No. 11-1101

In the Supreme Court of the United States

TIMBERRIDGE PRESBYTERIAN CHURCH, ET AL.,

Petitioners,

v.

PRESBYTERY OF GREATER ATLANTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment allows a state to enforce language in a denominational constitution or bylaws purporting to impose a trust on local church property, when that language would ordinarily have no legal effect under neutral principles of state property and trust law.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. In its practice, The Becket Fund has represented religious organizations with virtually every sort of religious polity, including congregational, hierarchical, connectional, presbyterial, synodical, trustee-led, and other polities.

Because the free exercise of religion includes the right of religious associations to shape their ecclesiastical polities freely, The Becket Fund has resolutely opposed attempts to have government interfere in matters of church polity.[2] For example, The Becket Fund represented the nation's oldest Hindu temple in a dispute over whether a state court could impose a congregational membership polity on a trustee-led non-membership religious organization. See *Hindu Temple Soc'y of N. Am.* v. *Supreme Court of N.Y.*, 335 F. Supp. 2d 369, 374 (E.D.N.Y. 2004). It has also

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Counsel of record received timely notice of intent to file this brief and have granted their consent.

[2] This brief uses the term "church" broadly to refer to religious associations of all different traditions, including non-Christian traditions.

represented hierarchical, synodical, and congregational religious groups in efforts to prevent government interference with their freedom to choose ministers freely. See *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) (religion teacher at Roman Catholic school); *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 132 S.Ct. 694 (2012) (religion teacher and commissioned minister at Lutheran school); *Int'l Mission Bd.* v. *Turner*, 977 So. 2d 582 (Fla. Dist. Ct. App. 2008) (Southern Baptist missionary);.

The Becket Fund thus has an interest in this case not because it favors any particular religious organization or type of polity, but because it seeks an interpretation of the First Amendment that will promote the maximum of religious liberty and the minimum of government interference for all religious organizations, no matter what polity they happen to choose.

The Becket Fund is concerned that the Supreme Court of Georgia's adoption of a unilateral denominational trust rule, in conflict with decisions by other state courts, unjustly interferes with the ability of churches to control their polities. Just as courts should not interfere with a church's choice of ministers, the courts should also not interfere with a church's choice of polity, even if one party to a schism invites them to.

SUMMARY OF THE ARGUMENT

The constitutional jurisprudence of church property disputes is in disarray and needs correction. Although this Court last attempted to provide direc-

tion to lower courts in the 1979 case *Jones* v. *Wolf*, it has become increasingly clear that as constitutional guidance, *Jones* has proven to be a failure.

I. Although *Jones* lays out general First Amendment principles that few would question—that government may not decide religious questions, and that government must not favor one sort of church polity over another—ambiguities in how *Jones* was written have led to great confusion in the lower courts.

In particular, the Court's *descriptive* statement (in *dicta*) that "the constitution of the general church can be made to recite an express trust in favor of the denominational church" has been misinterpreted by a number of lower courts as a *prescriptive* statement that the First Amendment requires state trust and property law to contain a special provision allowing denominational bodies to declare unilateral trusts in their own favor. *Jones* v. *Wolf*, 443 U.S. 595, 606 (1979). This understanding of *Jones* makes little sense in light of the *Jones* Court's repeated insistence that the relevant denominational documents must "indicate[ ] that the parties have intended to create a trust " and do so in "legally cognizable form." *Jones*, 443 U.S. at 604, 606. But that has not stopped state supreme courts from adopting it.

The better rule is for courts to indulge no unwarranted presumptions about how religious bodies have chosen to hold property. Courts should instead determine how religious bodies choose to hold church property by looking to the legal documents they have used to do so.

This case, and several other pending cases like it, demonstrate the problem.[3] Three years after *Jones* was decided, the Presbyterian Church (USA) ("PCUSA"), which has a presbyterial polity, put into its Book of Church Order a "trust" provision declaring that all property held by local churches affiliated with the denomination were held in trust for the national church. Pet. App. 2. PCUSA now seeks to enforce this provision of church law against a local church body that seeks to leave the denomination. Although the Georgia Supreme Court concluded that the standard trust and property law of Georgia would normally not result in an enforceable trust, Pet. App. 19, it nevertheless relied on the fateful *dictum* from *Jones* to hold that such a unilateral trust must be enforceable with respect to church-held property. Other courts have followed the same logic.

