No. 13-449

IN THE

Supreme Court of the United States

THE FALLS CHURCH,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE PRESBYTERIAN LAY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus concurs with the question presented as stated by the Petitioner, and respectfully suggests that the issues extend farther, and urges review and clarification of the following additional questions presented.

I. Whether this court, in *Jones v Wolf*, intended to create a new means of establishing trusts, available only to hierarchical religious denominations, and which does not otherwise comply with state law requirements, and does not require the consent of the property owner.

II. Does the holding in *Jones v Wolf* override state trust law and permit a denomination to declare itself a trust beneficiary and superimpose a trust upon the property of a member church which did not intend to have its property placed in trust?

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INTERESTS OF THE *AMICUS CURIAE* [1]

The Presbyterian Lay Committee respectfully submits the accompanying brief as amicus curiae in support of petition for writ of certiorari.

[1] The parties have consented to the filing of this brief (letters on file in the Clerk's office). Pursuant to S.Ct. R.37.6, this affirms that no counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this amicus brief, which is funded solely by the Presbyterian Lay Committee. In accordance with S.Ct. R. 37.2, counsel of record received notice of intent of this *amicus* to file its brief more than 10 days prior to the filing.

Established in 1965, the Presbyterian Lay Committee ("PLC") is a non-profit corporation whose mission includes informing Presbyterians about issues facing their denominations[2], and equipping local congregations and their members in their interaction with regional and national entities of the Presbyterian Church (United States of America) ("PCUSA").

The PLC has served as an advocate on behalf of congregations concerned with the misapplication of ecclesial governance and the improper usurping of authority and improper seizure of property and has served as an amicus in multiple state supreme courts on the property issues at the heart of the current petition. As an entity that helps equip lay leaders and clergy in maintaining the integrity and balance of the PCUSA's expression of Presbyterianism, the Lay Committee has a strong interest in this matter. As an advocate of local churches which seek to retain their property as a legal right, the PLC has a strong interest in this matter.

The PLC regularly reports on judicial decisions concerning church property issues and publishes a legal guide regarding church property matters: "A Guide to Church Property Law, Theological, Constitutional and Practical Considerations (2nd ed., Reformation Press, 2010)."

In the wake of this Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979), the General Assembly of the

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[2] There are numerous Presbyterian denominations in the United States, including the Presbyterian Church (USA), ("PCUSA"), Presbyterian Church in America, ("PCA"), Evangelical Presbyterian Church ("EPC"), Orthodox Presbyterian Church ("OPC"), Evangelical Covenant order of Presbyterians, ("ECO"), the Cumberland Presbyterian Church, ("CPC"), and others, along with independent Presbyterian Churches.

PCUSA amended its *Book of Order*, purporting to assert a trust in its favor over local congregational property, even though legal title to local Presbyterian church property is virtually always held by the local church, and in the name of the local church, alone. In almost all instances, the local churches never assented to the purported trust. Few, if any, formal property transfers followed the General Assembly's unilateral declaration. The PLC holds that this unilateral assertion of a trust is inconsistent with the intent of member congregations, and is inconsistent with the historical structure of Presbyterian governance.

The PCUSA is the only main Presbyterian denomination in the United States which asserts a trust interest in affiliated churches properties – and that assertion of trust interest is fervently disputed by members and affiliated churches throughout the denomination. The PCA, EPC, OPC, and ECO, for example, do not make such a claim on property upon disaffiliation. The PCUSA's trust clause, upon which they base their claim, came into being after *Jones v Wolf*, as a direct response to *Jones v Wolf*.

Courts, such as the Virginia Supreme Court in the case sub judice, have misinterpreted this Court's ruling in *Jones* in a manner which raises issues of entanglement, establishment of religion, and denial of due process of law, all to the detriment of the titled property owner.

Because courts are constitutionally prohibited from delving into issues of ecclesiastical self governance, and are not well situated to assess comparative differences between religious organizations and their structures, the PLC is concerned that unfamiliarity with ecclesiastical structure and polity has led to misapplication of neutral principles of law and

"deference" has been given to one litigant's assertion over the others.

To clear up the confusion which has ensued based on misapplication of *Jones v. Wolf*, this *Amicus* urges review.

