IN THE SUPREME COURT OF VIRGINIA

Record No. 120919

THE FALLS CHURCH (ALSO KNOWN AS THE CHURCH AT THE FALLS—THE FALLS CHURCH),

Defendant-Appellant,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,

Plaintiffs-Appellees.

REPLY BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLANT

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GLOSSARY

Becket *Amicus* Br.	Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Appellant
Diocese Br.	Brief of Appellee Protestant Episcopal Church in the Diocese of Virginia
Episcopal Church	The Protestant Episcopal Church in the United States of America
Mainline *Amici* Br.	Brief of Religious Organizations as *Amici* in Support of Appellees
TEC Br.	Brief for Appellee-Cross-Appellant The Episcopal Church
TFC Br.	Brief for Appellant The Falls Church
The Falls Church	Defendant-Appellant The Falls Church

INTRODUCTION

The parties offer two competing approaches to resolving church property disputes. One approach treats churches like other voluntary associations, relying on "neutral principles of law, developed for use in *all* property disputes." *Jones* v. *Wolf*, 443 U.S. 595, 599 (1979) (emphasis added). Under this approach, ownership of church property turns on ordinary principles of property and contract law, as applied to the deeds, corporate charter, and civil legal documents. Internal church canons are given legal effect only if they are "embodied in some legally cognizable form." *Id.* at 606.

The Episcopal Church, however, rejects this approach. According to it, church property disputes "are *not* resolved based on the legal principles used to resolve other types of disputes," TEC Br. 29, and "conventional contract law principles do *not* apply," Diocese Br. 27 (emphases added). Instead, courts must enforce internal church canons, even if those canons would not create a valid property interest in any other association.

This Court should reject the Episcopal Church's request to abandon longstanding property and contract laws in favor of church canons. First, their argument is based on a fundamental misunderstanding of "implied consent" in *Jones*, *Norfolk*, and *Green*. Of course, the members of an association consent to be bound by the association's rules, *in the sense that*

they can be expelled from the association for violating them. But internal rules do not create property rights unless they are "embodied in some legally cognizable form." *Jones*, 443 U.S. at 606. Here, they were not.

Second, abandoning neutral principles of law in favor of church canons would undermine free exercise rights, entangle courts in religious questions, and unsettle private property rights. The First Amendment does not permit such a result, much less require it.

ARGUMENT

A. This case can and should be resolved on the basis of neutral property and contract laws, without abandoning those laws in favor of church canons.

1. Under governing precedent, church property disputes should be resolved according to "neutral principles of law, developed for use in *all property disputes*." *Norfolk*, 214 Va. at 504 (emphasis added); *Jones*, 443 U.S. at 599. But the Episcopal Church argues just the opposite—that church property disputes should "not [be] resolved based on the legal principles used to resolve other types of disputes." TEC Br. at 29. It is easy to see why: Under ordinary legal principles, the Episcopal Church cannot prevail.

As the Episcopal Church admits, "[n]either the Diocese nor the Episcopal Church is specifically named as a grantee as such in any of [the Falls Church's deeds]." A7033. No deed includes a use restriction mentioning

the Episcopal Church. TFC Br. 16-18. No deed refers to church canons. *Id.* No contract grants the Episcopal Church an interest in the property. TFC Br. 28-30. Thus, under ordinary principles of property and contract law, the Episcopal Church has no valid interest in the Falls Church's property.

Nor is the Episcopal Church unaware of these principles or unable to comply with them. In fact, it has repeatedly complied with ordinary legal principles for *other* properties in Virginia. For some parishes, such as Truro and St. Stephen's, it included express use restrictions in the deeds, subjecting the property to "the Constitution, canons & and regulations of the Protestant Episcopal Church." A110. For other parishes, it has placed title in the name of the diocesan bishop—an option used almost thirty times. TFC Br. 18. Thus, the Episcopal Church knows how to create a legally cognizable property interest when it wants to—and when its parishes agree to. But it did not do so here—indicating a lack of intent or authority to do so.

