No. 20-536

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 a Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

After 41 years, there is broad agreement that this Court's decision in *Jones* v. *Wolf*, 443 U.S. 595 (1979), has produced intolerable disarray in the lower courts—and nowhere more clearly than in cases involving express trusts and issues of church polity. Courts have noted their "massive inconsistency" on these questions. *Church of God in Christ, Inc.* v. *L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 168 (Tenn. 2017). Religious denominations have bemoaned the "unpredictability" and "inconsistency" of decisions applying *Jones*. Br. of Presbyterian Church *et al.* 7. And even *Jones*'s defenders—and the authors of one of Respondents' principal authorities—concede that *Jones* has led to "disparate results" and "uncertainty" that "comes at great human price." Michael M. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 309 (2016).

Respondents nonetheless refuse to acknowledge even a *single* instance in which lower courts have disagreed over *Jones*, going so far as to claim that courts have applied this decision "without complaint or difficulty." Opp. 1. Respondents reach that improbable conclusion, however, only by inverting the holdings of cases that run against them, eliding the issues on which courts disagree, and substantially inflating the number of jurisdictions that apply their favored approach. When the dust settles, the fact remains that courts are irretrievably confused about how to resolve church-property disputes consistent with the First Amendment. And "[t]he blame for the uncertainty falls squarely on * * * *Jones*." McConnell & Goodrich, *supra*, at 310.

This case presents a clear opportunity to set courts back on the right course. The issues that have divided jurisdictions are squarely presented and outcome-determinative. And it would be difficult to find a decision that more starkly illustrates *Jones*'s defects, or the massive intrusion it has invited into matters the Constitution ensures religious denominations the right to resolve for themselves.

ARGUMENT

I. JURISDICTIONS ARE SPLIT ON THE STANDARD FOR REVIEWING EXPRESS-TRUST PROVISIONS IN CHURCH DOCUMENTS.

State high courts are deeply divided over the standard for reviewing express-trust provisions in church documents. Courts and commentators have repeatedly acknowledged this split. *See* Pet. 22-23. So have religious denominations. *See* Br. of Presbyterian Church *et al.* 8-11. And, here, the Texas Supreme

Court rejected the views of courts on the other side of the divide and denied enforcement of the very same express-trust provision—the Dennis Canon—that other high courts have held *Jones* requires them to enforce. This division has festered for far too long. This Court must step in to resolve it.

1. Respondents contend that this widely-recognized disagreement over the meaning of *Jones* merely reflects "state-law differences." Opp. 12. But Respondents can support that characterization only by inverting the reasoning of the courts that reject their position.

Respondents claim, for instance, that the Georgia Supreme Court has enforced express-trust provisions only because the parties "established a trust under Georgia Code §§ 14-5-46 and 14-5-47." Opp. 14. To the contrary, the Georgia high court held that lower courts "may have *erred* in reading [§§ 14-5-46 and 14-5-47] as applying" to the disputed property, but that *Jones* required it to enforce an express-trust provision "even where the text of the statutes *did not squarely apply*." *Rector, Wardens, & Vestrymen of Christ Church in Savannah* v. *Bishop of Episcopal Diocese of Georgia, Inc.*, 718 S.E.2d 237, 243-244 (Ga. 2011) (emphases added); *see Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 452-454 (Ga. 2011) (same).

Respondents likewise mischaracterize the Tennessee Supreme Court as holding that, although an express trust "need not appear in a 'deed or other civil legal document,' " it must use "language sufficient under state law" to create a trust. Opp. 16. Actually, the Tennessee Supreme Court held the opposite: It stated that it would "defer to and enforce trust language * * *

even if this language of trust is not included in a civil legal document *and does not satisfy the formalities that the civil law normally requires to create a trust*." *Church of God*, 531 S.W.3d at 168 (emphasis added); *see id.* at 170-171 (adopting this "hybrid approach").

