No. 17-1136

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 A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PROFESSORS RANDY BECK, ASHUTOSH BHAGWAT, SAMUEL BRAY, NATHAN CHAPMAN, ROBERT COCHRAN, RICHARD EPSTEIN, MARCI HAMILTON, JOHN INAZU, MICHAEL MCCONNELL, JOHN NAGLE, MICHAEL PAULSEN, LAWRENCE SAGER, CHAIM SAIMAN, JAMES STERN, ANNA SU, NELSON TEBBE, EUGENE VOLOKH, AND ROBIN FRETWELL WILSON AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

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.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[*]

This Court's review is urgently needed to decide whether the First Amendment requires civil courts to enforce denominational rules that purport to create a "trust" in church property without satisfying the neutral and secular requirements of civil law. Properly understood, this Court's decision in *Jones* v. *Wolf*, 443 U.S. 595 (1979), *should* provide the answer. As the Court there confirmed, civil courts may resolve church property disputes by applying "neutral principles of law, developed for use in all property disputes." *Id.* at 599 (quoting *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 449 (1969)).

The neutral principles approach is supposed to be "completely secular in operation" and "rel[y] exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 603. The outcome of that approach is not foreordained, and favors neither denominations nor congregations. By using "reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency." *Ibid.* Moreover, applying neutral principles has substantial constitutional benefits: It "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Ibid.*

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[*] Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

As petitioners have shown, however, the lower courts are squarely, expressly, and intractably divided over whether *Jones*'s "neutral principles" analysis requires courts to enforce so-called "trusts" in internal church documents that do not satisfy state law. In conflict with a host of state supreme court decisions, the court below is but the latest to consider itself "bound" to recognize a trust that does not satisfy neutral civil law, reasoning that the church that seeks to impose it is hierarchical in governance. App. 40a–42a (Hearn, J.). This approach has been termed the "hybrid approach" to neutral principles, as it combines a pure "neutral principles approach with deference to church canons or denominational constitutions" for certain religious organizations. Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 309 (2016).

Amici curiae—18 law professors who teach and write about constitutional law, the First Amendment, and the law of property—file this brief to explain that certiorari is warranted not only to resolve this mature conflict of authority, but because a *genuine* neutral principles approach best serves the religious liberty of both denominations and congregations. The hybrid approach, by contrast, both misreads *Jones* and conflicts with core First Amendment principles.

To begin with, nothing in *Jones* requires courts to disregard legal forms in favor of examining religious rules and practice to determine whether a denomination is "hierarchical" and, if so, whether its rules purport to retain control over church property in the event of a church split. Rather, *Jones* holds that civil courts need enforce trusts in church property only if they are embodied in "legally cognizable form." 443 U.S. at 606.

Indeed, the hybrid approach nullifies *Jones*'s teaching that neutral principles will "obviate[] entirely the need for an analysis or examination of ecclesiastical polity or doctrine." *Id*. at 605.

Moreover, the hybrid approach raises substantial First Amendment concerns. The balance between national and local authority in religious denominations is often nuanced—and often disputed. Civil courts are poorly equipped both to discern how a church is governed and to apply internal denomination-specific rules. A regime that calls for courts deciding church property disputes to give it their best shot threatens not only to entangle them in issues of "religious doctrine, polity, and practice," but to "frustrate the free-exercise rights of the members of [the] religious association." *Id*. at 603, 606. Further, by exempting religious denominations from otherwise-applicable legal rules governing property ownership, the hybrid approach "impose[s] special disabilities on the basis of religious status." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (internal quotation marks and ellipsis omitted).

Making matters worse, the hybrid approach incentivizes religious denominations to become more "hierarchical," and skews the decisions of local churches concerning whether to join or leave them. And because the hybrid approach frees hierarchical organizations from the "minimal" "burden" of complying with state law (*Jones*, 443 U.S. at 606)—interests are recorded in deeds thousands of times every day—its preference for "hierarchical" denominations cannot be defended as a religious "accommodation," which must alleviate "a *significant* burden" on religious exercise. *Corp. of Pre-*

siding Bishop v. *Amos*, 483 U.S. 327, 336 (1987) (emphasis added). For all of these reasons, a genuinely neutral approach to church property disputes—whereby courts apply ordinary principles of contract and property law and "scrutinize the document[s] in purely secular terms" (*Jones*, 443 U.S. at 604)—both frees civil courts from the danger of entanglement in church affairs and better protects the religious liberty of denominations and congregations alike.