In short, the *Jones dictum* has confused state courts into altering their states' existing trust and property law to create unique rules for church property disputes. Not only that, but the rule they have implemented, in the name of "neutral principles," one-sidedly privileges denominational bodies over local churches. Indeed, rather than comply with the First Amendment by "reflect[ing] the intentions of

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[3] *See Gauss* v. *The Episcopal Church in the Diocese of Conn.*, No. 11-1139 (cert. pet. docketed March 19, 2012); *Rector, Wardens and Vestrymen of Christ Church in Savannah* v. *Bishop of the Episcopal Diocese of Ga., Inc.*, No. 11-1166 (cert. pet. docketed March 26, 2012); *Masterson* v. *Diocese of N.W. Tex.*, No. 11-0332 (Tex.) (oral argument pending); *Salazar* v. *Episcopal Church*, No. 11-0265 (Tex.) (oral argument pending); *Presbytery of Ohio Valley, Inc.* v. *OPC, Inc.*, No. 82S02-1105-MF-314 (Ind.) (argued Sept. 1, 2011).

the parties," *Jones*, 443 U.S. at 603, the unilateral denominational trust rule violates it by "'pass[ing] the control of matters strictly ecclesiastical from one church authority to another,'" thereby "intrud[ing] the 'power of the state into the forbidden area of religious freedom * * *.'" *Hosanna-Tabor*, 132 S.Ct. at 705 (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)). This result cannot be sustained under either the Free Exercise Clause or the Establishment Clause.

Nor does the fact that a church body is asking the courts to interfere excuse the interference. If there are to be, as Locke put it, "just bounds" between civil and ecclesiastical authority, civil courts should resist interfering in church polity not only when it is government that seeks to meddle in internal church governance through regulation, but also when one church faction invites government to interfere through a private suit. See John Locke, *A Letter Concerning Toleration* 10 (Huddersfield ed., 1796); *Hosanna-Tabor*, 132 S.Ct. at 702 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.")

II. Without this Court's intervention, several disturbing consequences will follow in those states where the unilateral denominational trust rule prevails. First, preferring one particular form of church governance violates the commands of both the Free Exercise Clause and the Establishment Clause. Second, allowing unilateral denominational trusts results in entanglement by forcing civil courts to interpret and enforce church law. Third, the rule

upends property rights for both the church bodies involved and third parties.

Only this Court can dispel the confusion sown by *Jones*, and draw the proper boundary between civil and ecclesiastical authority in the context of church property disputes.

REASONS FOR GRANTING THE WRIT

I. *Jones* v. *Wolf* has sown confusion in the lower courts.

A. As the Petition demonstrates (at 17-22), there is an entrenched split of authority over the meaning of *Jones*. The key question is what happens when a denomination adds language to its church constitution unilaterally declaring a trust interest in the property of local congregations. According to five state supreme courts (and the Eighth Circuit),[4] unilateral trust language is properly scrutinized under standard principles of state property and trust law. If the language would be insufficient to create a trust for a nonreligious organization, then it is insufficient to create a trust for a church.

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[4] *All Saints Parish Waccamaw* v. *Protestant Episcopal Church*, 385 S.C. 428 (2009), cert. dismissed, 130 S.Ct. 2088 (2010); *Arkansas Presbytery of the Cumberland Presbyterian Church* v. *Hudson*, 344 Ark. 332 (2001); *Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522 (8th Cir. 1995) (Missouri law); *Berthiaume* v. *McCormack*, 153 N.H. 239 (2006); *St. Paul Church, Inc.* v. *Bd. of Trustees of the Alaska Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541 (Alaska 2006); *In re Church of St. James the Less*, 585 Pa. 428 (Pa. 2005).

Four state supreme courts, by contrast, have interpreted *Jones* as requiring that they craft special rules for churches.[5] Under this approach, courts have enforced a unilaterally declared denominational trust even when such a trust violates ordinary rules for creating a trust under state law.[6]

B. The seed of this division is a lone *dictum* in *Jones*. Responding to criticism that the neutral-principles approach was too rigid, this Court explained:

> Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. 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. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general

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[5] *Episcopal Church Cases*, 45 Cal.4th 467 (Cal. 2009); *Episcopal Church* v. *Gauss*, 28 A.3d 302 (Conn. 2011); *Rector, Wardens and Vestrymen of Christ Church in Savannah* v. *Bishop of the Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237, 245 (Ga. 2011); *Timberridge*, Pet. App. 19; *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920 (N.Y. 2008).

