favoritism of the law for such government-established churches and, relatedly, for the state-sponsored concentration of power at the denominational level of religious organizations. During this period of disestablishment, as reflected in statutes, state constitutions and reported decisions, “protection of the individual against the power of religious organizations was the central preoccupation of those charged with implementing the new law of religious liberty.” Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. Penn. L. Rev. 307, 371 (2014). An important result of those efforts was improved legal protection for the local control of church property – most significantly, adoption of general incorporation laws that allowed religious societies to incorporate without special leave from the legislature and on the basis of their own principles of governance. That local control persisted as a general, and nearly universal, rule through the American Civil War. This widely recognized local control demonstrates an important aspect of the original meaning of disestablishment.

The Denominational Deference Rule turned the original idea of disestablishment on its head and gave denominational authorities unbridled control over local congregations and their property. *Watson* is suspect as a matter of constitutional law in that it singled out

a local congregation and, by assigning it to a judicially (rather than ecclesiastically or theologically) defined category of hierarchical churches, denied it the protection of neutral laws governing voluntary associations that until then were relied upon by both the congregation and its denominational authorities as governing the ownership and control of church property. Further, a look at the history and circumstances of the *Watson* decision strongly suggests that the political climate of the day, and possibly the desire of some members of the *Watson* Court to impose political policies on the “wayward” members of a divided presbytery, led to the problematic Denominational Deference Rule.

Moreover, the Denominational Deference Rule, once enunciated by the *Watson* Court, actually operated to harm the denominations that it sought to protect by serving as a flash point effectively preventing estranged former factions of the Presbyterian Church torn asunder by the Civil War from reuniting in the years immediately following the War. Further, while long-established beliefs about local control of church property persisted for a time, by the 1930s denominational authorities had learned to weaponize the Denominational Deference Rule against dissenting congregations and their property.

The results have been profound. Long-held beliefs and practices of Presbyterians, Episcopalians, and other religious adherents have changed as denominational authorities have used, and local congregations have tried to defend themselves against, the Denominational Deference Rule. TEC compromised its own

established processes and longstanding positions regarding property ownership by unilaterally and without prior notice adopting by resolution at its General Convention in 1979 a denominational canon (the so-called “Dennis Canon”) asserting trusts over congregational and diocesan property, leaving parishioners without an adequate remedy. Although disestablishment paved the way for the variety and vitality of voluntary church activity known as the Second Great Awakening, *Watson’s* imposition of the Denominational Deference Rule after the Civil War had the opposite effect: of stifling innovation and local variety in favor of large national organizations, chilling the free exercise of religion. In short, the Rule’s impact has been the exact opposite of what the U.S. Constitution requires.

Stare decisis is “not an inexorable command . . . particularly when . . . interpreting the Constitution.” *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations and citations omitted). In particular, the Court may reconsider a prior decision when “[s]ociety’s understanding of the facts upon which a constitutional ruling [is] sought . . . [are] fundamentally different from the basis claimed for the [prior] decision.” *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992). While the *Watson* court promulgated the Denominational Deference Rule purportedly to *protect* religious freedom, 80 U.S. at 728, a review of the Rule’s history shows that use of the Denominational Deference Rule to decide property disputes actually *harmed* church polity and *changed* religious beliefs. The facts

surrounding the genesis of the Denominational Deference Rule and its use over the past 150 years are fundamentally different from the assumptions upon which it was built. It is time to reconsider the Denominational Deference Rule. This Court should grant the Petition.



REASONS FOR GRANTING THE WRIT

In the decades immediately following the founding of the United States, efforts toward the disestablishment of religion meant that local congregations had control of their property and were protected from denominational overreach backed by the power of the state, and that local churches kept their property in the event of a schism. An otherwise theological dispute was not overshadowed by the worldly question of the disposition of church property if the dispute could not be intra-denominationally resolved. It is perhaps no coincidence that the years following the birth of our republic saw the most fervent religious reawakening in American history.

But a century and a half ago, seven justices of this Court – most of them of Presbyterian persuasion, no less – jettisoned centuries of common law and decades of American practice and altered the historic relationship between local religious adherents and their denominational leaders. As set out below, this profoundly impacted religious beliefs and practices in America.

