No. 20-____

In the Supreme Court of the United States

JEFF SCHULZ, ELLEN SCHULZ, LIZ CEDERGREEN, DAVID MARTIN, LINDSEY MCDOWELL GEORGE NORRIS, NATHAN ORONA, AND KATHRYRN OSTROM, AS TRUSTEES OF THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, A WASHINGTON NONPROFIT CORPORATION, PETITIONERS

v.

THE PRESBYTERY OF SEATTLE, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a dispute between a local congregation and its former denomination over ownership of property to which the local congregation holds legal title, does the First Amendment permit courts to apply a rule of absolute deference to assertions of ownership by the denomination?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners, Jeff Schulz, Ellen Schulz, Liz Cedergreen, David Martin, Lindsey McDowell, George Norris, Nathan Orona, and Kathryn Ostrom, were defendants in the trial court, appellants in the court of appeals, and petitioners in the Washington Supreme Court.

Respondents, The Presbytery of Seattle, The First Presbyterian Church of Seattle, Robert Wallace, and William Longbrake, were plaintiffs in the trial court, appellees in the court of appeals, and respondents in the Washington Supreme Court.

Petitioners, as trustees of First Presbyterian Church of Seattle, state that it is a Washington non-profit corporation that has no parent corporation and issues no stock.

RELATED PROCEEDINGS

Superior Court of Washington (King County):

The Presbytery of Seattle, et al. v. *Jeff Schulz, et al.*, No. 16-2-03515-9 SEA (Sep. 17, 2017)

The Presbytery of Seattle, et al. v. *Jeff Schulz, et al.*, No. 16-2-23026-1 SEA (April 3, 2017)

Court of Appeals of Washington (Division I):

The Presbytery of Seattle, et al. v. *Jeff Schulz, et al.*, No. 78399-8-I (Oct. 7, 2019)

Supreme Court of Washington:

The Presbytery of Seattle, et al. v. *Jeff and Ellen Schulz, et al.*, No. 97996-1 (April 1, 2020)

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INTRODUCTION

For the past forty years, many of this nation's largest Protestant denominations have been thrown into upheaval by doctrinal and other disagreements, leading to church splits, the creation of new denominations, and—relevant here—lawsuits over the ownership of church property. These disputes involve more than just the monetary value of the properties involved, which runs into the billions of dollars; they involve places of immense importance for worship, having been the locus of veneration and emotional attachment for generations.

The proper resolution of property conflicts in some denominations—those that are clearly hierarchical or clearly congregational—is straightforward under current doctrine. Truly hierarchical churches such as the Roman Catholic Church or LDS Church generally vest title in bishops or other high church authorities, and churches adopting decentralized polities, such as Baptists and Quakers, generally vest title in the local corporate entity or trustees.

Many religious traditions arising out of the Reformation, however, deliberately rejected both the hierarchical and the congregational forms of governance. These groups established unique systems of ecclesiastical "federalism" that divide authority among church bodies at the various levels, with differing degrees of democratic control and interconnection. Treating such denominations as purely "hierarchical" or "congregational"—or even as a monolithic class of hybrid denominations—ignores vital theological differences that inform their polities.

Unfortunately, in a politically charged case after the Civil War, this Court did just that, ruling that for

purposes of resolving church property disputes, there are just two forms of church organization: the "strictly congregational or independent" church, "governed solely within itself," and hierarchical denominations having "general and ultimate power of control" that is "more or less complete" and "supreme" (lumping Presbyterianism in with the latter). *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 724, 722 (1871). In so holding, the Court declared that local churches affiliate with denominations "with an implied consent to th[eir] government, and are bound to submit to it" in matters involving property. *Id*. at 729.

These assumptions were not only bad theology, but also bad constitutional law, as they effectively convert federal or mixed forms of church governance into top-down hierarchies. Indeed, the assumptions conflicted with the thrust of the *Watson* opinion, which affirmed "the full and free right" of all people "to organize voluntary religious associations" in accordance with their "religious doctrine." *Id*. at 728. As the Court has since noted, *Watson* was this Court's first decision to affirm the "freedom for religious organizations" to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 186 (2012) (citation omitted). Those foundational principles, for which *Watson* has so often been quoted, cannot be squared with the idea that religions come in just two organizational shapes, or that joining a denomination forfeits all rights in possible future conflicts with the denomination.

In *Jones* v. *Wolf*, 443 U.S. 595 (1979), this Court took the first step toward correcting *Watson*'s incorrect assumptions. It held that civil courts deciding

church property disputes need not follow *Watson*'s rule of absolute deference to denominations, explaining that First Amendment values are better served if courts apply "neutral principles of law": "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 603. A genuinely neutral approach, whereby courts "scrutinize the document[s] in purely secular terms," "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 604, 603. Moreover, because neutral principles facilitate "ordering private rights and obligations to reflect the intentions of the parties," they are "flexible enough to accommodate all forms of religious organization and polity." *Id.* at 604, 603. In short, neutral principles better protect the liberty of religious communities—be they hierarchical, congregational, or something else—to fashion systems of ecclesiastical governance that "accord with the desires of the[ir] members" and the dictates of their faiths. *Id.* at 604.

Perhaps because of a lingering loyalty of four Justices to *Watson*'s rule of denominational deference, and perhaps because doing so was unnecessary to resolving the question presented, the Court in *Jones* v. *Wolf* did not declare the denominational deference approach unconstitutional. Instead, it left the choice between deference and neutral principles to the state courts. A large majority of States have since adopted neutral principles, but Washington and eight other States have clung to *Watson*'s rule of absolute deference, and several others have purported to adopt neutral principles while effectively adhering to *Watson*. Some courts rejecting the deference approach have held that it violates the Free Exercise and/or Estab-

lishment Clauses, while others cite the First Amendment concerns of the Court in *Jones* without conclusively stating that deference is unconstitutional.

This case is a stark example of the consequences of *Watson*'s denominational deference rule. Washington's state courts awarded valuable church property in downtown Seattle to petitioners' former denomination, despite the undisputed facts that "[t]itle to [the] property" has always been in the local church's "name as a nonprofit corporation" and that the church never consented to give the denomination any trust or other interest in the property, which the church purchased entirely "with funds from its members." App. 3a. The sole reason for favoring the denomination was the Washington courts' continued adherence to *Watson*.

