No. 11-1139

In The Supreme Court of the United States

RONALD S. GAUSS, *et al.*,

Petitioners,

v.

THE EPISCOPAL CHURCH IN THE DIOCESE OF CONNECTICUT, *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND *AMICI CURIAE* BRIEF OF ST. JAMES ANGLICAN CHURCH, THE AMERICAN ANGLICAN COUNCIL, THE PRESBYTERIAN LAY COMMITTEE, CAPINCROUSE LLP, AND NUMEROUS RELIGIOUS CONGREGATIONS IN SUPPORT OF PETITIONERS

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RELIGIOUS CONGREGATIONS *AMICI*

All Saints' Anglican Church
Long Beach, California

Christ Church
Fox Chapel, Pennsylvania

Christ Church
Plano, Texas

Christ Church of Atlanta
Atlanta, Georgia

Grace Church
Pittsburgh, Pennsylvania

Moorpark Presbyterian Church
Moorpark, California

Servants of Christ
Anglican Church
Gainesville, Florida

St. Charles Anglican Church
Poulsbo, Washington

St. David's Anglican Church
North Hollywood, California

St. John's Anglican Church
Petaluma, California

St. Stephen's
Anglican Church
Oak Harbor, Washington

St. Timothy's Church
Catonsville, Maryland

The Church of the Ascension
Pittsburgh, Pennsylvania

The Church of
the Holy Trinity
North Augusta, South Carolina

The Falls Church
Falls Church, Virginia

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of the Supreme Court, St. James Anglican Church, Newport Beach, California; the American Anglican Council; the Presbyterian Lay Committee; CapinCrouse LLP; All Saints' Anglican Church, Long Beach, California; Christ Church, Fox Chapel, Pennsylvania; Christ Church, Plano, Texas; Christ Church of Atlanta, Atlanta, Georgia; Grace Church, Pittsburgh, Pennsylvania; Moorpark Presbyterian Church, Moorpark, California; Servants of Christ Anglican Church, Gainesville, Florida; St. Charles Anglican Church, Poulsbo, Washington; St. David's Anglican Church, North Hollywood, California; St. John's Anglican Church, Petaluma, California; St. Stephen's Anglican Church, Oak Harbor, Washington; St. Timothy's Church, Catonsville, Maryland; The Church of the Ascension, Pittsburgh, Pennsylvania; The Church of the Holy Trinity, North Augusta, South Carolina; and The Falls Church, Falls Church, Virginia, respectfully move for leave to file the following brief as *amici curiae* in support of the petition for certiorari.

Pursuant to Rule 37.2(b), counsel of record for all parties received notice at least 10 days prior to the due date of the intention of St. James Anglican Church and additional parties to file this brief.

Respondents The Episcopal Diocese of Connecticut, Bishop Seabury Church, Father Canon David

Cannon and The Protestant Episcopal Church in the United States of America ("TEC") have *not* granted consent to file this brief on behalf of any church they have sued and any church which is currently affiliated with them – the very congregations that have the greatest and most direct interest in the outcome of this case: St. James Anglican Church, Newport Beach, California; All Saints' Anglican Church, Long Beach, California; Christ Church, Fox Chapel, Pennsylvania; Grace Church, Pittsburgh, Pennsylvania; St. David's Anglican Church, North Hollywood, California; St. John's Anglican Church, Petaluma, California; St. Timothy's Church, Catonsville, Maryland; The Church of the Ascension, Pittsburgh, Pennsylvania; and The Falls Church, Falls Church, Virginia.

Respondents have consented to the filing of the brief on behalf of the remaining *amici*, and Petitioners, through their counsel of record, have consented to the filing of the brief on behalf of all *amici*. Those consents are being lodged herewith.

As described more fully in the brief, the following church congregations to which Respondents have not consented have very similar, if not greater, interests in this case than the congregations to which Respondents have consented:

St. James Anglican Church, Newport Beach, California, incorporated in 1949 as a California nonprofit corporation. Since 1950, St. James has held

record title to its property. In 2004, St. James, by overwhelming vote of its board of directors and members, changed its Anglican affiliation from TEC and the Episcopal Diocese of Los Angeles to another branch of the worldwide Anglican Communion. Those organizations filed suit against St. James, which case (after two appeals to the California Supreme Court and a petition for certiorari filed with this Court) is currently pending in the Superior Court of Orange County, California *sub nom. Episcopal Church Cases* (Case No. 4332). Notwithstanding the fact that St. James has held record title to its property since 1950, and that the Episcopal Church did not provide any funds for that property, the plaintiffs in that suit have asserted that the property of St. James is impressed with a trust in their favor by virtue of TEC having purportedly adopted an internal rule or "canon" to that effect in 1979. Plaintiffs assert that said canon must be enforced in their favor under this Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979).