REASONS FOR GRANTING THE PETITION

Confusion continues over whether *Jones v. Wolf* modified substantive trust law, creating a new way of claiming a trust interest available only to hierarchical religious denominations, or if the hypothetical example given in dicta was meant only as an illustration and still contemplated compliance with state trust law requirements. State Supreme Courts are seeing it differently[3], with some applying *Jones* as a means to allow non-owners of property to acquire a beneficial interest in the land which permits them to divest the titled owner of that land when there is a theological parting of the ways, contrary to otherwise established state trust laws and contrary to the intent of the property owner. If the intent of the dicta in *Jones* was *not* to modify substantive trust law, then constitutional error has crept into church property law jurisprudence, and clarification is needed to stop the improper divestiture of property from local churches.

This is not a split of two constitutionally permissible legal methodologies for resolving church property disputes, but is a split on applying one Supreme Court precedent in mutually exclusive ways.

The *Falls Church* case is emblematic of the approach resulting from an erroneous interpretation

[3] The division between state law interpretations of *Jones* is well documented by the petitioner and need not be restated here.

of *Jones*. The result admittedly contradicts both the intent of the property owner and the state statutes on trust creation. This petition presents an opportunity to establish the scope of permissible constitutional inquiry under neutral principles of law with clarity and certainty, and answer the question as to whether this court's decision in *Jones* created a new form of trust creation available only to hierarchical denominations, which permit unilateral imposition of trusts on property not owned by the denomination claiming it at the time the trust is allegedly asserted, or whether the intent of neutral principles is to make the same laws apply to religious denominations as to any secular legal entity.

Denominations are not static. Ever since the Protestant Reformation began in 1517 Western Christian Churches have aligned themselves in groupings, or denominations, in accordance with the dictates of their consciences. Disagreements over theology, liturgy, or principles of church governance lead to realignments with great regularity, birthing hundreds of denominations in the U.S. alone. Because denominational realignment will continue in this country as long as there are churches, clarification of the property laws affecting those realignments is crucial.

The effect of the erroneous approach employed by several states divests legally seized property owners of their lands against their will, and without compensation. Multi-tiered or so-called "hierarchical" denominational entities have been given a free pass to declare themselves beneficial owners of local church properties, taking the titled landowner's property when churches withdraw from the denomination. Courts have been all too willing to permit this alienation of property even when the landowner

challenges the validity of the claim of the trust, and even when the purported basis of the claim of trust fails to meet state law standards for trust creation. By employing a deferential posture to one party's claim, solely by virtue of its status as an ecclesiastical governing body, the court places a secular governmental imprimatur on a challenged religious declaration. Clarification of this court's holding in *Jones* is needed to avoid entrenching an unconstitutional misinterpretation into church property jurisprudence.

As cautioned in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 734 (1976), "to make available the coercive powers of civil courts to rubber stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would . . . create far more serious problems under the establishment clause." (*Id*. at 426 U.S. at 734, Renquist, J. dissenting). The Virginia Supreme Court has fallen into this trap, placing its rubber stamp and imprimatur upon an ecclesiastical edict by the Episcopal Church when such a similar edict would never stand under state law. In the very first paragraph of its opinion, the Virginia Supreme Court acknowledges that it is "asked to consider whether the trial court properly applied neutral principles of law in deciding the ownership of certain disputed church property, [and] whether that application was constitutional . . . ." (Pet. App. 1a). The court then proceeded to set aside all ordinary indicia of ownership, disregard statutory requirements for trust establishment, and "look no further than the Dennis Canon to find sufficient evidence of the necessary fiduciary relationship" (Pet. App. 20a) to imply a trust which the court assumes would divest the church of its property interest upon departure from the denomination.

What the Virginia court has done is to create a class of implied trusts established by ecclesiastical edict alone, disregarding the intent of the property owner to retain title and control. The intent "inferred" by the court is strictly by virtue of the court's interpretation of what it means to be a member of a church hierarchy. Given that any church hierarchy is a function of internal polity, and is necessarily established by the church's Book of Order, Book of Canons, or discipline the court delves right into the heart of ecclesiology and accepts, or defers to, the interpretation of one of the parties – the denomination – by virtue of its claim to be the "superior" tribunal. This is so even where the scope of its authority is disputed by the opposing party. Analogizing church connectionalism to a contractual relationship, as was done by the *Falls Church* court, (Pet. App. 21a), misclassifies an ecclesiastical spiritual relationship in a manner not intended by the parties, and entangles the court with religious matters. In Presbyterianism, for example, membership has spiritual leadings, but not "contractual obligations." To impose a contractual or quasi-contractual set of duties upon members fundamentally alters the nature of the relationship. Thus the court is establishing the terms, conditions, and consequences of participation in a denomination, which clearly violates constitutional boundaries. Once the door is opened to courts placing contractual obligations on church membership, either for individual members or congregations of members, entanglement and establishment issues enter in without logical limitation.

