Nos. 11-1139 and 11-1166

In the Supreme Court of the United States

RONALD S. GAUSS, ET AL.,
Petitioners,
v.
THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, ET AL.,
Respondents.

THE RECTOR, WARDENS AND VESTRYMEN OF CHRIST CHURCH IN SAVANNAH, ET AL.,
Petitioners,
v.
THE EPISCOPAL CHURCH, ET AL.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURTS OF CONNECTICUT AND 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 denominational constitutions 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. As set forth in detail its *amicus curiae* brief in support of a separately pending petition for certiorari, the Becket Fund has a great interest in ensuring that government does not interfere in the polities of religious institutions. See *Timberridge Presbyterian Church* v. *Presbytery of Greater Atlanta*, No. 11-1101, Brief *Amicus Curiae* of The Becket Fund for Religious Liberty at 1-2.

SUMMARY OF THE ARGUMENT

Many of the large Protestant denominations of this nation are currently experiencing deep divisions over questions of scriptural interpretation and ecclesiastical governance, leading congregations to withdraw and form new denominational groupings that better reflect their religious convictions, as Protestant churches have done many times in the past. Unfortunately, ambiguities and contradictions in the constitutional law applicable to church property cases – stemming from this Court's decision in *Jones* v. *Wolf*, 443 U.S. 595 (1979) – have exacerbated internal disagreements, produced inconsistent results in state and federal courts, and led to unfair-

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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.

ness and heartbreak. In some instances, congregations that have purchased, paid for, and maintained church properties for generations, and retained full legal title to own and control those properties, have been evicted from their church homes as a result of unilateral denominational actions (inspired by *Jones* v. *Wolf*), over which they had no control, and in defiance of standard state trust and property laws.

We have already set out in detail the reasons this Court should intervene to resolve the disarray in church property disputes, in a case involving the nation's largest Presbyterian denomination, the Presbyterian Church (U.S.A.) ("PCUSA"). See *Timberridge Presbyterian Church* v. *Presbytery of Greater Atlanta*, No. 11-1101, Brief *Amicus Curiae* of The Becket Fund for Religious Liberty. Both of these cases involve the largest Anglican denomination, the Protestant Episcopal Church in the United States of America. The ecclesiastical governance structures of these denominations are different, but the constitutional issues are the same. Rather than repeat those reasons here, we adopt them in full with respect to the two pending Petitions. We also set forth several additional considerations for the Court. In particular, we argue that the Court should grant all three pending Petitions and set them for argument in tandem.

REASONS FOR GRANTING THE WRITS

I. As constitutional guidance, *Jones* v. *Wolf* has proven to be a failure.

As each of the three pending Petitions demonstrates, language in this Court's decision in *Jones* v. *Wolf*, 443 U.S. 595 (1979) has produced an en-

trenched split of authority among state and federal courts, and has been interpreted in some states to empower denominations unilaterally to appropriate property to which they are not entitled under standard principles of trust and property law. *Timberridge* Pet. at 17-22; *Gauss* Pet. at 14-23; *Savannah* Pet. at 16-25; see also *Timberridge* Br. of Becket Fund at 6-7 & nn.4-6 (describing 6-4 split of authority among state supreme courts and Eighth Circuit).

We argued in our companion *amicus* brief that there are two layers of problems created by *Jones* v. *Wolf*'s failure. On one level, there is the problem of state supreme courts adopting a unilateral denominational trust rule on the basis of a single dictum in *Jones*. *Timberridge* Br. of Becket Fund at 7-9. The *Jones* dictum does not require anything of state courts, yet several state supreme courts nevertheless consider themselves "bound" by that dictum to impose a unilateral denominational trust rule. *Id.* at 8-9.

