No. 11-1101

IN THE

Supreme Court of the United States

TIMBERRIDGE PRESBYTERIAN CHURCH, INC. AND
TIMBERRIDGE PRESBYTERIAN CHURCH,
Petitioners

v.

PRESBYTERY OF GREATER ATLANTA, INC.,
Respondent.

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

BRIEF OF THE PRESBYTERIAN LAY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

FORREST A. NORMAN
Counsel of Record
GALLAGHER SHARP
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, OH 44115
(216) 522-1175
fnorman@gallaghersharp.com

DAVID H. GAMBRELL
LINDA A. KLEIN
JOHN HINTON IV
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.
3414 Peachtree Road – NE
Suite 1600
Atlanta, GA 30326

Counsel for Amicus Curiae Presbyterian Lay Committee

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

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

Whether this court, in *Jones v Wolf*, intended to create a new means of establishing trusts, available only to ecclesiastical entities, civilly enforceable, but the validity of which is not reviewable by U.S. state or federal courts?

Does the holding in *Jones v Wolf* override state trust law and permit a national church body to declare itself a trust beneficiary and superimpose a trust upon the property of a 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. The petition

[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.

was filed on March 7, 2012 and placed on the docket on March 8, 2012. Accordingly, this application is timely under S.Ct. Rule 37.

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

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 and as an amicus in the case at bar, at the Georgia Supreme Court. As an entity that helps equip lay leaders and clergy in maintaining the integrity of the PC(USA)'s expression of Presbyterianism, the Lay Committee has a strong interest in this matter. The PLC is composed of Presbyterian church members who are concerned with the integrity of the denomination's theology, polity, and stewardship.

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

Courts, such as the Georgia 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 has crept into the application of neutral principles of law as the concept was explained in *Jones v. Wolf*, 443 U.S. 595 (1979). Several state courts have misconstrued an example given in *dicta* to legitimize ecclesiastical declarations of trust which would otherwise fail for want of compliance with standard state property laws. The effect of this misconstruction has been to violate the Establishment Clause and divest legally seized property owners of their lands against their will, and without compensation. Multi-tiered denominational entities have been given a free pass to declare themselves beneficial owners of local church properties, taking the titled landowners' 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 trust, and even when the purported basis for 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 East 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 estab-

lishment clause." (*Id*. at 426 U.S. at 734, Renquist, J. dissenting). The court below has all but conceded this discrepancy, noting the denomination's assertion of trust is based on a claim which would not be valid under Georgia's express or implied trust statutes. *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church*, 719 S.E.2d 446 (Ga. 2011); pet. App. 1, 19.[2] The underlying justification is based upon a reading of Justice Blackmon's comment that "[a]lternatively, the constitution of a general church can be made to recite an express trust in favor of the denominational church," *Jones, supra*, at 606, that has elevated facially deficient allegations of express trusts to the status of dispositive pronouncements exempt from the requirements of state property law simply because a denominational entity so declares it. Georgia is not alone in reading *Jones* as an ecclesiastical trump card over traditional trust law. California has similarly deviated from neutral principles, imbuing a preference for ecclesiastical edicts over other conflicting evidence, while purporting to apply neutral principles. *In Re Episcopal Church Cases*, 45 Cal. 4th 467, 198 P.3d 66 (2009). Again, the rationale was that *Jones* purportedly granted permission to ecclesiastical bodies to bypass property conveyance laws.

New York has similarly adjusted its former neutral principles approach by inserting evidentiary deference, in *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (NY 2008); Connecticut, in a case where certiorari is now being sought with this court,

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[2] "The fact that a trust was not created under our state's generic express [or implied] trust statutes does not preclude the implications of a trust on church property under the neutral principles of law doctrine." *Id*.

has taken the same diversion from neutral principles based on an erroneous reading of *Jones*, in *Episcopal Church in the Diocese of Connecticut v. Gauss*, 28 A.3d 302 (Conn.2011).

