No. _____

In The
Supreme Court of the United States

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA, *et al.*,

Petitioners,

v.

THE EPISCOPAL CHURCH, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that courts may resolve church property disputes between religious organizations by applying "neutral principles of law, developed for use in all property disputes." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). The Court has further held that the neutral-principles approach embodied in the First Amendment "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

The high courts of seven States, plus the Eighth Circuit, faithfully follow the neutral-principles approach, resolving church property disputes by applying the same ordinary, well-established rules of state trust and property law that apply in all other property disputes. These jurisdictions recognize a trust in favor of a national church over the local church only if the alleged trust satisfies the requirements under state law for forming a trust. But the high courts of eight other States, including the Supreme Court of South Carolina in this case, believe that the neutral-principles approach and the First Amendment require them to recognize a trust in favor of a national church even if the alleged trust does not satisfy the rules for forming a trust that state law would require in any other context.

The question presented is:

Whether the "neutral principles of law" approach to resolving church property disputes requires courts to recognize a trust on church property even if the alleged trust does not comply with the State's ordinary trust and property law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1. The following parties were plaintiffs-respondents below and are petitioners in this Court: The Protestant Episcopal Church In The Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Church of the Cross, Inc. and Church of the Cross Declaration of Trust; Church of the Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Bartholomews Episcopal Church; St. Davids Church; St. James' Church, James Island, S.C.; St. Paul's Episcopal Church of Bennettsville, Inc.; The Church of St. Luke and St. Paul, Radcliffeboro; The Church Of Our Saviour Of The Diocese of South Carolina; The Church of the Epiphany (Episcopal); The Church Of The Good Shepherd, Charleston, S.C.; The Church of The Holy Cross; The Church Of The Resurrection, Surfside; The Protestant Episcopal Church Of The Parish of Saint Philip, In Charleston, In the State of South Carolina; The Protestant Episcopal Church, The Parish of Saint Michael, In Charleston, In The State of South Carolina and St. Michael's Church Declaration of

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

Trust; The Vestry and Church Wardens of St. Jude's Church of Walterboro; The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens Of The Episcopal Church Of The Parish of St. Matthew, Fort Motte; The Vestry and Wardens of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church, Edisto Island; Trinity Episcopal Church, Pinopolis; Vestry and Church-Wardens of The Episcopal Church Of The Parish of Christ Church; Vestry and Church-Wardens Of The Episcopal Church Of The Parish Of St. John's, Charleston County; and The Vestries and Churchwardens of the Parish of St. Andrews.

2. The following parties were plaintiffs-respondents below but are not petitioners in this Court: Christ the King, Waccamaw; St. Matthews Church, Darlington; St. Andrews Church–Mt. Pleasant and The St. Andrews Church–Mt. Pleasant Land Trust; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Conway; and The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah.

3. The following parties were defendants-appellants below and are respondents in this Court: The Episcopal Church (a/k/a The

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

Protestant Episcopal Church in the United States of America), and The Episcopal Church in South Carolina.

No parent or publicly held company owns 10% or more of any Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

When a schism occurs within a religious denomination between a national church and an affiliated local diocese or congregation, secular courts must often determine which organization owns the property where the local church worships. This Court has long held that courts may resolve these church property disputes the same way they resolve garden-variety property disputes between secular institutions or, for that matter, between a religious and a secular institution: by applying "neutral principles of law, developed for use in all property disputes." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("*Blue Hull*"). This Court has held that the neutral-principles approach "is completely secular in operation" and "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

Nearly 40 years after this Court last addressed the neutral-principles approach in *Jones*, the courts are deeply divided about what "neutral" means. For many courts, "neutral" means just that—"neutral": the high courts of seven States, plus the Eighth Circuit and three intermediate state courts, follow *Jones*' clear guidance and resolve property disputes between religious organizations by applying well-established state trust and property law. These jurisdictions hold that a disassociating local church's property is held in trust for the national church only if the alleged trust satisfies ordinary state law requirements for the creation of

trusts. Courts and commentators call this the "strict approach" to *Jones*, because it blinds judges to the religious nature of the parties to the dispute, requiring them to apply the same ordinary state law that would apply to property disputes between any other parties.

For other courts, however, the neutral-principles approach "is not really 'neutral' after all." App.61a (Kittredge, J., concurring in part and dissenting in part). The high courts of eight States, including the Supreme Court of South Carolina here, believe *Jones* requires courts to recognize a trust in favor of a national church even if the national church has not complied with "the specific legal requirements in each jurisdiction where the church property is located." App.28a n.11 (lead opinion of Pleicones, A.J.). These courts believe that requiring a national church to comply with ordinary state law "would impose a constitutionally impermissible burden on the National Church and violate the First Amendment." App.42a (Hearn, J., concurring). Liberating national churches from the constraints of state law, these courts place a dispositive thumb on the scale in favor of national church denominations. This is called the "hybrid approach" to *Jones*, because it eschews application of ordinary state law in favor of deference to the national church's unilateral rules and canons.

The Supreme Court of South Carolina's highly fractured decision below typifies the courts' yawning division over the neutral-principles approach. Petitioners have disassociated from the national Episcopal Church. The parish properties at issue here are titled

in the names of Petitioners, not the national church. Under ordinary principles of South Carolina trust law, in the strong words of Justice Kittredge below, "the suggestion that *any* of the thirty-six local churches created a trust in favor of the national church would be laughable." App.61a. Nevertheless, the court below, in a 3-2 decision, held that a trust could exist in favor of Respondents because the national church has promulgated the "Dennis Canon," a unilateral ecclesiastical declaration that all parishes affiliated with the Episcopal Church hold their property in trust for the national church. Although neither the Dennis Canon nor any parish's alleged accession to that Canon created a legally cognizable trust under South Carolina law, the court below thought *Jones* and the First Amendment required it to recognize a trust in favor of the national church.