This Court "has made a point of instructing religious bodies on actions open to them in advance of controversy, to keep judicial intrusion within bounds." *Congregation Jeshuat Israel* v. *Congregation Shearith Israel*, 866 F.3d 53, 58 (1st Cir. 2017) (Souter, J.). And as the Court explained nearly 150 years ago in *Watson* v. *Jones*, 80 U.S. 679, 722-723 (1872), denominational rules cannot trump grantor intent: "regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed." *Jones*, 443 U.S. at 603 n.3 (quoting *Watson*). Yet rampant confusion persists over this Court's neutral principles approach, and the Court, after having dealt with the issue in several cases over the course of a decade, has not considered the issue in nearly 40 years. Given the resulting chaos for religious bodies nationwide and judicial intrusion into religious affairs, certiorari should be granted.

A list of the *amici curiae* is set forth in the Appendix to this brief.

STATEMENT

This case involves a dispute over property where petitioners and their congregants have worshiped for many years—some for centuries, before any denominational body existed. App. 151a. The property involved is held and titled in the names of petitioners, which are 29 parishes, the Protestant Episcopal Church in the Diocese of South Carolina, and the Trustees of the Protestant Episcopal Church in South Carolina. App. 171a. Nothing in the deeds references any trust in favor of respondents, the Protestant Episcopal Church in the United States of America et al. *Ibid*. Moreover, the property at issue was purchased, maintained, and possessed exclusively by petitioners. App. 175a. Throughout the history of the parishes, the "parishes and their parishioners worshipped on property titled in the individual parishes' names, which the parishes owned in fee simple." App. 78a (Toal, A.J.).

In 1979, the national Episcopal Church unilaterally announced the "Dennis Canon," which states that "[a]ll 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." App. 79a (Toal, A.J.). The Dennis Canon is not a part of the national Episcopal Church's Constitution—incorporating the Canon in its Constitution would have required the national Episcopal Church to first send the proposed Canon to all the Dioceses for approval. App. 173a.

The local diocese later "adopted its own version of 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 [the national church] *and the* [*disassociated diocese*]." App. 79a & n.47 (Toal, A.J.). It is undisputed that "no formal trust documents were ever executed by the [petitioner] parishes, the disassociated diocese, or the trustee corporation in favor of the national church specifying the title holder as the settlor or creator of the trust and the national church as the *cestui que* trust or holder of the beneficial title of the trust." App. 80a (Toal, A.J.).

Between 2009 and 2013, petitioners cut their ties with the national Episcopal Church. App. 81a–83a, 140a–145a. The local diocese withdrew its accession to the canons and Constitution of the national Episcopal Church. App. 140a, 143a–144a. The diocese also issued quitclaim deeds to the petitioner parishes, disclaiming any interest that the diocese might have had in the parishes' properties. App. 82a (Toal, A.J.). "On November 17, 2012, the disassociated diocese held a Special Convention, at which the [petitioner] parishes and their clergy overwhelmingly voted to affirm the diocese's disaffiliation from the national church, as well as voting to remove the diocese's accession to the national church's constitution." App. 83a (Toal, A.J.).

After petitioners left the national Episcopal Church, the national church "claimed ownership over all of the property held by [petitioners], arguing [that they] only held such property in trust for the benefit of the national church," "because [petitioners] acceded to the Dennis Canon." App. 84a (Toal, A.J.). Petitioners brought suit, seeking a declaration that they own the relevant properties.

Consistent with this Court's decision in *Jones* v. *Wolf* and the South Carolina Supreme Court's decision

in *All Saints Parish Waccamaw* v. *Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163 (S.C. 2009), the trial court resolved the dispute by applying neutral principles of South Carolina law. Quoting *Jones*, the court noted that "the 'peculiar genius' of a 'neutral principles analysis' [is] that it orders 'private rights and obligations to reflect the intentions of the parties.'" App. 172a (quoting 443 U.S. at 603).