All Saints' Anglican Church, Long Beach, California, and *St. David's Anglican Church, North Hollywood, California*, withdrew from TEC in 2004. Despite holding record title to their properties for many decades, both churches were sued by the Episcopal Diocese of Los Angeles and TEC, both of which claim that the local churches' properties are impressed with a trust in their favor. The suits against

All Saints' and St. David's have been coordinated with the suit against St. James.

Christ Church, Fox Chapel, Pennsylvania, was a parish of TEC but elected to realign with the Anglican Church of North America ("ACNA") in 2009. Christ Church is now experiencing financial strain due to the unsettled state of the law regarding church property ownership. Parishioners are unwilling to contribute to maintain real estate and buildings that potentially could be forfeited in litigation, even though Christ Church holds record title, the people of Christ Church paid the full cost to acquire its land and buildings in 1946, and Christ Church has never received any funds from TEC. The financial reserves of Christ Church are now being expended and deferred maintenance increases with no resolution in sight.

Grace Church, Pittsburgh, Pennsylvania, and *The Church of the Ascension, Pittsburgh, Pennsylvania* are part of the Anglican Diocese of Pittsburgh, which prior to 2008 was aligned with TEC. In 2008, the Anglican Diocese of Pittsburgh, with each of its constituent parishes, ended their affiliation with TEC. All of the property of these churches is held in the name of each local church corporation. Nonetheless, the newly-formed Episcopal Diocese of Pittsburgh and TEC have asserted claims to ownership of these properties. These claims seriously compromise the work of these churches in their planning and mission

work. A resolution of the issues before this Court will materially advance the ultimate disposition of the disputes between Grace Church and The Church of the Ascension, and the Episcopal Diocese of Pittsburgh and TEC.

St. John's Anglican Church, Petaluma, California, ended its affiliation with TEC in 2003 over core theological differences. Church members continued to use the property they had maintained and improved from their own funds, and where generations of families had worshipped for the past 150 years. In 2006, TEC sued St. John's, seeking to take possession of its property, the church rectory, and all financial assets. After lengthy litigation, the court decided in favor of TEC by supposedly applying "neutral" principles of law. The congregation was forced to vacate the property and relinquish its bank accounts. St. John's, a thriving and healthy body of 175 congregants, now worships in a local community center. St. John's is concerned that under current law, a strong majority of those who have worshiped in a church for decades and developed and maintained their property without any support from a denomination can be forced out of their church home.

St. Timothy's Church, Catonsville, Maryland has been affiliated with TEC since 1844. As a congregation of the Episcopal Diocese of Maryland, St. Timothy's believes it holds title to its property and

buildings. The church's goal is not to engage in litigation nor does the congregation have any plan to end its relationship with TEC. The church believes there is enough confusion regarding application of neutral principles of law that a clear and definitive ruling is necessary in order to avoid protracted and expensive litigation. The church's concerns are not limited to theology, but also of a matter of law, fairness and what is morally right.

The Falls Church, *Falls Church, Virginia*, is an Anglican congregation formerly affiliated with TEC. In 1732, decades before TEC and its Virginia Diocese were formed, The Falls Church was established as a colonial congregation under the authority of the Church of England. The Falls Church began worshipping at its current location in 1734, and completed construction of a brick church structure, still part of the church's property today, in 1769. Today, The Falls Church serves approximately 2500 worshippers on an average Sunday. In December 2006, the congregation of The Falls Church voted by a 90% majority to end its affiliation with TEC and the Episcopal Diocese of Virginia. For over five years, The Falls Church has been embroiled in litigation with TEC and the Episcopal Diocese of Virginia over the ownership of its property.

The perspectives and arguments of the *amici* demonstrate that this brief will be "of considerable help to the Court" by "bring[ing] to the attention of the Court relevant matter not already brought to its

attention by the parties." Rule 37.1. For these reasons, this motion for leave to file the following brief should be granted.