When a legal rule alone changes religious beliefs, it is not neutral. It is unconstitutional.

A. Disestablishment Protected Local Control of Property Through the Civil War

Shortly after ratification of the Constitution, the states began the process of disestablishing state-established churches, a process that began in 1786 in Virginia and essentially culminated in Massachusetts in 1836. Gordon, at 310 n.9. But what did early Americans understand disestablishment to mean? If we look at the actual practice of early Americans in the first century after the Revolution, Americans understood disestablishment to mean, in (important) part, legal recognition and protection for local and lay control over church property.

In an article that reviews in detail the statutes, case law, and writings actually implementing disestablishment, Professor Sarah Gordon concludes that disestablishment meant not only an end to formal state support for a particular religious denomination, but in fact an increase in individual and local religious autonomy via statutes that corrected the earlier legal favoritism for a few religious denominations by “carefully limiting the powers of religious organizations and empowering their individual members.” *Id.* at 314. State laws fostered the creation of corporate entities governed by lay members and recognized that power over property could and often should appropriately reside at the local level. The result was that “[w]hen religious

doctrine conflicted with state legislation limiting religious property . . . judges often did not hesitate” to enforce state property laws. *Id.* at 326.

Professor Gordon contends that this process of disestablishment in the early republic, especially the “discipline imposed on churches after disestablishment . . . undergirded the development of a fiercely competitive religious culture based on the commitment to uncoerced liberty of belief.” Gordon, at 370. Her argument has credence. The Second Great Awakening, traditionally viewed as running from 1795 to 1835, coincides almost exactly with the period of disestablishment. See “Second Great Awakening,” Encyclopedia Britannica, available at <https://www.britannica.com/topic/Second-Great-Awakening> (last accessed September 30, 2020). Moreover, the theological message of the Second Great Awakening mirrored the focus on individualism in the law related to disestablishment, as preachers focused on “the ability of sinners to make an immediate decision for their salvation.” *Id.* Although it is beyond the scope of this *amicus curiae* brief, one could therefore argue that early Americans’ belief in disestablishment and in laws that emphasized individual and local rights vis-à-vis denominations fostered, through the resultant “fiercely competitive religious culture,” core religious beliefs that have been central to American history and identity.

But however disestablishment may have fostered religious fervor, for purposes of this brief, it unquestionably resulted in legal recognition that church property could be held and controlled by local authorities.

As schisms emerged in the 1830s and 1840s, local churches overwhelmingly chose which faction they would join and kept their property.

For example, the Presbyterians divided in 1837 into “New School” and “Old School” factions based on a disagreement over polity. Eric G. Osborne & Michael D. Bush, *Rethinking Deference: How the History of Church Property Disputes Calls Into Question Long-Standing First Amendment Doctrine*, 69 SMU L. Rev. 811, 821 n.78 (2016). After this division, there were some intra-congregation fights over property, such as in Pennsylvania where the court awarded church property to the faction with the majority of adherents, but courts did not necessarily favor the faction wishing to preserve existing denominational ties. *See, e.g., Presbyterian Congregation v. Johnston*, 1 Watts & Serg. 9, 38-39 (Pa. 1841). In any event, Presbyterian denominational authorities did not assert any right to congregation property. Indeed, in 1838, the Old School Presbyterian Church Assembly expressly stated that it did not control local church property (unless such property was specifically under the control of the Assembly) and “advised” (not directed) its members to act with a “spirit of candor, forbearance, and equity” to settle property disputes with their New School brethren. Samuel J. Baird, *A Collection of the Acts, Deliverances and Testimonies of the Supreme Judicatory of the Presbyterian Church from its origin in America to the present time: with notes and documents explanatory and historical: constituting a complete illustration of her polity, faith, and history*, at 158 (1856).

Likewise, when the Methodists divided in 1844 over issues related to slavery, the church created a “Plan of Separation” that allowed the southern Methodist conferences to withdraw with their property, an act that quickly culminated in the formation of the Methodist Episcopal Church, South in 1845. Gordon, at 362-63. While the Methodists still ended up contesting the ownership of certain joint assets – notably book rights, *see Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853) – ownership of the real property of local churches was not at issue. Gordon, at 363-70.

