No. __-____

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

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

PETITION FOR A WRIT OF CERTIORARI

STEFFEN N. JOHNSON
Counsel of Record
GORDON A. COFFEE
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

WILLIAM P. FERRANTI
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

JOSHUA D. HAWLEY
University of Missouri School of Law
323 Hulston Hall
Columbia, MO 65201
(573) 882-0394

HOWARD M. WOOD, III
JAMES H. HOWARD
Phelon, Fitzgerald & Wood, P.C.
773 Main Street
Manchester, CT 06040
(860) 643-1136

Counsel for Petitioners

QUESTION PRESENTED

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.

PARTIES TO THE PROCEEDING

Petitioners include the Venerable (Rev.) Ronald S. Gauss; Arthur H. Hayward, Jr.; the Rev. Stanley Price; Kathy Tallardy; Barbara Stiles; Amy Ganolli; James Conover; and Everett Munro.

Respondents include The Episcopal Church in the Diocese of Connecticut; the Rev. Canon David Cannon; Bishop Seabury Church; and The Protestant Episcopal Church in the United States of America. Respondents who are expected to be non-adverse to petitioners but are not joining in the petition include the Attorney General of Connecticut, who has appeared in the case but has not participated in the litigation to date; Richard Vanderslice; Deborah Gaudette; Marion Ostaszewski; Shelley Steendam; and Debra Salomonson.

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INTRODUCTION

This case raises a critical and recurring question that has deeply divided the lower courts: whether the First Amendment compels state civil courts to enforce a "trust" imposed on affiliated churches' properties by provisions in denominational documents, even when those provisions would not otherwise have any effect under generally applicable rules of state property and trust law.

In *Jones* v. *Wolf*, 443 U.S. 595 (1979), this Court held that the First Amendment is fully satisfied when state courts resolve church property disputes by applying "neutral principles of law"—"objective, well-established concepts of trust and property law" that are "developed for use in all property disputes." *Id.* at 599, 602-603 (citation omitted). *Jones* rejected the notion that courts must "defer to the resolution of an authoritative tribunal of the hierarchical church," or to denominational "laws and regulations." *Id.* at 597, 609. Instead, the Court explained, whether denominational rules are enforceable turns on whether they are "embodied in some legally cognizable form" under state law. *Id.* at 606.

Yet the lower courts are squarely divided over the meaning of this rule, and the split is well-developed. At least five state supreme courts and one federal circuit hold that a neutral-principles approach requires courts to apply the State's neutral trust and property law, without deference to church law or canons. By contrast, four state supreme courts hold that a neutral-principles approach requires enforcing language in denominational documents unilaterally asserting a "trust," and that any state law defenses "are no longer relevant." Pet. 49a. This turns *Jones* on its head.

Not only does the decision below deepen the lower-court split and conflict with this Court's precedents, it also raises issues of tremendous practical importance to thousands of local congregations across a host of religious denominations. "Neutral principles" are supposed to entail a straightforward analysis of familiar concepts of secular property and trust law. Due to the uncertainty in current law, however, neither local churches nor denominations can predict how courts will determine ownership. As a result, they must spend precious resources—resources both sides would prefer to devote to mission—on costly litigation. Further, this uncertainty discourages local churches from acting in accordance with conscience concerning whether to change denominational affiliations, or even from affiliating in the first place—to the detriment of religious choice.

Certiorari is warranted.

OPINIONS BELOW

The Supreme Court of Connecticut's opinion (Pet. 1a-63a) is reported at 302 Conn. 408. The Connecticut Appellate Court did not exercise review (Pet. 64a-66a). The Connecticut Superior Court's opinion (Pet. 67a-103a) is reported at 49 Conn. L. Rptr. 630.

JURISDICTION

The Supreme Court of Connecticut entered judgment on October 11, 2011, and denied a timely motion for reconsideration on December 15, 2011. On January 20, 2012, that court stayed its decision until this Court has ruled on certiorari and, if necessary, rendered a decision on the merits. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATEMENT

A. Bishop Seabury Church

Petitioners are the rector and current or former officers and vestry members of Bishop Seabury Church ("the Church") in Groton, Connecticut. Pet. 1a-2a. The Church is a religious association of roughly 700 individuals, including 280 voting members. For over 50 years, the Church has had sole title, possession, and control of its property, including real estate assessed at over $4.5 million. Further, the Church alone has financed the property's maintenance.

The Church was initially organized in 1875 as a mission congregation of respondent The Episcopal Diocese of Connecticut ("the Diocese"), a diocese of respondent The Protestant Episcopal Church in the United States of America ("TEC"). In 1956, the Church decided to affiliate with the Diocese as a parish. The Church's members thus declared themselves "an Ecclesiastical Society * * * under the Constitution and Canons of the Diocese * * * for the purpose of supporting the Worship of Almighty God according to the Doctrine, Discipline and Liturgy of said Church in these United States." Pet. 5a-6a (capitalization changes omitted). The Church's affiliation was accepted in May 1956. *Ibid.*

B. Bishop Seabury Church's property

In July 1956, the Diocese (through its Missionary Society) executed a quit claim deed in favor of the

Church. For "good and valuable consideration," the Diocese "remised, released, and forever quit-claimed * * * for itself and heirs" three parcels of real property to the Church. As the deed stated, the Diocese would never "hereafter claim or demand any right or title to the premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred." Conn.App. 45-46.

The quit claim deed conveyed absolute title to all three parcels, each of which has since been sold by the Church and the proceeds used to purchase or improve other Church property, including the Church's current principal place of worship ("the North Road property"). Pet. 6a-8a. The North Road property was acquired by two deeds and in two parts—one as a gift from a member, the other by purchase. Pet. 7a.