Jones is clear: Because the neutral-principles approach demands application of ordinary state law, courts may give effect to property deeds or to trusts recited in the constitution of a general church only if the parties' intent "is embodied in some legally cognizable form." 443 U.S. at 606. Courts adopting the hybrid approach ignore *Jones*' unambiguous guidance because they believe that requiring national churches to comply with ordinary state trust law would violate the Free Exercise Clause. *E.g.*, App.42a (Hearn, J.). But *Jones* squarely rejected that argument, holding that "[t]he 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." 443 U.S. at 606.

Petitioners are here for one simple reason: they are churches. If this dispute arose between two secular organizations, or between a religious and a secular organization, the party standing in Petitioners' shoes would have prevailed. Thus, far from yielding to the First Amendment, the decision below actually violates it. The Religion Clauses command a "principle of neutrality" whereby "the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *McCreary Cty. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 875-76 (2005). The hybrid approach disregards this vital bulwark, favoring one religious organization over another by allowing a national church to disregard the requirements of state trust law at the expense of a disassociated congregation's claim to property. As two leading commentators recently emphasized, the strict approach to *Jones* is "the only approach consistent with the free exercise and nonentanglement principles of the Religion Clauses." Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 311 (2016).

The persistent confusion over the meaning of *Jones* and the neutral-principles approach has resulted in polar-opposite outcomes in materially indistinguishable cases, creating enormous—and enormously expensive—uncertainty for this country's religious institutions.

Case outcomes turn on courts' differing interpretations of *Jones* and the First Amendment, not on how the parties have arranged their affairs under state law. This case could have been easily resolved under ordinary state trust and property law. Instead, the parties and the property have been mired in litigation since 2013. Several years and millions of dollars later, Petitioners seek this Court's review.

This Court should grant the petition.[1]

OPINIONS BELOW

The Supreme Court of South Carolina's opinion, App.1a, is reported at 806 S.E.2d 82. Petitioners filed a timely rehearing petition, and a motion to recuse Justice Hearn, App.194a. The orders denying rehearing, App.189a, and denying as untimely the motion to recuse Justice Hearn, App.120a, are unpublished. The trial court's opinion, App.127a, is unpublished.

JURISDICTION

The Supreme Court of South Carolina filed its opinion on August 2, 2017, and denied a timely

[1] Another pending petition, challenging the unpublished decision of a Minnesota intermediate court adopting the strict approach to *Jones*, presents the same question as this petition. Petition for a Writ of Certiorari, *Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian Church*, No. 17-582, 2017 WL 4685352 (Oct. 16, 2017).

rehearing petition on November 17, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

A. Legal Background.

"[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Jones*, 443 U.S. at 602. "It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment." *Blue Hull*, 393 U.S. at 449. This Court has thus made clear 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 604.

Because the neutral-principles approach "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges," the approach is "completely secular in operation, and yet flexible enough to accommodate all forms of

religious organization and polity." *Id.* at 603. In this manner, "the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties." *Id.*

Despite *Jones*' clear guidance, some courts believe *Jones* requires States to confirm a trust in favor of a national church over a local church, even if the national church disregarded the state law requirements for the formation of trusts that apply in all other contexts. The division over the meaning of *Jones* centers on this passage from Justice Blackmun's majority opinion:

> 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*.

Id. at 606 (emphases added). Courts that adopt the "strict approach" to *Jones* interpret this passage as simply recognizing that executing a trust or amending a deed presents a minimal burden. But courts that

adopt the "hybrid approach" interpret this passage as implicitly holding that the First Amendment requires a lower burden for national churches to create a trust than state law requires for any other institution (secular or religious) to do so. *See infra* pp. 21-28.

B. Factual Background.

Petitioners are 29 parishes, the Protestant Episcopal Church in the Diocese of South Carolina ("the Diocese"), and the Trustees of the Protestant Episcopal Church in South Carolina ("the Trustees Corporation"). This case involves a dispute over property where Petitioners have long worshiped. Some of the parishes involved in this case are among the oldest in the nation and predate both the American Revolution and the formation, in 1789, of the Protestant Episcopal Church in the United States of America ("the national Episcopal Church"). App.151a-52a. For example, the Parish of Saint Philip dates to 1680, while the parishes of Christ Church and St. Helena date respectively to 1706 and 1712. App.151a. The parishes' graveyards provide the resting place for signers of the Declaration of Independence and the United States Constitution, Justices of the Supreme Court of the United States, a Vice President of the United States, and heroes of the Revolutionary War.

Everyone agrees that the parish property is "titled and held in [the] names" of Petitioners, and that "there is nothing in the deeds of their real property referencing any trust in favor of [the national Episcopal

Church]." App.171a; *see also* App.75a-76a, 80a. Moreover, "[t]he undisputed evidence is that all the real and personal property at issue was purchased, constructed, maintained and possessed exclusively by the Plaintiffs." App.175a. *See also* App.105a, 154a. The national Episcopal Church nevertheless claims Petitioners' property and argues that Petitioners hold the parish property in trust for the national church. This claim relies primarily on the fact that in 1979, the national church pronounced the "Dennis Canon," which states:

> 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 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 part of, and subject to this Church and its Constitution and Canons.

App.14a-15a.

The national Episcopal Church "chose not to place its Dennis Canon in its Constitution," perhaps because "[t]o do so would require that the proposed amendment be sent to all the Dioceses first to get their conventions to vote on the proposed amendment." App.173a. "Rather, [the national Episcopal Church] chose to pass it as a canon, which required a single vote at one Convention [of the national Episcopal Church]." *Id*. "To make matters more confusing, the denomination's

official commentary on the Dennis Canon suggested that it might have no legal force." McConnell, 58 ARIZ. L. REV. at 320. In 1987, the Diocese enacted its own version of the Dennis Canon stating that parishes hold their property in trust for the Diocese and the national Episcopal Church. App.15a.