Respectfully submitted,

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APRIL 18, 2012

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.

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INTERESTS OF THE *AMICI CURIAE**

Amici strongly believe that the law governing church property disputes – in particular what is meant by "neutral principles of law" – is uncertain, unpredictable, and inconsistently applied by lower courts, creating numerous problems in their organizations and congregations as they seek to fulfill their religious missions. Churches are uncertain about whether they really own the property to which they hold clear title, church members are withholding funds from capital campaigns to acquire new land and buildings or to maintain old structures, and accountants cannot properly audit financial records of nonprofit religious corporations.

These concerned *amici* include the following church organizations, a non-profit accounting firm, and congregations in addition to those listed in the Motion above:

The American Anglican Council ("AAC"), a non-profit religious corporation founded in 1996, is a network of individuals (lay and clergy), parishes, dioceses, and ministries who affirm biblical authority

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* In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.2(b), counsel of record for all parties received notice at least 10 days prior to the due date of the intention of St. James Anglican Church and additional parties to file this brief.

and Christian orthodoxy within the Anglican Communion. AAC regularly assists Anglican churches in distress who are the subject of litigation by TEC and its dioceses. AAC also monitors such litigation and reports on it to the broader Anglican Communion. AAC seeks to represent the important perspective of local Anglican congregations in church property litigation where incorrect interpretations of the law could have a significant adverse impact upon congregational property rights. Consistent with its mission, AAC has a strong interest in seeing that state courts remain free to apply their neutral rules of trust and property law to resolve church property disputes, rather than being required to apply a deferential approach that permits denominations to bypass those state laws and entangles courts in religious matters such as how a denomination is religiously structured. AAC is particularly concerned that misapplication or abandonment of neutral principles will have a significant chilling effect upon the ability of individual congregations – not only within the Anglican tradition but across a broad range of denominations – to acquire, maintain, and develop property, to use that property to carry out their important religious and charitable missions, and to affiliate with denominational entities on clear and unshifting terms and conditions.

The Presbyterian Lay Committee ("PLC") established in 1965, 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 (U.S.A.). The PLC is composed of Presbyterian church members who are concerned with the integrity of the denomination's theology, polity and stewardship. The PLC regularly reports on judicial decisions concerning church property issues and publishes a legal guide regarding church property matters. 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. As an entity that helps equip lay leaders and clergy in maintaining the integrity of the PC(USA)'s expression of Presbyterianism, the PLC has a strong interest in this matter.

CapinCrouse LLP is a certified public accounting firm devoted to serving not-for-profit entities nationally, with 11 offices, 16 partners, and more than 100 associates. The firm serves more than 700 not-for-profit entities including associations, community organizations, foundations, more than 200 churches and denominations, 100 international organizations, and 55 colleges, universities and seminaries. Firm offices are located in Atlanta, Chicago, Colorado Springs, Columbia, Dallas, Denver, Indianapolis, Los Angeles, New York City, Orlando, and San Diego. CapinCrouse LLP joins this brief because the petition raises concerns that relate to hundreds of churches and

church denominations that the firm serves. In particular, CapinCrouse LLP is significantly concerned about the implications to ownership of assets under the reasoning of the Connecticut Supreme Court's decision in this case. Such court decisions generate uncertainty for churches and their financial position in reporting, and also for any audited financial statement or disclosure by such churches.

Christ Church, Plano, Texas is an Anglican church that began in 1985 and has grown to serve an average of 2000 worshippers per week. Christ Church severed ties with TEC in September 2006 and is a member of ACNA. Christ Church empathizes with those churches that continue to be mired in the uncertainty of ownership of the very buildings and land that their parishioners acquired with their own funds. Moreover, Christ Church seeks to provide leadership and counsel to Anglican parishes to assist them in their efforts to grow and develop their ministries. The requested clarification from the Court would help Christ Church better advise these churches and focus on their ministerial mission without being distracted by issues of uncertain property ownership.