It is time for this Court to take the next step and hold that neutral principles are not only constitutionally permissible, but constitutionally required. Compare *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (holding that neutrality in aid to otherwise eligible religious and secular schools is permissible), with *Trinity Lutheran Church* v. *Comer*, 137 S. Ct. 2012 (2017), and *Espinoza* v. *Mont. Dep't of Rev.*, 140 S. Ct. 2246 (2020) (both holding that neutrality in aid to otherwise eligible religious institutions is constitutionally required). Only that approach ensures that all religious societies—not just "hierarchical" and "congregational" churches—enjoy "the full and free right" to "organize voluntary religious associations" and adopt forms of property ownership consistent with their religious polities. *Watson*, 80 U.S. at 728.

OPINIONS BELOW

The Washington Supreme Court's order denying review (App. 53a–54a) is reported at 460 P.3d 177. The Washington Court of Appeals' opinion (App. 1a–26a) is reported at 449 P.3d 1077. The trial court's orders granting partial summary judgment (App. 27a–35a) and denying a preliminary injunction (App. 36a–50a) are unreported.

JURISDICTION

The Washington Supreme Court issued its final judgment, denying the petition for review, on April 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV, § 1.

STATEMENT

A. The First Presbyterian Church of Seattle and its property

First Presbyterian Church of Seattle (FPCS) was incorporated in 1874. CP1798.[1] Its articles of incorporation stated that the church's "objects and purposes" were to "promote the worship of Almighty God and the belief in and extension of the Christian Religion, under the forms of government and discipline of The Presbyterian Church in the United States of America." CP1805. The articles expressly granted "charge and control of the property and temporal affairs" of the Corporation to First Presbyterian's Board of Trustees, a body elected by the congregation. CP1807. The articles did not give the denomination any right to its property. As amended in other respects, those articles remain in effect today.

FPCS owns real property in the heart of downtown Seattle, estimated to be worth more than $20 million, plus roughly $10 million in personal property. CP1032, CP1312–1314. It is undisputed that all of FPCS's property was purchased with "funds from its members," and that "[n]either [the] Presbytery nor [the denomination] has financially contributed to its property." App. 3a. Title has always "remained in [FPCS's] name as a nonprofit corporation." *Ibid.*

In addition, no trust interest in favor of the Presbytery or PCUSA or any predecessor denomination has ever been recorded in the deeds or other corporate documents. CP1814–1824 (deeds). In 1929, one of

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[1] "CP____" refers to the relevant page of the "Clerk's Papers," the record in the Washington courts.

PCUSA's predecessor denominations proposed amending its constitution to require local congregations to amend their charters or articles to "declare that [the congregation's] property is held in trust * * * for the [denomination]." CP1988. The proposal was rejected. *Ibid.*

B. The Presbyterian Church (U.S.A.) and the Seattle Presbytery

Contrary to this Court's characterization in *Watson*, 80 U.S. at 722–723 (discussed in detail below), Presbyterian churches are neither congregational nor hierarchical. See generally II James Bannerman, *The Church of Christ: A Treatise on the Nature, Powers, Ordinances, Discipline, and Government of the Christian Church* 245–341 (1868) (contrasting Presbyterian governance with Roman Catholic, Episcopalian, Independent, and Congregational governance). Much like the U.S. Constitution, which many Presbyterians believe was modeled on Presbyterian church polity, the church is "partly federal and partly national." THE FEDERALIST, No. 39 (Madison) (1788). Unlike a hierarchical church, authority is bottom-up: congregations elect their own governing boards made up of lay "elders" (collectively called the "Session"), which send "commissioners" to local and regional boards (called Presbyteries and Synods) and ultimately to a national General Assembly. CP1974–1976; Sidney Ahlstrom, *A Religious History of the American People* 265 (1972) (every level has "certain fixed responsibilities"); Joan Gray & Joyce Tucker, *Presbyterian Polity For Church Leaders* 10 (4th ed. 2012) ("Each council has certain expressed powers, and only those power, to exercise."). Control over property and other material aspects of corporate affairs are typically entrusted to a Board of

Trustees, which is likewise elected by the congregation. For a period, members of FPCS's Session also served as trustees.

Over the centuries, Presbyterian churches have experienced frequent splits and mergers,[2] with individual congregations deciding where to affiliate after the split. Until *Watson*, congregations that chose to disaffiliate kept their property. Eric Osborne & Michael Bush, *Rethinking Deference: How the History of Church Property Disputes Calls Into Question Long-Standing First Amendment Doctrine*, 69 S.M.U. L. Rev. 811, 839 (2016). There had been "no trust language, express or implied, automatically in favor of a national denomination or general body in any Presbyterian constitution from the inception of Presbyterianism in the 16th Century until the addition of express trust language to some Presbyterian constitutions in the early 1980s." CP1980.

In 1983, the United Presbyterian Church in the United States of America (UPCUSA) adopted such a clause—but even then, consistent with Presbyterianism's non-hierarchical polity, the denomination recognized and represented to member churches that the clause did "not give Presbytery, Synod, or Assembly any jurisdiction over property" unless the local church consented under state law. CP1980–1990; CP2064–2125. That representation reflected black-letter trust law in Washington and elsewhere: because the UPCUSA did not hold title to local church property, it

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[2] See CP1945; *Family Tree of Presbyterian Denominations*, Presbyterian Historical Society (last visited Aug. 27, 2020) https://www.history.pcusa.org/history-online/presbyterian-history/family-tree-presbyterian-denominations.

could not grant itself a legally cognizable trust interest in that property. Restatement (Third) of Trusts §§ 10, 13 (2003).

It is undisputed that FPCS refused to transfer its property to the denomination. App. 3a. FPCS's lawyers concluded that UPCUSA's trust clause would not "change the title or legal effect of ownership without [FPCS] itself correcting—amending all of its deeds to show title is held in trust for UPC USA." CP1838; accord CP1833–1843. FPCS informed the Presbytery of its "unalterable opposition" to any denominational trust. CP1848.

FPCS's "unalterable opposition" did not change. *Ibid.* When UPCUSA merged with the Presbyterian Church in the United States (PCUS) to form the Presbyterian Church in the United States of America (PCUSA) in 1983, PCUSA put a trust clause in its Book of Order. CP1799; CP1863 (Book of Order, G-4.0203). PCUSA recognized, however, that the clause had no legal effect absent express consent from affiliated churches. CP1990–1991. To encourage such consent, PCUSA circulated model articles of incorporation that expressly granted PCUSA an interest in local church property. CP2128 (Model Article VI–"All Property Held in Trust for the Presbyterian Church (U.S.A.)"). When FPCS restated its articles and amended its bylaws to affiliate with PCUSA, it included no such language. CP1804–1812 (1985 articles); CP1870–1874 (2005 bylaws).