2. Despite its ability to comply with ordinary principles of law in the past, the Episcopal Church asks this Court to abandon those principles and enforce church canons instead. It offers two arguments in support.

First, it claims that other state courts have "overwhelmingly" enforced church canons at the expense of ordinary principles of property and contract law. TEC Br. 4. But the precedents actually show the opposite.

Several cases cited by the Episcopal Church do not purport to follow the "neutral principles" rule of *Jones* at all; instead, they follow the deference approach rejected in *Norfolk*.[1] Other cases failed to address proprietary or contract interests because they found that the congregation consented to a denominational trust under state law[2]—something not done here.

More importantly, the Episcopal Church simply ignores the many states that have rejected a hierarchical denomination's claim of interest in local property based on ordinary principles of property and contract law.[3] It also ignores the many states that have rejected a denominational interest based

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[1] *See Tea* v. *Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980) (deference under *Watson*); *Daniel* v. *Wray*, 580 S.E.2d 711 (N.C. Ct. App. 2003) (never mentioning "neutral principles"); *Episcopal Diocese of Mass.* v. *Devine*, 797 N.E.2d 916, 921-92 (Mass. App. Ct. 2003) ("inappropriate" to apply "neutral principles").

[2] *See Bishop and Diocese of Colo.* v. *Mote*, 716 P.2d 85, 108 (Colo. 1986) (finding trust); *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) (same); *In re Church of St. James the Less*, 888 A.2d 795, 809-10 (Pa. 2005) (congregation agreed to trust); *Episcopal Church Cases*, 198 P.3d 66, 81, 85-86 (Cal. 2009) (state statute recognized a trust).

[3] *See All Saints Parish Waccamaw* v. *Protestant Episcopal Church*, 685 S.E.2d 163 (S.C. 2009) (rejecting trust under neutral principles); *Presbytery of Ohio Valley, Inc.* v. *OPC, Inc.*, 973 N.E.2d 1099, 1108-13 (Ind. 2012) (same); *Carrollton Presbyterian Church* v. *Presbytery of S. La.*, 77 So.3d 975, 981 (La. Ct. App. 2011) (same); *Heartland Presbytery* v. *Gashland Presbyterian Church*, 364 S.W.3d 575, 583 (Mo. Ct. App. 2012) (same); *Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522, 525-26 (8th Cir. 1995) (same); *cf. Hope Presbyterian Church* v. *Presbyterian Church (U.S.A.)*, 291 P.3d 711, 722 (Or. 2012) (ruling for denomination but holding trust must be "'legally cognizable'" under state "trust laws").

merely on a reference to denominational affiliation in the deeds.[4] Of these nine contrary decisions, the Episcopal Church mentions only one (TEC Br. 17) (discussing *Waccamaw*); it pretends the rest do not exist.

3. Next, the Episcopal Church claims that its canons are legally enforceable because the Falls Church "necessarily consented" to them "simply by joining the [denomination]." Mainline *Amici* Br. 24; *cf.* TEC Br. 30 ("implied consent"); Diocese Br. 18 ("implied consent"). According to this view, all local churches commit to "follow[ing] the rules of [the denomination]"; therefore, "civil courts [are bound] to enforce those [rules]." TEC Br. 29-30.

But this argument fundamentally misunderstands the nature of consent within a voluntary association. To be sure, the members of an association agree to be bound by the association's rules, in the sense that they can be expelled for violating them. But that does not mean that every rule of a voluntary association is enforceable in civil court.