Neither deed conveys any interest to the denomination. As the court below observed, "[i]t is undisputed that the deeds to the property in question are in the name of 'Bishop Seabury Parish' or 'Bishop Seabury Church.' There is no language of express trust in those deeds or in the deeds of the property previously owned by the Parish and subsequently conveyed to others." Pet. 27a. Nor has the Diocese ever disclosed any trust in the Church's property (or any parish property) on its audited financial statements. Conn.Sup.Ct. Docket Entry 149.50, Ex. 48.

Instead, in laying claim to the Church's property, TEC and the Diocese rely on the fact that, with respect to certain property transactions over the years, the Church observed provisions of the denomination's internal rules—so-called "anti-alienation canons"—directing parishes to obtain consent from the bishop before encumbering or alienating their property. See

TEC Canons I.7.3, II.6, Pet. 32a-33a. These canons, however, do not purport to affect ownership—legal or beneficial—of parish property, and they say nothing about any sort of trust. Nor do these canons purport to restrict parishes' right to disaffiliate. As TEC itself has acknowledged in the official annotated version of its Constitution and Canons, its anti-alienation canon law "is only of moral value, and has no legal effect."[1]

At all times, therefore, the Church's members intended and believed that the Church did, and always would, control itself and its property. One member who signed the 1956 Act of Organization, affiliating Bishop Seabury with the Diocese, testified: "At no time when we considered joining as a Parish did anyone tell us that the Diocese or the national Episcopal Church would always keep an interest in the property. It was not my understanding that the Diocese or the national Episcopal Church would have any legal interest in the property after the Missionary Society gave us title." Conn.App. 6. And this understanding was shared by generations of members who, without exception, understood that the Church property was, and always would be, controlled by the Church's elected leaders. *E.g.*, Conn.App. 1-2, 15-17, 53-54.

Consistent with this understanding, at no point did the Church transfer any property interest to the Diocese. Nor, despite opportunities, did the Diocese ever request such a transfer. For example, in 1967,

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[1] Conn.App. 38-39 (quoting Edwin Augustine White, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Adopted in General Conventions 1789-1922* 785 (New York: Edwin S. Gorham, 1924)).

as part of a relocation, the Church sold two parcels that had been quit-claimed to it by the Diocese in 1956—property, as noted above, to which the Diocese had "forever" waived any interest. In keeping with its spiritual obligations as a member of the Diocese, the Church requested the Bishop's permission for the sale. The Bishop responded in kind, granting his blessing on only two conditions: "(1) the Parish would retain exclusive use of the properties to be sold until a new place of worship could be erected, and (2) after the last church service, all Christian symbols would be removed and the church would be secularized and unconsecrated." Pet. 7a-8a. The Bishop said nothing about any Diocesan trust.

Other conduct of the Church and the Diocese confirms that neither understood the Diocese to hold a trust in the Church's property. The Church did not seek permission for construction of its current building—the primary focus of this case. Conn.Supp.App. 14. Nor did the denomination contribute funding for that project, and the Church's members understood that the building would belong to them, not the Diocese—which was why they were willing to finance its construction. *Ibid.*; Conn.App. 1-2, 15-17, 53-54. The Church's members completed that project—the most expensive ever undertaken by the Church—entirely *without* Diocesan approval.

Finally, when the Church affiliated with the Diocese in 1956, Connecticut law provided that a local church could remain independent in temporal affairs even if "the church accepted the dogma of the denomination, followed its ritual, participated in its conferences and contributed to its support." *Indep. Methodist Episcopal Church* v. *David*, 137 Conn. 1, 15-16 (1950) (citing *Calkins* v. *Cheney*, 92 Ill. 463, 479

(1879), which held that a parish disaffiliating *from TEC* would keep its property). Connecticut law further provided that, in the event of a church split, the church property would remain with "that part of the congregation which is acting in harmony with its own law and the ecclesiastical laws, usages, customs and principles which were accepted by it before the dispute arose." *Id.* at 12-13. Thus, although such an inquiry was invalidated in *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969), the Church's members had every reason to believe when they joined the denomination that Connecticut law would protect their right to their property, particularly if the Church disaffiliated on account of doctrinal changes in the denomination.

C. The decisions below

In 2007, after doctrinal disagreements led the Church's members to vote unanimously to affiliate with another branch of the Anglican Church (Conn.App. 3-6), the Diocese sued and TEC intervened as a plaintiff. Notwithstanding the evidence discussed above, the trial court concluded that an implied trust existed over the Church's property and granted summary judgment to the denomination. Pet. 81a-90a.

The Church appealed, but the Connecticut Supreme Court (exercising direct review, Pet. 64a) did not address the implied trust finding. Instead, the court held that the denomination's "Dennis Canon" created an *express* trust, enforceable as a matter of civil law—and that this conclusion was *required* by the First Amendment and this Court's decision in *Jones*. Pet. 4a, 27a-48a.

The Dennis Canon is a church canon adopted by resolution at TEC's convention in 1979—unilaterally, without prior notice, and without opt-out rights for any of TEC's parishes, including Bishop Seabury. Conn.App. 39-40. Further, as the court below acknowledged, the canon was adopted *after* all of the property transactions here were consummated. *E.g.*, Pet. 31a, 37a. The Dennis Canon provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for th[e] [Episcopal] Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, th[e] [Episcopal] Church and its Constitution and Canons.