There are many states and cases which apply neutral principles without deviating from standard state law requirements for trust creation, such as South Carolina in *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 385 S.C. 428 (2009) *cert* dismissed 130 S.Ct. 2088 (2010). Appellate courts in several other states solidly adhere to neutral trust creation standards without deviating into deference. Ohio, for example, in *Eastminster v. Stark & Knoll*, 2012-Ohio-900 (C.A. 9), notes

> While *Jones* firmly established the neutral principles doctrine and provided guidance with respect to the extent to which courts may look to church documents in resolving property disputes, it neither set a uniform standard for how such cases should be analyzed nor required deference to ecclesiastical documents. Instead, it left the matter of what constitutes a "legally cognizable form" for trusts to determination under state law. [Cite omitted] In this respect, Ohio law is well established: any trust established between church bodies in a hierarchical relationship must be express, not implied, and the existence of the trust must be established by clear and convincing evidence.

Id. at ¶14, citing to *Serbian Orthodox Church Congregation of St. Demetrius of Akron v. Kelemen*, 21 Ohio St.2d 154 (1970).

Extrapolating Judge Blackmon'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 the state statutes, and not contrary to the state statutes.

Likewise, the paragraph in which the "alternative" is stated is clearly a hypothetical designed to illustrate one potential application of neutral principles. Justice Blackmon 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 Blackmon was not suggesting that the hierarchical church should always retain the church property or that it could 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 in church property disputes.

Earlier in *Jones*, prior to the "alternative" hypothetical, the opinion described the logic of neutral principles, stating:

> The neutral principles analysis shares the peculiar genius of private law systems in general - flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through 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. In this matter a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

443 U.S. 595, 603-604. Thus, neutral principles contemplates the possibility that parties may order their private rights to reflect their intentions. This includes the use of "appropriate" clauses and trust provisions, relying "exclusively on objective well-established concepts of trust and property law familiar to lawyers and judges." 443 U.S. 595-603. It seems self-evident that an "*inappropriate*" trust provision would, for example, be one which does not reflect the intent of the local churches, especially where they are the titled property owner.

The holding in *Jones* cannot be read in such a narrow light without trampling upon the constitution. Read in isolation, Justice Blackmon's comment indicating that the constitution of a general church can be made to recite an express trust might appear to support the concept that an ecclesiastical assembly can seize property owned by constituent churches

merely by amending its constitution. Because nothing in the common law previously provided for creating a trust in this manner, and no state statutes allow for non-owner declarations of ecclesial trusts, construing Justice Blackmon's comment in this manner suggests that a new federal common law authorization was being created for church hierarchies, only. However, that reading is illogical because the very same paragraph qualifies Justice Blackmon's example by requiring that it be "embodied in some legally cognizable form." *Jones v. Wolf*, 443 U.S. 605, at 606. For something to be "legally cognizable" means that the law is cognizant of the form; that the law "knows" the form. The meaning of the statement that it be embodied in a legally cognizable form is that the assertion of an express trust must be in a form already recognized by the law. It does not suggest that a new form of trust formation is being birthed.

Construing Justice Blackmon's single limited example as a pronouncement by the U.S. Supreme Court of a new means of trust creation violates the very foundation of the neutral principles being elaborated upon in *Jones v. Wolf*. The same opinion which postulates the possibility of an express trust being placed in a "general church"[3] constitution extols the virtue of neutral principles because it relies upon

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[3] Because denominations and religious orders are structured in a myriad of forms, the term "general church" would require judicial analysis before a "general church" pronouncement could be deemed controlling over connected units. If there is a dispute regarding internal church authority, then an entanglement issue arises. Even the concept of a "hierarchical" church is problematic because there are varying degrees of hierarchical control and authority, which again invites entanglement problems.

"objective, well-established concepts of trust and property law" that are "developed for use in all property disputes." 443 U.S. at 599, 603. The concept of an ecclesial trust emplaced by canon or edict is nowhere to be found in *Jones*.

If "neutral principles" can be interpreted as the Georgia Supreme Court did in *Timberridge*, 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 ecclesial 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 protests, 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 *Timberridge* 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 the property of the local church.

"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.