The Diocese in 1841 had acceded to the Constitution and canons of the national Episcopal Church. App.7a, 135a. As the trial court found, "[n]one of the Plaintiff parish churches have ever been members of [the national Episcopal Church] or [Respondent the Episcopal Church in South Carolina]." App.148a. Respondents claim the parishes previously "'acceded,' in some form or another, either to the local or national version of the Dennis Canon." App.79a-80a. The Petitioner Trustees Corporation is a legislatively-chartered corporation that holds some trust property for uses of the Diocese. App.146a-47a. As the trial court also found, "[t]he Trustees Corporation is not now, nor has it ever been, a member of either the Diocese or [the national Episcopal Church]." App.147a. "In 1982, the Trustees Corporation's bylaws stated that its duties would be carried out under the authority of the 'Constitution and Canons of The Episcopal Church and of the Diocese of South Carolina.'" *Id.*

Petitioners eventually severed their relationships with the national Episcopal Church. Between 2009 and 2011, the Diocese withdrew its accession to the Dennis Canon and other canons of the national Episcopal Church, rescinded its diocesan version of the Dennis Canon, and issued quitclaim deeds to the parishes disclaiming any interest in their property.

App.81a-82a, 139a-43a. In 2010, the Trustees Corporation amended its bylaws to remove their reference to the canons of the national Episcopal Church. App.81a, 147a-48a. Finally, in 2012 and 2013, the Diocese with the parishes formally disassociated from the national Episcopal Church, removing accession to the Constitution of the national Episcopal Church. App.82a-83a, 143a-45a, 151a.

C. Proceedings Below.

After Petitioners disassociated from the national Episcopal Church, they commenced this action in state court, requesting a declaration that they own the property where they have long worshiped.

1. The legal proceedings occurred against the backdrop of the Supreme Court of South Carolina's unanimous 2009 decision in *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 685 S.E.2d 163 (S.C. 2009), *cert. denied sub nom. Green v. Campbell*, 559 U.S. 1059 (2010). *All Saints* also involved a property dispute between the national Episcopal Church and a local congregation. *All Saints* followed the strict approach to *Jones*, holding that the congregation owned its property and rejecting the national church's argument that the Dennis Canon created a trust over the congregation's property. *Id.* at 174. The court held that the Dennis Canon "had no legal effect on the title to the congregation's property" because under South Carolina law, "a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another. . . ."

Id. at 173. *All Saints* is widely recognized as emblematic of the strict approach to *Jones*. *See*, *e.g.*, McConnell, 58 ARIZ. L. REV. at 326.

2. The trial court in this case applied *Jones*' "neutral principles of law" approach and granted judgment for all plaintiffs. The trial court explained that the circumstances of this case are "most akin to those in *All Saints*," App.175a, and it agreed with Petitioners that under a proper reading of *Jones* and upon application of ordinary principles of South Carolina law, the Dennis Canon did not create a trust in the parish properties because the national church did not hold title to the property in which it purported to create a trust, App.172a-75a. With respect to property titled in the name of the Diocese or held in trust by the Trustees Corporation, the trial court concluded that the Dennis Canon could not possibly create a trust over those properties because that Canon is not addressed to property owned by a diocese or its trustees, App.159a, 170a, and that the national church cannot otherwise claim an interest in property titled in the Diocese or Trustees Corporation because those entities severed their relationships with the national church in a manner that complies with South Carolina law, App.169a, 170a.

3. The Supreme Court of South Carolina reversed in part and affirmed in part. All five justices wrote separately.

Acting Justice Pleicones wrote what the Court referred to as its "lead opinion." This opinion, in which Justice Hearn concurred in full, argued that because the Episcopal Church is hierarchical and the property dispute grew out of a doctrinal dispute between the parties, the court must defer to the national church's unilateral decree that it owns all the disputed property, even under the neutral-principles approach. App.11a-13a, 26a-28a. Acting Justice Pleicones acknowledged that Petitioners amended their corporate documents and disassociated from the national church against the backdrop of *All Saints*, App.24a-25a, but he said he would "overrule *All Saints* to the extent it holds that [the national Episcopal Church's] Dennis Canon and the [Diocesan] version of that Canon were ineffective in creating a trust over the property at issue here, and to the extent the opinion distorts the correct understanding of the neutral principles of law approach. . . ." App.10a. He acknowledged that *Jones* requires church trust documents to be embodied in "some legally cognizable form," *Jones*, 443 U.S. at 606, but he concluded that "*Jones* does not require that these 'cognizable forms' be created in a way that satisfies the specific legal requirements in each jurisdiction where the church property is located," App.28a n.11; *see also* App.17a-18a.

Justice Hearn, in an opinion joined in full by Acting Justice Pleicones, agreed that the national church was entitled to all the plaintiffs' property, regardless of whether the Dennis Canon created a trust under ordinary principles of state law. Justice Hearn argued that

even under the neutral-principles framework, courts must "refrain from wading into matters of internal organization, or ecclesiastical rule, custom or law," App.36a, and that because the Episcopal Church is hierarchical and the property dispute originated in a doctrinal dispute, the court had to defer to the national church's unilateral decree that it owns the properties, App.33a, 36a. Justice Hearn also concluded that even if deference were not required, the national church still prevailed under the hybrid approach to *Jones*. Justice Hearn "join[ed] the lead opinion in departing from *All Saints* to the extent it held that the Dennis Canon and subsequent acquiescence by individual parishes were insufficient to establish a trust in favor of the National Church." App.43a. She concluded that the Dennis Canon created a trust over every plaintiff parish's property regardless of whether that Canon satisfied the requirements of South Carolina trust law, arguing that to require the national church to comply with state law and "obtain a separate trust instrument from each of the thirty-six parishes would impose a constitutionally impermissible burden on the National Church and violate the First Amendment." App.42a.

Chief Justice Beatty wrote a brief separate opinion concluding that the Dennis Canon alone did not create a trust in the parish properties but that "the parishes' accession to the Dennis Canon" created a trust if the parishes "acceded in writing" to the Canon.