C. The dispute between First Presbyterian Church of Seattle and the Seattle Presbytery

Over the past decade, relations between FPCS and the Presbytery of Seattle deteriorated. The congregation had dwindled precipitously. In 2006, under new pastoral leadership, the church initiated plans to reinvest the value of its property in urban ministry and to partner with a younger congregation to create a "church in an urban village." At first, FPCS tried to work with the Presbytery, but it soon became clear that the Presbytery had other plans for FPCS's property. CP1907–1908; CP1913–1918. Things came to a head in 2015: the Presbytery's leaders threatened that if FPCS sought ecclesiastical permission to leave PCUSA—under a so-called "Gracious Separation" policy—the process would "not be gracious." CP1784.

FPCS's elected elders and trustees then took the steps necessary under Washington law to disaffiliate FPCS from PCUSA. On November 5, 2015, the Session provided written notice to the congregation of a November 15 meeting to vote on disaffiliation. CP1800; CP1905–1919. The Session also sent notice to the congregation—as members of FPCS's nonprofit corporation—of a November 15 meeting to vote on amending FPCS's corporate articles to remove reference to PCUSA if the congregation approved disaffiliation. CP1921–1936. Although not legally required, these notices also informed FPCS's congregation and corporate members that they would be asked to ratify revised bylaws. *Ibid.*

FPCS held the two congregational meetings after services on November 15, 2015. A few members angrily disagreed with the motion to disaffiliate, but all

the measures passed by margins exceeding 85%. CP1800–1801.[3]

The Presbytery viewed FPCS's disaffiliation as an opportunity to seize its valuable downtown property, and it unilaterally appointed an administrative commission to investigate. Months later, after FPCS had severed ties with the Presbytery and begun the process of reaffiliating with another Presbyterian denomination, the administrative commission issued a report. Without notice or a congregational vote, and contrary to FPCS's articles, bylaws, and Washington law, the commission purported to remove the elected elders and trustees and to appoint the commission, who are not even members of FPCS, to serve as the church's Session and Board of Trustees. CP612. The commission also declared that FPCS's amended bylaws and disaffiliation vote "ha[d] no effect." CP608–609. Finally, the commission seized control of FPCS's property, declaring: "All property held by or for FPCS —including real property, personal property, and intangible property—is subject to the direction and control of the Administrative Commission exercising original jurisdiction as the session." CP613.

D. The civil court proceedings below

1. One day later, the Presbytery sued, seeking a declaratory judgment that the commission's report was "conclusive and binding" and that any "interest FPCS has in church property is held in trust for" PCUSA. CP494; CP479–520. Before FPCS had even answered, the Presbytery sought partial summary

[3] The meeting's Moderator did not allow proxy voting, but even counting proxies, the vote to disaffiliate greatly exceeded two-thirds. CP1801.

judgment. FPCS opposed the motion and sought a preliminary injunction to stop the Presbytery from asserting control over FPCS's corporate affairs and property.

The trial court denied the preliminary injunction and granted summary judgment to the Presbytery. App. 27a–50a. In denying the injunction, the court held that, under *Presbytery of Seattle, Inc.* v. *Rohrbaugh*, 485 P.2d 615 (Wash. 1971), Washington Supreme Court precedent that pre-dates *Jones* v. *Wolf*, 443 U.S. 595 (1979), the administrative commission's "determinations" were "entitled to conclusive deference." App. 48a–49a. (As explained below, *Jones* criticized without overruling the nineteenth-century precedent on which *Rohrbaugh* relied.) The trial court also concluded, without explanation, that FPCS's attempt to disaffiliate was "ineffective" under "corporate law," and that the Presbytery controlled FPCS's property by virtue of the trust clause added to PCUSA's Book of Order in 1983 over FPCS's objection. *Ibid*.

In granting summary judgment to the Presbytery, the court declared that PCUSA "is a hierarchical church"; the "findings and rulings of the Administrative Commission" are "conclusive and binding"; the "amendments to the bylaws" and "articles of incorporation that the FPCS congregation purported to adopt" are "void"; "[a]ny interest that FPCS has in church property is held in trust for the benefit of [PCUSA]"; and the "current governing body of FPCS is the Administrative Commission." App. 34a.

2. FPCS appealed, arguing that the First Amendment bars civil courts from automatically favoring one side over another in ecclesiastical conflicts, without

regard to ownership under neutral law. The court of appeals affirmed in a published opinion. App. 3a.

Citing *Rohrbaugh*, the court held that Washington courts must defer to the decisions of the highest tribunals of hierarchical churches in "any civil dispute." App. 3a. *Rohrbaugh* was not affected by *Jones* v. *Wolf*, the court reasoned, because *Jones* held that "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." App. 12a. Viewing the Presbyterian Church as "hierarchical"—a disputed legal issue—the court deemed itself bound to accept the Administrative Commission's findings. App. 17a.

3. FPCS sought Washington Supreme Court review, arguing that *Rohrbaugh*'s rule of absolute denominational deference was unconstitutional. Pet. for Rev. 15–19. The court denied review. App. 54a.

REASONS FOR GRANTING THE WRIT

Church property cases arise with frequency in almost every State, and they have wrenching emotional, spiritual, and economic consequences. Unfortunately, a minority of nine States continue to follow the path set by *Watson* v. *Jones*, granting "compulsory deference" to denominations' assertions of property ownership (*Rohrbaugh*, 485 P.2d at 619), without regard to the actual property arrangements reflected in the deeds, corporate charters, and any trust instruments. Under that approach, applied below, churches are deemed either "strictly congregational" or hierarchical, and congregations that affiliate with denominations are treated as having irrevocably given their "implied consent" to the denominations' "general and ultimate power of control" over all church property. *Watson*, 80 U.S. at 722–724, 729.

By effectively establishing a top-down hierarchical governance structure for any and all faith groups that are not wholly "independent" (*ibid.*), *Watson*'s denominational deference approach denies religious groups their constitutional freedom to determine their own form of governance. State courts that still adhere to *Watson* dismiss this Court's later guidance, in *Jones* v. *Wolf*, that constitutional principles of free exercise and nonestablishment are better served by applying "neutral principles of law." The resulting split implicates all but four States and appears to be intractable.

