No. 13-1520

IN THE
Supreme Court of the United States

THE EPISCOPAL CHURCH, ET AL.,
Petitioners,
v.
THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.,
Respondents.

THE DIOCESE OF NORTHWEST TEXAS, ET AL.,
Petitioners,
v.
ROBERT MASTERSON, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

BRIEF FOR THE EPISCOPAL CHURCH IN SOUTH CAROLINA; GRADYE PARSONS, STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.); GRACE PRESBYTERY; PRESBYTERY OF NEW COVENANT; AND THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment requires courts resolving a property dispute within a hierarchical church to give legal effect to a pre-existing trust provision in the church's canons.

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INTEREST OF *AMICI CURIAE*

Amicus Curiae The Episcopal Church in South Carolina has firsthand experience with application of *Jones v. Wolf*, 443 U.S. 595 (1979), to disputes within hierarchical religions.[1] The Episcopal Church formed a diocese in South Carolina as the result of the organization of The Episcopal Church's General Convention; that diocese acknowledged the authority of The Episcopal Church's Constitution in 1790. The diocese in South Carolina has participated in The Episcopal Church, and has conducted its affairs, as a subordinate unit of The Episcopal Church.

The Episcopal Church in South Carolina is currently involved in litigation with a dissenting faction that seeks to subvert the hierarchical structure of The Episcopal Church. *The Protestant Episcopal Church in the Diocese of South Carolina et al. v. The Episcopal Church*, No. 2013-CP-18-00013 (S.C. Ct. Common Pleas). In that litigation, a former Bishop of the Episcopal Diocese in South Carolina has renounced The Episcopal Church and has been removed from his position as Bishop by Church authorities, yet continues to hold himself out as Bishop of the Diocese. The South Carolina trial court has expressed an intention to apply the neutral principles approach approved by this Court in *Jones*, even though the dispute between the parties includes an

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no person other than *amici curiae* and their counsel authored this brief or made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for all parties received notice of the filing of this brief compliant with this Court's Rule 37.2 and each has consented to the filing of this brief.

explicit attack on the very structure of the Church and its authority to designate its bishops. As such, the experience of The Episcopal Church in South Carolina may aid the Court's consideration of the risks presented by an unduly invasive application of neutral principles to disputes with dissident factions of hierarchical churches.

Amicus Curiae Gradye Parsons is the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with over 1,760,000 members in more than 10,000 congregations, organized into 171 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. The General Assembly is the highest legislative and interpretive body of the denomination and the final point of decision in all disputes. As Stated Clerk, Mr. Parsons is the highest ecclesiastical officer of the General Assembly and the senior continuing officer of the Presbyterian Church (U.S.A.).

This brief is consistent with hundreds of years of Presbyterian Church (U.S.A.) understanding of connectional churches and the religious trust inherent in its polity. Mr. Parsons appears here on behalf of the General Assembly only.

Amicus Curiae Grace Presbytery is an intermediate governing body of the Presbyterian Church (U.S.A.), with ecclesiastical jurisdiction over approximately 165 congregations across 53 Texas counties. Just days after issuance of the decision below, one of the oldest and largest congregations in the Presbytery, which the Presbytery created nearly a century

ago under church law, sued Grace Presbytery in Texas state court. That suit seeks to nullify the congregation's repeated commitments to hold property in trust for the church. Citing the opinions below, the congregation obtained a temporary injunction prohibiting Grace Presbytery from following its own ecclesiastical procedures and those set out in the church's governing Book of Order, including a civil injunction against "initiating any disciplinary . . . action against the . . . ministers or members of [the congregation] which directly or indirectly arises from or is connected to any property issue."

The injunction further enjoins Grace Presbytery from forming an "administrative commission" and assuming "original jurisdiction" over its subordinate congregation, an ecclesiastical process expressly set forth in the Book of Order, which the congregational officers had sworn to uphold. Relying on the injunction, the congregation purported to leave the Presbyterian Church (U.S.A.) and to take over $30 million in church property without following the church's dismissal process and its provisions for continued ownership of church property by loyal Presbyterians. The injunction remains in place, and the case is set for trial in October 2014.