Pet. 29a-30a (alterations by the court) (quoting TEC Canon I.7.4).[2]

In the trial court, TEC and the Diocese did not invoke the Dennis Canon. Pet. 81a ("plaintiffs have not alleged or demonstrated that the Parish subscribed to an express trust provision at the time of any relevant

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[2] Although TEC has suggested that this canon confirms a pre-existing trust, the word "trust" did not appear in TEC's property canons until 1979. Nor can TEC's position be reconciled with the denomination's history, including the recognition in TEC's own official canon law reporter that denominational canons have no civil law effect. See *supra* n.1; *Bjorkman* v. *PECUSA Diocese of Lexington*, 759 S.W.2d 583, 586 (Ky. 1988).

real estate transaction"). Instead, *both* sides treated as dispositive the Connecticut Supreme Court's earlier statement that the Dennis Canon could not impose an express trust on property conveyed before that canon's adoption. See *Rector, Wardens & Vestrymen of Trinity–St. Michael's Parish, Inc.* v. *Episcopal Church in the Diocese of Connecticut*, 224 Conn. 797, 805 (1993) ("[b]ecause the Dennis Canon was not enacted until 1979, it is undisputed that no express trust existed at the time of the relevant property transactions"); accord *New York Annual Conference of the United Methodist Church* v. *Fisher*, 182 Conn. 272, 285 (1980) ("It may well be that the applicable rules of the hierarchical church to which Round Hill was connected did not at all relevant times create a preference for the general church. If not, such property would remain with Round Hill despite its connection with the Methodist Church.").

Thus, as the court below acknowledged, "both parties made only fleeting references to the Dennis Canon in their initial briefs, focusing instead on other provisions in the Episcopal Church constitution and canons that existed in 1956." Pet. 36a-37a & n.23. Yet the court seized on the Dennis Canon, ordered supplemental briefs addressing it, abandoned prior precedents addressing later-enacted discipline (*i.e.*, church rules), and ruled "under neutral principles of law that the Dennis Canon applies and that it clearly establishes an express trust interest in the property." Pet. 5a, 37a, 40a-42a. The court thus "affirm[ed] the trial court's judgment on that ground." Pet. 5a.

The court purported to follow a neutral-principles approach. Pet. 3a-5a, 22a-24a. That approach should

render the nature of the denomination's polity irrelevant (Pet. 21a),[3] and should turn "exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges." Pet. 23a (quoting *Jones*, 443 U.S. at 603). Yet the court ultimately gave no consideration to Connecticut law.

In addition to its First Amendment defense (*e.g.*, Pet. 9a, 68a), the Church raised fifteen "special defenses" based on well-settled principles of state property, associations, and trust law. Among other points, the Church asserted the following: (1) the plain terms of the deeds conveyed no interest to the denomination; (2) unregistered property interests are extinguished by the Marketable Title Act, Conn. Gen. Stat. §47-33b *et seq.*; (3) the statute of frauds; (4) laches; (5) the 1956 quit claim deed waived any interest in Church property; (6) nonprofit associations are not subject to resulting trusts; (7) uncertain trusts are void; (8) any trust that had been created was revoked by the Church's unanimous vote; and—most fundamentally—(9) a trust must be created by the *settlor*, not the would-be *beneficiary*. Pet. 9a-11a, 68a-69a.

But the court below never reached these state law issues. Pet. 49a. Instead, it concluded that its hands were tied by the First Amendment as interpreted by *Jones*.

First, squarely rejecting the Church's argument that "a denomination's self-serving declaration of trust" is not cognizable under neutral legal principles,

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[3] Here, TEC's "hierarchical" status is a disputed question of fact, but the court below did not reach that issue.

the court held that "*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." Pet. 42a-43a.

Second, the court deemed irrelevant under *Jones* the congregation's evidence that it never agreed to put its property in trust. Neutral-principles analysis, the court held, turns *exclusively* on "*documentary* evidence, such as the relevant deeds and state statutes, and the constitution and canons of the general and local churches. * * * Accordingly, the subjective intent and personal beliefs of the parties, including those of the donors are, according to *Jones*, irrelevant in an express trust case." Pet. 38a-40a.

Third, as to the Church's state law defenses, the court concluded: "[Because] there is an express trust interest in favor of the Episcopal Church and the Diocese, * * * the special defenses are no longer relevant, and we need not address them." Pet. 49a.

In other words, the court subordinated neutral principles of state property, trust, and associations law to an incorrect reading of the First Amendment—in conflict with both this Court's decisions and the decisions of at least five state supreme courts and one federal court of appeals.

REASONS FOR GRANTING THE PETITION

I. In the 33 years since *Jones* was decided, "neutral principles" has become the dominant approach to resolving church property disputes.[4] Yet the lower courts cannot agree on the meaning of "neutral principles," and the disagreement turns not on differences in state law, but on the meaning of *Jones*.

On one side of the split, at least five state supreme courts and one federal circuit read *Jones* to hold that courts need enforce trust provisions in denominational documents *only if* the provisions create a trust under "objective, well-established concepts of trust and property law" that are "developed for use in all property disputes." 443 U.S. at 599, 603. On the other side of the split, four state supreme courts (including the court below) read *Jones* to mandate enforcing denominational documents asserting a trust *regardless of whether* those documents are otherwise "embodied in some legally cognizable form." *Id.* at 606.

This split is square, entrenched, and on full display here. The Connecticut Supreme Court interpreted *Jones* as *mandating* deference to the denomination's unilateral declaration of a trust via canon law. This holding is wrong: *Jones* rejected the view "that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes." *E.g.*,

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[4] See Jeffrey B. Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 Pepp. L. Rev. 399, 457 (2008) (appendix collecting and categorizing approach prevailing in each State).

id. at 605. More importantly, however, the holding squarely departs from the rules adopted by several other state supreme courts in the name of the same decision of this Court—*Jones*.