It is therefore no surprise that when the greatest schism of all emerged in 1861, local churches were generally able to keep their property. Southerners split off from the Presbyterian Church (U.S.A.)² to form the Presbyterian Church in the Confederate States of America. Lewis G. Vander Velde, *The Presbyterian Churches and the Federal Union, 1861-1869*, at 102 (1932). The local Presbyterian congregations, north and south, kept their property at the start of the war. In fact, when asked how a congregation withdraws, one northern Presbyterian assembly stated that the congregation should simply “decline the further jurisdiction of the Presbytery” and that the presbytery should note “the character of the withdrawing church.” *Gen.*

² The historical terminology for Presbyterian Churches changed repeatedly. For much of its history, and today, the name of the largest Presbyterian denomination is the Presbyterian Church in the United States of America (the “PCUSA”), but at times the church was called UPCUSA (the “United Presbyterian Church in the United States of America”), and various denominations have split off from and rejoined PCUSA during its history.

Assembly of the Presbyterian Church in U.S.A., Minutes of the General Assembly 171-72 (1862) (New School).

Likewise, southern dioceses of the Episcopal Church withdrew themselves and their congregations from the Protestant Episcopal Church in the United States of America (“PECUSA”) and set up the Protestant Episcopal Church in the Confederate States of America (“PECCSA”). After the Civil War ended, the PECUSA met in General Convention and allowed the southern bishops and delegates present to take their seats. After this, the southern dioceses rejoined the PECUSA and dissolved the PECCSA. See generally Henry T. Shanks, *The Reunion of the Episcopal Church, 1865*, CHURCH HISTORY Vol. 9, No. 2, at 120-40 (June 1940); DuBose Murphy, *The Spirit of a Primitive Fellowship: The Reunion of the Church*, HISTORICAL MAGAZINE OF THE PROTESTANT EPISCOPAL CHURCH, Vol. 17, No. 4, at 435-48 (December 1948). *Amicus curiae* is not aware of any claims that were made upon diocesan or congregational property of the Southern dioceses and churches. Indeed, the PECUSA Canons were silent as to congregational or diocesan property until nearly a century after the Civil War.

The foregoing thus illustrates a settled historical fact. At the founding and for the first eight decades of the republic, Americans understood disestablishment to mean, generally, that local congregations and lay leaders controlled church property, and that the disposition and control of that property were governed by established and neutral principles of contract,

property, trust and other law. That historical reality, recently confirmed via research, is reason enough for this Court to reconsider the Denominational Deference Rule and grant the Petition.

B. The *Watson* Denominational Deference Rule Prevented Reunion of the Presbyterian Church and Was Rejected in Some Form by Both Northern and Southern Presbyterians

At the end of the Civil War, Presbyterians were not so willing to forgive and forget as the Episcopalians were. To the contrary, the northern and southern Presbyterians disagreed about the level of contrition required for reunion and whether past support for slavery was grounds for exclusion from the church. This then led to a theological division – could membership in the church depend on political viewpoints? *See Osborne*, at 824-33 (explaining the theological divisions that arose via resolutions of various national assemblies of the northern Presbyterian Church, resolutions and statements of mid-level governing bodies in border states, and decisions of ecclesiastical courts between 1865 and 1867). Because the two factions were unable to come to agreement on such issues, the Presbyterian Church remained split into two denominations after the war – the PCUSA (northern), and the Presbyterian Church in the United States (the “PCUS”) (southern).