App.58a.[2] He stated that his decision "look[s] no further than our state's property and trust laws" to decide the case, App.56a, even though, as other Justices noted, the parishes' alleged accession to the Dennis Canon clearly did not suffice to create a trust under South Carolina law, App.61a, 101a. Although his opinion otherwise focused solely on the parish properties, Chief Justice Beatty added in a footnote that the Trustees Corporation holds one property, Camp St. Christopher, for "the welfare of the Protestant Episcopal Diocese of South Carolina," but that the disassociated diocese cannot claim to be that diocese. App.58a n.29.

Justice Kittredge concurred in part and dissented in part, concluding that the national church owns none of the plaintiffs' properties. Justice Kittridge argued that the national church's claim to own the parishes' properties via trust "turns the law of express trusts on its head," App.64a, and that under ordinary South Carolina law, "the suggestion that *any* of the thirty-six local churches created a trust in favor of the national church would be laughable," App.61a. He nevertheless agreed with the majority's adoption of the hybrid approach, concluding that the neutral-principles approach is "not really 'neutral,'" and that under *Jones*, "[t]he burden the law imposes on a religious organization in creating a trust is reduced." *Id.* He argued that *Jones* required the court to find the Dennis Canon established a trust over the properties of the parishes

[2] There was no dispute below that certain parishes did not accede in writing to the Dennis Canon. *See* App.54a n.27, 72a, 80a n.49. These parishes are not petitioners here.

that allegedly acceded to it in writing. App.64a.[3] But Justice Kittredge ultimately found that those parishes revoked this trust when they disassociated from the national church. App.66a-67a & n.35. His opinion did not cite, much less attempt to distinguish, *All Saints*. Justice Kittredge also criticized Justice Hearn's "unrelenting vilification of [the bishop of the disassociating diocese]." App.67a n.36.

Acting Justice Toal dissented from her colleagues' adoption of the hybrid approach to *Jones*. She argued that *Jones*' statement that a church's burden to create a trust was "minimal," *Jones*, 443 U.S. at 606, did not require courts to create special rules of trust law that apply only to church property disputes, but simply signified that "only minimal efforts" are required to comply with state trust law, App.98a. She concluded that neither the national church's promulgation of the Dennis Canon, nor any of the parishes' alleged accession to it, were sufficient to create a trust under South Carolina law. App.98a-101a, 105a. Justice Hearn and Acting Justice Pleicones' belief that the neutral-principles approach requires deference to the national church's unilateral declaration that it owns the disputed property, she argued, "essentially gut[s] the neutral principles approach" because if this garden-variety property dispute requires deference, "[u]nder their formulations, there will **never** be a civil law suit involving a church that can be resolved without reference to ecclesiastical doctrine, law, custom, or

[3] Petitioners contested that they acceded to the Dennis Canon.

administration." App.95a-96a. Emphasizing that "the effect of [the lead opinion's] holding is to reverse the result in *All Saints*," App.75a; *see also* App.102a, she lamented that the Court's "distinct departure from well-established South Carolina law and legal precedents . . . appears to be driven by a sole purpose: reaching a desired result in *this* case," App.75a.[4] Finally, Acting Justice Toal stated that the Trustees Corporation holds title to Camp St. Christopher for the benefit of the Petitioner Diocese because the Trustees Corporation validly amended its bylaws under South Carolina law to remove all references to the national church. App.112a.[5]

Petitioners filed a motion for reconsideration and a motion to recuse Justice Hearn, both of which were denied. App.120a, 189a. The motion to recuse was based principally on the fact that Justice Hearn's husband was involved in the underlying schism and was deposed in this case as a witness in support of the national Episcopal Church. App.200a-01a, 204a-05a, 217a. Although the recusal motion was denied as untimely, App.121a-22a, Justice Hearn did recuse herself from the vote on the rehearing petition, App.191a. Justice Kittredge "requested that a fifth justice be appointed to fill the absence created by Justice Hearn's

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[4] Acting Justice Toal asserted that the majority opinion she authored in *All Saints* "remain[s] good law," App.118a n.72, but she did not explain how the results in that case and this one could be reconciled.

[5] The decision below also addressed a dispute over the ownership of service marks, but that issue is not presented in this petition.

recusal so that a *full* Court could decide this matter of great importance." App.123a. The court denied his request, *id.*, and the rehearing petition was denied by an equally divided court, App.190a-91a.

REASONS FOR GRANTING THE PETITION

This case implicates a deep, acknowledged, and fully matured split both among and within the Nation's courts over the meaning of *Jones* and the neutral-principles approach. The high courts of seven States, plus the Eighth Circuit and three state intermediate courts, follow *Jones*' clear guidance, recognizing a national church's claim of title to local property only if the ordinary requirements of the State's property and trust law have been satisfied, as would be required with any secular organization. But the high courts of eight other States have transmogrified *Jones*' neutral-principles approach into something that "is not really 'neutral' after all." App.61a. The "hybrid approach" ignores *Jones*' statement that the neutral-principles approach is "completely secular in operation," 443 U.S. at 603, and holds instead that courts must recognize trusts announced in church canons, even if those alleged trusts do not satisfy the requirements of state law. Petitioners lost below, not because a trust requiring that result had been created under South Carolina trust law, but because the court below thought the First Amendment required it to apply what amounts to a federal common law of trusts that

supersedes state law and places a dispositive thumb on the scale in favor of the national Episcopal Church.

This result cannot be squared with *Jones* or this Court's broader First Amendment jurisprudence. *Jones* made clear that the Free Exercise Clause does not prohibit courts from resolving church property disputes by resort to neutral principles of state law. 443 U.S. at 606. Indeed, it is the hybrid approach, not the strict approach, that violates the Religion Clauses. The Free Exercise Clause prohibits States from "impos[ing] special disabilities" against religious bodies. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). But the hybrid approach does just that, making it more difficult for local congregations to retain their property than it is for any other organization, secular or religious, to do so. Meanwhile, the Establishment Clause prohibits government from favoring one religion over another. *McCreary Cty.*, 545 U.S. at 875-76. But the hybrid approach does that too, favoring national church organizations in their property disputes with disassociating local congregations by allowing national churches—and no one else—to skirt ordinary state law.