Respondents' descriptions of the holdings of the high courts of Connecticut and New York are similarly inaccurate. Respondents quote language from each jurisdiction stating that courts may consider "[s]tate statutes" when applying the neutral-principles approach. Opp. 15-16 (citations omitted). But they fail to acknowledge that when considering an "express trust provision," the Connecticut Supreme Court held that it was "*bound* by such a provision" regardless of whether it complied with the state's "Marketable Title Act" or "statute of frauds." *Episcopal Church in Diocese of Connecticut* v. *Gauss*, 28 A.3d 302, 325-326 (Conn. 2011). And they ignore that the New York high court deemed the Dennis Canon "dispositive" despite finding that the state's "Religious Corporation Law" did not "conclusively establish a trust." *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920, 924-925 (N.Y. 2008)

So it goes with Kentucky and California. The Kentucky Supreme Court did not rest its decision on a "compulsory deference rule" (Opp. 17); it found an express-trust canon "[d]ecisive" because it "followed to a T the suggestion of [this] Court in [*Jones*]." *Cumberland Presbytery of Synod of the Mid-West of Cumberland Presbyterian Church* v. *Branstetter*, 824 S.W.2d 417, 421-422 (Ky. 1992). And the California Supreme Court held that an express trust may be imposed "by whatever method the church structure contemplate[s]," even if it does not follow the "particular

method" dictated by state law. *Episcopal Church Cases*, 198 P.3d 66, 80 (Cal. 2009) (citing *Jones*, 443 U.S. at 606).

2. Lacking a basis to contest the split, Respondents contend that the Church has characterized it inconsistently. That too is incorrect. Even when opposing certiorari, the Church has expressly acknowledged a "conflict among state courts" over "whether federal law mandates a trust when state law would not otherwise recognize one." Opp. 21, *The Protestant Episcopal Church in the Diocese of S.C.* v. *The Episcopal Church*, No. 17-1136 (U.S. May 7, 2018). The Church has previously opposed certiorari not because it denied the split's existence, but because prior cases "d[id] not implicate" this conflict. *Id.*; *see* Opp. 12, *The Falls Church* v. *The Protestant Episcopal Church in the U.S.*, No. 13-449 (U.S. Dec. 30, 2013) ("Whatever conflict may exist * * * is not implicated here."); Opp. 13-19, *Gauss*, *supra*, No. 11-1139 (U.S. May 18, 2012) (explaining that courts would have reached the same conclusion even under different approaches).

3. Respondents' attempt to conjure up a vehicle problem is similarly unavailing. They suggest that this case is atypical because the Texas Supreme Court invoked state laws concerning "revocability" rather than "creation" of a trust. Opp. 21. But courts on the other side of the split have rejected claims that a breakaway faction "revoked" a trust under state law. *See Gauss*, 28 A.3d at 310; *Episcopal Church Cases*, 198 P.3d at 83. And, regardless, there is no meaningful distinction between creation and revocation. *Jones* held that courts are "bound to give effect" to "an express trust in favor of the denominational church." 443 U.S. at 606. "[G]iv[ing] effect" means rejecting

attempts to unilaterally revoke trusts just as it means rejecting efforts to deny their existence. The latter would be no protection without the former.

Nor is it relevant that Texas has "no statutes specifically favoring general-church trusts" or that Respondents attempted to "disavow[]" the Dennis Canon. Opp. 22. Courts on the other side of the split have enforced express-trust provisions in the absence of church-specific statutes, *see Church of God*, 531 S.W.3d at 169; *Branstetter*, 824 S.W.2d at 422, and where those statutes did not apply, *see Christ Church*, 718 S.E.2d at 245; *Harnish*, 899 N.E.2d at 924-925. And the entire point of an express trust is to ensure that property remains with the denomination even if a subordinate body later attempts to "disavow" it.[*]

4. Finally, Respondents fail to muster a plausible defense of their rule on the merits. Respondents suggest that declining to scrutinize church canons for conformity with every jot and tittle of state law would "turn *Erie* on its head." Opp. 19. But *Erie* made clear that state law does not take precedence "in matters governed by the Federal Constitution." *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). On the contrary, the First Amendment bars courts from applying state law in a manner that "interferes with the internal governance of [a] church." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 188,

[*] Contrary to Respondents' repeated claim (at 6, 22, 30-31, 32), the Diocese did not disavow the Dennis Canon by amending its own canons in 1989. The Diocese lacked authority to amend its canons in a manner that conflicted with higher church law. Pet. 10-11. And in 1994, high-ranking Diocesan leaders specifically asked a court to enforce the Dennis Canon and "acknowledged that they [we]re governed by and recognized the authority of the * * * Canons of the Episcopal Church." CR 20:7123-27.

194-195 & n.3 (2012) (barring claims under federal and Michigan law).