While congregations comfortably located in the north or south generally chose their denomination, and retained their property, without undue conflict, congregations in border states were split on which direction to turn. It was just such a divided congregation, the Walnut Street Presbyterian Church in Louisville, Kentucky, that became the center of this Court's decision in *Watson v. Jones*. The case had already been decided by the Kentucky Court of Appeals, which held that the election of additional ruling elders by the northern faction of the congregation (in a sort of Presbyterian version of court-packing) violated the Presbyterian Church's own ecclesiastical rules. See *Watson v. Avery*, 65 Ky. (2 Bush) 332, 359-63 (1867); see also Osborne, at 832-33 (explaining the structure and rules of the Presbyterian ecclesiastical courts, and why the Kentucky court held that the northern faction had violated the church's own rules). When the same case was brought again in federal court, two justices of this Court therefore held that there was no jurisdiction. See *Watson*, 80 U.S. at 737 (Clifford, J., dissenting) ("I am of the opinion that the Circuit Court had no jurisdiction to hear and determine the matter . . . as there were two courts of common law exercising the same jurisdiction between the same parties in respect to the same subject matter"). But the majority did exercise jurisdiction and set forth the Denominational Deference Rule, thereby overturning centuries of common law and establishing a standard for church property

control wholly different from the regime before the Civil War.³

The justices of the era may not have seen the decision as terribly important. For example, when Justice Strong delivered lectures in 1875 on religious freedom, he did not even mention the case, *Gordon*, at 372 n.342, and as a federal common law case, *Watson* was not applied to the states until much later, when this Court incorporated the Denominational Deference Rule in *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952). Many church adherents, however, realized its importance immediately. The PCUS General Assembly protested that the Denominational Deference Rule was unconstitutional. See *Minutes of the General Assembly of the Presbyterian Church in the United States* 17, 88-89 (1875). And in 1875, when northern and southern Presbyterians corresponded to discuss a possible reunion, the southerners wrote complaining that the northern Assembly had approved *Watson's* Denominational Deference Rule in 1872 while an opposing principle of local control had been articulated by the 1839 Old School Assembly. *Id.* at 88.

Thus, just as the laws of the era of disestablishment had been “fundamental to the understanding of

³ Why did the *Watson* Court set forth a new rule in a case with questionable jurisdiction? Some scholars have suggested it may have had to do with the times. The “case was prosecuted and argued by an ardent foe of secessionists (Bristow) at the height of Reconstruction and decided by a Republican Court filled with justices from a pro-Union, Presbyterian/Congregationalist background.” Osborne, at 837.

what it meant to be a religious institution” in the years before the Civil War, Gordon, at 342, so too after *Watson* the Presbyterian Church “began to adjust its polity to bring it into alignment with the Court’s description of it as hierarchical. . . . In short, in response to *Watson*, [the PCUSA] *discovered* [itself] as hierarchical . . . at least with respect to church property disputes.” Osborne, at 839 (emphasis added). In other words, the *Watson* Court’s supposedly neutral Denominational Deference Rule quickly began to impact Presbyterian beliefs and practices.

The Denominational Deference Rule continued to prevent healing in the church for many years. The two Presbyterian denominations remained divided in the decades following the Civil War in part because of how church property was handled. The PCUSA General Assembly did not endorse or reject the Denominational Deference Rule *per se*, but noted that questions of property “must be determined by the courts of the State.” *Gen. Assembly of the Presbyterian Church in U.S.A., Minutes of the General Assembly* 80 (1876). Because of the uncertainty created by the Denominational Deference Rule and the ways in which state courts might apply it to church property disputes, however, the PCUS refused to reunite with the northern church, stating, “[T]he property interests of the Southern Church, under the decision of the Supreme Court of the United States, would be seriously jeopardized, in the event of any subsequent change in our relations.” *Minutes of the General Assembly of the Presbyterian Church in the United States* 212 (1894).

This Court's decision in *Watson* fundamentally affected Presbyterian polity and thoughts on church property. It also prevented reunion. The Denominational Deference Rule thereby impacted religious beliefs and practices after the Civil War. It should be reconsidered.

C. Application of the Denominational Deference Rule Has Impacted Beliefs and Practices

Watson's impact on church polity was felt almost immediately. Nevertheless, in 1929 the PCUSA's presbyteries voted down a proposed amendment to the church's constitution that would have added a trust clause similar to the one that now exists. *United Presbyterian Church in the United States of America, Minutes of the General Assembly* 102 (1980); CP1988, CP2122–23. As an ecclesiastical matter, northern Presbyterians apparently clung to the last vestiges of pre-Civil War disestablishmentarianism and were not yet willing to assert denominational control over local church property. What ultimately led to a sea change in thinking on that issue was the next great schism, in connection with which denominational authorities realized the value of the Denominational Deference Rule in helping to control congregations seeking to depart the PCUSA.