Once a local congregation legally disassociates from the national church over a doctrinal matter, it by definition no longer adheres completely to the national church's fundamental tenets. The law cannot then place a thumb on the scale in favor of a national church in its property dispute with a disassociating congregation any more than it can enact a presumption that the national Episcopal Church shall prevail in litigation

against the Roman Catholic Church or Ford Motor Company.

The division over the meaning of *Jones* is deep and intractable. Even the cavernous divide among states understates the extent of disagreement over *Jones*, for many of the state court decisions feature impassioned dissents contending that the majority has misapplied *Jones*. This massive inconsistency in the results of materially indistinguishable cases has visited enormous and expensive uncertainty upon this country's religious institutions. Worse still, by unmooring courts from the predictability of established state law, the hybrid approach "gives judges tremendous flexibility to reach almost any result—making the outcome unpredictable and largely dependent upon the predilections of the judges." McConnell, 58 ARIZ. L. REV. at 339 (quotation marks and brackets omitted). The need for clarity is more pressing now than ever, for this "time of intense theological ferment and division" has led to some of "the most widespread schisms in our nation's history." *Id.* at 321.

Four decades after *Jones*, the Nation's lower courts and religious institutions are in urgent need of this Court's guidance.

I. Courts Are Intractably Split over How To Apply *Jones*' Neutral-Principles Approach.

A. Eleven Jurisdictions Apply the Strict Approach to *Jones*.

The Eighth Circuit and the high courts of seven States—Alaska, Arkansas, Indiana, New Hampshire, Oregon, Pennsylvania, and Texas—have adopted the "strict approach" to *Jones*. Intermediate courts in Louisiana, Minnesota, and Missouri have likewise adopted this approach in decisions that the high courts of those states declined to review. Each of these jurisdictions holds that *Jones* requires courts to resolve property disputes between religious organizations the same way they resolve property disputes between secular institutions: by applying ordinary principles of state trust and property law. Accordingly, these courts recognize a trust claimed to vest title to local real property in a national church only if the alleged trust satisfies the established rules that state law requires to create a trust.

The Supreme Court of Texas' divided decision in *Masterson v. Diocese of Northwest Texas*, 422 S.W.3d 594 (Tex. 2013), *cert. denied*, 135 S. Ct. 435 (2014), exemplifies the strict approach. A parish disassociated from the national Episcopal Church and revoked any trusts that may have existed in favor of the national church. *Id.* at 598. Although the parish's real property was titled in its name, the national Episcopal Church claimed the Dennis Canon imposed an irrevocable trust in its favor. *Id.* at 610-11. The court acknowledged that the high courts of several other

States have held that "an express trust canon like [the Dennis Canon] precludes the disassociating majority of a local congregation from retaining local parish property after voting to disaffiliate from the Church." *Id.* at 611. But the court disagreed with that approach, holding that it would "not read *Jones* as purporting to establish substantive property and trust law that state courts must apply to church property disputes." *Id.* at 612. Instead, the court held that *Jones* instructs courts to "apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues." *Id.* at 606. *See also Episcopal Church of Fort Worth v. Episcopal Church*, 422 S.W.3d 646, 653 (Tex. 2013), *cert. denied*, 135 S. Ct. 435 (2014). Two justices dissented, arguing that the majority misapplied *Jones* by declining to give dispositive effect to the Dennis Canon. *Masterson*, 422 S.W.3d at 615, 618 (Lehrmann, J., dissenting).

The Supreme Court of Indiana has also faithfully followed *Jones*, albeit in a 3-2 decision. *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012), *cert. denied*, 569 U.S. 958 (2013). The majority acknowledged that "[s]ome state courts have apparently read *Jones* as an affirmative rule *requiring* the imposition of a trust whenever the denominational church organization enshrines such language in its constitution." *Id.* at 1106 n.7. But the court disagreed with that view, observing that the hybrid approach "result[s] in *de facto* compulsory deference"—which the *Jones* dissenters advocated but the majority rejected—

"by enforcing the claim of the denominational church organization merely because the trust claim is added to the denominational church organization's constitution and *regardless of any contrary evidence or state law*." *Id.* The Indiana court held that the relevant question under *Jones* is instead whether a trust "'is embodied in some legally cognizable form' under state law." *Id.* (quoting *Jones*, 443 U.S. at 606). Two justices dissented, agreeing with a lower court's holding that under *Jones*, a trust existed based on the national church's Dennis Canon-analogue. *Id.* at 1114 (Sullivan & Massa, JJ., dissenting); *see also Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 940 N.E.2d 1188, 1194-95 (Ind. Ct. App. 2010).

The Supreme Court of Arkansas adopted the strict approach in *Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, 40 S.W.3d 301 (Ark. 2001), *cert. denied*, 534 U.S. 945 (2001). A four-justice majority held that a national church's Dennis Canon-analogue did not establish a trust over the property of a disassociated congregation because the canon did not create a trust under ordinary principles of Arkansas law. *Id.* at 309. Three justices dissented, endorsing the hybrid approach and arguing the court "was *bound* to give effect to" the national church's Dennis Canon-analogue. *Id.* at 311 (Imber, J., dissenting).

The Eighth Circuit has also applied the strict approach to *Jones*, holding that language in a national church's constitution and charter purporting to establish a trust was "not dispositive" of the property dispute, and that its relevance would have to be judged

against ordinary principles of state law. *Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 526 (8th Cir. 1995).

The high courts of Oregon, Alaska, and Pennsylvania have similarly adopted the strict approach to *Jones*. Applying ordinary state law, these courts ultimately found in favor of the national church. But this result is perfectly consistent with the strict approach because under that approach, unlike under the hybrid approach, "the outcome of a church property dispute is not foreordained." *Jones*, 443 U.S. at 606. *See Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 291 P.3d 711, 722 (Or. 2012); *St. Paul Church, Inc. v. Board of Trustees of Alaska Missionary Conference of United Methodist Church, Inc.*, 145 P.3d 541, 553-54, 557 (Alaska 2006); *In re Church of St. James the Less*, 888 A.2d 795, 806 (Pa. 2005).