Christ Church of Atlanta, Atlanta, Georgia has recently become a member of ACNA. Christ Church was formed in 1998 as an independent, de novo congregation. It has never received any financial support from ACNA or any other church body, and its worship services have been held in rented facilities since its inception. Christ Church established a

building fund in 2002. Parishioners have contributed more than $1.7 million to the fund and have made pledges totaling several times that amount pending the identification of a suitable site. Although ACNA's current national and diocesan canons state that it will not claim an interest in congregational property, the current state of church property jurisprudence has a chilling effect on Christ Church's continued fundraising ability because an after-enacted canon asserting a trust in favor of ACNA might be enforced by a civil court.

Moorpark Presbyterian Church, Moorpark, California ("MPC"), is part of the Presbyterian Church (U.S.A.). While title to its property is held by the higher body, many of the funds that have built the buildings and the ministry of this congregation have been donated by its members. The local synod of which MPC is a member has been torn by litigation that is both costly and acrimonious. The uncertainty in the legal situation creates hesitancy for capital campaigns and some MPC members are reluctant to donate even to the operating budget of the congregation. Doubts about church property status has hampered MPC's ability to express its beliefs and serve those who most need the church's ministrations.

Servants of Christ Anglican Church, Gainesville, Florida is a parish established in 2006. Servants of Christ is a member of ACNA, Gulf Atlantic Diocese. At the time of founding, the church was made up entirely of members and clergy of St. Michael's Episcopal Church of the Episcopal Diocese of Florida,

which was established in 1960. Despite representing 95 percent of the congregation, the church members chose to walk away from the buildings and property and bank account they had funded because they felt that legal engagement would detract from the tangible ministries they provide to their city. The church has since been meeting in rented space one mile from their former location. The buildings are now used by the Diocese, although only a very small number of individuals attend services at the location. The Episcopal Diocese of Florida is currently attempting to sell the property to Walgreens Corporation (as reported in the *Gainesville Sun*) rather than to the members of Servants of Christ who contributed to build and maintain it over many years.

St. Charles Anglican Church, Poulsbo, Washington and *St. Stephen's Anglican Church, Oak Harbor, Washington* withdrew from TEC in 2004, placing themselves under the authority of the Anglican Diocese of Recife, Brazil. Under the North American realignment of Anglicanism, they became founding members of the Anglican Diocese of Cascadia in June 2009. Both churches continue to exercise full use of their property because of a ten-year agreement with the Episcopal Diocese of Olympia, which is set to expire in 2014. Although the Episcopal Diocese granted both churches quitclaim deeds to their properties, and they have maintained and improved their properties at great cost and effort, they expect that the Diocese will commence litigious action upon termination of the agreements. If this happens, neutral

principles of law may well govern the outcome; therefore, St. Charles and St. Stephen's desire that these principles be clarified by this Court to avoid the ongoing confusion caused by their misapplication.

The Church of the Holy Trinity, North Augusta, South Carolina, is presently affiliated with ACNA and its constituent Anglican Diocese of the South. The original members of Holy Trinity came out of St. John's Episcopal Church, North Augusta where they held record title to the church's property. As a matter of religious conscience, the clergy, vestry and congregation could not follow the Episcopal Church in its theological shift away from the historic Faith upon which the church had rested. In forming Holy Trinity, the members of St. John's chose to leave their property and parish bank accounts rather than engage in litigation that would have interfered with the mission and ministry of the local church fellowship. As a result, St. John's property and other assets were taken over and disposed of by the Episcopal Diocese. Holy Trinity has a strong interest in seeing the Court resolve the laws about church property ownership so that other church congregations do not experience property issues that are difficult and detrimental to their mission and ministry to each other and the community around them.

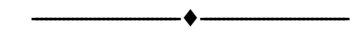
These *amici* represent a diverse array of religious organizations and congregations. Some are currently affiliated with a mainline denomination such as TEC, while others recently changed their affiliation. Some are currently defending their properties in

court against suits brought by their former denomination, while others fear litigation in the future.

Some have walked away from their properties that generations of their members sacrificially gave to acquire and construct so they would not be diverted from their core religious mission by expensive and protracted litigation. They have watched while the remaining congregants have dwindled in number or seen their church properties sold by their former denomination to for-profit corporations. Other *amici* have successfully retained their properties after a change of denominational affiliation, but have done so by repurchasing property they already own or are concerned that they might need to do so if litigation commences.