For example, if a fraternal lodge adopts a new rule that members must donate fifty hours of service to the lodge each year, and a member fails to do so, the lodge may expel him—but it cannot obtain a court injunction en-

[4] *See Ark. Annual Conference of AME Church, Inc.* v. *New Direction Praise and Worship Ctr., Inc.*, 291 S.W.3d 562, 569 (Ark. 2009); *Presbytery of Beaver-Butler* v. *Middlesex Presbyterian Church*, 489 A.2d 1317, 1324-25 (Pa. 1985); *Foss* v. *Dykstra*, 342 N.W.2d 220, 223 (S.D. 1983).

forcing the rule. The rule would be enforceable as a contract only if it met the ordinary rules for contract formation in the state. Similarly, if the lodge declares that it has a vested remainder in all members' real property upon their death, it will not obtain their property when they die. The property interest must be created by a formal conveyance. If a member refuses to make the conveyance, he can be expelled from the lodge; but the mere existence of the rule doesn't constitute a legal conveyance.

The same is true of a church. If a hierarchical church adopts a rule declaring a trust in local property, it can order local officials to record that trust or be expelled from the denomination. *Cf. Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976) (expelled bishop). But the mere existence of the internal rule, without more, does not create a legally cognizable trust. That is the way the Roman Catholic hierarchy obtained control over church buildings in the 1800s, during the trusteeship controversy. The Council of Baltimore in 1823 declared that church property should be held in the name of the bishop, but it took decades before this decision was effectuated through changes in property and trust instruments. J.A. Chisholm, *Civil Incorporation of Church Property*, in THE CATHOLIC ENCYC. (1910). Church canons are authoritative within the church, but they have no legal force unless they are properly embodied in legal instruments.

This is not a "crass argument" that ignores the "spiritual benefit" of joining a denomination. Mainline *Amici* Br. 26. Rather, it is a recognition that courts are ill-equipped to parse those "spiritual benefits" and assign a secular value to them—unless the members avail themselves of the clear Virginia law regarding property rights. Civil courts enforce civil law. They are not competent to interpret and not authorized to enforce canon law.

The key question is: When do a church's internal rules become *binding on civil courts*? On that question, *Watson* and *Jones* are clear: Internal church rules are binding in "purely ecclesiastical" matters, such as issues of "church discipline, [or] ecclesiastical government"; but they are *not* binding on civil matters, such as the "right to property, real or personal." *Watson*, 80 U.S. at 733; *Jones*, 443 U.S. at 603 (distinguishing issues of "religious doctrine, polity, and practice" from issues of "trust and property law"). On civil property matters, church rules *become* binding only if they comply with "the formalities which the laws require," *Watson*, 80 U.S. at 723, and only if they are "embodied in some legally cognizable form." *Jones*, 443 U.S. at 606.

Watson was particularly clear on this point. As the Mainline *amici* note, *Watson* said that "an association of individuals may dedicate property by way of trust," and that it would be "the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from

the trust." Br. 25 (quoting *Watson*, 80 U.S. at 723). But *amici* omit the key limitation from the same sentence: "***provided*** that in [creating the trust] they . . . give to the instrument by which their purpose is evidenced, ***the formalities which the laws require***." *Watson*, 80 U.S. at 723 (emphasis added). In other words, internal church rules create a trust only if they comply with "the formalities which the laws require." *Id.*

Jones said the same thing when it required church canons to be "embodied in some legally cognizable form." 443 U.S. at 606. In response, the dissent repeatedly criticized the majority for rejecting church canons unless they "ha[d] been stated, in express relation to church property, ***in the language of trust and property law***." *Id.* at 612 (Powell, J., dissenting); *id.* at 612 n.1 (rejecting the "search for statements ***expressed in the language of trust and property law***"); *id.* at 613 n.2 (rejecting the requirement that churches "include a specific statement of church polity ***in the language of property and trust law***") (emphases added).

In short, both *Watson* and *Jones* confirm that canons are binding on property matters only if they comply with the requisite "formalities" and use the "language of property and trust law." The Episcopal Church's canons did not do so. Its self-serving notion of "implied consent" is no substitute for following "the formalities which the laws require." *Watson*, 80 U.S. at 723.

B. Abandoning neutral property and contract laws in favor of church canons undermines free exercise, invites entanglement, and unsettles private property rights.