On a second level, there is an ambiguity in the meaning of the *Jones* Court's use of the term "neutral principles." See Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. Rev. 1715, 1736-47 (2004) (noting that "*Jones*'s language of 'neutral principles of law' is not the equivalent of *Smith*'s "neutral, generally applicable laws" and is confusing) (citing *Employment Div.* v. *Smith*, 494 U.S. 872 (1990)). Some lower courts have resolved this ambiguity by treating intermediate forms of church organizations—those lying between the poles of purely hierarchical and purely congregational governance—as if they were like the Roman Catholic or LDS Churches, controlled from above. These courts have empowered national denominational authorities to make unilateral

changes in internal church canons, bylaws, or constitutions, with the effect of superseding ordinary neutral principles of state property and trust laws, and thus vitiating the rights that local congregations long enjoyed under both state law and long-established ecclesiology.

At the end of the 1970s, immediately after this Court's decision in *Jones*, national denominational authorities in both the Presbyterian and the Episcopalian churches announced changes in their internal constitutions exploiting the ambiguities in Jones. *Timberridge* Pet. at 8; *Gauss* Pet. at 8. Now those denominational bodies are asserting that those internal denominational changes are enforceable in courts of law, and supersede the property rights of local congregations. These changes are evidence that *Jones*, rather than providing a neutral framework for deciding church property conflicts in accordance with churches' own internal structure, disrupted prior understandings and threatens to transform the mixed regimes of Protestant churches into a hierarchical form alien to their histories.

In short, both problems warrant review in this Court. *Timberridge* Br. of Becket Fund at 10.

II. Courts should use legal documents interpreted using standard trust and property law as best evidence of religious groups' intentions.

All parties to these conflicts believe, or purport to believe, that the law must enable all church groups to structure their property ownership in accordance with their own principles of church doctrine rather than by the government favoring one side or the other. But *Jones* has been interpreted in some states

as requiring the government to side with the national denomination, without regard to the property and trust arrangements the purchasers of these properties selected at the time.

We believe that the diversity of approaches to governance can best be respected not by mechanical deference to one side in the conflict, but by scrupulous compliance with the legal instruments the parties drafted at the time of property acquisition, in accordance with genuinely "neutral principles" of trust and property law. *Timberridge* Br. of Becket Fund at 10. This is not because state property and trust law must prevail over church law, in the way that "neutral laws of general applicability" prevail over individual acts of religious observance, see *Smith*, 494 U.S. at 879. Rather, it is because property and trust instruments drafted by churches at the time of property acquisition, or subsequently, are the best evidence of how those churches understood the relation between their ecclesiastical polity and church property ownership. Cf. *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of [Congressional] purpose is the statutory text"). This approach is "neutral principles" at its best. It allows courts to honor churches' decisions about polity and property-holding without forcing courts to decide religious questions—including the application of unwarranted presumptions. See *Jones*, 433 U.S. at 603 (Court's approach promised to "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice" and to allow churches to order "private rights and obligations to reflect the intentions of the parties.")

This understanding of neutral principles does not favor any particular polity or choice about which

entity should hold property. As Petitioners have pointed out, applying standard trust and property law does not mean that the local congregation always wins, even when it holds formal legal title to the property in question. See *St. Paul Church, Inc.* v. *Bd. of Trustees of the Ala. Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541 (Alaska 2006) (without giving unilateral denominational trust automatic effect, finding that congregation intentionally held property in trust for denominational body)*; In re Church of St. James the Less*, 585 Pa. 428 (Pa. 2005) (same); *Gauss* Pet. at 19-20; *Savannah* Pet. at 20-21.

This approach to the neutral principles analysis also ranks societal interests properly. Courts would not be relying on and interpreting state property and trust law because the interests those laws represent are of a higher order than freedom of religion—far from it. Instead a "best evidence" approach solves the *knowledge* problem courts have in schism cases: What did the parties intend before the religious dispute erupted? Legal documents—deeds of trust, quitclaim deeds, and the like—can tell courts what the parties intended without using unwarranted or loaded presumptions. Unlike the crude dichotomy between hierarchical and congregational polities, state property and trust law allows believers of all persuasions the flexibility to tailor their property ownership to their particular ecclesiastical structure, whatever that might be. Honoring the parties' intentions honors religious liberty.

III. In order to provide guidance in the full range of church property disputes, the Court should grant all three petitions pending before it.