[6] Two of those state supreme courts and one concurring justice in another state supreme court expressly acknowledged that, under normal principles of state trust and property law, the unilateral denominational trust would be invalid. *See Episcopal Church Cases*, 45 Cal.4th at 495 (Kennard, J., concurring) ("No principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner."); *Savannah*, 718 S.E.2d at 243-44; *Timberridge*, Pet. App. 19; *Harnish*, 899 N.E.2d at 925.

> church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. And 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*.

443 U.S. at 606 (emphasis added).

Every lower court that has enforced a unilateral denominational trust has relied on this passage—in particular, the statement that "the constitution can be made to recite an express trust in favor of the denominational church."[7] According to these courts, "*Jones* * * * not only gave general churches explicit *permission* to create an express trust in favor of the local church, but stated that civil courts would be *bound* by such a provision, as long as the provision was enacted *before* the dispute occurred." *Gauss*, 28 A.3d at 325 (first emphasis added); see also *Timberridge*, Pet. App. 20 n.3; *Harnish*, 899 N.E.2d at 924.

Other courts, by contrast, have ruled in accordance with the qualifying phrase in *Jones*: "provided it is embodied in some legally cognizable form." According to these courts, trust language in a church constitution is not enforceable unless the language comports with the typical requirements for creating a

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[7] *Episcopal Church Cases*, 45 Cal.4th at 487; *Gauss*, 28 A.3d at 325; *Savannah*, 718 S.E.2d at 244; *Timberridge*, Pet. App. 17; *Harnish*, 899 N.E.2d at 924 (all quoting *Jones*, 443 U.S. at 605-606).

trust under state law.[8] This split is now square and entrenched, and only this Court can resolve it.

C. So which interpretation of *Jones* is correct? The answer is found in the First Amendment principles underlying *Jones*. *Jones* recognized two constitutional limits on how civil courts can resolve church property disputes. First, civil courts may not "resolv[e] church property disputes on the basis of religious doctrine and practice." 443 U.S. at 602. Second, state law must allow churches to adopt the form of government or polity they desire. *Id*. at 606. Beyond these two principles—no deciding religious doctrine, and no interfering with church polity—"the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Id*. at 602.

Thus, the lower courts are simply wrong when they say they are "bound"—by the First Amendment or by *Jones*—to enforce a unilateral denominational trust. *Harnish*, 899 N.E.2d at 924. Rather, state courts are well within the spirit and letter of *Jones* when they require any trust interest to be "embodied in some legally cognizable form." *Jones*, 443 U.S. at 606. If a denomination wants to ensure that it has a

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[8] *Waccamaw*, 385 S.C. at 449 (unilateral denominational trust had no "legal effect on title"); *Hudson*, 344 Ark. at 339 (under *Jones* courts must rely "exclusively on objective, well-established concepts of trust and property law"); *Graham*, 54 F.3d at 526 (under *Jones* "express terms of property instruments must be enforced"); *Berthiaume*, 153 N.H. at 249 (*Jones* did not require that religious documents be examined); *St. Paul Church*, 145 P.3d at 554 (relying on finding that *congregation* intended to create a trust); *St. James the Less*, 585 Pa. at 451 (same).

trust interest in local property, it need only comply with the standard state law of property and trust.

II. Church property disputes should be resolved by enforcing standard principles of property and trust law, not by imposing a unilateral denominational trust rule.

The split Petitioners have identified would be reason enough to grant *certiorari*. But the underlying logic of *Jones*—and, more importantly, the First Amendment—goes further. It is not just constitutionally *permissible* to apply standard principles of trust and property law to resolve church property disputes; it is constitutionally *required*.

The alternative approach—adopted by the lower court here—is to bend the laws of trust and property to favor unilateral trusts declared by denominational bodies. But that approach contradicts both of the key principles in *Jones*. First, it interferes with the freedom of churches to choose their own polity by placing a thumb on the scale in favor of denominational control. Second, it entangles courts in religious questions by forcing civil courts to interpret and enforce church law. Beyond these two problems, it also confuses property rights by nullifying standard principles of trust law. Accordingly, the unilateral denominational trust rule cannot be squared with the First Amendment.