Disregarding ordinary principles of property and contract law is not just contrary to *Watson* and *Jones*. It also has serious consequences: It undermines free exercise rights, entangles courts in religious questions, and unsettles private property rights. Neither the Episcopal Church nor its *amici* offers a cogent response to these problems.

1. Undermining Free Exercise. All parties agree, in the abstract, that the Free Exercise Clause protects the right of churches "to create their own forms of governance." TEC Br. 30. The question is which method of resolving church property disputes protects that right. According to the Episcopal Church, free exercise is protected only if courts "enforce a hierarchical church's internal rules"—regardless whether they are embodied in a legally cognizable form. TEC Br. 33. According to this view, all hierarchical churches have a "*general and ultimate power of control more or less complete*" over all congregations. TEC Br. 32 (quoting *Watson*, 80 U.S. at 722-23) (emphasis by TEC). But there are several problems with this argument.

Most importantly, not all churches want to organize themselves like the Episcopal Church now claims it does. Some denominations want local congregations to retain control over their property even if they disaffiliate. *See*

Becket *Amicus* Br. 23-24, 26-27 (discussing PCA). Local control ensures that local congregations can serve as a check on theological drift at the national level; it also encourages local congregations to affiliate with the denomination without risking loss of their property. These denominations also want this form of governance to be *permanent*, such that the denomination cannot change ownership of property merely by changing its internal rules.

But under the Episcopal Church's approach, it is *impossible* for denominations to adopt this form of governance and make it binding on themselves. Even if local congregations hold property in their own name, and even if internal church rules provide for local control, under their approach the denomination can always change those internal rules and assert national control. Effectively, the Episcopal Church's approach forces all denominations into either purely hierarchical or purely congregational form, eliminating the choice of intermediate forms.

It is no response to say that local control can be maintained by requiring congregations to "withdr[a]w" from the denomination whenever they object to one of its rules. Mainline *Amici* Br. 31-32. Perhaps some denominations want to organize that way; if so, they can order their deeds, trust agreements, or contracts accordingly. But other denominations want to permit dissenting congregations to remain within the denomination so they can

work through theological differences peaceably—a process that can take decades. A rule forcing congregations to withdraw immediately on pain of losing their property makes this form of church governance impossible.

By contrast, enforcing ordinary property and contract laws protects *all* forms of church governance. If a denomination wants local property to be under denominational control, it can require parishes to adopt use restrictions or place title in the name of the bishop—as the Episcopal Church has done for many other properties in Virginia. If a denomination wants local property to be under local control, it can place title in the local congregation—like the property here. And if a denomination wishes to change the way it holds church property, it can change the legal documents accordingly. This is the only approach that protects all forms of church governance.

2. Entangling Courts in Religious Questions. Abandoning ordinary rules of property and contract law also entangles courts in religion. According to the Episcopal Church, courts should simply "enforce a hierarchical church's internal rules." TEC Br. 33. But enforcing canon law is easier said than done—particularly for civil courts, which must avoid religious issues.

Canon law is complex. Sometimes churches are clearly hierarchical or congregational; other times they are a mix, or cannot be located on a hierarchical–congregational continuum at all. Becket *Amicus* Br. 21-24. Some-

times church canons are reliable guides to church governance; other times they are contested within the church and widely ignored in practice. Becket *Amicus* Br. 25. Sometimes the "course of dealings" within the church is revealing; other times it is not. In short, there is no reliable methodology for "enforc[ing] a hierarchical church's internal rules." TEC Br. 33.

That is why *Jones* requires churches to embody their internal rules in a "legally cognizable form." 443 U.S. at 606. When churches comply with ordinary property and contract law, there is no need to parse church canons; courts can instead rely on "well-established concepts of trust and property law," as applied to "appropriate reversionary clauses and trust provisions." *Id.* at 603. This not only protects churches' chosen form of polity, it "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Jones*, 443 U.S. at 605.

The Episcopal Church simply ignores the problem of entanglement. Their *amici*'s response is no better. According to them, there is no entanglement here because the canons are "explicit, plainly worded and readily discernible." Mainline *Amici* Br. 33. But this argument is both false and beside the point.