Despite their diversity, *amici* are united in their concern over the uncertainty generated by the lower courts' decisions in this area. In the absence of clear guidance, religious institutions must make decisions about their most important temporal and spiritual assets – their church buildings and sanctuaries – unable to predict how a court will ultimately rule. And as this Court has recognized, the "[f]ear of potential liability" has an unfortunate chilling effect on "the way an organization carrie[s] out . . . its religious mission." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987).

Amici respectfully request that the Court grant certiorari to address this uncertainty.



SUMMARY OF ARGUMENT

Thirty-three years have passed since this honorable Court addressed the complex and competing constitutional issues inherent in church property disputes. *Jones v. Wolf*, 443 U.S. 595 (1979), commended the use of "neutral principles of law" (i.e., the same indicia of ownership used in secular property disputes) to resolve such disputes, because this method would be familiar to civil courts, produce predictable outcomes, operate in a "completely secular" way, and avoid the constitutional problems of establishment and entanglement.

Since *Jones*, however, the state of church property jurisprudence has deteriorated to the point where many, if not most, states now resolve church property disputes in a way that bears little resemblance to the straightforward and neutral manner this Court had envisioned in *Jones*. In practicality, these deviations violate the Establishment Clause.

Most of the confusion and error stems from state courts (and sometimes legislatures) interpreting certain *dicta* in *Jones* as authorizing select denominations to self-create trusts in their own favor with respect to property owned by affiliated, but separately incorporated, local churches. Principally, these self-created trusts have taken the form of provisions inserted in the denomination's governing documents (e.g., Constitution and Canons, Book of Order, etc.) by the denomination itself, often without notice to or consent by affected affiliates, and often decades after

local churches have acquired land and buildings in their own name and with their own funds.

In most cases, these provisions lie dormant until a local church chooses to withdraw from the denomination (usually a lateral transfer from one brand of Anglicanism, Presbyterianism, etc., to another), at which point the denomination springs its self-created "trust" on the unsuspecting congregation and files suit. All too frequently, despite the fact that the local church is a separate legal entity holding clear record title to its property, the state courts enforce the denominational "trust rule" – *even where state law would not permit a secular beneficiary to self-create a trust in such a manner* – believing that this Court's decision in *Jones* authorizes, if not compels, that result.

The danger of constitutional infirmity in misreading *Jones* and implementing "neutral principles of law" in name only is manifest. Instead of a method of resolution that is "completely secular in operation" (*Jones*, 443 U.S. at 603), the perversion of neutral principles now operating in many states in fact does the opposite – it establishes certain religious denominations by granting them a special power not granted to secular voluntary associations, non-religious organizations, or other religious groups not deemed "hierarchical" or "denominational" enough by a state court judge. This unique and breathtaking power – to create a trust in another person's property simply by the enactment of an internal rule or canon – is not shared by any secular organization and tramples the

property and free exercise rights of the affiliated (or formerly-affiliated) religious organization whose property the denomination seeks once a dispute arises.

Unlike exempting religious bodies from certain laws (such as anti-discrimination statutes or income tax), which is consistent with the First Amendment's protection of religious freedom, no constitutional basis exists to give religious bodies (and only certain ones, at that) a *special* power in derogation of the ordinary principles of property ownership and trust law.

While the totality of *Jones* is clear that this Court intended no such thing, the out-of-context reference in *dicta* that "the constitution of the general church can be made to recite an express trust in favor of the denominational church" (*Jones*, 443 U.S. at 606) has overwhelmed and obscured the central point of *Jones* – that *neutral* (i.e., non-religious) principles of law should be used to adjudicate church property disputes. Since non-religious organizations have no right to create trusts in property owned by other entities simply by amending the organization's governing charter, religious organizations should have no such right either.

Certiorari is warranted to address the states' misapplication of *Jones* and the resulting conflicting decisions, and to confirm that any rule of decision or statute that grants special powers to religious denominations to self-create trusts violates the

Establishment Clause. Denominations and local churches need relief from the legal uncertainty caused by conflicting state approaches to *Jones* as they seek to fulfill their religious missions and structure their affairs, raise donations, and acquire, mortgage or sell property.

ARGUMENT

I. Thirty-Three Years Ago, This Court Urged That Church Property Disputes Be Decided Using the Legal Principles "Developed For Use in All Property Disputes."