Respondents also cannot reconcile their position with *Jones*'s assurance that the "burden" of imposing express trusts must be "minimal." 443 U.S. at 606. If denominations had to draft their canons to conform with the varied trust laws of 50 states—including a Texas rule that Respondents themselves call "rare," Opp. 22 n.7—the burden on religious exercise "would not be minimal but immense." *Timberridge*, 719 S.E.2d at 453. Indeed, although Respondents hold up the Methodist Church as a denomination that has easily "overcome this * * * hurdle," Opp. 32, the Methodist Church explains that, in reality, some courts have "declined to enforce [its] trust provision." Br. of Presbyterian Church *et al.* 11. A rule that disables even the most conscientious denominations from reliably retaining control over their sanctuaries and synagogues cannot be consistent with the First Amendment.

II. CERTIORARI IS WARRANTED TO RESOLVE CONFUSION OVER WHEN COURTS MUST DEFER ON QUESTIONS OF RELIGIOUS POLITY.

This Court's intervention is also warranted to resolve division over when a church is entitled to deference in determining its own leadership and hierarchy. *See* Pet. 25-31; Br. of Presbyterian Church *et al.* 12-14.

1. Respondents claim that courts "agree that state law cannot overrule ecclesiastical determinations." Opp. 23. But that characterization simply glosses over the relevant dispute: whether the determination of who controls a subordinate unit in a church

hierarchy is necessarily ecclesiastical. As to that question, Respondents' analysis reinforces rather than refutes the courts' division.

Respondents acknowledge that courts on their side of the split have taken the view that "churches have two natures[,] one corporate and one religious," and that control of a church corporation is by definition not an ecclesiastical issue. Opp. 25. But that is precisely the argument rejected by courts on the other side, which hold that "a church that incorporates under [state law] does not forfeit its fundamental First Amendment rights," *Harris* v. *Matthews*, 643 S.E.2d 566, 572 (N.C. 2007), and thus refuse to overrule ecclesiastical bodies in "dispute[s] regarding governance of a religious corporation," *Hutterville Hutterian Brethren, Inc.* v. *Waldner*, 791 N.W.2d 169, 170 (S.D. 2010).

Respondents also claim that courts have deemed questions of church governance "ecclesiastical" only because they implicated questions of "religious doctrine and practice." Opp. 24 (citation omitted). But the only respect in which those cases implicated questions of "religious doctrine and practice," as opposed to just church officeholding, is that the governing ecclesiastical body took a position on the "role" and "authority" of church officials. *Harris*, 643 S.E.2d at 571; *see Hutterville*, 791 N.W.2d at 177-178; *Church of God of Madison* v. *Noel*, 318 S.E.2d 920, 924 (W. Va. 1984). That is exactly the type of determination the Church made here: It concluded, based on deeply held religious precepts (Pet. 10), that the leaders of the breakaway faction "*immediately* vacated their offices" upon voting to secede, and thus lacked authority to disassociate the Diocese from the Church. Pet. App. 27a; *see*

id. at 43a-44a, 70a-74a. Yet the Texas Supreme Court, like other courts on its side of the split, held that this decision was "not entitled to deference." *Id.* at 29a.

2. Respondents' vehicle arguments are similarly confused. Respondents assert that "this is not a case about 'who represents [the Church's] own subordinate bodies,'" because Respondents "chose to disassociate from" the Church. Opp. 26. That is a puzzling assertion. In order to disassociate from the Church *and take the Church's property with them*, Respondents needed to be the legitimate leaders of the Episcopal Diocese of Fort Worth at the time they left. *See* Pet. App. 15a-16a. That is the very issue they prevailed on below: The Texas Supreme Court held that Respondents' faction "*is* the Fort Worth Diocese," *id.* at 30a (emphasis added), and ordered the Church's chosen representatives to "desist from holding themselves out as leaders of the Diocese," *id.* at 228a. Having persuaded the Texas courts to reject the Church's contrary judgment, Respondents cannot now claim this case had nothing to do with courts' authority "to question a religious body's own understanding of its structure." *Roman Catholic Archdiocese of San Juan* v. *Acevedo Feliciano*, 140 S. Ct. 696, 702 (2020) (Alito, J., concurring).

3. Respondents do not even try to defend the decision below on the merits. That is unsurprising. This Court held in *Serbian Eastern Orthodox Diocese* v. *Milivojevich* that a church's removal of a bishop necessarily divested him of control of the church's "property-holding corporations." 426 U.S. 696, 709, 720 (1976). And it recently reaffirmed that "[t]he First Amendment outlaws" any intrusion into the "selection of the

individuals who play certain key roles." *Our Lady of Guadalupe Sch.* v. *Morrisey-Berru*, 140 S. Ct. 2049, 2060 (2020). The determination of who controls a diocese and all of its property plainly falls within the scope of that authority.