Amicus curiae The Presbytery of New Covenant, Inc. ("PNC") is an intermediate governing body of the Presbyterian Church (U.S.A.), with ecclesiastical jurisdiction over 96 congregations in 29 Texas counties. It is currently defending two lawsuits involving property disputes. In the first action, in 2008, Windwood Presbyterian Church ("Windwood") sued PNC and the Presbyterian Church (U.S.A.) for a declaratory judgment that their property was not subject to the trust clause of the Book of Order. The Texas appeals court initially ruled in favor of PNC,

holding that Windwood was subject to the trust clause whether "hierarchical deference" or "neutral principles" were applied. *Windwood Presbyterian Church, Inc. v. The Presbyterian Church (U.S.A.)*, 2012 Tex. App. LEXIS 7663 (Tex. App. Aug. 30, 2012). The Texas appeals court later reversed and remanded the case to the trial court for further proceedings in light of the Texas Supreme Court decision below. *Windwood Presbyterian Church, Inc. v. The Presbyterian Church (U.S.A.)*, 2014 Tex. App. LEXIS 114 (Tex. App. Jan. 7, 2014). In May 2014, Windwood terminated its affiliation with Presbyterian Church (U.S.A.) in violation of the Book of Order, which requires the consent of PNC before such a withdrawal can be effected. Windwood has since refused to permit PNC on the property.

In the second action, in 2014, First Presbyterian Church of Houston ("FPCH"), one of the oldest and largest congregations in the PNC, and which the PNC created in 1839 under church law, sued the PNC in Texas state court. That suit seeks to nullify the congregation's repeated commitments to hold property in trust for the church. Citing the opinions below, the congregation obtained a temporary restraining order prohibiting the PNC from following its own ecclesiastical procedures and those set out in the church's governing Book of Order, including provisions similar to those obtained against Grace Presbytery and described above. The congregation's suit seeks a declaration from the Texas court that FPCH owns its property free-and-clear of any beneficial interest of PNC.

The experiences of *amici curiae* Grace Presbytery and PNC demonstrate firsthand that the opinions below invite courts to intrude into the core religious functions of hierarchical churches under the guise of deciding property disputes.

Amicus Curiae the General Council on Finance and Administration of The United Methodist Church, Inc. ("GCFA"), is the financial and administrative arm of the United Methodist Church. The United Methodist Church is a worldwide religious denomination with approximately 13,000,000 members. Through its various agencies, it performs mission work in more than 165 countries. The United Methodist Church has approximately 33,000 local churches and over 7,400,000 members in the United States. There are approximately 760,000 United Methodist members and 1,760 United Methodist churches in the state of Texas alone. Under United Methodist polity, GCFA is the agency charged with protecting the legal interests of the denomination. United Methodist polity, set forth in ¶¶2501 *et seq.* of the *Book of Discipline of The United Methodist Church* (2012), does not permit the pastor or members of a local church who choose to leave the denomination to take either the church's real or personal property with them. This fundamental principle is inextricably linked to other important aspects of its polity.

SUMMARY OF ARGUMENT

This Court should grant review to resolve the deep division among the state courts regarding the scope of its holding in *Jones v. Wolf*, 443 U.S. 595 (1979), to restore the First Amendment right of churches and their members to establish hierarchical polities, and to protect valuable church property from dissident members through appropriate trust provisions that reflect their hierarchical organization.

The holding of the Supreme Court of Texas that an express-trust canon of The Episcopal Church could be disregarded because, in its view, the trust

created did not conform to state law, deepens an existing split among the highest courts of several states over the proper interpretation of this Court's decision in *Jones*. *Compare*, *e.g.*, *Ark. Presbytery of Cumberland Presbyterian Church v. Hudson*, 40 S.W.3d 301, 310 (Ark. 2001), *and All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163, 172-73 (S.C. 2009), *with In re Episcopal Church Cases*, 198 P.3d 66, 82 (Cal. 2009), *and Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008). This division of authority on a critical issue of First Amendment law implicates the disposition of hundreds of millions of dollars of Episcopal Church property now enmeshed in litigation in state courts across the country. And by interpreting *Jones* to impose immense burdens on hierarchical churches that seek to avoid government interference with their church structure, the Supreme Court of Texas has authorized a significant infringement upon the First Amendment rights of such churches and their adherents.