This case offers a clean opportunity to resolve the split and correct the constitutional error. Certiorari should be granted.

I. Washington's denominational deference approach violates the First Amendment.

Review is warranted because Washington's rule of compulsory deference flouts the core principles of the First Amendment, with severe consequences for the self-determination of churches across America.

A. *Watson*'s understanding of the principles that ought to govern church property disputes was largely undermined by *Jones* v. *Wolf*.

In manifest tension with its ringing affirmation of the right of religious groups to organize themselves as they see fit, *Watson* adopted a rule of compulsory deference to the tribunals of hierarchical churches. 80 U.S. at 727; *Rohrbaugh*, 485 P.2d at 619. Under that approach to property disputes between congregations and denominations, the position of one side—the denomination—is treated as "binding," no matter what the legal documents governing property ownership

may say. *Watson*, 80 U.S. at 729.[4] And although *Watson* arose under the federal common law, this Court later stated that its reasoning had "a clear constitutional ring" (*Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church* ("*Hull Church*"), 393 U.S. 440, 446 (1969)), leading the state courts to treat it as authoritative.

Over time, *Watson*'s broad compulsory deference rule "encountered vivid and strong criticism," and this Court moved away from it. *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 115 (1952). As Justice Brennan explained for the Court in *Hull Church*:

> [T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded. But 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. If civil courts undertake to resolve such

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[4] *Watson* qualified the deference rule with the statement that it is the "obvious duty" of civil courts to enforce the "express terms" of deeds, wills, or other instruments. *Id.* at 722–723. But as the decision below illustrates, that qualification has fallen by the wayside. The deeds here expressly vest ownership in FPCS, whose charter vests control of property in the congregation's elected trustees. CP1814–1824 (deeds); CP1810 ("The Board of Trustees * * * shall have charge and control of the property and temporal affairs of the church"). Following *Watson*, the courts below disregarded these "express terms," instead relying on the self-serving claims of the Presbytery's administrative commission and PCUSA's internal rules. App. 3a.

> controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."

393 U.S. at 449. Ultimately, in *Jones* v. *Wolf*, this Court squarely held that "neutral principles" not only are a permissible means of deciding church property disputes, but in many key respects are preferable. 443 U.S. at 603; see also *ibid.* (the neutral-principles approach "received approving reference in [*Hull Church*], 393 U.S., at 449, in Mr. Justice Brennan's concurrence in *Md. & Va.* [*Eldership of*] *Churches* [*of God*] v. *Sharpsburg Church*, 396 U.S.[] [367, 370 (1970)]; and in [*Serbian Orthodox Diocese* v. *Milivojevich*], 426 U.S.[] [696,] 723 n. 15 (1976)]").

"Neutral principles of law" are those "objective, well-established concepts of trust and property law" that are "familiar to lawyers and judges" and have been "developed for use in all property disputes." *Id.* at 599, 603. Courts examine "the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property," so long as these documents do not "incorporat[e] religious concepts in the provisions relating to the ownership of property." *Id.* at 603–604.

As the Court in *Jones* recognized, the neutral principles approach to church property disputes yields numerous "advantages" over denominational deference. *Id.* at 603. It is "completely secular in operation" and thus "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and

practice." *Ibid.* Critically, moreover, it "shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties"—and thus "accommodate[s] all forms of religious organization and polity." *Ibid.* Naturally, courts must take care not "to rely on religious precepts in determining whether the document[s] indicate[] that the parties have intended to create a trust." *Id.* at 604. But "the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for" these "occasional problems in application." *Ibid.*

The time has come for this Court to take the logical next step: to hold that applying neutral principles is not only constitutionally permissible, but constitutionally required. Much as the Court's doctrine in the context of state aid to religiously-affiliated institutions has evolved—from holding that States generally must refrain from funding such institutions, even on a neutral basis,[5] to holding that neutral funding is constitutionally permissible,[6] to holding that it is unconstitutional for States to discriminate against otherwise eligible institutions based on their religious status[7]—the Court should take this opportunity to hold that the neutral principles approach endorsed in *Jones* v. *Wolf* is the only constitutional method for resolving church property disputes.

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[5] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Meek* v. *Pittinger*, 421 U.S. 349 (1975).

[6] *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Zelman*, 536 U.S. at 653.

[7] *Comer*, 137 S. Ct. at 2022; *Espinoza*, 140 S. Ct. at 2256.

B. Compulsory deference to the denomination cannot be reconciled with the free exercise and nonestablishment principles of the First Amendment.

Watson's holding rests on two assumptions—that religious societies are either congregational or hierarchical, and that all noncongregational entities that affiliate with denominations "impliedly consent" to the denominations' assertions of ownership of their property. Both assumptions are unfounded.

1. First, the Court in *Watson* wrongly assumed that all religious groups fall into one of two categories: "strictly congregational" or hierarchical. *Id.* at 722–723. That was not true in 1871, and it is not true today. See *Jones*, 443 U.S. at 605–606 (church government is often "ambiguous"). According to one study, "Approximately 17% of the religious organizations report that their organizational structure is either along a continuum of types or of some structural form other than hierarchical, congregational, presbyterial, or connectional." H. Reese Hansen, *Religious Organizations and the Law of Trusts*, *in* Religious Organizations in the United States 279, 285 n.49 (James A. Serritella ed., 2006) (citing DePaul University, *1994 Survey of American Religions at the National Level*, Public Release Document 3).

The "hierarchical" label best fits the Roman Catholic Church, whose worldwide church is governed by strict, descending levels of authority—from the Pope, to diocesan bishops, to local priests. Congregational elections have no formal role in governance. Roman Catholic parishes vest property in diocesan bishops—thus ensuring that the hierarchy has "a general and ultimate power of control." *Watson*, 80 U.S. at 722.

At the other end of the polity spectrum, Quakers and Independent Baptists exemplify the classic "congregational" model. These groups are "strictly independent of other ecclesiastical associations," and thus are "governed solely [from] within." *Id.* at 722, 724.

Many religious polities, however, fall between the two extremes, or change over time. Familiar examples include "mainline" Protestant denominations such as Presbyterians, Episcopalians, Methodists, and Lutherans. For example, the Evangelical Lutheran Church in America, the largest Lutheran denomination, emphasizes that it is organized neither as a hierarchical church in the Roman Catholic tradition nor as a congregational church in the Baptist tradition, but as a church in which all levels are "interdependent partners sharing responsibility in God's mission."[8] Similarly, Methodists and Episcopalians each reject elements of both congregational and hierarchical governance.[9]

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[8] Evangelical Lutheran Church in Am., Constitutions, Bylaws, and Continuing Resolutions § 5.01 (2008), https://newlifelutheran.com/wp-content/uploads/sites/56/2016/07/ELCA-Constitution.pdf.