Because the national church did not hold title to the property in which it allegedly created a trust, and could not unilaterally create a trust in the property of a distinct legal entity, the trial court agreed with petitioners that the Dennis Canon did not create a trust in the parish properties. App. 172a–175a. As the court explained, the national church failed to use any "legally cognizable" form to create a trust, as "[a] legally cognizable form in South Carolina would have required a writing signed by each parish church as the owner of the property making a declaration of trust in [the national church's] favor." App. 174a.

In a decision that produced separate opinions from every single Justice on the Court, the South Carolina Supreme Court reversed in part and affirmed in part. In the "lead opinion," Acting Justice Pleicones concluded that the national Episcopal Church is hierarchical and that the property dispute originated in a doctrinal dispute between the parties, so he deferred to the church's "highest ecclesiastical body." App. 26a–28a. Notably, he interpreted the neutral principles approach to require that the court defer to the national church even if it does not "satisf[y] the specific legal requirements in each jurisdiction where the church property is located." App. 28a n.11. In his view, the neutral principles approach does not mean that a

"court must look *only* at state corporate and property law," but instead means that a court must also consider "the ecclesiastical context." App. 11a.

Justice Hearn concurred with Acting Justice Pleicones's opinion, concluding that even if the Dennis Canon did not satisfy South Carolina's legal requirements for the creation of a trust, to require a church to satisfy South Carolina trust law requirements would impermissibly burden the church, in violation of both *Jones* and the First Amendment. App. 42a.

Chief Justice Beatty wrote that the Dennis Canon alone did not create a trust in the parish properties at issue, but that the parishes' accession to the Dennis Canon (which was rescinded) served to create a trust (App. 58a)—even though state law does not provide for creation of a trust in this manner (App. 61a, 101a).

Justice Kittredge concurred in part and dissented in part, calling the idea that the parishes had created a trust in favor of the national Episcopal Church "laughable" under neutral state law. App. 61a. Nonetheless, he reasoned that *Jones*'s "neutral principles" approach barred the court from applying "the normal rules of the road concerning the creation of express trusts." App. 64a. According to him, "'neutral principles of law' is a bit of a misnomer, for it is not really 'neutral' after all." App. 61a. Instead, "constitutional considerations require courts to analyze and resolve the property dispute through the framework of a 'minimal burden' on the national religious organization." *Ibid.* Ultimately, Justice Kittredge "conclude[d] that a trust was created in favor of the national church over the property of the twenty-eight local churches that acceded in writing to the 1979 Dennis Canon," but that those parishes successfully "withdrew their accession

to the 1979 Dennis Canon in accordance with state law prior to the filing of this litigation" and thus retained title to their properties. App. 64a–68a.

Acting Justice Toal dissented, applying a pure neutral principles approach and refusing to look beyond "state principles of property and trust law." App. 100a. As she explained, "[u]nder South Carolina law," respondents failed "to create a trust." App. 100a–109a.

REASONS FOR GRANTING THE PETITION

I. The decision below cannot be reconciled with this Court's decision in *Jones* or the "neutral principles" approach that it endorsed.

"[W]hen resolving church dispute cases," the South Carolina Supreme Court purports "to apply the neutral principles of law approach as approved by the Supreme Court of the United States in *Jones* v. *Wolf*." *All Saints*, 685 S.E.2d at 171; App. 39a (Hearn, J.). In that court's view, *Jones* requires "a holistic analysis of deeds, corporate charters, and the constitution and governing documents of the general church," under which courts are "bound to recognize [a] trust" contained in church canons that concededly does not satisfy neutral state law. App. 40a–42a (Hearn, J.); see also App. 21a–22a, 28a n.11 (Pleicones, A.J.).

This understanding of the neutral principles approach cannot be squared with either *Jones* or this Court's other precedents, which do not require courts to abandon neutral principles for the benefit of certain types of religion organizations. Indeed, applying the neutral principles approach in a manner that ultimately defers to church canons or practice on issues of trust or property law—the so-called "hybrid" approach—ultimately guts both this Court's teaching that "[t]he

neutral principles approach * * * obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine" and its assurance 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 604–605.