A. The unilateral denominational trust rule undermines free exercise.

In the decision below, the Supreme Court of Georgia held that if a church is "hierarchical," civil courts *must* enforce trust language in the church constitution—even if that language would be insufficient to create a trust under standard principles of

property and trust law. See *Timberridge*, Pet. App. 9, 19. In other words, "hierarchical" churches can create a trust in ways that no other entity can (*i.e.*, unilaterally).

That approach is fundamentally at odds with First Amendment principles. First, it assumes that churches are either "congregational" or "hierarchical," and that "hierarchical" churches desire centralized control over church property. But in the real world, not all churches are purely "congregational" or "hierarchical," and a church's governing structure may offer little insight into how it intends to hold its property. Second, it subtly pressures churches toward a more "hierarchical" form of church government, directly contradicting the First Amendment rule that churches remain free "to decide for themselves, free from state interference, matters of church government." *Kedroff*, 344 U.S. at 116.

By contrast, the best constitutional approach to adjudicating church property disputes is not to grant unilateral trust rights to denominational bodies, but simply to enforce the property rights legally specified by the parties involved at the time of acquisition of the property, along with any subsequent legally cognizable changes. That approach gives effect to any legally cognizable agreement between the denomination and its local congregations, while "obviat[ing] entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Jones*, 443 U.S. at 605. At the same time, it provides the flexibility necessary "to accommodate all forms of religious organization and polity." *Id.* at 603.

1. In the religiously diverse American context, many churches and religious associations are neither "congregational" nor "hierarchical," and it is no easy task for a court to determine where along the spectrum a given church lies. See *id*. at 605. (noting that church government is often "ambiguous"). The "hierarchical" label best fits the Roman Catholic Church, where local parishes are subject to strict, descending, and clearly-delineated levels of authority—from the Pope, to diocesan bishops, and then to priests. Catholic entities hold title to property in various civil forms all designed to give the diocesan bishop and the Holy See legal control over the property to the extent mandated by canon law. See *Codex Iuris Canonici*, 1983 Code cc. 1254 *et seq*.

At the other end of the polity spectrum, Quakers and independent Baptists exemplify the classic "congregational" model. As this Court recognized in *Watson* v. *Jones*, 80 U.S. 679, 722 (1871), these groups are "strictly independent of other ecclesiastical associations." There are no religious bodies connecting individual congregations to each other. They recognize no ecclesiastical head. In property disputes, each congregation is treated like any other voluntary association.

But many religious polities fall somewhere between the two. Familiar examples include "mainline" Protestant denominations, such as Methodists, Presbyterians, Episcopalians, and Lutherans. The Evangelical Lutheran Church in America ("ELCA") emphasizes that it "is organized neither as a hierarchical church in the Roman Catholic tradition nor as a congregational church in the Anabaptist tradition" but as a church in which all levels are "'interdepend-

ent partners sharing responsibility in God's mission.'" Brief for ELCA et al. as Amici Curiae at 5, *Protestant Episcopal Church* v. *Truro Church*, 280 Va. 6 (2010), available at http://www.virginiabriefs.com/docs/SCV/2009/090682_amicus_1A.pdf (quoting ELCA Constitution, § 5.01).

Or take the PCUSA, of which Respondent is an element. It has multiple levels of governance. Individual congregations are governed directly by a "Session" consisting of congregationally-elected elders presided over by the pastor. The Session in turn sends delegates to a regional Presbytery; the Presbytery sends delegates to a Synod; and the Synod sends delegates to the nationwide General Assembly. Despite this multi-tiered structure, the highest adjudicative body in the PCUSA has emphasized that "[w]hile the *Book of Order* refers to a higher governing body's 'right of review and control over a lower one' (G-4.0301f), these concepts *must not be understood in hierarchical terms*, but in light of the shared responsibility and power at the heart of Presbyterian order (G-4.0302)."[9]

Moreover, presbyterial form alone offers little insight into how Presbyterian churches intend to hold property. Different Presbyterian denominations take different positions. The PCUSA now includes in its constitution a provision stating that all property of local congregations is held in trust for the denomina-

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[9] *Johnston* v. *Heartland Presbytery*, Permanent Judicial Comm'n Remedial Case 217-2, 7 (2004) (quoting *The Book of Order: The Constitution of the Presbyterian Church (U.S.A.) Part II* (2009)) (emphasis added), *available at* http://oga.pcusa.org/media/uploads/oga/pdf/pjc21702.pdf.

tion.[10] But the Presbyterian Church in America ("PCA"), with an ecclesial structure otherwise virtually identical to that of the PCUSA, affirms just the opposite: the PCA has unified hierarchical church governance, but local congregations retain their properties if they leave.[11] As one commentary has noted, "the mere outward presbyterial form—*i.e.*, a series of assemblies—does not necessarily import a functional hierarchy * * *." Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L. Rev. 1142, 1160 (1962).