The effect of the state courts' distortion of this Court's decision in *Jones* affects not only The Episcopal Church, but extends to the many other hierarchical denominations in America. For example, the churches that later combined to form the Presbyterian Church (U.S.A.) adopted trust provisions in response to *Jones* that are also threatened by the decision below. And insofar as the decision below and others like it now also stand for the proposition that state law can override the decisions of ecclesiastical authorities on matters of church polity—such as whether a subunit of a hierarchical church may secede from the general church or who is the ecclesiastical leader for a church subunit—they threaten the most fundamental religious freedoms of all hierar-

chical churches. Only this Court can ensure that the First Amendment rights of hierarchical churches and their adherents do not vary from jurisdiction to jurisdiction and that hierarchical churches are governed by uniform First Amendment standards.

Though the appropriate scope of *Jones* is a matter of confusion among state courts, the misapplication of this Court's precedent in the decision below is clear. Despite approving the neutral principles approach, this Court in *Jones* unambiguously held that, "[t]hrough appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy." 443 U.S. at 603. And this Court specified that modifying the deeds or the corporate charter was not required; "[a]lternatively," amending "the constitution of the general church . . . to recite an express trust" would protect the hierarchical church. *Id*. at 606.

Hierarchical churches throughout the country have relied on this portion of the holding of *Jones*. Indeed, in the immediate aftermath of *Jones*, The Episcopal Church adopted an express trust through the Dennis Canon to "ensure . . . that the faction loyal to the hierarchical church will retain the church property" in the event of a doctrinal dispute. 443 U.S. at 606. Notwithstanding this Court's seemingly unambiguous instruction that "the civil courts [are] bound to give effect to the result" of such trust provisions (*id.*), the Supreme Court of Texas declined to give the Dennis Canon any legal force, finding it invalidated by the "neutral principles" of Texas state law.

Permitting a local parish to withdraw from a hierarchical church and take church property with it—even if the local and central churches have previously agreed that the property is held in trust for the central church—poses a significant risk to the church's ability to adopt a position on a controversial doctrinal issue. And the experience of *amici* confirms that applying neutral principles to church disputes poses substantial risks to constitutionally protected church autonomy reaching far beyond the ownership of property.

The entrenched split among the state courts, the important implications for the religious freedoms of hierarchical churches, and the substantial financial stakes all counsel strongly in favor of this Court's review. But the case for review here is even more compelling because the Texas Supreme Court *retroactively* applied a new reading of *Jones* to impair The Episcopal Church's freedom to organize itself according to its religious viewpoint. Before the decision below, the state of Texas had declined to adopt the *Jones* "neutral principles" approach; Texas courts consistently deferred to the decisions of religious authorities in disputes over church property. The retroactive application of "neutral principles" of state law to override The Episcopal Church's religious choice to hold property in trust for the general church magnifies the First Amendment injury. It defeats the reasonable expectations of hierarchical churches, jeopardizes billions of dollars of property that churches have attempted to safeguard from dissident parishioners through express trust provisions akin to the one invalidated here, and creates uncertainty regarding how, if at all, they may direct the organization of their affairs and shield their church structure from civil lawsuits.

ARGUMENT

I. THE TEXAS SUPREME COURT'S DECISION INVADES THE FIRST AMENDMENT FREEDOMS OF HIERARCHICAL CHURCHES.

Over 130 years ago, this Court held that, in the event of a legal dispute within a hierarchical church (such as The Episcopal Church), "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872). *See also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704-05 (2012) (same). In *Jones v. Wolf*, this Court reaffirmed that "the [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization," but concluded that, in some circumstances, where "church property disputes" are at issue, courts may apply "neutral principles of law" to resolve those disputes. 443 U.S. at 602. By reading *Jones* to apply "neutral principles of law" even where doing so would *conflict with* resolution of an issue of church polity made by the highest body in a hierarchical church, the Supreme Court of Texas, in this context, has deprived the First Amendment of all force.

A. THE DECISION BELOW MISAPPLIES *JONES* BY IGNORING THE PARTIES' CLEARLY EXPRESSED AGREEMENT THAT CHURCH PROPERTY WOULD BE HELD IN TRUST FOR THE GENERAL CHURCH.