It is false because the canons are conflicting. The 1836 canons, in effect when the Falls Church joined the denomination, secured existing or "here-

after acquired" property to "the congregation." A5912a. Even after the Episcopal Church adopted its consent canons, it specifically acknowledged that the "the Colonial Churches," including the Falls Church, "belong absolutely" to the "congregations which own them." A6081. Finally, in its own authoritative expression of the Canons' meaning, the Episcopal Church states that the canons "have no legal force" (A2347) and permit a parish "to affiliate the parish—and its property—with a new ecclesiastical group." A2222.

But conflicting canons are also beside the point, because the rule adopted here will control future cases too. As *Jones* said: "In some cases, [examining church polity] would not prove to be difficult. But in others, the locus of control would be ambiguous." 443 U.S. at 605. The solution is to forbid "an analysis or examination of ecclesiastical polity" in *any* case. *Id.*

The Episcopal Church's reliance on the "course of dealings" between the parties is even more entangling. Among other things, the Episcopal Church points to the oaths sworn by clergy and vestry members, the hymnals and prayer books used by congregations, and the attendance of delegates at annual councils, claiming that all of these demonstrate implied consent to denominational control of local church property. Diocese Br. 10-17. On its part, the Falls Church disputes the ecclesiastical significance of these actions; it also cites *other* actions that are more consistent with local

control—such as the fact that the congregation purchased, designed, built, maintained, and controlled the property, and the fact that diocesan bishops could visit only at the congregation's invitation. TFC Br. 21-22.

All of these "dealings" were informed by religious concepts, freighted with religious meaning, and integrated in a religious relationship foreign to civil courts. For the lower court to try to discern the parties' "intent" based on this course of dealings is precisely the sort of "searching and therefore impermissible inquiry into church polity" forbidden by *Jones*. 443 U.S. at 605. It makes civil courts the interpreters of religious practice. Worst of all, it is completely unnecessary, given the fact that this dispute can be resolved on the basis of "well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 603.

3. Unsettling Private Property Rights. Finally, abandoning ordinary principles of property and contract law would also unsettle private property rights—to the detriment of both churches and third parties. As we have explained (Becket *Amicus* Br. 34-37), if ownership turns on canon law and the church's course of dealings, nobody can know for sure who owns church property. Churches will pay a risk premium on every transaction, whether they are experiencing a schism or not. And the rights of lenders, buyers, and tort claimants will turn on internal church rules and relationships.

The Episcopal Church and its *amici* do not dispute this point. Rather, they claim that disputes involving "independent third parties," unlike "intrachurch disputes," are subject to "generally applicable principles of Virginia law." TEC Br. 26-27; *see also* Mainline *Amici* Br. 35 (different rules for "outside third-part[ies]"). But there cannot be one set of ownership rules when a congregation seeks to disaffiliate, and a different set of rules when a congregation seeks to sell its property, take out a second mortgage, or defend a tort suit. Otherwise, ownership of church property would change depending on who was disputing it. Indeed, there will inevitably be cases involving *both* "intrachurch" and "third party" disputes—such as when a third party contracts to buy property from the congregation, but the denomination tries to negate the contract. Which set of rules governs then?

The only way to ensure clear property rights while respecting the rights of churches is to resolve church property disputes in accordance with ordinary principles of property and contract law.

CONCLUSION

The judgment of the Circuit Court should be reversed.

Respectfully submitted,

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February 11, 2013

CERTIFICATE

I hereby certify that this brief complies with Virginia Supreme Court Rule 5:26 in the following respects:

On the 11th day of February, 2013, fifteen printed copies of the foregoing brief were filed by hand with the Clerk of the Court. An exact electronic copy in PDF was also tendered to the Court.

The foregoing brief is 15 pages.

The brief has been signed by counsel.

Three printed copies and one electronic copy of the brief were sent via overnight mail to the following counsel of record:

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