Other religious groups cannot be located on a hierarchical–congregational spectrum at all. This is particularly true of non-Christian religious organizations, which often do not share the Christian notions of "assembly" and "membership" that underlie the hierarchical–congregational dichotomy. See, *e.g.*, Willard G. Oxtoby, *The Nature of Religion*, in *World Religions: Eastern Traditions* 486, 489 (Willard G. Oxtoby ed., 2001) (Hindu temples have neither "members" nor "congregations."); Helen R. F. Ebaugh & Janet S. Chafetz, *Religion and the New Immigrants* 49 (2000) (Islamic mosques have neither congregations nor members); *Singh* v. *Singh*, 9 Cal.

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[10] *See The Book of Order: The Constitution of the Presbyterian Church (U.S.A.) Part II*, §§ G-4.0203 (2011-2013) ("All property held by or for a congregation * * * is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).").

[11] *See The Book of Church Order of the Presbyterian Church in America* (6th ed. 2007) §§ 25-9, 25-10 ("All particular [i.e. local] churches shall be entitled to hold, own and enjoy their own local properties, without any right of reversion whatsoever to any Presbytery * * *.").

Rptr. 3d 4, 19 n.20 (Cal. Ct. App. 2004) (Sikh temples or "gurdwaras" not arranged in either a "congregational" or "hierarchical" fashion); *Congregation Yetev Lev D'Satmar, Inc.* v. *Kahana*, 879 N.E.2d 1282, 1289 (N.Y. 2007) (Smith, J., dissenting) (Hasidic Jewish groups defy "congregational" or "hierarchical" classification). In other words, just as the Protestant-derived term "minister" has "no clear counterpart in some Christian denominations and some other religions," *Hosanna-Tabor*, 132 S.Ct. at 711 (Alito, J., concurring), so also the hierarchical–congregational continuum is a poor fit for many religious polities.

Furthermore, it is virtually impossible to discern church polity from an organization's formal structure alone. To understand how a church is really governed, one must be intimately familiar not merely with documents such as the church constitution, canons, and bylaws, but also with the history of those laws in operation. As one scholar of church governance put it, "the constitutions of church groups vary widely in how, and the extent to which, they provide the definitive clue to the governance patterns of those groups." Edward LeRoy Long, *Patterns of Polity: Varieties of Church Governance* 3 (2001). Some constitutions are hortatory but widely ignored in practice; some are purely aspirational; some are adopted without the agreement of, or against the will of, a large minority of local congregations or individual members and may not reflect the desires of those constituencies.

In short, the true nature of a church's polity is a complex, nuanced question that members of the relevant church may struggle to define. The civil courts are institutionally incompetent to resolve such questions. See *Watson*, 80 U.S. at 729 ("It is not to be

supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.")

2. The Supreme Court of Georgia ignored all this. It assumed that any church that maintains an association with other churches is "hierarchical"; and that if a hierarchical church unilaterally recites a trust in its church constitution, a civil court is constitutionally bound to give that language effect—even when it would ordinarily have no effect under civil property and trust law. This unilateral trust rule—which applies to no other form of voluntary association—effectively prevents churches from adopting certain forms of government.

For example, the rule would thwart polities like the PCA's, which combines ecclesiastical governance based on ascending judicatories with local congregational control of property in the event of a split. See *supra* p.14 & n.11. Under the unilateral denominational trust rule, that constitutional provision is in no way binding. If at some point in the future the PCA's General Assembly reversed course and, contrary to the will of many or even most of its congregations and their individual members, amended its constitution to assert that all local property is held in trust for the denomination, the lower court's rule would leave local congregations no recourse.[12] That

[12] This scenario is not merely hypothetical. In *Comm'n of Holy Hill Cmty. Church* v. *Bang*, No. B184856, 2007 WL 1180453 (Cal. Ct. App. 2007), the PCA denomination attempted to control the property of a breakaway congregation, notwith-

is, even if the PCA fully intends *ex ante* to give local congregations ultimate control over their property, and existing local congregations join or remain within the denomination on that basis, the Georgia Supreme Court's rule holds that the PCA is *constitutionally* barred from making that aspect of "congregational" governance binding on itself.