II. The urgency of resolving this split is underscored by the recent rise in church property litigation and the prevailing uncertainty surrounding ownership under the status quo—points that numerous commentators have noted. *Jones* rested on the premise that neutral-principles analysis would turn on "concepts of trust and property law familiar to lawyers and judges," facilitating a straightforward determination of ownership. *Id*. at 603. In reality, however, local churches in denominations across the theological spectrum cannot predict whether courts will recognize them as owners of property titled in their own names and maintained with their own resources. Indeed, if the Connecticut Supreme Court's conception of "neutral principles" is correct, then no local church can affiliate with a denomination without risking loss of its property, as the denomination can always pass a resolution declaring ownership.

This uncertainty has several pernicious effects: It forces both churches and denominations—nonprofits having limited resources—to wage costly battles over property; it discourages local churches from expanding their buildings; it discourages local churches from acting in accordance with their conscience concerning whether to remain affiliated with their current denominations; and it discourages local churches from affiliating with denominations in the first place—all to the detriment of religious freedom. Moreover, if ownership under neutral principles turns on church law, then third parties such as lenders and buyers can never determine who the owner is—even where

title is clear of recorded encumbrances—without examining all relevant denominational rules, past and present. That is no small task, and it may not yield a clear answer.

III. The decision below simply cannot be reconciled with *Jones*, or with this Court's free exercise and establishment jurisprudence more generally. As *Jones* recognized, free exercise is not implicated by "neutral provisions of state law governing the manner in which churches own property." *E.g.*, 443 U.S. at 606. Indeed, insofar as free exercise analysis is principally concerned with laws that "impose[] special disabilities on the basis of * * * religio[n]" (*Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (citation omitted)), it is allowing denominations to create trusts by means not available to others that implicates the Constitution. See also *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 117, 127 (1982) (barring States from "vesting in the governing bodies of churches" any "unilateral and absolute" power over others' property rights). At a bare minimum, however, the First Amendment *permits* state courts to apply genuinely neutral principles to determine ownership of church property.

I. The lower courts are deeply divided over the meaning of *Jones*.

The lower courts are deeply divided over whether *Jones* requires enforcing trust provisions contained in denominational documents without regard to whether those provisions satisfy the neutral requirements of state law. At least five state supreme courts and the Eighth Circuit have held that *Jones* does *not* require this result. *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 (2005).

Four state supreme courts disagree. In addition to the decision below, see *Rector, Wardens & Vestrymen of Christ Church in Savannah* v. *Bishop of Episcopal Diocese of Georgia, Inc.* ("*Christ Church*"), 290 Ga. 95 (2011), application to extend deadline for petition for cert. granted (Feb. 2, 2012) (No. 11A740); *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church* ("*Timberridge*"), 290 Ga. 272 (2011), petition for cert. filed (March 6, 2012) (No. 11-1101); *Episcopal Diocese of Rochester* v. *Harnish*, 11 N.Y.3d 340 (2008); *Episcopal Church Cases*, 45 Cal.4th 467 (2009).

We quote the critical passage from *Jones* in full:

> The dissent * * * argues that a rule of compulsory deference is necessary in order to protect the free exercise rights "of those who have formed the association and submitted themselves to its authority." This argument assumes that the neutral-principles method would somehow frustrate the free-exercise rights of the members of a religious association. Nothing could be further from the truth. The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own

> property, hire employees, or purchase goods. 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 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.

Jones, 443 U.S. at 605-606 (internal citation omitted).

A. Following this Court's direction that a trust need be enforced only if "embodied in some legally cognizable form," the high courts of South Carolina, Arkansas, Alaska, and Pennsylvania, as well as the Eighth Circuit (applying Missouri law), take trust provisions in church documents and hold them up to the light of state law. *If* such provisions satisfy generally applicable state law standards for creating a trust, *then* they are enforced. And in New Hampshire, such provisions will not be considered *at all* unless purely secular documents are unclear.

In *All Saints*, for example, the South Carolina Supreme Court set aside TEC's discipline based on the "axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another." 385 S.C. at 449. Like the Church here, the parish there had re-

ceived a quit-claim deed from the diocese long before the Dennis Canon's adoption. *Id.* at 448. But where the decision below held that state law defenses based on the quit-claim deed "ha[ve] no merit" after *Jones* (Pet. 28a n.14), the court in *All Saints* held that "the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes." *Id.* at 444. Applying that law, the court held that "neither [a notice of interest recorded by the diocese] nor the Dennis Canon has any legal effect." *Id.* at 449.[5]

The Supreme Court of Arkansas took a similar approach in *Arkansas Presbytery*, ruling for a local church based on the deeds—and in spite of a trust provision in the denominational discipline adopted after the relevant conveyances. As the court explained, "nothing in the language of the deeds reflects that the [local church's property] was held in trust for the Arkansas Cumberland [Presbytery] or the National Church." 344 Ark. at 341. Claiming property conveyed in 1968 and 1977, the denomination invoked a 1984 amendment to its constitution that purported to "impose[] a trust in favor of the National Church upon property previously held by the local congregations." *Id.* at 343. But the court refused to

[5] The court below dismissed *All Saints* as turning on state law. Pet. 43a-44a. But where the court below deemed state law "no longer relevant" under *Jones* (Pet. 49a), the South Carolina decision read *Jones* as approving the application of "property, corporate, and other forms of [state] law" (385 S.C. at 444)—and ultimately gave the canon "no weight" (Pet. 43a). Thus, the different outcomes turn on a fundamental disagreement about the mandates of *Jones*—not on state law.

consider it: state law did not "allow a grantor to impose a trust upon property previously conveyed without the retention of a trust," and *Jones* did not overthrow the "long held" state law rule "that parties to a conveyance have a right to rely upon the law as it was at that time." *Id.* at 343-344.