The high court of New Hampshire has also adopted the strict approach, *Berthiaume v. McCormack*, 891 A.2d 539, 547 (N.H. 2006); and so too has an unpublished intermediate court decision in Minnesota, *Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian Church, Inc.*, 2017 WL 1436050, at *7-8 (Minn. Ct. App. Apr. 24, 2017), *review denied* (Minn. 2017), *petition for cert. pending*, No. 17-582; and published intermediate court decisions in Missouri and Louisiana, *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 590 (Mo. Ct. App. 2012), *application for transfer denied* (Mo. 2012); *Carrollton Presbyterian Church v. Presbytery of S. La. of Presbyterian Church (USA)*, 77 So.3d 975, 981 (La. Ct. App.

2011), *writ denied*, 82 So.3d 285 (La. 2012), *cert. denied*, 568 U.S. 818 (2012).

B. Eight Jurisdictions Apply the Hybrid Approach to *Jones*.

The Supreme Court of South Carolina has joined the high courts of seven other States—California, Connecticut, Georgia, Kentucky, New York, Tennessee, and Virginia—that have adopted the "hybrid approach" to *Jones*. These courts believe that *Jones* instructs courts to resolve church property disputes by applying special rules of trust and property law that place a thumb on the scale of the national church, and that apply only to intra-denominational property disputes between a national church and a disassociating congregation.

The Supreme Court of Georgia has decided two companion cases that apply the hybrid approach to recognize trusts in favor of a national church even though those purported trusts did not comply with the ordinary requirements of state law. *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446 (Ga. 2011), *cert. denied*, 567 U.S. 916 (2012); *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237 (Ga. 2011), *cert. dismissed*, 566 U.S. 1007 (2012). *Christ Church*, a case involving the Episcopal Church and its Dennis Canon, held that "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." 718 S.E.2d at 245. The court held that "requiring strict compliance with [Georgia law] to find a trust under the neutral principles analysis would be inconsistent with the teaching of *Jones v. Wolf* that the burden on the general church and its local churches to provide which one will control local church property in the event of a dispute will be 'minimal.'" *Id.* at 244 (quoting *Jones*, 443 U.S. at 606). *See also Timberridge*, 719 S.E.2d at 452-54.

Both Georgia cases featured impassioned dissents. Judge Brown dissented in *Christ Church*, arguing that "[t]he majority's undisciplined analysis of neutral principles simply does not comport with the language or the spirit of *Jones*," and that the court violated the Establishment Clause through its "gift to the National Church to ignore *Jones* and various applicable Georgia laws regarding deeds." 718 S.E.2d at 284, 270. Three judges dissented in *Timberridge*, arguing that the majority's distortion of the neutral-principles approach "disregard[ed] a basic principle of trust law" to transfer title from congregation to denomination, 719 S.E.2d at 462 (Carley, P.J., dissenting), and effected a "startling cession of governmental power to a religious organization," *id.* at 465 (Benefield, J., dissenting) (citation omitted).

The Supreme Court of Tennessee recently adopted the hybrid approach and recognized a trust that did not comply with ordinary state law. *Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146 (Tenn. 2017). The court acknowledged that "massive inconsistency exists among states adopting the

neutral-principles approach, and courts have reached different results given the same facts, depending on how the court in question applies the [*Jones*] standard." *Id.* at 168 (quotation marks omitted). The court expressly adopted the hybrid approach, holding that "a civil court must enforce a trust in favor of the hierarchical church, even if the trust language appears only in the constitution or governing documents of the hierarchical religious organization," *id.* at 170, and "even if this language of trust . . . does not satisfy the formalities that the civil law normally requires to create a trust," *id.* at 168.

A divided Supreme Court of California adopted the hybrid approach in *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009), *cert. denied*, 558 U.S. 827 (2009). A local church that disassociated from the national Episcopal Church held record title to its property, but the California court nevertheless held that, under *Jones*, the Dennis Canon created a trust in favor of the national church. *Id.* at 79-80. The court thought *Jones* permitted national churches to create trusts "by whatever method the church structure contemplated," regardless of what state law requires. *Id.* at 80. The court held that "[r]equiring a particular method to change a church's constitution—such as requiring every parish in the country to ratify the change—*would* infringe on the free exercise rights of religious associations to govern themselves as they see fit." *Id.* Justice Kennard dissented from the court's interpretation of *Jones*. He argued that California law required the court to defer to the national church's recitation of a trust rather

than apply neutral principles, but that "[i]f a neutral principle of law approach were applied here, the Episcopal Church might well lose" because under ordinary California trust law, the Dennis Canon "is of no legal consequence." *Id.* at 86 (Kennard, J., concurring and dissenting).

The high courts of Connecticut, Kentucky, New York, and Virginia have likewise held that courts must recognize trusts recited in a national church's governing documents even if that trust does not comply with ordinary state law. *Episcopal Church in Diocese of Connecticut v. Gauss*, 28 A.3d 302, 325 (Conn. 2011), *cert. denied*, 567 U.S. 924 (2012); *Cumberland Presbytery of Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 422 (Ky. 1992); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 924-25 (N.Y. 2008); *Falls Church v. Protestant Episcopal Church in the United States*, 740 S.E.2d 530, 541 (Va. 2013), *cert. denied*, 134 S. Ct. 1513 (2014).

* * *

In sum, the courts of at least ten States and the Eighth Circuit have adopted the strict approach to *Jones*, and at least eight state courts of last resort have adopted the hybrid approach. The division exists not only among States but also within them, as exemplified by the deeply divided decisions just discussed, and now, with the decision below, by conflicting decisions within a single State's jurisprudence. This patchwork of conflicting decisions cannot be chalked up to federalism and the inconsistency from State to State in the

law of property and trusts. The conflict, rather, is over the meaning of *Jones*. The Court's review is therefore warranted.