Although the holding of *Jones* was that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute" (*Jones*, 443 U.S. at 605), this Court clearly emphasized its preference for the use of the neutral principles method over other rules of decision. The *Jones* decision praised neutral principles as "completely secular in operation," "flexible," and "objective." *Id.* at 603.

Most of all, however, this Court's praise of neutral principles was constitutionally based. *Jones* recognized that other rules of decision inherently tend toward establishing denominations by deferring to their own resolution of the dispute in which they are the claimant. Also, other methods entangle civil courts with religious matters by directing them to look for the locus of authority within the

denomination, the nature of church governance, or to interpret religious documents such as spiritual rules or canons, or both. *See Jones*, 443 U.S. at 605 (other rules of decision would require courts "to examine the polity and administration of a church to determine which unit of government has ultimate control over church property" and/or engage in a "careful examination of the constitutions of the general and local church, as well as other relevant documents"). These methods would "require 'a searching and therefore impermissible inquiry into church polity.'" *Id.*, *quoting Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).

On the other hand, "inherent in the neutral-principles approach" is the "promise of nonentanglement and neutrality" because "[t]he neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity." *Jones*, 443 U.S. at 604-605. By resolving church property disputes using the same well-established indicia of ownership familiar to lawyers and judges – deeds and other *secular* written documents like declarations of trust – establishment and entanglement are avoided, the parties have more certainty about their temporal affairs should a dispute arise in the future, and as far as property is concerned, religious organizations and entities stand in precisely the same position as secular parties.

II. Although the Neutral Principles Approach Has Been Adopted in Name, Many States Have Converted It Into Its Functional Opposite: A Rule of Deference to Denominational Rules or Canons.

At least twenty-one states adopted the neutral principles of law method for resolving church property disputes in the wake of *Jones*. 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 cases). In practice, however, the courts of many of these states have seized on one line of *dicta* in *Jones* in a way that fundamentally morphs the preferred neutral principles method into denominational deference: "Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church." *Jones*, 443 U.S. at 606.

These state courts have interpreted this language in *Jones* to mean that if a plaintiff denomination has a provision in its own constitution or rulebook purporting to create a trust in its favor in the property of affiliated churches, that provision must be enforced as a federal constitutional mandate *regardless* of whether that internal rule complies with neutral principles of state property and trust law.

For example, in the case below, the Connecticut Supreme Court purported to adopt neutral principles of law as the rule of decision: "Having considered

these differences, we conclude that the neutral principles of law approach is preferable because it provides the parties with a more level playing field, and the outcome in any given case is not preordained in favor of the general church, as happens in practice under the hierarchical approach." *Episcopal Church in the Diocese of Conn. v. Gauss*, 302 Conn. 408, 429 (2011). However, despite the fact that the deeds were in the name of the local church and there was absolutely no evidence that the local church had ever settled an express trust in plaintiffs' favor (*id.* at 433), the state court treated the Episcopal Church's "trust canon" as dispositive, citing the language in *Jones* that "the constitution of the general church can be made to recite an express trust in favor of the denominational church." *Id.* at 434. The ultimate ruling that "the Dennis Canon[1] applies to defeat claims of ownership and control over parish property . . . even in cases in which record title to the property has been held in the name of the parish since before enactment of the provision," *id.* at 438, is simply impossible to square with a *true* application of neutral principles of law.

Similarly, in *Episcopal Diocese of Rochester v. Harnish*, 11 N.Y.3d 340 (2008), the New York court

[1] "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which Parish, Mission or Congregation is located." Constitution and Canons of the Episcopal Church, Title I, Canon 7, Section 4 (purportedly adopted 1979).

claimed to have "adopted the neutral principles of law approach to church property disputes set forth by the United States Supreme Court in *Jones*." *Id.* at 5. However, it too proceeded to enforce the Episcopal Church's "Dennis Canon," finding it "dispositive" against all other indicia of ownership. *Harnish*, 11 N.Y.3d at 351. The *Harnish* court did so despite the undisputed evidence, under *neutral* principles of state law, that the local church and the local church *alone* held record title to its property, and the absence of any express written declaration by the local church to hold its property in trust.