The Eighth Circuit read *Jones* the same way in *Church of God*, rejecting the denomination's position that "its decree governs the property issue and failure to defer to that disposition would alter its polity, thereby violating the First Amendment." 54 F.3d at 525-526. Applying "objective, well-established concepts of trust and property law," the court explained, does not "run afoul of the First Amendment." *Id.* at 526 (citing *Jones*, 443 U.S. at 603). In short, "states are not required to defer to an ecclesiastical determination of property ownership." *Id.* at 526 (citing *Jones*, 443 U.S. at 605). Accord *Heartland Presbytery* v. *Gashland Presbyterian Church*, __ S.W.3d __, 2012 WL 42897, *10-12 (Mo. Ct. App. Jan. 10, 2012) ("*Jones* contemplates * * * that the applicable law—like American property and trust law in general—would be *state*, rather than *federal*, law"), application for transfer denied (Mo. Feb. 28, 2012); *Carrollton Presbyterian Church* v. *Presbytery of South La.*, 77 So.3d 975, 981 (La. Ct. App. 2011) (rejecting "the Presbytery's contention that the requirement of a 'legally cognizable form' was met simply by the PCUSA's amending its constitution," and applying "Louisiana's Trust Code" instead), writ denied (La. Feb. 18, 2012).

Even when ruling for denominations, several other state supreme courts interpret *Jones* to prescribe a neutral application of state property and trust law. In *Berthiaume*, for example, the court sided with the Roman Catholic Church based solely on a review of

state statutes and the relevant deed, which (as is typical in Catholic churches) placed title in the bishop. Stating "that the Supreme Court has left it to the States to 'adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters,'" the court determined to "first consider *only* secular documents such as trusts, deeds, and statutes," and to determine ownership on that basis if at all possible. 153 N.H. at 248 (quoting *Jones*, 443 U.S. at 602) (second emphasis added). "[O]nly if these documents leave [ownership] unclear," the court continued, "will we consider religious documents, such as church constitutions and by-laws, *even when such documents contain provisions governing the use or disposal of church property*." *Ibid.* (emphasis added).

Likewise, in *St. Paul Church*, the Alaska Supreme Court ruled for the denomination—but only after finding under state law that the members clearly intended to grant the Methodist denomination a trust, and only after applying the rule, then prevailing in Alaska, that trusts are presumed irrevocable unless the trust instrument says otherwise. "[U]nder different facts," the court stated, "we might determine that in accordance with [a later-enacted, non-retroactive, generally applicable state trust law] a trust created by a local church in favor of a parent church is revocable." 145 P.3d at 557. Had the Alaska Supreme Court read *Jones* as the court below read it, such an analysis would have been deemed unconstitutional.

Similarly, in *St. James*, the Pennsylvania Supreme Court reaffirmed that "courts of this Commonwealth are to apply the same principles of law as would be applied to non-religious associations." 585 Pa. at 446 (citation omitted). As in *All Saints* and

this case, the central issue in *St. James* was whether the parish was bound by the Dennis Canon. Like *All Saints*, and unlike the decision below, the Pennsylvania court subjected the canon to state law: "In the first instance, we note that a member of a voluntary association is bound by amendments to the association's rules so long as the amendments (1) are duly enacted; and (2) do not deprive the member of vested property rights without the member's explicit consent." *Id.* at 448. The court concluded that "the Dennis Canon does not deprive St. James of its vested property rights." *Id.* at 452.

Unlike Bishop Seabury, however, the parish in *St. James* had placed provisions in its corporate charter automatically excluding from membership anyone who disclaimed denominational authority, and further requiring the parish "to obtain the Diocese's consent for amendments to its charter." *Id.* at 449-450. The court thus sided with TEC under state law, based on "a trust relationship that was implicit in St. James' Charter." *Id.* at 451 (citation omitted). This reasoning conflicts sharply with that of the court below. Where the Connecticut court held itself "*bound*" by the Dennis Canon under *Jones* (Pet. 43a), the Pennsylvania court assessed that canon under the law of voluntary associations and held that "we are not simply deferring to a religious canon to override the rights of parties under civil law." 585 Pa. at 452 (citation and internal quotation marks omitted).

In sum, at least five state supreme courts and the Eighth Circuit have rejected the reading of *Jones* adopted below.

B. The high courts of Connecticut, Georgia, New York, and California, by contrast, understand *Jones*

as mandating enforcement of "trust" provisions in church documents. In their view, *Jones answered* a question (whether trust provisions in denominational discipline are legally cognizable) as a matter of *federal constitutional* law, when *Jones* merely *posed* that question as one to be answered under *state* "trust and property law." 443 U.S. at 603.

The Georgia Supreme Court took this approach in a pair of recent cases. In *Christ Church*, the court affirmed summary judgment for TEC, reasoning that "requiring strict compliance with [Georgia's trust statute] to find a trust under the neutral principles analysis would be inconsistent with the teaching of *Jones v. Wolf*." 290 Ga. at 101. "[C]hurches *may* modify their deeds, amend their charters, or draft separate legally recognized documents to establish an express trust," but *requiring* churches to do so "is not how the *Jones v. Wolf* Court envisioned that the neutral principles doctrine would be applied in conformity with the First Amendment.'" *Id.* at 102. Rather, a trust imposed "through the general church's governing law" must be given civil law effect: "the fact that a trust was not created under our State's generic express (or implied) trust statutes does not preclude the implication of a trust on church property under the neutral principles of law doctrine." *Id.* at 101-102, 103. The court relied on the same rationale in *Timberridge*, decided the same day, in ruling that local property was held in trust for the national Presbyterian denomination. 290 Ga. at 288.

The New York Court of Appeals adopted a similar view of "neutral principles" in *Harnish*, awarding parish property to TEC based on the view that *Jones* imposed a constitutional mandate to enforce denominational canons. The court found no trust in the

deeds, corporate articles, or state statutes, stating: "[T]here is nothing in the deeds that establishes an express trust in favor of the Rochester Diocese or National Church. [The parish's] certificate of incorporation, further, does not indicate that the church property is to be held in trust for the benefit of either the Rochester Diocese or the National Church. Nor does any provision of the Religious Corporations Law conclusively establish a trust." 11 N.Y.3d at 351.