II. The Decision Below Conflicts with this Court's Decisions and with the First Amendment.

The Supreme Court of South Carolina's decision adopting the hybrid approach misinterprets *Jones*, violates the Religion Clauses, and injects crippling and costly uncertainty into the property markets. This Court should grant review not simply to resolve the deep and irreconcilable conflict among the Nation's courts, but also to make clear that courts must not favor one religious organization over another and thus must apply *bona fide* neutral principles of state law to decide church property disputes.

A. The Decision Below Misinterprets *Jones*.

Jones held that the neutral-principles approach "is completely secular in operation" and "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones*, 443 U.S. at 603. That decision followed from this Court's earlier pronouncement that courts may resolve church property disputes by applying those "neutral principles of law, developed for use in all property disputes." *Blue Hull*, 393 U.S. at 449.

The Supreme Court of South Carolina ignored this seemingly clear guidance. Its decision, like other

decisions adopting the hybrid approach, disregards a State's "well-established concepts of trust and property law," *Jones*, 443 U.S. at 603, and applies instead a unique, specialized trust and property law that the court does *not* "use in all [other] property disputes," *Blue Hull*, 393 U.S. at 449. The court below resolved this property dispute by deferring to the national church's unilateral claim to Petitioners' properties, notwithstanding *Jones*' holding that the neutral-principles approach does not entail "defer[ence] to the resolution of an authoritative tribunal of the hierarchical church." 443 U.S. at 597.

Courts that adopt the hybrid approach rely heavily upon *Jones*' statement that a national church's constitution "can be made to recite an express trust in favor of the denominational church." *Id.* at 606. But that same passage makes clear that "civil courts will be bound to give effect to the result indicated by the parties" only if that intent "is embodied in some legally cognizable form." *Id.* In other words, an express trust recited in a church constitution has legal force only if it is legally cognizable "under state law." *Presbytery of Ohio Valley*, 973 N.E.2d at 1106 n.7. The hybrid approach renders superfluous *Jones*' requirement that trusts recited in a general church constitution must be "legally cognizable," for that approach holds that *all* trusts recited in church constitutions are *per se* legally cognizable.

Justice Rehnquist, a member of the *Jones* majority, made this point explicit only months after *Jones* was decided, explaining that *Jones* forecloses a

church's argument that it is "somehow entitled to different treatment than that accorded to other charitable trusts." *Synanon Found., Inc. v. California*, 444 U.S. 1307, 1308 (1979) (Rehnquist, Circuit Justice). Justice Rehnquist thus explicitly rejected the hybrid approach's premise that *Jones* requires courts to apply specialized trust rules to church property disputes.

Courts that adopt the hybrid approach also rely upon *Jones*' assurance that the "burden" involved in creating a trust to "give effect to the result indicated by the parties" will be "minimal." *Jones*, 443 U.S. at 606. These courts believe that *Jones*' use of the word "minimal" somehow implicitly requires courts to apply special rules of trust law that enable national churches, uniquely and unilaterally, to create trusts vesting in themselves ownership of real property titled in other parties. *See*, *e.g.*, App.42a (Hearn, J.); *In re Episcopal Church Cases*, 198 P.3d at 80. The passing reference to a "minimal" burden would have been a curiously opaque way for the Court to transform the law of church property disputes and mandate the creation of special rules that apply only to disputes between two religious bodies. *Cf. Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

By referring to a "minimal" burden, "the *Jones* Court was merely stating that only minimal efforts would be required on the part of national church organizations to bring their ownership interests within the ambit of state law." App.98a (Toal, A.J.). As Justice

Souter recently explained, *Jones* stands for the straightforward proposition that there are "options available to religious organizations *as readily as to their secular counterparts*," and that "contractual arrangements between the contending [religious] parties deserve *the same preference* as secular grounds for judgment." *Congregation Jeshuat Israel v. Congregation Shearith Israel*, 866 F.3d 53, 58 (1st Cir. 2017) (emphases added). *Jones* commands equal treatment of religious and non-religious institutions, not preferential treatment for one religious institution over another.

In any event, it verges on frivolous to argue that the supposed "burden" required to execute ordinary trust documents is so onerous that it amounts to a violation of the Free Exercise Clause. As a factual matter, "it requires only minimal effort to comply with South Carolina trust law." App.99a (Toal, A.J.). *See also Christ Church*, 718 S.E.2d at 270 (Brown, J., dissenting). And as a legal matter, if churches are not entitled to exemptions from neutral and generally applicable laws that burden their religious exercise, *Smith*, 494 U.S. at 879, it is hard to see how they are entitled to exemptions from laws that "burden" them in the sense of causing them the same minor inconvenience (through, say, having to hire lawyers to prepare standard trust agreements) that the law visits upon all other similarly situated parties.

The clearest proof that the hybrid approach misinterprets *Jones* is that it effectively adopts the *Jones* dissent. The dissenters in *Jones* would have required

"as a matter of constitutional law that whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself.'" *Jones*, 443 U.S. at 604-05 (quoting *id.* at 614 (Powell, J., dissenting)). The majority rejected this proposed rule of "compulsory deference," electing instead to permit courts to follow neutral principles that do not place a thumb on the scale of the national denomination. *Id.* at 604-06. But the hybrid approach "result[s] in *de facto* compulsory deference by enforcing the claim of the denominational church organization merely because the trust claim is added to the denominational church organization's constitution and *regardless of any contrary evidence or state law*." *Presbytery of Ohio Valley*, 973 N.E.2d at 1106 n.7.

B. The Decision Below Conflicts with this Court's Free Exercise and Establishment Clause Jurisprudence.

This Court's review is also needed because the Supreme Court of South Carolina's decision, like other decisions adopting the hybrid approach, violates both the Free Exercise and Establishment Clauses. The strict approach is "the only approach consistent with the free exercise and nonentanglement principles of the Religion Clauses." McConnell, 58 ARIZ. L. REV. at 311.