Likewise, in *Episcopal Church Cases*, 45 Cal. 4th 467 (2009), the Supreme Court of California claimed to apply neutral principles of law. "[T]o the extent the court can resolve the property dispute without reference to church doctrine, it should use what the United States Supreme Court has called the 'neutral principles of law' approach." *Id.* at 473. But in actuality the court disregarded longstanding, neutral principles of state property and trust law by interpreting *Jones* as requiring enforcement of the so-called Dennis Canon: "Thus, the high court's discussion in *Jones* . . . together with the Episcopal Church's adoption of Canon I.7.4 in response,[2] strongly supports

[2] *Episcopal Church Cases* was decided on appeal from a demurrer granted in favor of the local church, and therefore the California Supreme Court did not have a full factual record before it. Under this procedural posture, the court was required to accept as true the well-pleaded allegations of the Episcopal Church, including that it had adopted the Dennis Canon and

(Continued on following page)

the conclusion that, once defendants left the general church, the property reverted to the general church." *Id.* at 487. As the dissent in *Episcopal Church Cases* recognized, the enforcement of denominational trust canons in derogation of the local church's record ownership is *not* consistent with neutral principles of property and trust law, because the same result would not obtain were secular actors involved:

> 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. [citations omitted] If a neutral principle of law approach were applied here, the Episcopal Church might well lose because the 1950 deed to the disputed property is in the name of St. James Parish, and the Episcopal Church's 1979 declaration that the parish was holding the property in trust for the Episcopal Church is of no legal consequence.

Episcopal Church Cases, 45 Cal. 4th at 495 (Kennard, J., dissenting).

Georgia is yet another state that purports to use neutral principles of law, but permits denominational rules to create trusts that override deeds and other secular proof of ownership. In *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of*

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that a statute – California Corporations Code section 9142(c) – applied to the dispute.

Episcopal Diocese of Georgia, *Inc.*, 290 Ga. 95 (2011), the state court read *Jones* as fully empowering denominations to self-create trusts:

> Thus, while local churches may modify their deeds, amend their charters, or draft separate legally recognized documents to establish an express trust as set forth in [state statutes], that is not the only way the parties can ensure that local church property will be held in trust for the benefit of the general church. *Jones v. Wolf* said that it may also be done through the general church's governing law, for example, by making it "recite an express trust."

Christ Church, 290 Ga. at 102, *citing Jones*, 443 U.S. at 606.

This is a very narrow reading of one line of *dicta* from *Jones* which disregards the rest of the paragraph that the "parties" (plural) can arrange property rights in advance of a dispute as long as their understanding is in *legally* cognizable form. *Jones*, 443 U.S. at 606. "Legally cognizable form" must mean neutral state laws, or this language would be superfluous. Yet, in the cases above, and many others catalogued in numerous law review articles and petitions to this Court, many state courts that want to give preference to certain religious denominations read *Jones* as mandating that church rules be given *paramount* effect – even if most or all other "neutral principles" in play (e.g., deeds, absence of trust documents, state statutes vesting full title in the record owner, etc.)

break for the local church. The upshot of these states' interpretation and application of *Jones* is that despite their adoption of the neutral principles of law approach in name, the rule of decision has become adulterated in such a way that it functionally operates in the *very same manner* as the "rule of automatic deference" that this honorable Court disclaimed and disapproved in *Jones*.

As discussed in the petition, other state courts that read *Jones* in its broader context, and want to give both the local church and the denomination a fair and neutral playing ground for the resolution of property disputes, interpret the decision as a mandate for the application of neutral principles of state law, with a resort to church documents (and the attendant risks of trial court judges entangling themselves in them) only as a last resort, if at all.

Only this Court can sort out the confusion and set a clear constitutional path for the resolution of church property disputes.

III. The Neutral Principles Method, As Corrupted By Some State Courts' Misinterpretation of *Dicta* in *Jones*, Now Violates the Establishment Clause.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., Amend I. This is, literally, America's first freedom – the first words of the Bill of Rights. Establishment, as this Court has held for

decades, means more than the actual creation of a state-approved or state-funded church. Establishment occurs when civil government provides a religious organization with a power over others that a non-religious entity would not also have.

In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), this Court invalidated a Massachusetts statute giving churches and schools – *but only churches and schools* – an absolute veto over liquor licenses applied for within 500 feet of their premises. *Larkin*, 459 at 117, *quoting* Mass. Gen. Laws, ch. 138, sec. 16(c) ("[p]remises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto").

> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith.