Specifically, starting around 1910, the northern Presbyterian Church was roiled by divisions over biblical criticism and those who affirmed versus those

who denied the supernatural elements of Christianity. See John R. Meuther, “The Fundamentalist-Modernist Controversy,” *Tabletalk Magazine* (May 2020), available at <https://tabletalkmagazine.com/article/2020/05/the-fundamentalist-modernist-controversy/> (last accessed September 30, 2020). Ultimately, this division led to the formation of a new denomination, the Orthodox Presbyterian Church (“OPC”). *Id.* Unlike in the past, however, when congregations had been permitted to leave the denomination with their property intact, the PCUSA now resolved to “protect all its property rights.” *Gen. Assembly of Presbyterian Church in U.S.A., Minutes of the General Assembly* 103 (1935). The difference, of course, was the Denominational Deference Rule, which by this time had been adopted by many state courts.

In a case reminiscent of Petitioners’, the Susquehanna Avenue Presbyterian Church, which sought to leave the PCUSA and join the OPC, was declared “dissolved” by the Presbytery of Philadelphia. *In re Dissolution of Susquehanna Presbyterian Church of Philadelphia*, 31 Pa. D. & C. 597, 605 (Pa. Com. Pl. 1938). That was not true – a congregation of worshippers existed – but because they had joined the OPC, the PCUSA did not recognize them and stated that there was no congregation. Applying the Denominational Deference Rule, despite the fact the property was held by the congregation’s trustees, the court awarded the property to the PCUSA. *Id.* at 609-10. Today the lot where the church used to be “shows no sign there was once a vital place of worship there.” Osborne, at 841.

Without this Court's intervention, the same would be true of Petitioners. Despite the local congregation's trustees holding title to the real property known as First Presbyterian Church Seattle, the Washington courts have applied the Denominational Deference Rule in favor of the PCUSA, and the Presbytery has announced plans to sell the property. *See* FPCS AC/Session FAQ, Oct. 5, 2018 Final Version, available at <https://static1.squarespace.com/static/4fd79c6ce4b0b003b32bc4c8/t/5bbfa3cfb208fc01e80654cd/1539285967778/FPCS+AC+Session+FAQs+10-8-18+Final.pdf> (last accessed September 30, 2020).

Thus, by the 1930s, the PCUSA had adopted a doctrine of church property in stark contrast to that which it had applied in the schisms of the 1830s and the 1860s. The church's beliefs and practices in this area had simply changed as a result of the power that the adoption of the Denominational Deference Rule by state courts afforded denominational authorities. The OPC failed to launch, *see* Meuther (noting that just 5,000 people joined that denomination in its first year), as congregations who agreed with the OPC quickly learned that they would lose their property if they tried to join the new denomination, as had happened to the Susquehanna Avenue church. Whereas before the Civil War the rule of disestablishment "sculpted . . . fabulous growth in popular religious life," Gordon at 338, similar growth, in the form of the OPC, was forestalled by the Denominational Deference Rule.

The Denominational Deference Rule meant that whatever the denominational authorities said, the courts accepted. From the 1930s on, the PCUSA's earlier disavowal of denominational control over property – including the vote against such an amendment in 1929 – disappeared, as the church exerted greater and greater control. Then, following this Court's 1979 decision in *Jones v. Wolf*, the current PCUSA's predecessors amended their constitutions to add a trust clause. The foregoing history illustrates that the ability of the church to change principles of polity to get “a desirable judicial result . . . is unmistakable.” Osborne, at 841.