Courts that adopt the hybrid approach believe that requiring national denominations to comply with

a State's neutral and generally applicable trust and property law would impermissibly burden those churches' free exercise rights.[6] *See*, *e.g.*, App.42a (Hearn, J.); *Timberridge*, 719 S.E.2d at 453; *In re Episcopal Church Cases*, 198 P.3d at 80. But since *Jones* was decided, this Court has made clear that the Free Exercise Clause generally does not relieve religious bodies of the obligation to comply with valid, neutral laws of general applicability, even in the exercise of religious rites. *Smith*, 494 U.S. at 879. State trust and property laws are quintessential neutral rules of general applicability. And even if exemptions from generally applicable laws are warranted where a church faces sanction from the State, there is no warrant for granting unique exemptions for one religious body in a property dispute with another religious body. *Jones* already decided this point, holding that "[t]he 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." 443 U.S. at 606. *See also Synanon Found.*, 444 U.S. at 1307-08.

It is the hybrid approach to *Jones*, not the strict approach, that violates the Free Exercise Clause. The

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[6] Courts applying the hybrid approach presume that without deference to church constitutions, it would be impossible for a national denomination to retain property after a schism. But ordinary state law allows national churches, no less than secular institutions, to amend deeds or execute valid trust documents that would allow them to retain property after a schism. *See* McConnell, 58 ARIZ. L. REV. at 342.

hybrid approach enables a national church unilaterally to establish a trust over property titled in a local church, and thus places a burden on local churches that the law does not place on any other institution, religious or secular. The hybrid approach thereby "impose[s] special disabilities" against local churches "on the basis of . . . religious status." *Smith*, 494 U.S. at 877. Moreover, by granting national hierarchical denominations a unique exemption from neutral and generally applicable state trust law, the hybrid approach "puts a heavy thumb on the scales in favor of a more 'hierarchical' form of polity, contradicting the First Amendment rule that churches must remain free 'to decide for themselves, free from state interference, matters of church government.'" McConnell, 58 ARIZ. L. REV. at 327 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. America*, 344 U.S. 94, 116 (1952)).

Nor can the hybrid approach be reconciled with this Court's Establishment Clause jurisprudence. The Establishment Clause prohibits government from "favor[ing] one religion over another." *McCreary Cty.*, 545 U.S. at 875-76. But the hybrid approach enacts unique rules of trust and property law that always favor the national church over the local congregation, permitting a national denomination to skirt rules that govern all other parties at the expense of a disassociating parish's claim to contested property. If this were a dispute between two secular organizations, or between a secular and a religious organization, or between two national denominations, the party in Petitioners' shoes

would prevail. The hybrid approach thus "is a bonanza for the National Church," for it "give[s] highly preferential legal treatment to hierarchical churches as compared to congregational churches or any other nonhierarchical church." *Christ Church*, 718 S.E.2d at 270, 281 (Brown, J., dissenting).

C. The Decision Below Subverts Stable Property Markets and the Rule of Law.

This Court has recognized that "contractual or property rights" are "matters in which predictability and stability are of prime importance." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994). Yet the decision below and the hybrid approach inject great unpredictability and instability into the Nation's property markets, for they shelve the "objective, well-established" guidelines of centuries-old trust and property law, *Jones*, 443 U.S. at 603, and replace those guidelines with novel, uncodified, and unarticulated property rules.

Under the hybrid approach, churches, insurers, financiers, and third-party purchasers can no longer rely on public deeds and trust documents to determine who owns church property. And "[i]f ownership no longer turns on publicly recorded deeds and trust instruments, but on the meaning of internal church rules and relationships, no one can know for certain who owns church property—at least not without the benefit of a thorough trial." McConnell, 58 ARIZ. L. REV. at 340.

This petition presents a case-in-point, for the property at issue here has been tied up in litigation for more than half a decade while the parties have spent millions of dollars and countless hours on litigation (rather than on their religious missions). Judge Brown's dissent seven years ago in Georgia's *Christ Church* case rings equally true today: "[T]his four-year multi-million dollar lawsuit would not be necessary if the basic precepts of *Jones* had been utilized." 718 S.E.2d at 256.

Finally, the hybrid approach liberates national churches from the constraints of law that is binding on all others. "If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness." *Serbian E. Orthodox Diocese for United States of America & Canada v. Milivojevich*, 426 U.S. 696, 727 (1976) (Rehnquist, J., dissenting, joined by Stevens, J.). Three years after Justices Rehnquist and Stevens expressed that powerful sentiment, they joined the majority in *Jones*, a decision that was supposed to ensure that church property disputes are not decided simply by the unilateral decree of one party.

The promise of *Jones* has not been fulfilled. The hybrid approach liberates not only churches but also judges from law, for the approach "gives judges tremendous flexibility to reach almost any result—making the outcome unpredictable and largely dependent upon the predilections of the judges." McConnell, 58 ARIZ. L. REV. at 339 (quotation marks and brackets

omitted). The vacillation of the Supreme Court of South Carolina from the strict approach in *All Saints* to the hybrid approach in this case makes clear that title to local church property is no more secure than the composition of a state's high court. "Uniform application of the neutral principles approach would minimize the likelihood that the judiciary could be misused as an instrument of religious preference." Michael William Galligan, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2029 (1983). This petition seeks that uniform application of neutral principles.

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This case plainly warrants the Court's review. The question presented is subject to a split among courts that is deep, acknowledged, and fully developed. This case presents a constitutional question of great national importance that should be decided by this Court. And this petition presents a suitable vehicle for this Court to resolve the question presented. The decision below is that of a state court of last resort, and the state court's resolution of the First Amendment question was dispositive: if the court below misinterpreted *Jones* and the First Amendment, the judgment below must be reversed. Petitioners respectfully seek this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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