Larkin, 459 U.S. at 125.

The misinterpretation of *Jones* that has occurred over the past thirty-three years, and the consequent morphing of neutral principles back into the "rule of deference," presents the same constitutional violation. When states, either through case law or statute,

confer on religious denominations or associations the power to create trusts in their own favor over property they do not own, through methods that have no precedent in the civil law dating back centuries, and that would not be effective if used by secular entities, those states have "established" those religious organizations in violation of the First Amendment.

The conferral of such unilateral authority is not necessary to protect the free exercise rights of the religious denominations in question. They could create trusts (or require affiliating congregations to create them) in a manner consistent with civil law – i.e., by getting the actual owner of the property to retitle property in the name of the denomination or sign an express written declaration of trust. Such a transfer of ownership could be a condition for affiliation. Some denominations, in fact, do so. The use of such "pure" neutral principles of law actually accommodates a much broader range of religious choices than a so-called neutral principles approach that, through preferential statutes and judicial deference to denominational rules, tilts the balance decidedly toward often-disputed assertions of so-called "hierarchical" structure or authority. *Cf.* K. Greenawalt, *Hands Off! Civil Court Involvement In Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1851 (1998) (noting that the deference-to-hierarchy approach "effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals").

A "pure" neutral principles approach is also more consistent with this Court's recent religion clause jurisprudence. The hallmark in current Free Exercise doctrine is "valid and neutral laws of general applicability." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (*quoting United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). One of the standards under the Establishment Clause is non-preferentialism. *See,* e.g., *Rosenberger v. Rector*, 515 U.S. 819, 880 (1995) (Thomas, J., concurring) ("the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others"). Although this Court in *Jones* did not explicitly derive its neutral principles of law method "from standard free exercise and establishment tests," Greenawalt, *supra*, at 1845, the resemblance is clear, and appropriate.

IV. The Uncertainty Caused By Differing State Court Interpretations of *Jones* Has Impinged Upon Religious Freedom.

Since *Jones* was decided thirty-three years ago, mainstream denominational churches in the United States and affiliated religious congregations have undergone historic shifts of membership and theology. No longer are religious affiliations based principally on geography and history, but with the recent advent of rapid global communications, new international alignments and religious communities are forming based on common interests and beliefs. Non-denominational churches have exploded in recent

years as membership in mainstream denominational churches has waned. As these new flexible church structures have quickly developed, the law governing church property disputes has not.

For decades, local churches considering an alignment with a general church or denomination, or contemplating realignment with a new structure, have assumed – often incorrectly – that they could structure their affairs and plan for their future with the understanding that neutral principles of state law would apply to any property dispute. But recent and differing church property opinions from the supreme courts of numerous states have crystallized the brewing conflict. Denominations, local churches, attorneys and trial courts are now uncertain about the legal status of local church property. Indeed, similarly situated local churches in two different states, both affiliated with the same denomination, may have completely different outcomes in a property dispute based on how their supreme courts have interpreted or will interpret *Jones*. At risk are properties owned by thousands of local churches throughout the country.

Even local churches with clear record title, quitclaim deeds in their favor, and church rules which are silent about church property at the time of affiliation, are now at risk of losing the property they now think they own and whose members sacrificially gave to build. Unrecorded property interests also adversely affect balance sheets, insurance, capital funding and fundraising. These risks are based not on

congregational decisions and votes, record title, or on any voluntary conveyance of their property, but simply on the quiet passage of internal rules by denominations to which local churches have never expressly consented. Such uncertainty oppressively burdens the ability of local churches to raise funds, grow, expand, and nurture generations of families in their religious traditions. As the *amici* demonstrate, this situation is intolerable for churches and religious institutions that are attempting to structure their affairs, raise donations, acquire, mortgage or sell property, and so forth.

CONCLUSION

The numerous petitions for certiorari filed in this Court in the past few years, arising from different faith groups, evidences the need for this Court to provide clarity and certainty to the law of church property. In an era of religious diversity and worldwide realignments of congregations and religious groups, the time is ripe for this Court to clarify *Jones*, and particularly whether states must (or indeed can) find an enforceable trust in favor of a religious denomination based solely on that denomination's own self-serving adoption of a "trust rule" or "trust canon," when such would not suffice to bestow any interest on a secular, non-religious entity.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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