[9] Judicial Council of the United Methodist Church, Decision No. 1312 (May 9, 2016) ("The system of government, with which The United Methodist Church constitutes itself, is based on an interconnected set of authorities. The system balances and constrains the power exercised by each of the authorities individually and by all connectionally. There are other ecclesial bodies that choose to vest all authority in one entity. That entity might be a single congregation, a regional synod, an episcopacy, or even an individual pastor. In The United Methodist Church, no single entity has authority for all ecclesial matters. Each authority

Other religious organizations cannot be located on a hierarchical–congregational spectrum at all. This is especially true of non-Christian groups, which often do not share the Christian notions of "assembly" and "membership" that underlie the hierarchical–congregational dichotomy. Examples include Hindu temples, Islamic mosques, Sikh temples, and some Jewish groups. *E.g.*, *Singh* v. *Singh*, 9 Cal. Rptr. 3d 4, 19 n.20 (Ct. App. 2004) (Sikh temples or "gurdwaras" are neither "congregational" nor "hierarchical"); *Congregation Yetev Lev D'Satmar, Inc.* v. *Kahana*, 879 N.E.2d 1282, 1289 (N.Y. 2007) (Smith, J., dissenting) (Hasidic Jewish groups defy "congregational" or "hierarchical" classification).[10] For these groups, hierarchical–congregational categorization makes no sense.

The Presbyterian denomination implicated here falls in the intermediate category. See Gray & Tucker, *supra*, at 1–5; Bannerman, *supra*, at 245–332 (contrasting Presbyterian and Roman Catholic, Episcopalian, "Independent," and "Congregational" govern-

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center is balanced or constrained by other authorities."); Ecclesiology Committee of the House of Bishops of The Episcopal Church, *A Primer on the government of The Episcopal Church and its underlying theology* (Jan. 2016), https://episcopalchurch.org/files/documents/primer.on_.tec_.pdf (describing the church's government as "at once democratic and hierarchical").

[10] See also, *e.g.*, Willard G. Oxtoby, *The Nature of Religion, in* World Religions: Eastern Traditions 486, 489 (Willard G. Oxtoby ed., 2001) (Hindu temples have neither "members" nor "congregations"); Helen R. Ebaugh & Janet S. Chafetz, *Religion and the New Immigrants* 49 (2000) (same for Islamic mosques).

ance); Ahlstrom, *supra*, at 265; CP1974–1976. Recognizing its bottom-up structure, with specific responsibilities at every level, the PCUSA's highest adjudicative body has explained that the church's structure "must not be understood in hierarchical terms, but in light of the shared responsibility and power at the heart of Presbyterian order." *Johnston* v. *Heartland Presbytery*, Remedial Case 217–2 (Permanent Judicial Comm'n of Gen. Assembly of PCUSA 2004).[11]

Enforcing *Watson*'s dichotomy in church property cases violates free exercise and establishment principles. Forcing every faith community into one of these two boxes prevents them from adopting forms of property ownership that accord with their doctrine. Arlin M. Adams & William R. Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291, 1337 (1980). Stated simply, hierarchical deference "effectively limits the ability of local church congregations to establish the terms of their association with more general church organizations." *Ibid.*

By contrast, when property ownership is governed by neutral state law, general and local church entities may "orde[r] [their] rights and obligations to reflect the intentions of the parties." *Jones*, 443 U.S. at 603. Before a dispute arises, "religious societies can specify what is to happen to church property in the event of a particular contingency" by drafting "appropriate reversionary clauses and trust provisions." *Ibid.* If they intend that the denomination have ownership, "[t]hey

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[11] http://oga.pcusa.org/media/uploads/oga/pdf/pjc21702.pdf.

can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church" or "the constitution of the general church can be made to recite an express trust" in its favor, provided that trust interest "is embodied in some legally cognizable form." *Id.* at 606. "The burden involved in taking such steps will be minimal." *Ibid.*

Watson's dichotomy invariably favors one ecclesiastical form, the hierarchical, over others, including federal, presbyterial, connectional, and mixed forms, in violation of the Establishment Clause requirement of denominational and doctrinal neutrality. As this Court has held, "[t]he clearest command" of the First Amendment "is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Churches must therefore be free to establish and follow their own doctrines regarding ecclesiastical structure. For courts to treat religious societies other than the "strictly congregational" as if they were hierarchical—forbidding application of the "ordinary principles which govern voluntary associations" to such societies (*Watson*, 80 U.S. at 724, 725)—is a bald-faced "denominational preference" for the hierarchical form. The deference approach effectively converts intermediate forms of church polity into top-down hierarchies.

Moreover, civil courts are ill-equipped to make difficult judgments about intra-church governance, which can be subtle or ambiguous. To understand how a church is governed, a court must be understand not only documents such as church constitutions, canons, and bylaws, but also their history in operation. As one church governance scholar put it, "the constitutions of church groups vary widely in how, and the extent to which, they provide the definitive clue to the

governance patterns of those groups." Edward Leroy Long, Jr., *Patterns of Polity: Varieties of Church Governance* 3 (2001). For courts to make these determinations—or even to determine what evidence to consider—is as clear an example of forbidden "entanglement" as one can imagine.

Neutral principles, by contrast, "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603. Unlike the deference approach, which requires courts to classify churches as congregational or hierarchical, neutral principles may be applied to "all forms of religious organization and polity." *Ibid.* This eliminates the need for courts to "review ecclesiastical doctrine and polity to determine where the church has 'placed ultimate authority over the use of church property'"—which often "require[s] 'a searching and therefore impermissible inquiry into church polity.'" *Id.* at 605 (quoting *Milivojevich*, 426 U.S. at 723).

2. Second, for churches that are not "strictly congregational or independent" (80 U.S. at 724), *Watson* mistakenly assumes that they consent to something they may not have consented to—giving the denomination "general and ultimate power of control" over their property (*id.* at 722). Here is the Court's logic:

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Id. at 729. Respectfully, however, this "implied consent" was the Court's own concoction.