Thus, under the unilateral denominational trust rule, the Free Exercise Clause becomes a one-way ratchet, pressing churches over time toward evermore hierarchical forms of government. Regardless of "the intentions of the parties[,]" *Jones*, 443 U.S. at 603, all hierarchical aspects of church polity must be enforced as a matter of constitutional law, while any congregational elements may be canceled by a denominational body unilaterally and at a moment's notice.

This Court has said time and again that religious organizations have a constitutional right to govern their own affairs, "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116; *accord Roberts* v. *Jaycees*, 468 U.S. 609, 622-623 (1984) (recognizing right of religious associations to control "internal organization or affairs"); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Church* (*Presbyterian I*), 393 U.S. 440, 447-448 (1969) (affirming *Kedroff*). The lower court's approach undermines those constitutional prerogatives.

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standing the denomination's constitutional commitment to local property control.

3. Given the broad and increasing diversity of religious polities within the United States, together with the difficulty of discerning how any particular religious polity intends to hold its property, the only way to protect *all* forms of religious polity is to rely on churches to translate their chosen polity into a "legally cognizable form." *Jones*, 443 U.S. at 606. The only way to do this is to apply the standard principles of property and trust law to religious organizations, just as a court would to nonreligious organizations. Courts will then have no need to investigate the intricacies of church governance.

The 19th century dispute over lay trusteeism within the Roman Catholic Church demonstrates the wisdom of this approach. In early American Catholic history, many church buildings were held using different property models, including lay trustees. After a number of property-related disputes over the role of trustees, the bishops decreed at the First Provincial Conference of Baltimore convened in 1829 that all church property should be held in the name of the diocesan bishop where possible.[13] Dioceses did not seek to enforce this decree by resort to the civil courts. Instead they used the Church's ecclesiastical power to force recalcitrant parishes to change their deeds in favor of the diocesan bishops.[14]

Of course, courts must defer to the highest church authority on "matters of church government as well as * * * doctrine." *Kedroff*, 344 U.S. at 116. But the

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[13] John Gilmary Shea, *A History of the Catholic Church Within the Limits of the United States* 414 (1890) (describing Decree V).

[14] Peter Guilday, *Religion in America* 87-91, 180 (1932).

existence (or nonexistence) of a property trust is not in this category. Typical questions of doctrine and governance include whether a denomination has departed from its previous theological commitments, see *Presbyterian Church I*, 393 U.S. at 442-443, or whether certain church figures are entitled to hold sacred offices, see *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976). In these matters, states have neither a legitimate interest in regulation nor the competence to make a decision. *Id.* at 714 n.8.

But property disputes are not doctrinal disputes, and the State has an interest in the rules governing property. In the words of *Jones*, the State is obligated to provide for "the peaceful resolution of property" conflicts of all kinds, and it has an interest "in providing a civil forum" where the ownership of property "can be determined conclusively." 443 U.S. at 602. But that interest does not extend to placing a thumb on the scales in favor of a particular form of church government, denominational or any other. A true *neutral* principles approach, based on the State's standard trust and property law, allows churches and denominations to choose the polity *they* prefer, not one imposed by the civil courts afterwards.

B. The unilateral denominational trust rule invites entanglement by forcing civil courts to interpret and enforce church law.

The *Jones* Court endorsed the neutral principles approach as a constitutional method for resolving ecclesiastical property disputes in large part because it "promise[d] to free civil courts completely from

entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603. The unilateral denominational trust rule reintroduces precisely the entanglement *Jones* sought to avoid.

In any church property dispute, there will typically be (at least) three types of ownership evidence: legal documents, such as the deed, corporate charter, State laws governing trusts, and any formal trust agreements; church governance documents, such as a book of order; and evidence of church practice, such as who typically controls local property and how the church constitution and other ecclesiastical laws are applied in practice. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1886 (1998) (listing possibilities).

When state trust and property law is used to settle church disputes, cases can be resolved—and in a predictable way—entirely on the basis of the legal documents. In the present case, for instance, the deeds are in the name of Timberridge, and a straightforward application of Georgia trust law would result in a finding that there is no valid trust agreement in favor of the Respondent presbytery. Absent a showing that Georgia law somehow infringed the PCUSA's ability to structure its polity in a legally cognizable fashion, see *Jones*, 443 U.S. at 606, the secular legal documents completely settle the dispute. This is the "neutral principles" approach at its best.