One final consideration: We believe the Court should grant all three petitions pending before it, and set all three cases for argument in tandem. Granting all three petitions will allow the Court to consider the entire spectrum of constitutional issues confronting courts deciding church property disputes and thus provide the best guidance to the lower courts. See *Davis* v. *Washington*, 546 U.S. 975 (2005) (mem.) (setting case for oral argument in tandem).

A. The petitions present different questions.

The three pending petitions present both questions described in our companion *amicus* brief: whether a unilateral denominational trust rule is *required*, and whether such a unilateral denominational trust rule is even *permitted*. *Timberridge* Br. of Becket Fund at 10.

For example, the *Timberridge* petition presents the following question:

> Whether the "neutral principles" doctrine embodied in the Religion Clauses of the First Amendment ***permits*** imposition of a trust on church property when the creation of that trust violates the state's property and trust laws.

Timberridge Pet. at i (emphasis added). By contrast, the *Gauss* petition presents the following question:

> Whether the First Amendment, as interpreted by this Court in *Jones* v. *Wolf*, 443 U.S. 595

> (1979), ***requires*** state civil courts to enforce an alleged trust imposed on local church property by provisions in denominational documents, regardless of whether those provisions would be legally cognizable under generally applicable rules of state property and trust law.

Gauss Pet. at i (emphasis added). And the *Savannah* petition presents the following question:

> Whether a trust allegedly imposed on local church property by provisions in denominational documents ***must be*** treated as legally cognizable under the "neutral principles" doctrine of *Jones* v. *Wolf*, 443 U.S. 595 (1979), and the First Amendment, even where such provisions do not satisfy generally applicable rules of state property and trust law

Savannah Pet. at i (emphasis added).

Granting all three petitions would thus allow the Court to fully address both questions: Is a unilateral denominational trust rule required? Is it permitted?

B. The petitions present different polities.

The *Timberridge* petition involves Presbyterian churches, while the *Gauss* and *Savannah* petitions involve Episcopalian churches. Presbyterian churches have a presbyterial polity, with ascending ranks of judicatories, each elected by the body below. A congregation elects its "session"; sessions elect a regional presbytery, presbyteries elect the Synod, and the Synod elects the General Assembly. Authority is thus distributed across the polity. See *Timberridge* Pet. App. at 3. It is perhaps this unique form of church government combining congregational and hierar-

chical elements that has led to so many prominent disputes among Presbyterians over the course of American history. *See*, *e.g.*, *Watson* v. *Jones*, 80 U.S. 679 (1871); *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Jones* v. *Wolf* (all Presbyterian disputes). By addressing how this particular form of polity can resolve its church property disputes, the Court can provide guidance with respect to a large class of disputes.

The Episcopal Church also combines congregational and hierarchical elements, but in a different way. It is a constituent part of the Anglican Communion, a branch of Christianity that has since its inception been marked by its adherence to the "via media" or a "middle way between the extremes of Catholicism and Puritanism" that partakes of both tendencies but identifies fully with neither. Donald S. Armentrout and Robert Boak Slocum, *Via Media*, in An Episcopal Dictionary of the Church: A User-Friendly Reference for Episcopalians 541 (Church Publishing 2005).

One example of how authority is spread across different Episcopal entities is the "vestry." The vestry is a body of lay members elected by the congregation that "is the legal representative of the parish with regard to all matters pertaining to its corporate property." *Vestry*, Episcopal Dictionary at 541. "The basic responsibilities of the vestry are to help define and articulate the mission of the congregation; to support the church's mission by word and deed, to select the rector, to ensure effective organization and planning, and to manage resources and finances." *Ibid.* Combined with this high degree of local control

of congregational affairs is an episcopate that is chosen through separate national organs.