1. In *Jones*, this Court held that, notwithstanding *Watson*, states need not defer to the decision of religious authorities in a hierarchical church to resolve church property disputes. Instead, this Court held that courts may resolve certain church property disputes based on "neutral principles of law"; *i.e.*, "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." 443 U.S. at 603; *see also Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 367-68 (1970) (per curiam) (upholding a state court's resolution of a church property dispute based upon same sources).

This Court was cognizant, however, "that 'the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes,'" and "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, 443 U.S. at 602 (citation omitted). And while *Jones* instructed courts to defer on ecclesiastical issues arising within property disputes, courts have routinely demonstrated the impracticability of that distinction, resolving ecclesiastical controversies under the guise of property law. Indeed, the four dissenting Justices openly warned that the application of a "neutral principles" approach would "invite intrusion into church polity forbidden by the

First Amendment." *Id.* at 610 (Powell, J., dissenting).

The Court responded with the assurance that, while application of a neutral principles approach is not "free of difficulty," hierarchical authorities can protect church property from dissident church members by promulgating a trust provision in their constitutions or canons "[a]t any time before the dispute erupts." 443 U.S. at 604-06. Such provisions could, the Court explained, "specify what is to happen to church property in the event of . . . a schism or doctrinal controversy." *Id.* at 603. That specification would enable hierarchical churches to ensure "that the faction loyal to the hierarchical church will retain the church property." *Id.* at 606.

The Court elaborated at length upon this safeguard for hierarchical churches' First Amendment right to govern their affairs. The Court explained that, to protect the property of the general church, such churches "can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church" or, "*[a]lternatively*, the constitution of the general church can be made to recite an express trust in favor of the denominational church." 443 U.S. at 606 (emphasis added). The Court's use of the word "[a]lternatively" made explicit that a legally effective trust provision could be added to the general church's constitution *without* "modify[ing] the deeds or the corporate charter to include a . . . trust in favor of the general church." *Id.*

The Court emphasized that the "burden involved in taking such steps will be minimal." 443 U.S. at 606. Moreover, "the civil courts will be bound to give effect to the result . . . ." *Id.* As a result, the Court believed that the "occasional problems in application" would be eliminated as churches followed its directions to "'structure relationships involving church

property so as not to require the civil courts to resolve ecclesiastical questions.'" *Id.* at 604 (citation omitted).

2. In recent years, doctrinal divisions in hierarchical churches have made this issue a recurring one of growing significance. *See*, *e.g.*, Kathleen E. Reeder, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 Colum. J.L. & Soc. Probs. 125, 125-28 (2006). As set forth more fully in the petition, several courts have properly "read *Jones* as an affirmative rule *requiring* the imposition of a trust whenever the denominational church organization enshrines such language in its constitution." *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1106 n.7 (Ind. 2012), *cert. denied*, 133 S. Ct. 2022 (2013); Pet'n at 18-22 (outlining split of authority). Those decisions respect the agreement of the hierarchical church and its adherents, prior to the dispute giving rise to litigation, that property is held in trust for the general church. In contrast, other state courts, including the Supreme Court of Texas, have refused to respect a hierarchical church's decision "to recite an express trust in favor of the denominational church" in its constitution, despite the plain language of *Jones*. *Jones*, 443 U.S. at 606; Pet'n at 18-22.

The decisions that impose a trust where the constitution of the general church evidences the church's intent to create such a trust are more faithful to *Jones*'s recognition that neutral principles must be carefully applied to avoid creating constitutional problems. The Supreme Court of California, for example, noted that the *Jones* majority "did not deny that free exercise rights require a secular court to defer to decisions made within a religious association when local churches have submitted themselves to the authority of that association." *In re Episcopal*

Church Cases, 198 P.3d 66, 80 (Cal. 2009). It construed this Court's holding that "'the constitution of the general church can be made to recite an express trust in favor of the denominational church'" as "suggest[ing] the high court intended that this could be done by whatever method the church structure contemplated." *Id*. (citation and emphasis omitted).

Similarly, the New York Court of Appeals found it "dispositive" under *Jones* that the Dennis Canon "clearly establish[es] an express trust in favor of" the diocese and the national church, and that the local church "agreed to abide by this express trust either upon incorporation . . . or upon recognition as a parish in spiritual union with" the diocese. *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008). As the Georgia Supreme Court specifically concluded, "requiring strict compliance" with the state's generic express trust statute "to find a trust under the neutral principles analysis would be inconsistent with the teaching of *Jones v. Wolf* that the burden on the general church and its local churches to provide which one will control local church property in the event of a dispute will be 'minimal.'" *Rector, Wardens, & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 718 S.E.2d 237, 244 (Ga. 2011).