Yet the court held the Dennis Canon "dispositive," reasoning that *Jones* "*requires* that we look to the constitution of the general church concerning the ownership and control of church property." *Id.* at 351-352 (emphasis added) (citation and internal quotation marks omitted).

The California Supreme Court's decision in the *Episcopal Church Cases* is to the same effect. Holding itself "not entirely free from constitutional constraints" in choosing between denominational discipline and ordinary property law, the court there enforced the discipline. 45 Cal.4th at 485-486. Like the New York and Connecticut courts, the court relied on the parish's accession to TEC's discipline decades before the Dennis Canon's adoption. *Ibid.* Based on *Jones*' "reference to what the 'parties' can do" in arranging ownership of church property, the parish argued that denominational canons were not enforceable under a proper neutral-principles approach. *Id.* at 487. The court disagreed, stating: "We do not so read the high court's words." Rather, "making the general church's constitution recite the trust * * * could be done by whatever method the church structure contemplated," and civil courts would be *required* to enforce it because requiring parishes "to ratify the change"—even if required by generally appli-

cable principles of civil law—"*would* infringe on the free exercise rights" of the denomination. *Ibid.*

As noted by the concurring justice—whose opinion rested on a state statute authorizing denominations to declare trusts for themselves (*id.* at 488, 492)—this reasoning "is not based on neutral principles of law. 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." *Id.* at 495.

Finally, the Connecticut Supreme Court here held that "*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." Pet. 43a. The court's analysis therefore turned on the Dennis Canon: "[T]here is no genuine issue of material fact as to whether the Parish controls the disputed property in this case because the Dennis Canon expressly provides that all parish property is held in trust for the Episcopal Church and the diocese." Pet. 27a. The Church's numerous state law defenses thereby became "no longer relevant." Pet. 49a.

That analysis makes this case an ideal vehicle to resolve the split: the court below was directly presented with the question whether *Jones* requires deferring to denominational documents; and its holding turns *wholly* on its assessment of that issue. The court mistakenly thought its hands were tied. Indeed, it declined even to review the trial court's implied trust ruling, the factual and record issues raised by the Church on appeal, or any of the Church's state law defenses—all in the name of *Jones*.

C. In fact, the court below went so far as to read *Jones* as a constitutional rule of evidence. According to the decision below, whatever neutral state rules of evidence and substantive law would permit, the First Amendment requires civil courts to consider only "*documentary* evidence, such as the relevant deeds and state statutes, and the constitution and canons of the general and local churches." Pet. 38a. "[T]he subjective intent and personal beliefs of the parties, including those of the donors are, according to *Jones*, irrelevant in an express trust case." Pet. 39a-40a.

Naturally, the States may restrict what evidence is admissible to establish a property interest—as a matter of *state* law. *E.g.*, *Ark. Presbytery*, 344 Ark. at 339 (in assessing local church intent, limiting itself to "deeds and other writings" under a state law "four corners" rule). The decision below, however, set testimonial evidence aside—and treated *national* church discipline as dispositive of *local* church intent—as a matter of *federal constitutional* law.

In so doing, the decision below further conflicts with the Alaska, Kentucky, and Mississippi Supreme Courts, all of which consider testimonial evidence in church property disputes to the extent called for by ordinary state law. In *St. Paul Church*, for example, the Alaska Supreme Court "view[ed] the relationship between St. Paul and UMC as a whole in order to discern intent." 145 P.3d at 553. The court ruled for the denomination based principally on the fact that the parish members "were fully cognizant"—having been warned expressly and repeatedly before joining—that "[a]ll property of United Methodist Churches is owned in trust on behalf of The United Methodist Church. There is no such thing as locally owned property." *Id.* at 553, 546 (quoting letter from UMC

bishop). See also *Bjorkman*, 759 S.W.2d at 586-587 ("[f]rom the documents *and testimony* presented," finding itself "unable to conclude that an express trust exists") (emphasis added); *Church of God Pentecostal, Inc.* v. *Freewill Pentecostal Church of God, Inc.*, 716 So.2d 200, 202-203, 207-210 (Miss. 1998) (declining to treat national church bylaws as dispositive of local church intent, or to hold that these provisions created an "express trust," and considering testimony regarding the congregation's conduct).

Here, the evidence of parishioner intent was to the contrary. As one signatory to the Church's affiliation documents testified: "At no time when we considered joining as a Parish did anyone tell us that the Diocese or the national Episcopal Church would always keep an interest in the property." Conn.App. 6. But, on account of its view that only "*documentary*" evidence is legally relevant under *Jones*, the court below set that evidence aside and refused to conduct a normal state trust law analysis. Pet. 38a.

In sum, not all approaches declared "neutral" are actually neutral. Courts across the country have interpreted "neutral principles" in irreconcilable ways, all in the name of *Jones*. Unlike the Eighth Circuit and the high courts of South Carolina, Arkansas, Pennsylvania, Alaska, and New Hampshire, the high courts of Connecticut, Georgia, New York, and California give denominational discipline binding civil law effect regardless of whether it satisfies generally applicable state law. And as the foregoing precedent shows, the issue is of concern to a wide range of denominations—Episcopalian, Presbyterian, Methodist, Pentecostal, and others—further underscoring the need for this Court to resolve the split.

II. The division over the neutral-principles approach generates uncertainty in private property rights and inhibits free exercise.