The Georgia Supreme Court's unilateral denominational trust rule, however, obligates courts to determine first whether a given church is "hierarchical" and, if it is, to enforce any ecclesiastical

provision regarding church property. Thus the property dispute no longer turns on legal documents; it turns first on an artificial dichotomy between "hierarchical" and "congregational," and then on the court's interpretation of church laws. This approach poses serious entanglement problems, for the reasons the Supreme Court explained in *Jones*: Under an approach of automatic deference, "civil courts would always be required to examine the polity and administration of a church * * *." 443 U.S. at 605. In some cases, of course, "this task would not prove to be difficult." *Id*. But in others, "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." *Id*. (internal quotations omitted). In those cases, "the suggested rule would appear to require a searching and therefore impermissible inquiry into church polity." *Id*. (internal quotations omitted).

This case is a perfect example. As Petitioners note, Timberridge relied on a specific provision of church law related to a merger of denominations that allowed it to declare its property off-limits. Pet. 8-9. Yet when it came time to honor the opt-out that Respondent had offered and Petitioner had accepted, Respondent refused to honor it. *Id*.

Thus if the Georgia Supreme Court is correct, and courts applying neutral principles must look beyond the property deed to applicable church laws, then courts must decide between two or more conflicting church laws to resolve cases like Timberridge's. It is far from clear how a court could do so without taking on itself the power of determining church polity.

The unilateral denominational trust rule embraced by the Supreme Court of Georgia and other state supreme courts will continue to embroil courts in these fact-intensive inquiries regarding church polity and practice on a regular basis. That is a level of entanglement this Court should prevent.

C. The unilateral denominational trust rule renders longstanding principles of trust law inoperative and unsettles private property interests.

Georgia's standard trust law rules are clear and well-settled: there must be an "intention by a settlor to create [a] trust" in property under the control of the settlor; there must be a beneficiary; a trustee; and "[t]rustee duties specified in writing or provided by law." Ga. Code Ann. § 53-12-20. These rules are in accord with the broader body of trust law nationwide, which unequivocally holds that one cannot declare oneself to be a beneficiary of a trust in someone else's property. See Restatement (Second) of Trusts § 18 cmt. a (1959) ("[O]ne who has no interest in a piece of land cannot effectively declare himself trustee of the land"); George T. Bogert, *Trusts* § 9 at 20 (6th ed. 1987) ("In order to create an express trust the settlor must own or have power over the property which is to become the trust property"). These rules provide a clear framework for the creation and transfer of property interests. The unilateral denominational trust rule upends this framework.

According to that rule, some ecclesiastical laws now displace these basic civil principles when it comes to church property. Going forward, courts cannot decide church property ownership based on publicly recorded property deeds or trust documents.

Rather, church properties would be uniquely apart from—and thus unable to benefit from—standard trust and property law. For example: In this case, the Georgia Supreme Court has discarded its own civil trust law and, in a misguided attempt to comply with *Jones*, given legal effect to a *unilateral declaration* of trust made by a trust *beneficiary* which *lacked legal title*.

Many of the consequences of such an approach are unjust. Making property ownership turn on ecclesiastical law instead of civil law undermines Georgia's property law regime and frustrates state and private interests—including churches' own interests—in clear property rights. If property ownership turns on church law, potential purchasers or lenders can never know who precisely owns a given property until they examine all relevant church laws and ecclesiastical precedents. Even if the deed were in the name of a local congregation, for instance, with no apparent encumbrances, the congregation would not necessarily be able to claim clear title; any title would potentially be held subject to church law that may or may not be known to the local congregation. Title insurance is far more difficult or impossible for churches to obtain.[15] Lenders, buyers, and reviewing courts will *always* face the burden of determining which provisions of church law are on point and how they affect the property interests in question. This frustrates the significant governmental, societal, and religious interests in predictability of property interests.

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[15] Cf. *Waccamaw*, 385 S.C. at 438 (congregation unable to obtain title insurance).

The unilateral denominational trust rule thus invites a host of troubles, all of which are unnecessary. Simply applying state trust law as it is written obviates "the need for an analysis or examination of ecclesiastical polity or doctrine." *Jones*, 443 U.S. at 605. Unlike the unilateral denominational trust rule, this approach keeps courts out of the unconstitutional business of interpreting ecclesiastical rules.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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