The experience of TEC has been similar. TEC's canons were silent as to congregational or diocesan property until after the Civil War. The first canon addressing congregational property, calling for diocesan consent to congregational alienation of property, was not adopted until 1868. Even then, the TEC General Convention recognized, in amending this canon in 1871, that such anti-alienation canons did not have any independent legal force but required taking measures such as “State legislation, or by recommending such forms of devise or deed or subscription,” to secure parish property under the canon. *Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States of America Assembled in a General Convention in 1871 (Printed for the Convention 1872)*, at 372. This understanding was reflected in leading TEC canonical and legal treatises in 1898, in 1924, in 1954, and even in 1981. See Edwin A. White, *American Church Law*:

Guide and Manual for Rector, Wardens and Vestrymen of the Church Known in Law as "The Protestant Episcopal Church in the United States of America" (1898), at 159; Edwin A. White, *Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Adopted in General Conventions 1789-1922, Annotated, with an Exposition of the Same, and Reports of Such Cases as have arisen and been decided thereunder* (New York: Edwin S. Gorham, 1924), at 539-42, 785-86; Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* (Second Ed., Rev. 1954) (Seabury Press 1954), Vol. 2, at 265, 431; Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church* (Church Publishing Inc., New York 1981 & 1997 reprint), at 297 ("1981 TEC Constitution").

Things escalated quickly. At its General Convention in 1979, based upon dicta in this Court's decision in *Jones v. Wolf*, TEC adopted by resolution – unilaterally, without prior notice, and without opt-out rights for any parishes, a new canon (the so-called "Dennis Canon") that provided for an implied trust for the denomination and the diocese in all local congregational property. TEC Canon I.7.4. There were significant procedural irregularities surrounding the adoption by resolution of this Dennis Canon. And even after its adoption, the official canonical treatise continued to

admit that “[t]he power of the General Convention over the disposition of real property is questionable, governed as it is by the law of the state in which it is situated.” *See* 1981 TEC Constitution at 297.

In one of the tragic ironies arising from the Denominational Deference Rule, TEC is often described in decisions following *Watson* as “hierarchical” in nature. Faced with *Watson*’s binary choice between hierarchical and congregational churches only, such misunderstandings are perhaps not surprising. But they directly conflict with the ecclesiastical and theological understandings of the church itself. And to the extent that there has been any change in internal understandings within the churches, that is more reflective of the impact of *Watson*’s Denominational Deference Rule than it is of theological developments.

There is substantial historical evidence and legal and scholarly analysis demonstrating that the diocese, not the denomination, is the fundamental unit of Episcopal polity in the United States. Among other things, the dioceses that established TEC pre-existed TEC chronologically, conceptually, and legally. It was the dioceses (then co-extensive with the newly-independent states) that created TEC’s constitution and General Convention in 1789, and thus that created TEC. Indeed, TEC’s official commentary on its constitution and canons states that “[b]efore their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent,” and describes the national body they created as

“a federation of equal and independent Churches in the several states.” 1981 TEC Constitution at 12, 29.

The Denominational Deference Rule also raises due process concerns. As noted above, voluntary associations are much in the nature of a contractual relationship, the substantive and procedural terms of which are set out in the constitution, bylaws and other governing documents of the association that have been accepted as binding by those who have chosen to associate. 7 C.J.S. Associations §§ 14 & 60; 6 Am. Jur. 2d Associations and Clubs §§ 5 & 6. What is a parishioner or local congregation to do if their or its denomination does not follow its own rules regarding church property (or any other matter) or seeks to alter the terms of the contract between them, perhaps even without notice or a meaningful opportunity to withdraw from the denomination in advance of the effectiveness of the change? In any other context, a court could consider that question under neutral principles of contract law, but the Denominational Deference Rule means that a local congregation can lose its property even if its denomination commits an act contrary to its own constitution, *i.e.*, even if the denomination breaches the contract that is the foundation of the voluntary association between the local congregation and the denomination. This is precisely what happened in TEC, and the results have been profound.



CONCLUSION

Whenever the facts upon which a prior Court decision are proven incorrect, this Court may reconsider that prior ruling. Recent scholarship demonstrates that the original meaning of disestablishment included local and lay control over church property. Other scholarship suggests that the Denominational Deference Rule itself arose in a questionable fashion, and that the Denominational Deference Rule has effected changes in the beliefs and practices of certain American protestants, notably Presbyterians and Episcopalians. A century and a half of experience has shown that local congregations and their parishioners are denied basic property and due process rights because of the Denominational Deference Rule. The historical picture is clear – the Denominational Deference Rule is problematic. This Court should reconsider it. This Court should grant the Petition.

Respectfully submitted,

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