Under a proper reading of *Jones*, the enforceability of the relevant church rules turns on whether they are embodied in "legally cognizable form" under ordinary property, contract, and trust law. *Id.* at 606. The point of the neutral principles approach is to *avoid* compelling courts to "defer to the resolution of * * * the hierarchical church," or to its "laws and regulations." *Id.* at 597, 609. Instead, the neutral principles analysis "is completely secular," "relies exclusively on objective, well-established concepts of trust and property law," and facilitates "ordering private rights and obligations to reflect the intentions of the parties" as embodied in "legally cognizable form." *Id.* at 603, 606.

To be sure, *Jones* requires that courts defer to "the highest court of a hierarchical church organization" on genuine "issues of religious doctrine or polity." *Id.* at 602. Such questions might involve, for example, whether a denomination has changed its theology (*Hull Church*, 393 U.S. at 442–443) or whether church figures may hold sacred offices (*Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976)). Questions of that nature are inextricably intertwined with the religious beliefs and internal authority of religious organizations.

Those types of questions, however, are not presented here, and the routine trust and property questions that *are* presented here may be fully resolved by applying neutral principles of law. *Jones* expressly

permits courts to resolve church property disputes by applying "completely secular" and "well-established concepts of trust and property law familiar to lawyers and judges." 443 U.S. at 603. And while civil courts must enforce denominational trusts on the same terms as other trusts—for example, where the congregation holds title but the deed recites a trust clause in favor of the denomination—they need not enforce canons or rules that are not embodied in "legally cognizable form" under neutral civil law. *Id.* at 606.

Following other state courts, however, the court below misinterpreted *Jones* to prescribe an approach that is "not really 'neutral' after all." App. 61a (Kittredge, J.). Under this misinterpretation, even a court applying a neutral principles approach is *not* "permitted to apply the law of * * * trusts as we ordinarily would." *Ibid.* Instead, the court considered it "bound to recognize [a] trust" reflected only in internal church canons, even though the national church did not follow state law by "obtain[ing] a separate trust instrument" for each property. App. 42a (Hearn, J.).

The court reached this result, moreover, based on its view that a pure neutral principles approach would violate both *Jones* and "the constitutional precepts that underlie" it. App. 21a-22a (Pleicones, A.J.); App. 42a (Hearn, J.). As the court put it, denominational "trusts" need not "be created in a way that satisfies the specific legal requirements in each jurisdiction where the church property is located." App. 28a n.11 (Pleicones, A.J.). According to the court, *Jones*'s statement that "parties can ensure" which entity "will retain the church property" so long as they "embod[y]" this result "in some legally cognizable form" (443 U.S. at 606) means that denominations need not adhere to

the most basic formalities that state law requires of all parties—secular or religious, private or public. See, *e.g.*, App. 28a n.11 (Pleicones, A.J.); App. 63a–64a (Kittredge, J.); Pet. 25–29 (collecting cases).

Unfortunately, the South Carolina Supreme Court is not alone. For example, the Supreme Court of Tennessee interprets *Jones* as "most consistent" with "the hybrid approach." *Church of God in Christ, Inc.* v. *L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 170 (Tenn. 2017). As that court describes the hybrid approach, "Tennessee courts may consider any relevant statutes, the language of the deeds and any other documents of conveyance, charters and articles of incorporation, and any provisions regarding property ownership that may be included in the local or hierarchical church constitutions or governing documents." *Ibid.* "But," the court has held, "under the neutral-principles approach that *Jones* approved," "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"—*i.e.*, "even if [the] trust language does not appear in a deed or other civil legal document." *Id.* at 170–171.