A congregation consents only to what it consents to; the choice to join a larger organization does not necessarily translate into a choice to submit to that organization in every respect and for always—on pain of losing property purchased with the congregation's own donations. As the New York Court of Appeals has explained, deference wrongly assumes that "the local church has relinquished control to the hierarchical body in all cases, thereby frustrating the actual intent." *First Presbyterian Church of Schenectady* v. *United Presbyterian Church in U.S.*, 464 N.E.2d 454, 460 (N.Y. 1984). Certainly, there was no moment in FPCS's history when it consented to give the Presbytery property rights. Whenever this was proposed, FPCS unequivocally objected. *Supra* at 9. And States may not grant "unilateral and absolute power" to "a church" on "issues with significant economic and political implications" for others' property rights—let alone by allowing them to strip others of title. *Larkin* v. *Grendel's Den*, 459 U.S. 116, 117, 127 (1982).[12]

Some congregations in federal or connectional denominations might consent to be bound by denominational policy as long they remain part of the denomination, but reserve the right to leave (with their property) if irremediable differences arise. Other congregations might consent to be bound on some issues but

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[12] Allowing denominations to secure ownership of congregational property without complying with civil law cannot be defended as a religious "accommodation," as accommodations must alleviate "a significant burden" on religious exercise (*Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987)) and any "burden" of placing ownership in "legally cognizable form" is "minimal" (*Jones*, 443 U.S. at 606).

not others, or only if certain procedures are followed, or with other conditions. Contrary to *Watson*'s assumption, consent to join a denomination is not necessarily an all-or-nothing proposition.

Watson's implied consent rationale also misunderstands the nature of consent within voluntary associations. To be sure, members of voluntary associations —church or otherwise—agree to be bound by associations' rules, in the sense that they can be expelled for violating them. But that does not elevate all such rules to the level of an enforceable contract, let alone make the remedy for breach loss of one's property.

Suppose, for example, that a fraternal lodge adopts a bylaw requiring members to bequeath to the lodge some portion of their real property. The lodge will not automatically obtain that property when the member dies. Rather, to be enforced in court, the property interest must be put in legally cognizable form, such as a will. If a member refuses to make the bequest, he can be kicked out of the lodge. But the mere existence of the bylaw, and the member's continued participation in the organization, do not, without more, give the lodge a judicially-enforceable property right.

So too with churches. If a church adopts a rule requiring members to tithe ten percent of their income, it can enforce the rule by excommunication. But the mere existence of the rule, and the members' decisions to continue attending until expelled, does not empower the church to sue them for unpaid tithes. A church rule cannot be enforced as such in court. Similarly, if a hierarchical church adopts a rule declaring a trust interest in local property, it can direct local church officials to execute a trust agreement or be expelled from the denomination. But the mere existence

of the internal rule, and the congregations' decision to remain in the denomination unless and until excommunicated, does not create a legally cognizable trust.

The experience of the Roman Catholic hierarchy in the 1800s, when it sought to obtain control over local church buildings during the trusteeism controversy, is instructive. In 1823, the Council of Baltimore declared that church property should be held in the name of the bishop. But that did not mean that bishops across the country immediately gained title to local parishes. Over time, this decision was effectuated by changing deeds or executing trust instruments. Joseph Chisholm, *Civil Incorporation of Church Property*, in 7 Catholic Encyclopedia (1910). Courts enforce those civil instruments, not church canons.

The same is true today. Churches can adopt internal rules and enforce them through ecclesiastical discipline—for example, by expelling congregations, declining to ordain pastors or elders, or refusing to seat representatives at convocations—but those rules do not convey property interests unless they are embodied in "legally cognizable form." *Jones*, 443 U.S. at 606. This Court should make clear that the Constitution does not permit, let alone require, civil courts to become the enforcers of intra-church rules or the decisions of their judicatories.

3. Stare decisis is no obstacle. Since *Watson*, this Court has moved away from denominational deference. *Watson*'s deference rule was "poorly reasoned," has "led to practical problems and abuse," and has been "undermined by more recent decisions" (*Janus* v. *Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2460 (2018)), most notably *Jones*. Even as

Jones implied in dicta that deference remained permissible, it expressed a preference for neutral principles so clear that a large majority of state courts have abandoned the deference approach. See 443 U.S. at 603–606; *infra* at 27–30 (discussing state court precedent). And insofar as denominations may assert reliance interests in denominational deference, congregations have equally substantial reliance interests in enforcement of their deeds and charters. As the Oregon Supreme Court put it, *Jones* put denominations "on notice that state courts no longer are required to defer to the denominational church's decision in a property dispute." *Hope Presbyterian Church* v. *Presbyterian Church (U.S.A.)*, 291 P.3d 711, 721 (Or. 2012).

Moreover, *Watson*'s error was not its interpretation of the First Amendment; indeed, its affirmation of religious groups' self-determination rights was right on the mark. Its error arose from misunderstanding the diverse character of church organization and the nature of consent in voluntary associations. There is no reason to give stare decisis effect to that sort of error. *Cf. S. Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (correcting historical errors).

II. Review is needed to resolve a longstanding split over the proper approach to resolving church property disputes.

As explained above, the Court in *Jones* explained why a neutral principles approach better accords with free exercise and nonestablishment values, but stopped short of overruling *Watson*. That encouraged conflict among state courts, which "have divided over the rules they apply and the mandates of the Constitution." Osborne & Bush, 69 S.M.U. L. Rev. at 813.

Three-fourths of the States, following this Court's lead in *Jones*, apply neutral principles. Others adhere to *Watson*, deferring to denominations' property claims in all cases not involving congregational churches. All but four States have weighed in on this issue, and the split appears to be entrenched.

1. Currently, the great majority of jurisdictions—thirty-six States and the District of Columbia—have rejected *Watson*'s rule and instead resolve church property disputes under neutral principles of law. See App. 55a–58a. Some have held that *Watson*'s compulsory deference rule is unconstitutional, and that "the First Amendment * * * necessitate[s] [the] adoption of the 'neutral principles approach." *Fluker Cmty. Church* v. *Hitchens*, 419 So. 2d 445, 447 (La. 1982). Others, following *Jones*'s "sharp[] criticism" of *Watson*, have expressed grave doubts about denominational deference without declaring it unconstitutional. *St. Paul Church, Inc.* v. *Bd. of Trustees of Alaska Missionary Conference of United Methodist Church, Inc.*, 145 P.3d 541, 552 (Alaska 2006).