The foregoing split raises important and recurring issues of national concern. To begin with, it is generating severe uncertainty concerning the ownership of valuable private property across a host of denominations. The investment-backed expectations of local churches are often betrayed by a "neutral principles" standard that renders normal rules of property and trust law null. All agree that "neutral principles" is constitutional. But the civil courts' varied readings of neutral principles leads to "nonuniform and unpredictable" results, "divergences on these questions much greater than one might imagine from reading Supreme Court opinions," and a far greater likelihood that each successive dispute will land in court. Kent Greenawalt, *Hands Off! Civil Court Involvement In Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1883 (1998).

These problems have been much remarked upon.[6] Further, these disputes are at an all-time high, affect denominations across the spectrum, and are only

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[6] *E.g.*, Hassler, 35 Pepp. L. Rev. at 416-426 (state courts apply "neutral-principles" in "widely divergent ways" that "can yield different results given the same facts"); Ashley Alderman, Note, *Where's the Wall? Church Property Disputes Within the Civil Courts and the Need for Consistent Application of the Law*, 39 Ga. L. Rev. 1027, 1028 (2005) ("Because of [*Jones*'] ambiguous instructions, state court decisions have become more and more disparate, as national churches face increasing threats of division.") (internal footnotes omitted).

likely to increase in the near term.[7] Indeed, this Court's docket will soon include three petitions presenting similar questions regarding the metes and bounds of *Jones*. See *supra* at 15. And disputes raising similar issues are pending in the Indiana and Texas Supreme Courts.[8]

Moreover, the uncertainty created by current law affects not only churches and their members, but also third parties. It starts as a notice problem. If the denomination need not record its supposed property interests (as the decision below held), or even disclose such interests on its audited financial statements (as the Diocese here has never done), then buyers and lenders cannot begin to determine who owns church property without examining all relevant church canons and historical precedents—a difficult and indeterminate task. And insofar as the available scope of recovery for tort claims often depends on who exactly owns the property on which the tort occurred, the effect of the ruling below (and others like it) is to force judges and juries to examine, interpret, and apply church canons to determine whether the congregation or the denomination is responsible.

Uncertainty is fundamentally inconsistent with the very concept of "neutral principles." The neutral-principles approach was supposed to be "completely

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[7] See Hassler, 35 Pepp. L. Rev. at 402-404; Calvin Massey, *Church Schisms, Church Property, and Civil Authority*, 84 St. John's L. Rev. 23, 33 (2010).

[8] *Masterson* v. *Diocese of Northwest Texas*, No. 11-0332 (Texas) (oral argument rescheduled; date pending); *Presbytery of Ohio Valley, Inc.* v. *OPC, Inc.*, No. 82S02-1105-MF-314 (Ind.) (argued Sept. 1, 2011).

secular in operation" and "obviate[] entirely the need for an analysis or examination of ecclesiastical polity or doctrine." *Jones*, 443 U.S. at 603, 605. It was supposed to "rel[y] exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 603. It was supposed to be the means to a straightforward, predictable disposition of church property.

Naturally, there will always be difficult cases at the margin. But the "promise of nonentanglement and neutrality inherent in the neutral-principles approach" (*id.* at 604) is betrayed when civil courts enforce denominational discipline without regard to generally applicable property or trust law. In a State that purports to follow neutral principles, a church reading *Jones*—seeing that "neutral principles" are "secular," "objective," and "familiar to lawyers and judges"—would have no inkling that *canon law* could be given dispositive weight in property disputes. If "neutral principles" is just deference by another name, that is confusing, surprising, and unfair.

It is also expensive—in terms of both dollars and religious liberty. Many religious organizations, particularly at the local level, can ill afford to litigate. And even those that can would rather not be forced to turn to the courts. Everyone involved, on both sides, would prefer that precious resources now spent on legal counsel be spent on mission. And beyond the financial costs, allowing denominations to obtain civil enforcement of church law chills local churches both from affiliating in the first place, and from leaving the denomination—even though their members might otherwise wish to do so.

The brand of "neutral principles" adopted below is particularly onerous: It not only defers to canons; it applies them *retroactively*. If that conception of "neutral principles" is correct, then no church can join a denomination without jeopardizing its property, as the denomination can always pass a resolution transferring ownership. According to the court below, the Dennis Canon secured ownership of the property of 7,000 parishes, in 50 states, in one fell swoop; and the denomination's unilateral declaration of trust *must* be enforced retroactively, even though the property-holding parishes—many holding sole title or even (like Bishop Seabury) a quit-claim from the denomination—had no prior notice or opportunity to opt out.

This Court predicted in *Jones* that "problems in application" would be "gradually eliminated." 443 U.S. at 605. That will not come to pass unless this Court intervenes. This case presents a prime opportunity to do so—to correct *Jones*' ambiguity and elaborate a clear rule that will settle the matter once and for all. If the Court forgoes this opportunity, property conflicts will multiply, litigation will proliferate, confusion in the lower courts will deepen, and the potential for entanglement will increase.

III. The decision below conflicts with this Court's decisions.

Review is also warranted to address the conflict between the decision below and this Court's own precedents. By holding itself bound to enforce church discipline, rather than generally applicable rules of state property and trust law, the court below did not follow *Jones*; it contradicted it. Moreover, the ruling below cannot be reconciled with the Court's free exercise or establishment jurisprudence more generally.

A. The decision below conflicts with *Jones*.

The ruling below conflicts with numerous aspects of *Jones*. We highlight just four here.

First, *Jones* held that civil courts were not required to "defer to the resolution of an authoritative tribunal of the hierarchical church," or to its "laws and regulations," in determining whether the majority of a local church affiliated with the denomination was entitled to the local church property. 443 U.S. at 597, 609. In so holding, the Court explicitly rejected the notion that "compulsory deference" to the denomination's rules was "necessary in order to protect the free exercise rights 'of those who have formed the association and submitted to its authority.'" *Id.* at 605-606 (citation omitted). "The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property." *Id.* at 606. And if civil courts may apply neutral principles to determine "which of the two factions represents the 'true congregation'" (*id.* at 607), then certainly they may apply such principles to determine the validity of a denominational trust.