Hearing argument in all three cases in tandem will enable the Court to provide guidance to lower courts with respect to different sorts of polities—polities which have made up a high percentage of recent church property disputes across the country. See Ira C. Lupu *et al.*, Pew Forum on Religion & Public Life, Churches in Court: The Legal Status of Religious Organizations in Civil Lawsuits (March 2011), http://www.pewforum.org/uploadedFiles/Topics/Issues/Church-State_Law/Pillar_Autonomy.pdf (describing wave of Episcopal and Presbyterian church property lawsuits); Mollie Ziegler Hemingway, *Twenty-First Century Excommunication*, Wall St. J., Oct. 7, 2011, (describing "dozens" of church property lawsuits brought by national Episcopal church against congregations).

C. The petitions present different histories.

The three petitions also present very different histories. These disparate histories make the cases *better* vehicles for resolving the split caused by ambiguities in *Jones*. Each case still turns on the same legal problem—the imposition of a unilateral denominational trust by a state supreme court that feels "bound" by *Jones*'s dictum. But the different histories create an *opportunity* for the Court: by dealing with several cases in tandem, the Court can definitively resolve the broad disarray caused by *Jones*, thereby preserving judicial resources.

In *Timberridge*, the Petitioner church was part of one Presbyterian denomination that merged with another. Throughout the merger process and for

years afterwards, the congregation consistently asserted its rights to its property, relying on both its clear title and provisions of church law that protected its right to hold property. *Timberridge* Pet. at 8-9. Yet when the time came to honor the congregation's title to its property and its rights under church law, the Respondent Presbytery refused to do so and instead asserted its claims under the *Jones*-inspired unilateral denominational trust the PCUSA had declared. *Ibid.*

In *Gauss*, there was a different kind of failure to honor original intentions. The Respondent Diocese exercised a quitclaim deed in favor of the congregation at the time the congregation agreed to join the Diocese. *Gauss* Pet. at 3-4. Since that time, the congregation has bought and sold many properties, and the Diocese acquiesced in those transactions—without a single mention of any trust interest the congregation held for the Diocese or the national Episcopal Church. *Id.* at 4-7. The case thus presents the question of whether the mere declaration of a unilateral denominational trust can overcome both the existence of a quitclaim deed and the absence of any history indicating that the congregation intended to hold its property in trust for the Diocese or the national Episcopal Church.

In *Savannah*, by contrast, history plays a much larger role. The Petitioner congregation was founded by the government of the United Kingdom before the American Revolution had occurred and thus before any denominational body existed, including both the national Episcopal Church and the Diocese of Savannah. *Savannah* Pet. at 3-4. Thus the property could not possibly have been held in trust for the

Respondents at the time the congregation acquired it in 1758. Indeed, because Christ Church was the first Anglican church in Georgia, it founded the Diocese, not the other way around. *Id.* at 5. Respondents' claims to Petitioner's property thus rely in part on the congregation's affiliation with the denomination in 1823 and in part on the "Dennis Canon," which was unilaterally adopted by the national denomination in 1979. *Id.* at 7. This history will afford the Court the opportunity to distinguish between the work done by the declaration of a unilateral denominational trust—in this case the Dennis Canon—in contrast to the work done by a 200-year history of interaction between the congregation and the diocese.

Granting all three petitions will therefore give the Court the ability to craft a rule of decision that will provide additional guidance to lower courts by demonstrating how that rule of decision applies to very different historical contexts.

* * *

For all their variety, there is one ironic similarity among the three church property disputes now before the Court. Both the Episcopal Church and the PCUSA—like other mainline Protestant denominations with what one might call "in-between" polities—adopted unilateral denominational trust provisions in their denominational constitutions shortly after *Jones* v. *Wolf* was decided. These new, and very similar, rules were a way of using *Jones* v. *Wolf* to steal a march on their congregations in their churches' internal struggles over religious authority. Thus an opinion that was ostensibly designed to keep courts out of church self-government itself resulted

in great changes in ecclesiastical law and stoked conflict (and many subsequent lawsuits) between denominational bodies and individual congregations. The only way to resolve these conflicts definitively is with this Court's intervention.

CONCLUSION

The Court should grant the petitions for certiorari in *Timberridge*, *Gauss*, and *Savannah*, and the cases should be set for oral argument in tandem.

Respectfully submitted.

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