Still other state courts purport to follow neutral principles, but use a "hybrid" approach that in effect is more like deference. *E.g.*, *Church of God in Christ, Inc.* v. *L. M. Haley Ministries, Inc.*, 531 S.W.3d 146 (Tenn. 2017); *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 453 (Ga. 2011); *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009). Those cases are subject to the same constitutional critique as those that openly embrace hierarchical deference, with the added vice of unpredictability. See Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 327–344 (2016); accord *Peters Creek United Presbyterian Church* v. *Washington Presbytery*,

90 A.3d 95, 109 (Pa. Commw. Ct. 2014) (hybrid approach "violates the Establishment Clause and would effectively divest legal property owners of their land against their will"); *Hope Presbyterian*, 291 P.3d at 722 (hybrid approach is "a *de facto* application of hierarchical deference"); *Presbytery of Ohio Valley* v. *OPC, Inc.*, 973 N.E.2d 1099, 1106 n.7 (Ind. 2012) (hybrid approach is "*de facto* compulsory deference").

The state courts applying neutral principles have given ample reasons to doubt the constitutionality of "compulsory deference" (*Rohrbaugh*, 485 P.2d at 619) to the claims of one side in litigation between denominations and congregations.

First, as the New York Court of Appeals has held, deference "prefer[s] one group of disputants to another" based solely on the court's assumptions of their hierarchical character, without regard to actual legal documents. *Schenectady*, 464 N.E.2d at 460. The Supreme Court of Connecticut has explained that deference is "unfair because it results in the disparate treatment of local churches, depending on whether the general church is hierarchical." *Episcopal Church in Diocese of Connecticut* v. *Gauss*, 28 A.3d 302, 315–316 (Conn. 2011). Deference deprives local churches of a fair hearing, as it "allow[s] the higher adjudicatory authorities within the denomination, which invariably support the position of the general church, to decide the dispute." *Ibid.* Similarly, the Louisiana Supreme Court has noted that hierarchical deference "den[ies] a local church recourse to an impartial body to resolve a just claim." *Hitchens*, 419 So. 2d at 447. And the Montana Supreme Court has explained that it raise "serious problems under the Free Exercise Clause" to "deprive religious organizations of all recourse to the protections of civil law that are available

to all others." *Second Int'l Baha'i Council* v. *Chase*, 106 P.3d 1168, 1172 (Mont. 2005) (citation omitted).

Second, several courts have recognized the "free exercise" problems with *Watson*'s false "assum[ption] that the local church has relinquished control to the hierarchical body in all cases, thereby frustrating the actual intent of the local church in some cases." *E.g.*, *Schenectady*, 464 N.E.2d at 460. "Whatever authority a hierarchical organization may have over associated local churches is derived solely from the local church's consent." *Hitchens*, 419 So. 2d at 447. In assessing intent, however, deference "ignor[es] other possibly relevant facts" beyond denominations' assertions of ownership. *Gauss*, 28 A.3d at 316. Indeed, it disregards the most relevant and reliable evidence of the actual terms of consent—deeds, charters, trust documents, and other "civil legal documents" whereby religious entities "organize their affairs." *All Saints Par. Waccamaw* v. *Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163, 171 (S.C. 2009).

Third, some courts have observed that, "by supporting the hierarchical polity over other forms," deference "may indeed constitute a judicial establishment of religion." *Schenectady*, 464 N.E.2d at 460; accord *York* v. *First Presbyterian Church of Anna*, 474 N.E.2d 716, 721 (Ill. App. Ct. 1984) (following *Schenectady*). As the Louisiana Supreme Court has held, deference "constitut[es] a judicial establishment of the hierarchy's religion" by granting it "authority" over "property" not obtained "from the local church's consent." *Hitchens*, 419 S. 2d at 447. A systemic tilt toward denominations in disputes with congregations distorts American ecclesiological doctrine toward hierarchy over mixed polities.

2. Nine States' courts nonetheless apply deference. Most, like the court below, simply adhere to pre-1979 precedent without grappling with the constitutional concerns raised in *Jones* v. *Wolf*. See App. 55a–58a. Because *Jones* did not hold that deference was "impermissible" (*Tea* v. *Protestant Episcopal Church in Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980)), these States see no need to overrule longstanding precedent. See *ibid.*; *Mills* v. *Baldwin*, 377 So. 2d 971, 971 (Fla. 1979) ("We have carefully reviewed *Jones* v. *Wolf* and find our decision [applying deference] to be not inconsistent with [it]."); *Heartland Presbytery* v. *Presbyterian Church of Stanley, Inc.*, 390 P.3d 581, 596 (Kan. App. Ct. 2017) (*Jones* did not "repudiate the principle of hierarchical deference").

Some state courts explain their adherence to *Watson* as "[d]ue to First Amendment entanglement considerations." *Original Glorious Church of God In Christ, Inc.* v. *Myers*, 367 S.E.2d 30, 33 (W.Va. 1988); *Tea*, 610 P.2d at 184 (Nevada's "rule of deference[] [was] adopted to avoid entanglement with questions of religious doctrine"). This rationale defies logic. As *Jones* explained, courts applying deference are "always * * * required to examine the [church's] polity and administration," which risks "'a searching and therefore impermissible inquiry into church polity.'" *Id.* at 605 (quoting *Milivojevich*, 426 U.S. at 723). By contrast, enforcing deeds, corporate articles, and trust documents under secular law is routine and avoids religious entanglement. *Jones,* 403 U.S. at 603.

3. The lower courts' approaches can be divided into three categories:

Neutral principles	Hybrid neutral principles	Hierarchical deference
Alabama	California	Florida
Alaska	Connecticut	Kansas
Arizona	Georgia	Michigan
Arkansas	Kentucky	Nevada
Colorado	New York	New Jersey
Delaware	South Carolina	New Mexico
District of Columbia	Tennessee	Oklahoma
Hawaii	Virginia	Washington
Illinois		West Virginia
Indiana		
Iowa		
Louisiana		
Maine		
Maryland		
Massachusetts		
Minnesota		
Mississippi		
Missouri		
Montana		
Nebraska		
New Hampshire		
North Carolina		
Ohio		
Oregon		
Pennsylvania		
South Dakota		
Texas		
Utah		
Wisconsin		

(For citations, see App. 55a–58a.) This split stems directly from *Jones*'s ambiguous instructions—which this Court alone can clarify.

III. The question presented is important and recurring, and this case is an ideal vehicle to clarify the law governing church property disputes.