Second, *Jones* reaffirmed that States may resolve church property disputes by applying "formal title" doctrine, which does not take account of denominational constitutions or canons *at all*, much less treat them as dispositive. 443 U.S. at 603 n.3; accord *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 723 n.15 (1976); *Maryland & Va. Eldership* v. *Church of God at Sharpsburg*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring) ("Under the 'formal title' doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state

corporation laws.").[9] The decision below cannot be reconciled with this aspect of *Jones*.

Third, *Jones* taught that "the neutral-principles approach" is "completely secular in operation," "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges," "obviates entirely the need for an analysis or examination of ecclesiastical polity," and "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." 443 U.S. at 603, 605. But these statements cannot be true if *Jones* requires reviewing and enforcing church polity and canon law, which have no role in secular property disputes.

Fourth, while *Jones* acknowledged that "the constitution of the general church can be made to recite an express trust in favor of the denominational church," its statement that "courts will be bound" was followed by this language—"to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form." *Id*. at 606. Thus, courts need only enforce trust language that reflects the intent of the "parties" (*plural*) and only if that intent is "embodied in some legally cognizable form." *Ibid*. Deciding what is "legally cognizable," of course, entails applying neutral rules of state law. Yet the

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[9] As *Jones* explained, even under *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 722-723 (1872)—a federal common-law decision that granted greater deference to denominations—"regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership." 443 U.S. at 603 n.3.

court below short-circuited any analysis of state law defenses, solely because it thought *Jones* rendered them "no longer relevant." Pet. 49a.

In sum, *Jones* did not grant denominations a constitutional right to control church property *without* complying with the States' ordinary legal norms. Rather, *Jones* distinguished between true matters of "doctrine or polity" and "church property issues," and held, contrary to the decision below, that States may resolve the latter by applying generally applicable state law. Cf. *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694, 706 (2012) ("Requiring a church to accept or retain an unwanted minister * * * interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."). The best way for a state to avoid interfering with internal church doctrine is to resolve property disputes in accordance with ordinary civil rules of property and trust law, rather than to interpret and enforce canon law or to make judicial determinations about the respective rights and powers of layers of church authorities under ecclesiastical documents.

B. The decision below conflicts with this Court's free exercise and establishment jurisprudence.

This Court's precedent since *Jones* only confirms that religious denominations have no constitutional right to enforcement of church law in civil property disputes. In *Employment Division* v. *Smith*, 494 U.S. 872, 879 (1990), for example, the Court held that "the right of free exercise does not relieve [a party] of the obligation to comply with a 'valid and neutral law of general applicability.'" 494 U.S. 872, 879 (1990); see

also *Lukumi*, 508 U.S. at 531. Ordinary rules of trust and property law are textbook examples of neutral and generally applicable laws. See *Jones*, 443 U.S. at 606. Thus, the Free Exercise Clause does not permit denominations to declare themselves exempt from such laws.

Nor can the decision below be reconciled with this Court's establishment jurisprudence. As the Court explained in *Larkin*, States may not grant "unilateral and absolute power" to "a church" on "issues with significant economic and political implications" for the property rights of other parties. 459 U.S. at 117, 127. Yet permitting denominations to create a trust in congregational property by immunizing them from the neutral requirements of state law does just that. Indeed, it does more—it actually transfers beneficial ownership of property to which the denomination lacks title. No other entity, secular or religious, enjoys that power under state law.

Ironically, the court below announced that neutral principles "provide[] the parties with a more level playing field." Pet. 23a. But giving civil law effect to a trust declared in denominational documents is not leveling the playing field. It is not even mere deference. It is giving denominations unilateral power to rewrite civil property law. By stripping local churches of their property via extra-legal means available to no one but denominations, such a rule "'impose[s] special disabilities on the basis of * * * religious status.'" *Lukumi*, 508 U.S. at 533 (quoting *Smith*, 494 U.S. at 877). Indeed, the rule adopted below is especially pernicious because it applies retroactively. Cf. *Jones*, 443 U.S. at 606 n.4 ("this case does not involve a claim that retroactive application of a neutral-principles approach infringes free exercise rights").

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In the 33 years since *Jones* was decided, the lower courts have become intractably divided over how to read that decision. At least five state supreme courts and the Eighth Circuit hold that *Jones* does *not* require enforcing trust provisions in church documents, whereas four state supreme courts hold that it does. The decisions involve multiple denominations, across the theological spectrum, and affect thousands of local churches. For as long as the law remains riddled with uncertainty, both sides in these disputes must divert resources from their mission to costly, protracted, and distracting litigation.

If the decision below is correct, moreover, it means religious denominations have a constitutional right to transfer beneficial ownership of the property of thousands of parishes in all 50 States in one fell swoop—simply by passing a church canon. Indeed, it means denominations have a right to do so retroactively, and without giving parishes opt-out rights or even notifying them that the canon will be voted on. No other institution has such breathtaking power over property titled in others' names. Granting denominations such power may not even be constitutionally *permitted*, and it is certainly not constitutionally *required*. This Court's intervention is needed to make that clear.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JOSHUA D. HAWLEY
University of Missouri School of Law
323 Hulston Hall
Columbia, MO 65201
(573) 882-0394

HOWARD M. WOOD, III
JAMES H. HOWARD
Phelon, Fitzgerald & Wood, P.C.
773 Main Street
Manchester, CT 06040
(860) 643-1136

STEFFEN N. JOHNSON
Counsel of Record
GORDON A. COFFEE
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

WILLIAM P. FERRANTI
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Petitioners

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