Besides conflicting with the decisions of many other courts,[1] these interpretations are at odds with *Jones*

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[1] *E.g.*, *Presbytery of Ohio Valley, Inc.* v. *OPC, Inc.*, 973 N.E.2d 1099, 1107 n.7 (Ind. 2012) (*Jones* does not "requir[e] the imposition of a trust whenever the denominational church organization enshrines such language in its constitution"; "such a rule would result in *de facto* compulsory deference"); *Ark. Presbytery* v. *Hudson*, 40 S.W.3d 301, 309–310 (Ark. 2001) (*Jones* did not overturn "long held" state

itself, which emphasized that, to be given effect under the neutral principles approach, a church's method of disposing of property must be embodied in "legally cognizable form." *Jones*, 443 U.S. at 606. Courts adopting the hybrid approach have pointed to *Jones*'s language that "the constitution of the general church can be made to recite an express trust in favor of the denominational church." *Ibid.* But the same paragraph of *Jones* goes on to explain that civil courts need "give effect to th[is] result" only if it is "the result indicated by the parties" (*plural*) and "embodied legally cognizable form." *Ibid.* Moreover, a form is "legally cognizable" only if it satisfies civil law principles "developed for use in *all* property disputes." *Hull Church*, 393 U.S. at 449 (emphasis added). There is no requirement that a court using neutral principles wade into the morass of church law.

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law barring "a grantor to impose a trust upon property previously conveyed"); accord *Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522, 525–526 (8th Cir. 1995); *Carrollton Presbyterian Church* v. *Presbytery of S. La.*, 77 So. 3d 975, 981 (La. Ct. App. 2011); *Heartland Presbytery* v. *Gashland Presbyterian Church*, 364 S.W.3d 575, 589 (Mo. Ct. App. 2012); cf. *Hope Presbyterian Church* v. *Presbyterian Church* (U.S.A.), 291 P.3d 711, 722 (Or. 2012) (ruling for the denomination but recognizing that "the express trust provision in PCUSA's constitution cannot be dispositive"; any trust must be "'legally cognizable'" under state "trust laws"); see McConnell & Goodrich, *supra*, at 319 ("[C]hurch constitutions have legal effect only when they are embodied in 'some legally cognizable form,' such as a trust document or a deed.").

As Justice Souter recently explained, "legally cognizable" means "including provisions in deeds and corporate charters spelling out reversionary rights or express trust benefits"—"*options available to religious organizations as readily as to their secular counterparts*." *Congregation Jeshuat Israel*, 866 F.3d at 58 (emphasis added). "[T]hese common instruments for establishing ownership and control * * * most readily enable a court to apply the required, neutral principles in evaluating disputed property claims," for such "contractual arrangements between the contending parties deserve the same preference as secular grounds for judgment." *Ibid.* The neutral principles approach thus minimizes "judicial intrusion" into the actions of "religious bodies." *Ibid.*

The hybrid approach achieves none of those goals. Lawyers and judges are not familiar with how to adjudicate internal church documents that might almost be valid under civil law: A form either complies with state law or it does not. A trust that is almost valid is not valid at all. A property interest that almost exists is not legally cognizable. As one Justice applying the hybrid approach below queried: "[J]ust how much of the general [state] law must a religious organization follow?" App. 64a (Kittredge, J.).

Not surprisingly, no court that has adopted the hybrid approach has reconciled the notion that *Jones requires* considering religious documents and practice with *Jones*'s actual teaching that neutral principles "promises to free civil courts completely from entanglement in questions of religious doctrine, policy, and practice." 443 U.S. at 603. But judicial entanglement in religious practice is the inevitable result of an "almost valid" approach, as what counts as almost a trust

in one denomination might be entirely different from what is almost a trust in another.

Moreover, the hybrid approach makes it nearly impossible for judges to avoid "pick[ing] and choos[ing] which state laws to apply." App. 44a (Hearn, J.). One Justice who adopted the hybrid approach below decried the dissent's "dogged effort to impose South Carolina civil law." App. 52a n.24 (Hearn, J.). Yet by "impos[ing]" State law as courts "impose" it in any other property dispute, the neutral principles approach avoids the necessity of picking and choosing among a mishmash of state laws, internal church rules, and judicial preferences to decide these highly contentious cases. That necessity inheres in any halfhearted effort to impose the law.

This Court should grant certiorari to confirm that *Jones*'s neutral principles approach does not require courts to go beyond a pure application of secular and otherwise applicable state law.

II. The decision below raises substantial First Amendment concerns.

Review is also warranted because reading *Jones* as requiring a hybrid approach to neutral principles puts the law of church property on a collision course with a host of other core principles of religious liberty.