This Court has received many petitions asking it to resolve church property questions left open by *Jones*. This case presents an ideal vehicle for the Court to clarify the law and reject *Watson*'s rule of compulsory deference.

A. Disputes over church property and the constitutionally required rule of decision are important and recurring.

For centuries, church property disputes have had "intrinsic importance and far-reaching influence." *Watson*, 80 U.S. at 734. Throughout this nation's history, there have been a "surprising number of litigated church [property] disputes." Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 Calif. L. Rev. 1378, 1380 (1981). On average, there have been around 120 cases each decade since 1948. See Kent Greenawalt, *Hands Off: Civil Court Involvement in Conflicts over Religious Property*, 98 Colum. L. Rev. 1843, 1844 n.1 (1998); Jeffrey B. Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 Pepp. L. Rev. 399, 455 (2008) (finding "91 church property cases" between 1998 and 2007). All but four States have weighed in. The issue is not going away.

Moreover, the issue affects property collectively worth billions of dollars—roughly $30 million here alone. *E.g.*, *Episcopal Diocese of Fort Worth* v. *Epis-*

copal Church, 602 S.W.3d 417, 434 (Tex. 2020) (dispute over "$100 million worth of real estate"). But the properties' dollar value is far eclipsed by their religious and emotional significance. Indeed, to parishioners exiled from their houses of worship, little could matter more. Families often worship (and tithe) at churches for generations, marking life-changing events like baptisms, weddings, and funerals there as well. Their constitutional right to freely exercise their religion—and to freely structure the terms of their affiliation with other believers—has been fundamentally infringed. Few issues brought to this Court have more human impact than this one.

B. This case squarely presents the question whether compulsory deference is constitutional.

This case presents an excellent vehicle to resolve the conflict. The petition cleanly presents a single question—whether, in disputes between local congregations and their former denominations, civil courts may apply a rule of absolute deference to denominations' ownership assertions. The court below squarely addressed that question. App. 3a (in Washington, "a civil court must defer to the decision of the highest tribunal of a hierarchical church" in "any civil dispute"; "the trial court properly deferred"). It did not articulate any other ground of decision (see *ibid.*), and nothing about its decision is fact-bound. Thus, there is no doubt that resolving the question presented in petitioners' favor will entitle them to a remand for application of neutral principles.

Few church property cases offer such a straightforward vehicle for review. Prior petitions have arisen from States following a "hybrid" variant of neutral

principles,[13] which obscures the rationale of the decision in a welter of factors and considerations. This wolf comes as a wolf.

C. Reversal would likely alter the outcome.

Having applied a rule of "compulsory deference" to the Presbytery's ownership assertions, the court below did not need to address who owns FPCS's property under neutral law. And because this Court "does not declare what the law of [a State] is," it need not decide who will ultimately prevail. *Jones*, 443 U.S. at 609. But a ruling in petitioners' favor would likely alter the outcome on remand, making this case an excellent vehicle for review.

1. Under ordinary rules of property and trust law, the legal documents contain no hint of a trust in favor of respondents. Even the court below acknowledged that, decades before PCUSA existed, FPCS bought its property "with funds from its members." App. 3a. "Title to [FPCS's] property has remained in its name as a nonprofit corporation," and "[n]either Presbytery nor PCUSA has financially contributed." *Ibid.* Moreover, it is undisputed that no trust is recorded in the deeds, and that FPCS's articles and bylaws contain no trust language. Under neutral principles, a Washington court would likely rule for FPCS.

The Presbytery asserts that a "trust clause" added to the denomination's constitution in 1983 grants it a

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[13] *E.g.*, Pet. i, *The Protestant Episcopal Church in the Diocese of South Carolina*, v. *The Episcopal Church*, No. 17-1136 (Feb. 9, 2018) (asking whether "courts [must] recognize a trust on church property even if the alleged trust does not comply with the State's ordinary trust and property law").

beneficial interest in FPCS's property. Under Washington law, however, no one can unilaterally grant themselves a beneficial interest in property of legally distinct entities; trusts are created by the "[d]eclaration by the owner." RCW 11.98.008(2). Here, FPCS never created or assented to such a trust. Indeed, FPCS *objected*. *Supra* at 9; Wash. COA Respondents Br. 13 (FPCS "voiced opposition to the express trust provision"). And since no denominational trust over the contested property has ever been placed in "legally cognizable form" (*Jones*, 443 U.S. at 606), deferring to the Presbytery's unilateral "trust clause" would flout the principles of *Jones*.

The Presbytery contends that references in FPCS's articles and bylaws to PCUSA's "Form of Government" incorporated the trust clause. Not so. That language antedates FPCS's membership in any Presbytery. It refers to the presbyterial "form" of church organization, not to hierarchical control by a denominational body. Indeed, the articles then immediately state that the "charge and control of the property and temporal affairs of the church" is vested in FPCS's corporate trustees, whom the congregation elects. CP1810 (1985 articles). Many state courts considering similar language have rejected PCUSA's claims. *E.g.*, *OPC*, 973 N.E.2d at 1112 (a congregation's corporate documents recognizing PCUSA's Constitution are insufficient "to create an express trust on its property in favor of the PC(USA)"); *Heartland Presbytery* v. *Gashland Presbyterian Church*, 364 S.W.3d 575, 588 (Mo. Ct. App. 2012) (bylaws' "general statements concerning subordination to the PCUSA's Constitution" do not "establish a trust").

Lacking evidence that FPCS expressly consented to create a trust, the Presbytery says FPCS's conduct

is enough. Not by a long shot. Scattered statements by FPCS's pastors or accountants (not its elected trustees or Session) over the years cannot establish a trust under neutral law.

2. Similarly, under ordinary corporate law, FPCS disaffiliated from PCUSA. Under Washington law, the articles could be amended on ten days' notice and a two-thirds vote of the members. RCW 24.03.080(1); RCW 24.03.165. It is undisputed both that FPCS's members received ten days' notice (CP1800; CP1905–1936 (notice)), and that far more than two-thirds of them approved disaffiliation and the amended articles. CP1800–1801; CP1943 (vote count). Petitioners also had authority to amend FPCS's bylaws to remove references to the PCUSA. RCW 24.03.070 ("power to * * * adopt new bylaws shall be vested in the board of directors unless otherwise provided" in articles or bylaws); CP1874 ("These bylaws may be amended * * * by a two-thirds vote of the voters present[.]") (2005 bylaws). