

No. 20-534

In the **Supreme Court of the United States**

THE EPISCOPAL CHURCH, ET AL.,
Petitioners,

v.

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.,
Respondents.

**On Petition for Writ of Certiorari to the Supreme
Court of Texas**

**BRIEF OF THE GREEK ORTHODOX
ARCHDIOCESE OF AMERICA AS *AMICUS
CURIAE* IN SUPPORT OF THE EPISCOPAL
CHURCH'S PETITION FOR A WRIT OF
CERTIORARI**

JOHN ZAVITSANOS
Counsel of Record
AHMAD, ZAVITSANOS, ANAIPAKOS,
ALAVI & MENSING P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010
(713) 600-4901
jzavitsanos@azalaw.com

Counsel for Amicus Curiae

November 18, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF THE AMICUS¹

The Greek Orthodox Archdiocese of America (“The Greek Orthodox Church”) files this *amicus curiae* brief in support of The Episcopal Church’s Petition for a Writ of Certiorari at the United States Supreme Court. This Court should grant a writ of certiorari in this case to underscore that the Free Exercise Clause protects the ability of hierarchical churches to resolve their own internal property disputes without fear that courts will second guess their ecclesiastical determinations.

The Greek Orthodox Church joins the Episcopal Church as an *amicus* because the outcome of this case affects the Greek Orthodox Church’s freedom promised by the First Amendment to arrange its internal affairs as it wishes without court interference. While the Greek Orthodox Church and the Episcopal Church differ in significant and well-known ways, including in their structure and doctrine, they share a common concern: by interpreting this Court’s so-called neutral-principles approach to presuppose congregational autonomy, well-meaning courts are interfering with hierarchical churches’ ability to arrange their own internal affairs.

¹ Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for petitioner and respondent have consented to *amicus curiae*’s request for consent to the filing of this brief, and both parties received timely notice of *amicus curiae*’s intent to file this brief.

Since its beginnings, the Greek Orthodox Church has been a hierarchical church. Accordingly, it holds all church property in a manner that reflects this longstanding hierarchy. All church property – regardless of which church entity it is held by – is held expressly for carrying out the faith and purpose of the Greek Orthodox Church. *See* Regulations of the Greek Orthodox Archdiocese of America (“Regulations”), Art. 16 § 1 (2007). Only the church hierarchy is vested with the authority to determine if a parish is carrying out the faith and purpose of the Greek Orthodox Church, so any property dispute is inherently entwined with ecclesiastical matters.

Here, the Texas Supreme Court’s decision threatens the Greek Orthodox Church’s free exercise rights in two ways. First, the rule fashioned by the Texas Supreme Court directly intrudes on churches’ right to structure themselves as they desire because it presupposes that churches are organized congregationally, even for hierarchical churches whose ecclesiology simply requires deference to church leadership. Second, the Texas Supreme Court’s rule requires that courts divine the “secular intent” of ecclesiastical documents and appropriate the role of the church hierarchy in adjudicating matters that are interwoven with ecclesiastical determinations solely because a dispute affects property.

This Court should grant certiorari to provide clear guidance about what the First Amendment requires. Moreover, after thirty years of courts’ failed attempts to apply the so-called neutral-principles approach, it is time that the Court reconsider whether the First

Amendment can tolerate an approach that sows confusion and repeatedly draws courts into ecclesiastical matters. For these reasons, the Greek Orthodox Church urges the Supreme Court to grant the writ of certiorari in this case and overturn the decision below.

SUMMARY OF THE ARGUMENT

In this case, the Texas Supreme Court handed over \$100 million worth of Episcopal Church property to a breakaway faction in contravention of a century of its own jurisprudence deferring to hierarchical church authorities' decisions regarding church property ownership. Left unchecked, this decision could leave the property of hierarchical churches across the country unprotected by giving other states the green light to apply new rules to church property arrangements made years ago under a longstanding deference regime. Moreover, this decision goes even further by rejecting express trust provisions formed according to the Court's new guidance in *Jones v. Wolf*, 443 U.S. 595 (1979).

The Texas Supreme Court—like other state courts across the country—thus arrogated to the judiciary an unwarranted role in disputes that parties agreed would be decided by religious authorities, simply because those disputes affect property. The Texas Supreme Court's newly adopted approach requires that courts place themselves squarely in the midst of intra-church disputes to surmise the supposed secular purposes of inherently ecclesiastical documents created for church self-government. This rule also threatens the free exercise rights of hierarchical churches because it

presumes that church authority is vested at the level of the local congregation even when a church has organized itself in a way that defers to a religious authority. Such judicial commandeering of religious bodies was never this Court's intent in *Jones*.

This case highlights the myriad problems stemming from this Court's holding in *Jones* that it could be constitutionally permissible for courts to resolve church property disputes in hierarchical churches by applying so-called neutral principles of law rather than deferring to religious authorities, which had previously been the only constitutionally permissible approach. *Id.* Over the last thirty years, lower courts have been struggling to understand what *Jones* means and how to apply it. Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 Va. L. Rev. 443, 450-451 (2010). *Jones* purported to allow courts to apply neutral principles to church property disputes because hierarchical churches opting out of default property law could with "minimal burden" make clear how their property should be treated if a dispute arose. 443 U.S. at 606. Whereas this approach had promised to free courts from involvement in intra-church ecclesiastical affairs, in practice it has caused deeper entanglement because church property issues are so often intertwined with inherently ecclesiastical matters that are as central to the church's mission as the hiring and firing of its clergy. In the Greek Orthodox Church, because church property is bound up with its religious purposes and property disputes are considered inherently ecclesiastical matters, such disputes cannot be resolved under so-called neutral principles without resulting in entanglement. Whereas the Greek Orthodox Church

conceives of its sacred property in religious terms, the neutral-principles approach would require that courts nonetheless craft a purely secular interpretation that was never intended.

This Brief offers three compelling reasons why this Court should grant the writ of certiorari and use this case as an opportunity to take a second look at its *Jones* decision.

First, this Court should grant certiorari to re-evaluate the wisdom of the neutral-principles approach, which repeatedly has entangled civil courts in ecclesiastical matters, requiring courts to determine who represents the “true” church and encouraging courts to interpret ecclesiastical documents about church self-governance through a secular lens when the church never intended for such a lens to be applied. Drawing a bright line respecting churches’ internal governance mechanisms, as this Court did in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al.*, 132 U.S. 694, 706 (2012), is the simplest way to avoid encroaching on hierarchical churches’ free exercise rights and to ensure consistency and clarity in the adjudication of church property disputes. This Court can prevent further, otherwise inevitable constitutional harms by overturning *Jones* and returning to its deference regime.

Second, short of overruling *Jones*, this Court should offer lower courts much-needed guidance on what the “minimal burden” described in *Jones* entails. This Court can ensure that lower courts no longer interpret *Jones* to require that hierarchical churches meet a

substantial burden to ensure that their property disputes are decided by religious authorities.

Third, this Court should grant certiorari to hold that courts cannot retroactively apply a newly-adopted neutral-principles approach as did the Texas Supreme Court. This Court largely premised the constitutionality of the neutral-principles approach at issue in *Jones* on the existence of an escape hatch for hierarchical churches by which they simply could indicate that the church hierarchy's determinations would control. In fact, although the parties never raised the issue in *Jones*, the Court *sua sponte* suggested that retroactive application of neutral principles would violate the Free Exercise Clause. *See* 443 U.S. at 606 n.4. This Court should take this opportunity to expressly rule what it suggested in *Jones*: a court cannot constitutionally apply the neutral-principles approach when it has not clearly enunciated its intent to do so prior to a church property dispute.

ARGUMENT

I. THE SO-CALLED NEUTRAL-PRINCIPLES APPROACH IS INCONSISTENT WITH THE FIRST AMENDMENT, AND THE COURT SHOULD GRANT CERTIORARI TO OVERTURN THE FAILED EXPERIMENT OF *JONES*.

The Court should take this opportunity to address the viability of *Jones v. Wolf*, which at best has caused widespread confusion and at worst has invited courts

to wade into inherently ecclesiastical disputes, as the Texas Supreme Court has done here. It is often not possible to treat church property disputes as though they involve secular subject matter as the majority in *Jones* envisioned. In the Greek Orthodox Church, property disputes are indistinct from other internal, ecclesiastical disputes so any application of “neutral principles” results in entanglement. The only way to prevent the threat of courts’ continued entanglement in such ecclesiastical matters is for this Court to return to the deference regime that steadfastly respected churches’ free exercise rights for over one hundred years.

a. Any Application of the So-Called Neutral-Principles Approach Will Interfere with the Greek Orthodox Church’s Free Exercise Rights and Entangle the Courts in Its Internal Affairs Because the Greek Orthodox Church Treats Church Property Ownership as Inherently Ecclesiastical.

The neutral-principles approach presumes that courts can resolve intra-church property disputes without deference to church authorities, even for hierarchical churches, because such matters can be analyzed in “purely secular terms” without reference to “religious precepts.” *Jones*, 443 U.S. at 604. But for the Greek Orthodox Church, as for other hierarchical denominations, no such distinction exists between sacred and secular matters in the life of the church. Because the Greek Orthodox Church’s governing

documents are “drawn in terms of religious precepts,” *id.* at 612 (Powell, J., dissenting), it is not possible to divine the Church’s secular intent with regard to property that is somehow apart from its religious intent.

The Greek Orthodox Church conceives of its Charter and Regulations as religious law, leaving no room for secular interpretations. In his introduction to the Regulations, Archbishop of America and Exarch of the Ecumenical Patriarchate Demetrios emphasized that the Regulations were created to “avoid any disorder, confusion, disorganization, and turmoil; for the God of Christians is a God of order and peace, not a God of disorder, confusion, and turmoil.” Regulations, *Prot. No. 33/05* at iv. It was “exactly for the advancement of order, decency and peace within the parishes” that the Regulations were published. *Id.* at v. Thus, the Greek Orthodox Church understands its Regulations to be religious doctrine that allows it to practice its faith by ensuring an orderly internal resolution of all matters that arise.

The Regulations that specifically govern church property also contain explicitly religious language. For example, the Regulations require that all church property “shall be held and used by the Parish to carry out the purposes of the Orthodox Christian Faith as defined in Article 15.” Regulations, Art. 16 § 1. Moreover, the Church edifice and other Parish Property “shall be used in accordance with the Charter to serve the religious, educational, cultural, and philanthropic ministries of the Parish.” *Id.* Thus, the resolution of intra-church property ownership disputes

within the Greek Orthodox Church turns on who is using the property in accordance with the Greek Orthodox faith, an inherently religious question that civil courts are incompetent to answer. As this Court recognized in *Kedroff*, “[e]ven in those cases when the property right follows as an incident from the decisions of the church custom or law on ecclesiastical issues, the church rule controls.” *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. America*, 344 U.S. 94, 120-121 (1952).

The Greek Orthodox Church urges this Court to consider the inherently religious nature of church property in analyzing whether civil courts should be allowed to usurp determinations by a hierarchical church’s governing authorities about church property disputes, especially in light of its unanimous decision in *Hosanna-Tabor*. 132 S. Ct. 694. In *Hosanna-Tabor*, this Court held that “the authority to select and control who will minister the faithful—a matter ‘strictly ecclesiastical,’ . . . —is the church’s alone.” *Id.* at 709. Moreover, this Court explained that when society’s “undoubtedly important” interest in the enforcement of civil law, like employment discrimination statutes, competes with religious organizations’ interest in exercising their right to self-governance “the First Amendment has struck the balance for us[] . . . [t]he church must be free to choose those who will guide its way.” *Id.* at 710. This is especially important in international hierarchical churches in which religious determinations are made by religious authorities located outside of the United States social climate. When the church’s religious and ecclesiastical interests are competing with local social interests, First

Amendment protections must prevail to prohibit government interference in the free exercise of religion. Thus, because the First Amendment “gives special solicitude to the rights of religious organizations,” secular law must yield when it interferes with internal, ecclesiastical matters. *Id.* at 706-07.

Similar to its selection of clergy, the Greek Orthodox Church conceives of its ability to govern church property as an integral part of its practice and the expression of its faith. Yet *Jones* fundamentally disregards the uniquely religious nature of church property and the importance for a hierarchical church to protect the use of these sacred places. For the Greek Orthodox Church, a church is not just a building in which its faithful worship, nor a building with a deed and title that can be passed from one group of people to another. Instead, it is a building uniquely designed to facilitate worship in the Greek Orthodox tradition and to reflect the tenets of the Greek Orthodox faith. Rev. Thomas Fitzgerald, *House of God*, The Greek Orthodox Archdiocese of America, <http://www.goarch.org/ourfaith/ourfaith7100>. The worship space itself is usually designed to be small to reflect the close community of Greek Orthodox worshippers. *Id.* Moreover, the Greek Orthodox Church teaches that when a church is consecrated, God’s grace and the Holy Spirit transform an ordinary building into a “House of God.” The Greek Orthodox Archdiocese of America, *Service of the Consecration of a Church*, http://www.goarch.org/chapel/liturgical_texts/consecrate_church. As part of the Consecration, relics of saints are sealed inside the Holy Altar. *Id.* This sacred classification of the church is rooted in the Church’s holy texts and scripture in

which Church fathers dating back to the third century explain that although a “rebellious and arrogant multitude of those who will not hear and obey may depart, the Church does not depart from Christ,” and the Church is “a people united to the priest, and the flock that adheres to its pastor.” Cyprian of Carthage, *CHURCH FATHERS: Epistle 68*, <https://www.newadvent.org/fathers/050668.htm>. Regardless of any heresies, breakaway factions, or disagreements, churches must still serve their mission as determined by the hierarchs, and to do otherwise would be to restrict the Church’s ability to comply with their own doctrine and teachings. Thus, any intra-church property dispute heard by the civil courts regarding the Greek Orthodox Church necessarily will entangle the court in doctrinal issues that go to the heart of the Greek Orthodox faith because the brick and mortar building is inseparable from the faith it represents.

This Court should take this opportunity to correct the mistaken premise of *Jones* that church property disputes can be resolved in an entirely secular manner. To pretend otherwise simply encourages courts to entangle themselves in church property disputes that are bound up with doctrinal concerns.

**b. *Jones* Failed to Fulfill Its Promises
and Has Resulted in the Harms the
Dissenting Justices Predicted.**

Before *Jones*, the only constitutional approach to church property disputes involving hierarchical churches was to grant deference to the duly constituted church authorities. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). In *Watson*, this Court simply enforced the

determination of the hierarchical church's relevant governing body regarding whether a pro-slavery or anti-slavery faction of a parish owned the property at issue. 80 U.S. at 722-724. This Court refused to second guess the church authorities' determination regarding which faction was loyal to the church and thus entitled to the property. For over one hundred years, courts deferred to hierarchical churches' decisions regarding property ownership.

Then, in 1979, this Court offered an alternative: rather than defer to a church's governing body as a matter of course, states could now apply "neutral" principles of law to determine church property ownership. *Jones*, 443 U.S. at 603-604. *Jones* promised that the application of "neutral principles" would "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 604. The majority saw this as a means for ensuring that civil courts would not "resolv[e] church property disputes on the basis of religious doctrine or practice" in violation of the First Amendment. *Id.* at 602. For this reason, *Jones* commanded that if resolving the property dispute would require the civil court to resolve a "religious controversy," then the court must defer to the "authoritative ecclesiastical body." *Id.* at 604. The majority believed, however, that this approach would be "completely secular in operation" and would "obviate[] entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Id.* at 603, 605.

At the time, the four dissenting justices warned that "this new approach inevitably will increase the

involvement of civil courts in church controversies,” and would “more likely . . . promote confusion than understanding.” *Id.* at 611, 612 (Powell, J., dissenting). Furthermore, the dissenters recognized that “indirect interference by the civil courts with the resolution of religious disputes within the church is no less proscribed by the First Amendment than is the direct decision of doctrine and practice.” *Id.* at 613. But the majority believed that this new approach nonetheless could be tolerated in situations in which no doctrinal controversy was at issue because courts would simply analyze the secular, legal aspects of church government and property documents to determine whether a parish or the hierarchical church owned parish property. *Id.* at 603. The majority theorized that this approach would not frustrate the free exercise of religion or freedom of association because a church could indicate in advance the desire that the faction loyal to the hierarchical church would retain church property. *Id.* at 606. As discussed below, however, in practice a standard requiring an advance expression of intent has turned out to be completely unworkable.

The last thirty years have only borne out the concerns expressed by the dissent, undermining the majority’s hope that the neutral-principles approach would disentangle the courts from ecclesiastical matters. Not only is the “secular” premise of this approach questionable because it asks courts to glean secular meaning from inherently ecclesiastical documents, but the neutral-principles approach also has produced wildly inconsistent case law. *See* Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional*

Evils, 11 St. Thomas L. Rev. 109, 130-135 (1998) (cataloguing contradictory case law). The *Jones* majority failed to realize that disposition of church property often includes an inherently ecclesiastical dimension that cannot be surgically excised. As a result, time and again this approach has invited courts to wrongfully interfere with hierarchical churches' internal governance by making ecclesiastical determinations of whether a breakaway faction is affiliated with the hierarchical church, and even initially going as far as to enjoin clergy from practicing under their designated church. *Episcopal Diocese of Fort Worth v. Episcopal Church*, 602 S.W.3d 417, 425 (Tex. 2020). This interference is encouraged by improper interpretations of *Jones* even though the Free Exercise Clause guarantees a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 154.

c. A Deference Regime for Hierarchical Churches Is the Only Way to Protect Free Exercise and Avoid Entanglement.

In approving the neutral-principles approach, the *Jones* majority decided for the first time to risk the constitutional hazards of court-adjudication of church property disputes. *Jones*' hopeful view that the "neutral principles" approach would be "completely secular," and would only use "objective, well-established concepts of trust and property law familiar

to lawyers and judges” has proven untenable. 443 U.S. at 603.

Instead, application of the so-called neutral-principles approach is fraught with constitutional infirmity because it sanctions an ongoing invasion of churches’ right to govern their internal affairs. The constitutional harm that earlier precedent, like *Watson*, recognized is tangible and harmful. 80 U.S. (13 Wall.) 679 (1872). Hierarchical churches have lost property that rightfully belonged to them, the ability of churches to organize their affairs as they wish has been compromised, and courts have indirectly interfered with or decided ecclesiastical disputes. Belzer, 11 St. Thomas L. Rev. at 131-35.

In contrast, *Watson* deference avoids all of these problems and ensures that courts will not intrude into ecclesiastical matters outside their competence. 80 U.S. (13 Wall.) 679. The deference approach respects hierarchical churches’ determinations and allows disputes to be resolved within the hierarchical church structure that parties originally agreed would govern the dispute. *Id.* at 727. As *Watson* explained, “[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it,” and the decisions of that hierarchical church structure “should be binding in all cases of ecclesiastical cognizance, subject only to appeals as the organism itself provides for.” *Id.* at 729.

Respectfully, *Jones* has not fulfilled the majority’s promises. It has proven complicated to apply, repeatedly has embroiled the courts in ecclesiastical controversies, and trampled on churches’ ability to

arrange their own internal affairs, just as the dissent warned. Though it may not have been apparent at the time *Jones* was decided, it is now abundantly clear that this experiment has failed abysmally because it encourages courts to glean supposed secular meaning from inherently religious documents about matters that cannot be neatly separated from doctrine or ecclesiastical governance.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE FREE EXERCISE CLAUSE DOES NOT TOLERATE IMPOSITION OF ANY MORE THAN A MINIMAL BURDEN ON A HIERARCHICAL CHURCH TO RECITE AN EXPRESS TRUST IN FAVOR OF ITS HIERARCHY.

Short of overruling *Jones*, this Court should at a minimum act to ensure that courts do not place substantial, unconstitutional burdens on hierarchical churches to protect their property, as the Texas Supreme Court has done here. In a well-intentioned attempt to further extricate the courts from entanglement with religious affairs, this Court issued a sharply divided decision in *Jones*, which offered an alternative to the *Watson* deference policy. This newly-permitted approach was premised on churches having the opportunity to arrange their affairs before a dispute arose. 443 U.S. at 606. The Court made explicit that its approval of the so-called neutral-principles approach would involve a “minimal burden” on churches because all that would be required for a church wishing to indicate that the faction “loyal to the

hierarchical church [would] retain the property” would be to express this in “some legally cognizable way.” *Id.* For example, the church could “modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church” or, alternatively, “the constitution of the general church [could] be made to recite an express trust in favor of the denominational church.” *Id.* The majority reasoned that the First Amendment would not be violated because the burden of enshrining the denomination’s intent by adding trust language to its constitution would be “minimal.” *Id.*

Here, the Texas Supreme Court’s rule ignores the fundamental premise of *Jones* that the neutral-principles approach could only be applied if it allowed churches to indicate how they wish property disputes to be decided with minimal burden, instead imposing an unconstitutional encumbrance on churches’ free exercise rights by intruding on how they arrange their internal affairs. That approach, and others like it across the country, burden the Greek Orthodox Church and other hierarchical churches far beyond anything the *Jones* Court envisioned.

a. Throughout Its History, the Greek Orthodox Church Has Been Organized Hierarchically and All Property Disputes Have Been Resolved Internally by the Church Hierarchy.

The Greek Orthodox Church has always been organized hierarchically, subject to the authority of the Ecumenical Patriarchate in Constantinople (modern day Istanbul). Local hierarchies, including bishops,

priests, and deacons, developed to govern nascent congregations once the founding itinerant Apostles left. Aristeidis Papadakis, *History of the Orthodox Church, The Greek Orthodox Archdiocese of America*, <http://www.goarch.org/ourfaith/ourfaith7053>. Although the hierarchical structure of the Greek Orthodox Church has become more complex since its origins, authority over parishes has always been vested in the church hierarchs.

The first Greek Orthodox faithful arrived in America in 1768, establishing the colony of New Smyrna south of St. Augustine, Florida. The Greek Orthodox Archdiocese of America, *About The Archdiocese*, <http://www.goarch.org/archdiocese/about>. At that time, there was not yet a separate governing church body in America through which the Ecumenical Patriarchate in Constantinople exercised its authority. Under the direction and leadership of Archbishops Athenagoras, Michael, and Lakovos, the growing Greek Orthodox communities in America became an Archdiocese, established in 1921 as the governing body of the Greek Orthodox Church in North and South America under the supreme authority of the Ecumenical Patriarchate in Constantinople. *Id.*

Today, the Greek Orthodox Archdiocese of America, now incorporated in New York, governs 540 parishes, 800 priests, and an estimated 1 million members. *Id.* The Archdiocese operates under a Charter from the Ecumenical Patriarchate, which establishes the responsibilities of the Archdiocese and governs its relationship with the Ecumenical Patriarchate. *See* Charter of the Greek Orthodox Archdiocese of America

(“Charter”) (2003). In accordance with the Charter, the Archdiocese is divided into a Direct Archdiocesan District and eight Metropolises, which are each governed by a Metropolitan. Although separately incorporated, as a condition of their affiliation with the Greek Orthodox Church, the Metropolises must agree to abide by the rules of the Archdiocese. *See* Regulations, Art. 9 § 2. The Eparchial Synod, composed of the eight Metropolitans and the Archbishop, promulgates Regulations, approved by the Ecumenical Patriarchate, to govern the operation and administration of the Archdiocese, the Metropolises, and the parishes within them. *See* Charter, Art. 4, 22. Parishes, like Metropolises, are separately incorporated in the state in which they sit. *See* Regulations, Art. 21. “Upon the assignment of a Priest by the respective Hierarchy, the Parish accepts and agrees to comply with the Charter and Regulations of the Archdiocese.” *See* Regulations, Art. 21 § 2.

The Greek Orthodox Church has an established, all-encompassing ecclesiastical government for all internal disputes that may arise. The Church’s mandatory Regulations are designed to govern every conceivable situation a parish may encounter. Thus, the Regulations govern both (a) matters that expressly relate to doctrine, such as the determination of a parishioner’s good standing, which is based on whether he or she has followed the Church’s rites and met religious, moral, and social duties, and (b) internal affairs that are not expressly doctrinal, such as establishment of a board of financial auditors for each parish. Art. 18 § 1; Art. 33. Moreover, each parish agrees to resolve conflicts according to the Archdiocese

Dispute Resolution Procedures, which vest authority for dispute resolution in the relevant church hierarchy. *See* Regulations, Addendum B. The Dispute Resolution Procedures allow a hierarch in his discretion to convene a Spiritual Court of the First Instance to resolve disputes, and appeals from these courts proceed to the Spiritual Court of the Second Instance. *See* Regulations, Addendum B-5; Charter, Art. 9. As the Charter and Regulations demonstrate, the Greek Orthodox Church understands all disputes that touch on its internal affairs to be ecclesiastical matters that should be resolved within these comprehensive church structures.

b. The Greek Orthodox Church Has Made Clear Its Intent that Any Church Property Must Remain in the Hands of Factions the Hierarchy Determines to be Loyal.

In *Jones*, this Court identified at least two possible options through which churches could ensure that factions loyal to the denominational church would retain church property under a neutral-principles approach: an express trust or a right of reversion. 443 U.S. at 606. The Greek Orthodox Church has included both an express trust and a right of reversion in favor of the Archdiocese in its Regulations to comply with *Jones*' requirement and ensure that loyal factions retain church property. *See* Regulations, Art. 16 §§ 1, 6.

Specifically, the Regulations recite an express trust, which is deemed incorporated into all parishes' by-laws, that requires that “[p]arish property shall be held

and used by the Parish to carry out the purposes of the Orthodox Christian Faith as defined in Article 15.” Regulations, Art. 16 § 1. In turn, Article 15 of the Regulations makes clear that the determination of these purposes is the province of the church hierarchy, which retains the authority to enforce its determinations even by “revok[ing] the ecclesiastical charter of a Parish.” *Id.*, Art. 15 § 6. Thus, while the property is held in the parish’s corporate name, a parish cannot buy, sell, mortgage, or develop its property without the approval of the respective Bishop or Metropolitan. *Id.*, Art. 16 § 3. These provisions demonstrate that church property is held in trust for the Greek Orthodox Church.

The Regulations also recite a right of reversion in favor of the Archdiocese in the event the Archbishop declares a parish in canonical disorder due to heresy, schism, or defection from the Archdiocese: “In the event that the Archbishop . . . determines that the Parish cannot be restored to canonical order, the title to properties shall vest in the Archdiocese.” *Id.*, Art. 16, § 6. The Regulations further provide that if title cannot vest in the Archdiocese, then “title shall vest in an ecclesiastical corporation controlled by the group of parishioners that the Archdiocese determines remains loyal to it.” *Id.* Thus, any decision about ownership of church property is inherently a church polity decision about who are the true Greek Orthodox parishioners, an issue about which the courts are incompetent. These provisions coupled with the Greek Orthodox Church’s long history of hierarchical governance make explicit that the Greek Orthodox Church wishes for its

property disputes to be resolved internally by its hierarchy.

c. The Texas Supreme Court Should Not Be Allowed to Intrude on Internal Governance Matters in Hierarchical Churches Simply Because Property Is Implicated.

The Texas Supreme Court has read *Jones* and its neutral-principles approach to require that courts flout churches' internal governance in favor of secular law simply because a dispute touches property, even when the matter is understood to be ecclesiastical. Thus, even though the Greek Orthodox Church has made clear in every way contemplated by *Jones* that church property is held for the church and that property disputes are inherently ecclesiastical matters to be resolved by the church hierarchy, the Church's clear intent still may not be respected. Other state supreme courts similarly have read *Jones* to require strict compliance with state property law across jurisdictions, notwithstanding the burden on churches to alter their internal affairs and without regard to resulting entanglement with ecclesiastical matters. See *Presbytery of Ohio Valley v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012), *cert. denied*, 133 S. Ct. 2022 (2013); *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina*, 685 S.E.2d 163, 166-167 (S.C. 2009); *Berthiaume v. McCormack*, 891 A.2d 539, 547 (N.H. 2006).

Furthermore, this reading of *Jones* would require churches to structure their property holdings differently in states with different property law. The

Greek Orthodox Church has parishes in 49 states. Greek Orthodox Archdiocese of America Parish Directory, <http://www.goarch.org/parishes/>. Thus, to require strict compliance with property law in every state would amount to an “immense” and unconstitutional burden far beyond the “minimal burden” that this Court sanctioned in *Jones*. See *Rector, Wardens, Vestrymen of Christ Church v. Bishop of Episcopal Diocese*, 718 S.E.2d 237, 244 (Ga. 2011).

Here, there is no question that the Episcopal Church met *Jones*' instruction that a church could “ensure, if [it] so desire[s], that the faction loyal to the hierarchical church will retain the church property” if that intent was “embodied in some legally cognizable form.” 443 U.S. at 606. Nonetheless the Texas Supreme Court is imposing a substantial, unconstitutional burden by ignoring the fact that the Episcopal Church amended its Church Constitution to include the Dennis Canon with the clear intent to create an express trust in the event a property dispute arose. The Texas Supreme Court's approach threatens not only the Episcopal Church, but other churches, including the Greek Orthodox Church, that have arranged their affairs based on *Jones*' promise that only a “minimal” burden could be imposed yet still face the possibility of losing church property to breakaway factions because some technical state law requirement was not met.

III. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT NEUTRAL PRINCIPLES CANNOT BE APPLIED RETROACTIVELY WITHOUT VIOLATING THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Unless this Court grants certiorari and holds that retroactive application of the so-called neutral-principles approach is unconstitutional when it was not clearly enunciated in advance, churches will remain in a precarious position in which the law can be turned upside down without notice that their property rights are no longer secured. *Jones* does not support and the Free Exercise Clause cannot tolerate placing churches in that position.

a. The Reasoning of Jones Makes Clear That Retroactive Application of Neutral Principles Is Unconstitutional.

In *Jones*, this Court specifically noted that because the Georgia Supreme Court “clearly enunciated its intent to follow the neutral-principles analysis,” it did not have to decide the constitutionality of retroactive application of neutral principles. 443 U.S. at 606 n.4. But *Jones* premised the constitutionality of the neutral-principles approach on the fact that churches’ free exercise rights would not be violated if only a “minimal” burden was placed on the church to effectuate its intentions *prior* to a property dispute arising. 443 U.S. at 606. It follows that the Free Exercise Clause cannot sanction a sudden deviation from a deference approach in favor of a neutral-

principles approach where the parties arranged their affairs under a deference regime.

b. The Texas Supreme Court Would Require That Hierarchical Churches Either Risk Losing Their Property or Alter Their Internal Approach to Ecclesiastical Governance.

Here, the longstanding unbroken Texas jurisprudence over the last 100 years indicated that Texas was a deference state. *Brown v. Clark*, 116 S.W. 360 (Tex. 1909); *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 551-552 (Tex. App.—Austin 1991). Even though Texas never clearly enunciated its intent to follow the neutral-principles approach until now, the Episcopal Church risks losing \$100 million worth of its property because of the Texas Supreme Court’s about-face. If the retroactive application of a neutral-principles approach is permitted, hierarchical churches, such as the Greek Orthodox Church, will face two untenable options: risk losing valuable church property in reliance on a state’s deference jurisprudence or alter their internal affairs to meet the substantial burden of strictly complying with multiple states’ property law in the event of a state’s unforeseen about-face. This Court should intervene to hold that the First Amendment will not tolerate retroactive application of “neutral principles” because such a reversal in the law disregards the clear intent of intra-church agreements made decades earlier regarding valuable religious property.

CONCLUSION

For the foregoing reasons, the Greek Orthodox Church respectfully requests that this Court grant certiorari in this case.

Respectfully submitted,

JOHN ZAVITSANOS

Counsel of Record

AHMAD, ZAVITSANOS, ANAIPAKOS,

ALAVI & MENSING P.C.

1221 McKinney Street, Suite 2500

Houston, Texas 77010

(713) 600-4901

jzavitsanos@azalaw.com

Counsel for Amicus Curiae