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 from that general religious association. The Eldership also claimed the rights 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 properties in question to the local church corporations, and upon the terms of the charters of the corporations, and upon provisions in 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*, 396 U.S. 367, *supra*, summarized in *Serbian Eastern Orthodox Diocese v. Milivojevich, supra,* 426 U.S. 696, 732. But the *Timberridge* decision does exactly that, and this Court should clarify the applicable law, rather than

condone the constitutional violations resulting therefrom.

The petitioners herein, like hundreds of other old-line southern churches subject to the merger of two denominations in 1983, opted out of the PCUSA's Book of Order's purported trust clause because it did not comply with their understanding of how they had traditionally held their property, and they did not wish to encumber their property with a new trust. In opting out of the trust clause, petitioner, along with hundreds of other churches, expressly stated its intent not to be subject to such a trust. In deferring to the denomination's assertion, the Georgia court disregarded evidence of Timberridge's intent. While evidentiary matters generally do not rise to the level requiring U.S. Supreme Court analysis, where the evidentiary rule relied upon by the State Court is based on a misinterpretation of a constitutional principle articulated by this Court, *certiorari* is called for.

While at first blush it may seem to be supportive of religious liberties to give extra credence to a religious institution's claim of property rights, preferring a "hierarchical" entity's claim over a "lesser" 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.

Presbyterian church membership has never been predicated on property ownership. Congregations can and do exist without owning a building, and may gather for worship in rented spaces. If a non-property owning congregation withdraws from its denomination there is no civil penalty imposed upon it; they are free to do so as a matter of conscience. So why should there be a civil penalty of property forfeiture imposed upon a congregation which bought and built its own worship house merely because the denomination says so? It does not stand to reason that *Jones* placed constitutional approval on otherwise defective trust creation methods simply because a "general church" wants to succeed to lands of those who leave it. Yet this is precisely the effect of elevating the *Jones* dicta/hypothetical to a proscriptive pronouncement of law.

Jones properly noted that the parties are free to order their affairs in the manner they see fit, and may predetermine the outcome of property rights in the event of a doctrinally induced division. But it did not proscribe what the outcome should be, or how it should be reached. *Jones* suggests that the parties may agree that the faction loyal to the denomination might be declared, in advance, by agreement, to be entitled to property, but that is only one example. The parties could also decide, in advance, that the

congregation departing the denomination could be entitled to the property by majority vote. The parties could agree on any number of options or methodologies. Or they could not agree, in which case the question is begged – who owns the property? The efficacy of neutral principles, rightly applied, is that it gives full legal effect to the intentions of the parties as they had seen fit to legally order their affairs prior to the dispute. If one party's claim is legally defective, is overreaching, or does not reflect the status quo ante, it is not given preference.

Church property disputes are prevalent, pervasive, and more frequent[4] as more local churches elect to switch denominational affiliations. But church property disputes are not limited to internecine doctrinal disputes. The operative presumption has been that all church property disputes will be between churches and denominations. However, it does not take a great leap of imagination to envision legal questions of ownership rights as between a creditor of a denomination and a local church. Would a local church be considered an asset of a Presbytery, Synod, or other regional ecclesiastical entity for purposes of tort liability? Can a denomination or diocese encumber a local church property, pledging it as security against the owner's intent? Once the local titled owner's control over its property is breached, where are the limits?

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[4] This issue is currently awaiting decision by the state supreme courts of Indiana, Oregon, and Texas. *Amicus* is aware of church property litigation pending at various stages in at least 18 states, with churches changing denominational affiliation in at least 30 states.

Amicus urges review to clarify the intent of this court in *Jones*, and to ensure application of neutral principles remain in helping with the first, fifth, and fourteenth amendments to the U.S. Constitution.

Respectfully submitted,

FORREST A. NORMAN
Counsel of Record
GALLAGHER SHARP
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, OH 44115
(216) 522-1175
fnorman@gallaghersharp.com

DAVID H. GAMBRELL
LINDA A. KLEIN
JOHN HINTON IV
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.
3414 Peachtree Road – NE
Suite 1600
Atlanta, GA 30326

Counsel for Amicus Curiae
Presbyterian Lay Committee