3. These courts properly construed this Court's decision in *Jones*, which dictates that The Episcopal Church is entitled to control the property at issue in this litigation. To be clear, before this dispute arose, Respondents had plainly "submitted themselves to the authority of" The Episcopal Church. *In re Episcopal Church Cases*, 198 P.3d at 80. As the court below concluded, "[i]n order to be accepted into union with [The Episcopal Church], missions and congregations must subscribe to and accede to the constitu-

tions and canons of both [The Episcopal Church] and the Diocese in which they are located," and each diocese "must accede to [The Episcopal Church's] constitution and canons." Pet'n App. 66a; *see also Episcopal Church in Diocese of Conn. v. Gauss*, 28 A.3d 302, 325 (Conn. 2011) (enforcing Dennis Canon because local "members agreed to be bound by the constitutions and canons of The Episcopal Church and the Diocese in 1956 when they affiliated with The Episcopal Church"), *cert. denied*, 132 S. Ct. 2773 (2012).

Moreover, The Episcopal Church explicitly declared that property was to be held in trust for it, and, before this dispute arose, the local church agreed. The language of the Dennis Canon is unequivocal: "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located." Pet'n App. 36a. And the Dennis Canon "'merely codifie[s] in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [The Episcopal Church] in 1789.'" *Gauss*, 28 A.3d at 324 (citation omitted).

In other words, all parties here did what they thought was necessary, before this dispute arose, to "ensure . . . that the faction loyal to the hierarchical church w[ould] retain the church property" in the event of a dispute. *Jones*, 443 U.S. at 606. Indeed, the timing of the adoption of the Dennis Canon—a mere two months after this Court issued *Jones*—confirms the parties' intent to implement the safeguard that this Court had provided. This Court's decision in *Jones* mandates that the Church's action be respected.

B. THE DECISION BELOW INFLICTS SIGNIFICANT CONSTITUTIONAL AND FINANCIAL HARM ON RELIGIOUS ORGANIZATIONS.

1. The contrary decision of the court below trenches on the First Amendment rights of the Church and adherents loyal to it. This Court has cautioned that "[i]f civil courts undertake to resolve . . . controversies [over religious doctrine and practice] 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 matters of purely ecclesiastical concern." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

The decision below causes precisely that interference. First, the governance of a religious organization is itself a religious choice. The First Amendment grants to individuals "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association." *Watson*, 80 U.S. (13 Wall.) at 728-29. Those forming the local churches and dioceses at issue here, like those who remain loyal to The Episcopal Church, exercised this right to organize under the auspices of, and the governing rules set by, the Church. Included among these rules was the unambiguous agreement that the local church owned church property not in its own right, but in trust for the general church.

Yet when they were "aggrieved by one of the[] decisions" of the general church, Respondents "ap-

peal[ed] to the secular courts" for a remedy. *See Watson*, 80 U.S. at 729. In particular, Respondents seek this Court's support in escaping The Episcopal Church's decisions with the Church's property in hand. That inversion of the previously agreed religious organization effectively substitutes a decentralized, congregational governing structure for the centralized structure adopted by both the general church and those who now dissent from it. The Constitution does not permit state law to have such an invasive effect on religious practice.

Relatedly, the decision of the court below provides local parishes an unintended "veto over every future change in the canons," *Harnish*, 899 N.E.2d at 925, which weakens the authority of The Episcopal Church (and other hierarchical churches) to resolve controversial doctrinal issues within the church. Of course, any adherent to a religion is free to withdraw from that religion in the event of disagreement. But providing every dissenting faction with the ability to take with it property held in trust for the central church—*even if*, as here, both the central church and the dissenting adherents previously had agreed that the property is held in trust for the general church—substantially burdens the ability of the ecclesiastical authorities for the general church to take action that might foster substantial dissent. And that disincentive will be felt most acutely where the dissenting faction constitutes a majority of the population of individual churches holding significant assets of the central church. Whether or not that is desirable as a matter of policy is beside the point; the First Amendment guarantees religious organizations the right to "organize voluntary religious associations" in the form they desire. *Watson*, 80 U.S. at 728.