"[B]oth the Free Exercise and the Establishment Clauses compel[] the State to pursue a course of neutrality toward religion." *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 696 (1994) (internal quotation marks omitted). The Free Exercise Clause proscribes laws that "impose special disabilities on the basis of * * * religious status" (*Lukumi*, 508 U.S. at 533 (internal quo-

tations omitted)), and the Establishment Clause forbids the government from "favor[ing] one religion over another" (*McCreary Cty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 875 (2005)). By allowing certain denominations to strip local churches of their property, the hybrid approach adopted below conflicts with both of these First Amendment proscriptions.

As *Jones* itself teaches, civil courts may not apply "neutral principles" in a manner that "frustrate[s] the free-exercise rights of the members of [the] religious association." 443 U.S. at 606. Protecting religious liberty requires civil courts to "give effect to the result indicated by the parties." *Ibid.* Even under the deference analysis of *Watson*, denominational rules cannot trump grantor intent: "regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed." *Jones,* 443 U.S. at 603 n.3 (quoting *Watson*, 80 U.S. at 722–723). Indeed, giving legal effect to trusts unilaterally declared in denominational documents is not even mere deference. It is giving denominations unilateral power to rewrite civil property law.

Further, by stripping churches of their property via means available to no one but certain denominations, the hybrid approach "impose[s] special disabilities on the basis of religious status," in conflict with core principles of free exercise. *Lukumi*, 508 U.S. at 533 (internal quotations and ellipsis omitted). "The threshold issue" in the hybrid approach is whether a particular church "is hierarchical or congregational." App. 31a n.14 (Hearn, J.). If a court using the hybrid approach finds that a church is hierarchical, then that church is entitled to "direct the disposition of property in case of a schism with a minimal burden" (App. 17a (Pleicones,

A.J.))—a lower burden than applies under state law, and thus a lower burden than would apply to a non-hierarchical church.

The hybrid approach thus applies one set of property and trust rules for hierarchical denominations, and a different set of property and trust rules for all other organizations. If a legislature attempted to catalogue "hierarchical" religious organizations and pass relaxed legal statutory rules only for their benefit, there is little doubt that its actions would run up against the First Amendment.[2] Yet that is precisely what the hybrid approach requires the judiciary to do.

It is a core First Amendment principle that "the government may not favor one religion over another." *McCreary*, 545 U.S. at 875; accord *Larson* v. *Valente*, 456 U.S. 228, 244 (1982) (calling this rule "[t]he clearest command of the Establishment Clause"). Further, "inherent" in neutral principles is the "promise of nonentanglement and neutrality." *Jones*, 443 U.S. at 604. Yet "[i]n the religiously diverse American context, many religious associations are neither 'congregational' nor 'hierarchical,' and it is no easy task for a court to determine where along the spectrum a given church lies." McConnell & Goodrich, *supra*, at 327–328.

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[2] *Cf. Goodson* v. *Northside Bible Church*, 261 F. Supp. 99, 103–104 (S.D. Ala. 1966) (striking down a law "creat[ing] a legislative body of a 65% Majority of adult members for local churches" and "grant[ing] to this legislative body the right, power and authority to change established systems of church ownership without regard to the ecclesiastical law of the denomination"), *aff'd*, 387 F.2d 534 (5th Cir. 1967).

Civil courts are poorly equipped to discern the often-delicate balance between local and denominational authority, which is often contested, and which varies from denomination to denomination. "[M]any religious polities fall somewhere between the two, or change over time," and some religious organizations, particularly non-Christian ones, "cannot be located on a hierarchical-congregational spectrum at all." *Id.* at 328–329. Further, notwithstanding a church's formal governance—which may or may not reflect how it actually operates—"a 'hierarchical' form alone offers little insight into" the particular question of "how any given church intends to hold property." *Id.* at 329. The hybrid approach thus forces courts to shoehorn churches into a dualistic hierarchical-versus-congregational paradigm that does not reflect the reality of how many religious organizations have chosen to organize themselves and structure their property ownership.

Further, 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.'" *Id.* at 327 (quoting *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice," and "[i]f civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine." *Hull Church*, 393 U.S. at 449.