The right to own property in the United States has never been tied to the holding of a particular belief structure. As aptly observed by the Ohio Supreme Court in an 1834 church property dispute case, "[i]t

does not follow that they lose their property by ceasing to entertain certain opinions." *Keyser v Stansifer* (1834) 6 Ohio 363, 365. Unless title itself is predicated on the maintenance of a particular belief, the changing of religious beliefs should have no bearing on property ownership whatsoever. The misapplication of *Jones* has supplanted property owners rights to hold titled land as they see fit, subordinating the land owners rights to a denominational declaration of self-control, or worse, to a court's estimation of the parties intentions regarding their church membership.

"The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982). The means by which property ownership is recorded, transferred, encumbered, or by which trusts are created, are matters historically governed by the states. Permitting religious institutions to set up alternative means of property alienation effectively establishes that religious entity with state powers. This court has stated that the "First Amendment mandates governmental neutrality between religion and religion, and between religion, and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Permitting state courts to recognize a "church only" form of trust formation does not reflect the neutrality required by our Constitution.

Extrapolating Justice Blackman's comment that "the Constitution of the general church can be made to recite an express trust in favor of the denominational church" to mean that the U.S. Supreme Court was establishing a new means of trust creation that trumps state law trust creation statutes, misconstrues the basic syllabus of *Jones v. Wolf*. The paragraph in

which the "alternative" comment/hypothetical is found first qualifies and limits the pronouncement by stating that "the civil courts will be bound to give effect to the result indicated by the parties *provided it is embodied in some legally cognizable form*." *Id.* (Emphasis added). At a bare minimum, this suggests that the legally cognizable form would be compliant with state statutes, and not contrary to these state statutes.

Likewise, the paragraph in which the "alternative" is stated is clearly a hypothetical designed to illustrate one potential application of neutral principals. Justice Blackman observed that "at any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property." *Id.* Certainly Justice Blackman was not suggesting that the hierarchical church should *always* retain the church property or that it would unilaterally declare the parties' rights. If the parties desired, they could take steps to ensure that the local congregation retained the church property as well. *Jones v. Wolf* was not making a pronouncement which foreordained a particular outcome, always in favor of the denomination, in church property disputes. Rather, the point of neutral principals, and Justice Blackman's dicta, was that the parties, plural, could decide the outcome they desired, in agreement with one another, by modifying the documents to reflect their mutual intent.

In *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367 (1970), the U.S. Supreme Court considered an appeal from a judgment of the Court of Appeals of Maryland upholding the dismissal of two actions brought by the National Level Eldership, seeking to prevent two of its local churches from withdrawing that general religious association. The Eldership also

claimed the right to select the clergy and to control the property of the two local churches, but the Maryland Courts, relying upon provisions of state statutory law governing the holding of property by religious corporations, and upon language in the deeds conveying the property in question to the local church corporations, and upon the terms of the charters of the corporations, and upon the provisions and the Constitution of the General Eldership pertinent to ownership and control of church property, concluded "that the Eldership had no right to invoke the state's authority to compel their local churches to remain within the fold or to succeed to control of their property." *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367 *supra* summarized in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 732.

If "neutral principles" can be interpreted as the Virginia Supreme Court did in *Falls Church*, a denominational assembly or ecclesiastical court can circumvent civil property laws by unilateral self-declaration, avoiding civil court review of its decision. Declaring that the trust was created by an ecclesiastical act, where it is known that civil courts will not review such ecclesial acts, or will defer to them regardless of the property owner's intent, entirely defeats the concept of neutral principles, and leaves the property owner without a remedy for the general church's appropriation of property.

Viewing neutral principles as the *Falls Church* court has done gives the full force and effect of the law to an ecclesiastical body's declaration of trust, and establishes that ecclesiastical entity's pronouncements as the law *over those who no longer adhere to that ecclesiastical entity*. This gives judicial cover to an anti-conversion "exit penalty." Thus, if a local

church body collectively determines its beliefs no longer comport with those of the national level association, the penalty for admitting that divergence is to allow the national level association to take property of the local church.

While admitting that "neither TEC nor the diocese can claim a proprietary interest in the property by way of an express denominational trust" (*Falls Church* at 24) an implied trust was inferred, apparently because the court reasoned that the ecclesiastical canon claiming the property interest was "enacted through a process resembling a representative form of government." Thus, it was enough for the Virginia Supreme Court that the hint of a representative process existed, to divest property owners of vested title by inference and implied trust.