Such coercion of religious institutions' internal governing procedures violates "the [First] Amend-

ment['s] require[ment] that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, 443 U.S. at 602. By second-guessing a hierarchical church's "resolution" of its own "issues of religious doctrine or polity," *id.*, the Supreme Court of Texas deprived The Episcopal Church and its loyal parishioners of their First Amendment right to determine the ownership and use of the valuable "real and personal property" protected by the Dennis Canon.

2. The interference with constitutional rights caused by the distorted application of neutral principles reaches beyond determining ownership of property. Some state courts have expanded an erroneous reading of *Jones* into authorization for interference with even more fundamental religious freedoms. Most notably, *Jones* has been read to authorize wide-ranging interference with church governance, even though "matter[s] of internal church government" are "issue[s] at the core of ecclesiastical affairs" as to which civil courts must defer to the determinations of the pertinent ecclesiastical authorities. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976).

Forms of church governance are not mere bureaucratic arrangements; they reflect underlying theological disagreements of fundamental significance. Governance by bishops, governance by bishops in cooperation with elected assemblies, governance by elected assemblies, governance by each local congregation independently of all others—each of these forms has its own theological basis. The role of Episcopal bishops, and whether to have bishops at all, was a central issue in the English Civil War of the 1640s and 1650s. Douglas Laycock, *Continuity*

and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century, 80 Minn. L. Rev. 1047, 1062 (1996). Believers are entitled to create and maintain churches with governance structures most suited to their understanding of the faith and its appropriate governance. Decisions like those below, which allow local congregations to take the church property with them when they leave, effectively convert episcopal and connectional churches into congregational churches. Ultimate power is placed in the hands of each local congregation, which can take the property and leave any time the general church does something that a local congregation does not like.

Amici's own experiences are instructive. *Amicus* The Episcopal Church in South Carolina is currently involved in litigation in South Carolina state court with a former Bishop of the South Carolina diocese of The Episcopal Church, who has renounced the Church and has been removed from his position as Bishop by the Church's highest authorities. The former Bishop purported to withdraw the diocese from The Episcopal Church, yet maintain his position as head of the Diocese, despite Church authorities' appointment of a successor.

As in the present case, the South Carolina litigation implicates issues of church governance far beyond property ownership—for example, whether a diocese may withdraw from The Episcopal Church; whether a Bishop, having renounced the Church and been removed from his position, nonetheless may remain Bishop of the Diocese; and whether Church has the authority to appoint the bishop of each diocese. Yet the South Carolina trial court, accepting the former Bishop's reading of *Jones*, has treated these fundamentally ecclesiastical questions as "civil

law issues concerning corporate control and interests in property." *The Protestant Episcopal Church in the Diocese of South Carolina et al. v. The Episcopal Church*, No. 2013-CP-18-00013 (S.C. Ct. Common Pleas Jan. 23, 2013). According to that court, "'when resolving church dispute cases, South Carolina courts are to apply the neutral principles of law approach.'" *Id*. (quoting *All Saints Parish Waccamaw*, 685 S.E.2d at 171).

This approach turns this Court's precedent on its head. Not only has this Court never permitted application of neutral principles of law to determine which individual is the proper head of a church or one of its subunits; it has squarely held that "it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor*, 132 S. Ct. at 704; *Watson*, 80 U.S. (13 Wall.) at 727 ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . ."). If a neutral principles approach is to be reconcilable with the Constitution, it must be more carefully limited to avoid inserting civil courts into these fundamentally ecclesiastical issues.

3. The decision of the court below not only has significant effects on the First Amendment rights of The Episcopal Church and other religious entities, but has far-reaching financial implications for The Episcopal Church, its nearly 7,000 congregations, and its millions of members, as well as for all other hierarchical religious organizations across the country.