According to the lead opinion below, "*Jones*' majority" directed that "a hierarchical church could direct the ownership of property in the case of a schism." App. 18a (Pleicones, A.J.). In other words, once a court applying the hybrid approach finds that a particular church is "hierarchical," that is all but the end of the matter—the national church will prevail.

Unfortunately, this "creates a one-way ratchet" for churches to become more hierarchical. McConnell & Goodrich, *supra*, at 332. Denominations, even "hierarchical" ones, may have various reasons for giving local congregations more control, including a right of exit: A "right of exit can serve as a check on the denomination from running roughshod over the strongly held views of a minority, including on divisive theological issues." *Id.* at 330. Such a right also "allows congregations to affiliate with a denomination safe in the knowledge that they can depart if deep differences arise"—"mak[ing] it more likely that congregations will join in the first place." *Ibid.*

The hybrid approach, by contrast, leaves no room for such intermediate structures; "establishing a form of governance with a secure right of exit is not possible." *Id.* at 332. "Once a church is deemed 'hierarchical,' all elements of denominational control must be enforced by the courts; but any elements of congregational control can be canceled by the denomination on a moment's notice, simply by changing the denomination's rules or adopting new interpretations of old rules." *Ibid.* Indeed, the decision below not only gave effect to canon law; it did so *retroactively* by divesting petitioners of property conveyed hundreds of years ago —before the denomination even existed, and when the grantors could not have contemplated that they were

conveying property to anything beyond their local church. In short, the hybrid approach ultimately "imposes more centralized forms of governance on churches than they may have agreed to." *Ibid.*

The hybrid approach cannot be defended as a religious "accommodation" of hierarchical denominations. Under this Court's precedent, religious accommodations are those that alleviate "a *significant* burden" on religious exercise. *Amos*, 483 U.S. at 336 (emphasis added). As *Jones* confirmed, free exercise is not implicated by "neutral provisions of state law governing the manner in which churches own property"; the "burden" of complying with such provisions is "minimal." 443 U.S. at 606. Nor is this surprising. Recording interests in deeds is a common, everyday occurrence.

In fact, the hybrid approach itself imposes substantial burdens on local congregations, the distinct legal entities that hold title under civil law—including, among other things, the loss of their principal secular resource and the base for their ministries. Even where the burdens on third parties are far less severe, this Court has held that States may not "vest[] in the governing bodies of churches" a "unilateral and absolute power" on "issues with significant economic and political implications" for others' property rights. *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 117, 127 (1982).

In short, the hybrid approach is inconsistent with core First Amendment principles. It forces judges to answer a complex question of religious hierarchy that may have no answer, and certainly not an answer that civil courts are well equipped to provide. It incentivizes denominations to become more hierarchical, while discouraging local congregations from affiliating with them and from expanding their property or acting in

accordance with their conscience as to whether to remain affiliated with their current denominations. As one Justice below aptly explained: "The message is clear for churches in South Carolina that are affiliated in any manner with a national organization and have never lifted a finger to transfer control or ownership of their property—if you think your property ownership is secure, think again." App. 72a (Kittredge, J.).

* * * * *

Under the hybrid approach to church property disputes sanctioned by the court below, a congregation cannot easily avoid having its property expropriated by an affiliated denomination. The denomination can always transfer ownership, even retroactively, simply by passing unilateral rules at church conventions. It does not matter who holds title, what the donor of the property intended, who paid for and maintained the property, whether the denomination's interest is publicly recorded, what the rules were when the congregation joined the denomination, whether the congregation then held title in its own name, or even whether the denomination then existed.

The decision below awards half a billion dollars of property to respondents by applying internal canons that were never embodied in any ordinary contract or recorded in any deed, and that were instead unilaterally adopted centuries after local congregants founded their local churches and purchased their properties. Effectively, the court below granted respondents all of the benefits of local church property ownership and none of the burdens—like having to pay insurance costs or the mortgage, or facing liability for conduct or injuries occurring on the property. No other private entity, secular or religious, enjoys that right.

The decision below is fundamentally inconsistent with this Court's First Amendment precedents, and the conflict among the lower courts can be resolved only by this Court. Review is warranted.

CONCLUSION

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

Respectfully submitted.

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APPENDIX

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