III. THE COURT SHOULD GRANT CERTIORARI TO RECONSIDER OR LIMIT *JONES*.

Respondents' inability to explain away the splits only highlights the core of the problem: *Jones* itself is irrevocably flawed, and should be limited or overruled.

1. Respondents do not deny that *Jones* has caused courts to "erroneously stray into religious questions" and led to "problems in application." Opp. 28-29 (citation omitted). They simply repeat *Jones*'s decades-old prediction that these problems would be "isolated." *Id.* Experience, however, has emphatically disproved that hypothesis. Courts have observed that " 'massive inconsistency' exists among state courts adopting the neutral-principles approach." *Church of God*, 531 S.W.3d at 168; *but see* Opp. 33 (claiming that "no *court*" has identified problems with *Jones*). Churches have bemoaned the "inconsistency and unpredictability" wrought by *Jones*. Br. of Presbyterian Church *et al.* 7-14, 20-21; *see* Br. of Greek Orthodox Archdiocese 6-14; *but see* Opp. 33 (claiming that *Jones* has "commanded decades of reliance by churches"). And even *Jones*'s defenders concede that *Jones* has produced "disparate results." McConnell & Goodrich, *supra*, at 309, *cited in* Opp. 29-30, 31-32, 34.

Respondents claim that the number of states that have tried the neutral-principles approach is proof of its workability. Opp. 33. But Respondents' assertion that "nearly every state" follows their approach (Opp.

1) is wildly overstated. Respondents' own allies estimate that 17 states apply the deference approach, *see* Br. of Becket Fund for Religious Liberty 5, *Schultz* v. *Presbytery of Seattle*, No. 20-261 (U.S. Oct. 2, 2020), while only nine follow the strict version of neutral principles that Respondents favor, McConnell & Goodrich, *supra*, at 319. And the deep "split" over "how the neutral principles approach should be applied" is itself confirmation of the rule's defects. *Id.*

Respondents are also unable to square *Jones* with this Court's precedents. *See* Br. of Rutherford Institute 7-9. Disputes over "[m]atters of church property" are not "fundamentally different" from disputes over church officers. Opp. 34 (citation omitted). They are often indistinguishable; that is why *Hosanna-Tabor* relied on pre-*Jones* precedents governing "disputes over church property" as a basis for the ministerial exception. *Hosanna-Tabor*, 565 U.S. at 185. Nor does overriding a church's internal resolution of such disputes simply "give legal effect" to "the church's decision." Opp. 34 (citation omitted). It ignores the means the Church and its members agreed upon to resolve their disputes, effecting the very sort of intrusion into "matters of internal government" the First Amendment forbids. *Our Lady*, 140 S. Ct. at 2060-61.

2. Respondents' attacks on the deference approach also overshoot the mark. Respondents claim that identifying whether to defer, and to whom, is "fraught with difficulty." Opp. 29. But courts engage in precisely that analysis under the neutral-principles approach when resolving "issues of religious doctrine or polity," *Jones*, 443 U.S. at 602, and Respondents insist the inquiry is workable there, *see* Opp. 23. This Court, moreover, engages in a closely similar analysis when

applying the ministerial exception. *See Our Lady*, 140 S. Ct. at 2066.

Respondents also contend that the deference approach would "convert courts 'into handmaidens of arbitrary lawlessness.'" Opp. 30 (citation omitted). Not so. All that religious denominations ask is that courts allow them to resolve their internal disputes—not disagreements with third parties "in the marketplace," Opp. 31—according to the rules their members voluntarily agreed to. That is not lawlessness, but the essence of religious autonomy.

3. At minimum, this Court should clarify that *Jones* may not be applied retroactively. Although the Texas Supreme Court claimed that it adopted the neutral-principles approach in *Brown* v. *Clark*, 116 S.W. 360 (Tex. 1909), it did not contend that *Brown* "clearly enunciated" that approach, *Jones* 443 U.S. at 606 n.4. Nor could it: As it acknowledged, for a century Texas appellate courts "read *Brown* as applying a deference approach." *Masterson* v. *Diocese of Nw. Texas*, 422 S.W.3d 594, 605 (Tex. 2013). Accordingly, this Court would not need to second-guess "the Texas Supreme Court's understanding of Texas law." Opp. 35 (emphases omitted). It would simply need to hold that a religious denomination cannot be made to conform its internal affairs to the peculiarities of each state's law without at least receiving clear notice first.

CONCLUSION

The petition for a writ of certiorari should be granted.

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