One is left to wonder whether the same process, applied in a different scenario, would survive judicial scrutiny. For example, if the Episcopal Church, employing a process which "resembled a representative form of government," were to declare that all of the real property owned by individual members, was subject to a trust running in favor of the Episcopal Church, would such an edict be given credence by the courts? Would it be given full effect of the law if it applied immediately upon passage by the ecclesiastical body? Worse – would it be given effect if it were viewed as applying retroactively? Of course that scenario is absurd, and the logic would not stand up to scrutiny. But that is precisely what is happening to local churches in jurisdictions where the state supreme courts view *Jones* as creating a class of ecclesiastical trusts. By virtue of a process "resembling a representative form of government" denominational tribunals declared that they were beneficiaries

of a trust which entitled them to property without evidence of consent by property owners, and the courts are deferring to that pronouncement, purportedly as an aspect of neutral principals, because the dicta in *Jones* postulated that denominational constitutions could be amended to do so, provided they were done so in a "legally cognizable" manner. The jurisdictions – like Virginia – which give credence to denominationally declared trust interests do so by ignoring the "legally cognizable" prong of Justice Blackman postulate and disregard the prong which required it reflect the intent of the parties. This turns neutral principals upside down.

While at first blush it may seem to be supportive of religious liberties to give extra credence to a religions institution's claim of property rights, preferring a "hierarchical" entity's claim over a "lessor" group's claim, nothing of the sort actually occurs. Religion is neither enhanced nor inhibited – all that happens is that one organizational structure is given evidentiary preference over another by virtue of its claimed status as a "higher" religious body. Thus, where an underlying question is whether the denomination had the legal right to lay claim to a beneficial ownership interest in the property in the first place, deference to the denomination's claim gives legal preference to a hierarchy's claim over a smaller group's denial of that claim merely because the "higher level" says so. The civil dispute is thus determined not by courts based on principles of law, but by a religious hierarchy's pronouncement. While resolution of questions of faith and practice are properly left to church judicatories for determination, civil rights are not. The circularity of deference does not protect religious liberties – rather it circumvents the rights of the property owner for proper judicial redress.

Denominations do not have the right to impose civil penalties. Forfeiture of property is a civil penalty. An ecclesiastical body has the right to define the terms of its membership, to set internal rules of operation, and to discipline those members who do not adhere to the internal rules, but submitting to any such discipline is purely voluntary on the part of the member. And, if a member ceases to consent, the only remedy left to the ecclesiastical body is to exclude that individual from membership. So it must be with church membership, as well. If a congregation of members withdraws consent to denominational discipline the denomination may sanction or censure the congregation with restrictions on participation in membership events, but cannot impose direct civil penalties. By any interpretation, forfeiture of property is a civil penalty. An ecclesiastical declaration that property of an affiliated congregation, parish, or local church, owned by that church by virtue of title, somehow reverts to the denomination, not by title, but by ecclesiastical edict, is an attempted enforcement of a civil penalty. This is not permitted by the U.S. constitution. A clear example of ecclesiastical overreaching was given in *Watson v. Jones*, 80 U.S. 679 (1872). Illustrating that ecclesiastical entities cannot decide matters of property the U.S. Supreme Court observed

> "If the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertained jurisdiction as between him and another member as to their individual right to property, real or personal,

> the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said in certain general sense very justly, that it was because the General Assembly had no jurisdiction of the case."

80 U.S. 679, 733. Thus, for over 140 years, the U.S. Supreme Court has recognized that an ecclesiastical tribunal cannot adjudicate property rights and give it civil law effect. It logically follows that if an ecclesiastical tribunal cannot make such a declaration, neither should an ecclesiastical council. The form of ecclesiastical body does not impact its ability to make declarations of civil law, it is simply beyond its jurisdiction. Yet the misunderstanding and misapplication of edicta in *Jones* has morphed into a principal of law which unconstitutionally gives ecclesiastical edict the force of civil law.