The Episcopal Church currently is embroiled in disputes with dissident church members regarding "hundreds of millions of dollars of church property." David Van Biema, *The Episcopal Property War*, Time (Apr. 4, 2008), http://www.time.com/time/nation/article/0,8599,1728134,00.html; *see also* Jim Remsen, *Episcopalians Fear Asset Fights*, Phila. Inquirer, Nov. 2, 2003, at C4. This case alone involves properties worth more than $100 million. In South Carolina, "an estimated $500 million in church buildings, grounds and cemeteries" is at issue. Valerie Bauerlein, *Church Fight Heads to Court – South Carolina Episcopalian Factions Each File Suit After Split Over Social Issues*, Wall St. J. (Apr. 16, 2013). These staggering financial stakes prompted one commentator to label the current disputes regarding the ownership of Episcopal Church property "the biggest church real estate sale in history." Remsen, *supra* (quoting the director of the Canon Law Institute).

Moreover, the implications of the state courts' disagreement about the enforceability of church trust provisions extend well beyond The Episcopal Church. In reliance on this Court's guidance in *Jones*, many other hierarchical churches have established trust provisions similar to the Dennis Canon to protect their property from dissident church members. *See*, *e.g.*, *Cumberland Presbytery v. Branstetter*, 824 S.W.2d 417, 422-23 (Ky. 1992) (describing the Cumberland Presbyterian Church's trust provision and awarding the general church disputed property); *African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church*, 2009 Ohio 1394, *P55-*P63 (Ct. App. Mar. 24, 2009) (describing the African Methodist Episcopal Church's trust provision and awarding the general church disputed property). Resolution of the Dennis Canon's legal

force directly affects the ability of these—and all other—hierarchical churches to use trust provisions to safeguard their property against breakaway factions. The value of that property may reach into the *hundreds of billions* of dollars. *See Hearing Before the H. Subcomm. on the Constitution*, 105th Cong. 134-35 (1998) (statement of Marc Stern, Director of Legal Department, American Jewish Congress) (stating that the reported value of religious property in just two States is $22.1 billion); *It's Time to Examine Costs of Tax-Free Property*, Indianapolis Star, Aug. 23, 2007, at 12 (estimating the value of church property nationwide at $150 billion).

The profound financial implications of this frequently recurring and sharply disputed issue—as well as its equally significant implications for the First Amendment rights of hierarchical churches and their millions of members—provide a compelling basis for this Court's review.

II. THE RETROACTIVE APPLICATION OF A CASE-DISPOSITIVE STANDARD HEIGHTENS THE FIRST AMENDMENT INJURY.

This case presents a particularly compelling vehicle for this Court's review. Unlike previous cases in which this Court has denied review—*see*, *e.g.*, *Falls Church v. Protestant Episcopal Church in U.S.*, 740 S.E.2d 530 (Va. 2013), *cert. denied*, 134 S. Ct. 1513 (2014)—the decision by the Supreme Court of Texas to apply neutral principles of state law to negate the Church's unambiguous trust provision was plainly dispositive. Under the hierarchical approach or under the intent-focused application of neutral principles endorsed in *Jones*, Petitioners would have prevailed and retained control of their property.

But this case is that much more compelling because Texas courts previously had deferred to decisions of ecclesiastical authorities in disputes involving church property, yet the Texas Supreme Court *retroactively applied* its adoption of neutral principles to this case. In *Jones*, this Court took pains to note that the Georgia Supreme Court had "clearly enunciated its intent to follow the neutral-principles analysis" in prior cases, and thus the case before it did "not involve a claim that retroactive application of a neutral-principles approach infringes free-exercise rights." *Jones*, 443 U.S. at 606 n.4. Here, there can be no doubt that, as the Texas appellate courts observed, Texas law prior to this case "consistently followed the deference rule." *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 707 (Tex. App.—Dallas 1986). Moreover, even in states that, unlike Texas, had previously applied neutral principles, *Jones* provided a road map to ensuring that the central church's rights were protected—a road map that The Episcopal Church followed, but the Supreme Court of Texas held inadequate.

This retroactive change in state law deprives The Episcopal Church—and those who affiliated with it and approved its organization, including Respondents—of their First Amendment rights to organize in their desired form even though the Church's safeguards previously would have been sufficient. The decision of the court below thus confirms that neutral principles, unless carefully applied to protect the pre-dispute organization of the church, will deprive the parties of their right to "ensure . . . that the faction loyal to the hierarchical church will retain the church property." *Jones*, 443 U.S. at 606. That deprivation will cause precisely the harm of which the

Jones dissent warned—*i.e.*, the court "interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority." *Id.* at 618 (Powell, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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