As an amicus to this petition, the Presbyterian Lay Committee is particularly interested in advising the court as to the adverse effect the unresolved split in law has upon Presbyterian churches. First off, the oversimplified two-fold classification of church structures as either "hierarchical" or "congregational" does not reflect the true variations of polity, many of which are not based upon a simple hierarchical or congregational structure. Presbyterianism is one of those variations. Presbyterianism is neither hierarchical nor congregational. Secondly, because the PCUSA modified its constitution based upon the dicta in *Jones* which suggested that a general church could amend its constitution to assert an express trust interest, and it seeks retroactive application of that assertion over the property of all affiliated churches,

regardless of the individual church / property owners' intent, every affiliated church in the PCUSA stands to be affected by the clarification of the law. Third, because Presbyteries, which are regional assemblies of Presbyterian churches, often cross state lines, and given the split in the law along state lines, affiliated churches are receiving disparate property rights determinations under similar fact patterns because of the lack of clarity as to how *Jones* should be applied. Fourthly, the courts' misinterpretation of *Jones* has given civil law authority over a denominational constitution that never intended to have such authority.

The largest of the Presbyterian denominations in the United States, the PCUSA, expressly notes in its constitution that "ecclesiastical discipline must be purely moral or spiritual in its object, and not attended with any civil effects." PCUSA Book of Order at F-3.0108. The PCUSA's constitution expressly states "that all church power, whether exercised by the body in general or by the way of representation by delegated authority, is only ministerial and declarative," again, emphasizing that it does not have punitive civil effect. (PCUSA Book of Order F-3.0107.) It further limits its reach by noting that "councils of this church have only ecclesiastical jurisdiction for the purpose of serving Jesus Christ and declaring and obeying his will in relation to truth and service, order and discipline." (PCUSA Book of Order G-3.0102.) And discipline, as noted above, is "not attended with any civil effects." The Book of Order of the PCUSA does not intend for the ecclesiastical pronouncements to be given civil law effect. At the outset of its constitution the PCUSA states that "we [the PCUSA] do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and

security, and at the same time, be equal and common to all others." (F-3.0101(B)). The immediately preceding version of the constitution expressly noted that "governing bodies of the church are distinct from the government of the state and have no civil jurisdiction or power to impose civil penalties." (PCUSA Book of Order G-9.0102, *pre-nFog*).

Notwithstanding the PCUSA's own limitations on civil law application of its constitution, cases like *Falls Church* superimpose civil law authority upon ecclesiastical edicts not intended to have that effect.

The *Falls Church* decision violates the First Amendment by employing the courts for the enforcement of religious edicts. In *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969), this court cautioned that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine *and practice*. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in the matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment or organs of government for essentially religious purposes." *Presbyterian Church v. Hull*, 393 U.S. at 449; citing to *Abbington School Dist. v. Schempp*, 374 U.S. 203 (1963). Consequently, the court cautioned that "states, religious organizations, and individuals must structure relationship involving church property so as not to require the civil courts to resolve ecclesiastical questions." *Presbyterian Church v. Hull*, 393 U.S. 440, 449. Yet *Falls Church* was decided

based upon the court's interpretation of an ecclesiastical edict, a congregation's inferred intent based upon apparent adherence to ecclesiastical order. Interpretation of polity, and inferring members intent is part and partial of a court construing a controversy over religious doctrine and practice. This crosses the constitutional line.

"To permit certain courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine." *Md. & Va. Churches v. Sharpsburg*, 396 U.S. at 369. Consequently, straightforward application of neutral principals of law, relying upon principals of law developed for use in all property disputes are to be employed.

The law of unintended consequences appears to be rearing its head. State supreme courts applying *Jones v. Wolf* in this manner – reading *Jones* to create implied trusts established by ecclesiastical edict – intend to strengthen religious autonomy by deferring to hierarchical ecclesiastical entities. Yet even under the guise of neutral principles, such deference, or preference, does not avoid entanglement between church and state so much as it interferes by establishing a preferred class of ecclesiastical hierarchical entity.

CONCLUSION

The United States Constitution forbids preferential treatment of assertions of power by ecclesiastical entities in civil courts resolving purely civil disputes over such matters as title to local church property. Accordingly, title to property held by local religious

corporations should be evaluated in the same manner as property held by any other legal entity. An assertion of a trust by a self-described trust beneficiary cannot properly be enforced under trust law principals applicable to every other person in civil society. That preferentially idiosyncratic rule should not be enforced merely because the self-described beneficiary occupies, for some purposes, a higher tier in a religious community. Correct enunciation of these principals by this court will help preserve the basic legal expectations of Presbyterian, Episcopal, and other congregations throughout the United States. Accordingly, the PLC respectfully submits its views on the constitutional analysis properly applicable to church property disputes and the ramifications of the competing analyses and methodologies which have spread from the competing applications of this court's decision in *Jones v. Wolf*, and as most recently manifested in the case *sub judice*.

Amicus urges review to clarify the intent of this court in *Jones*.

Respectfully submitted,

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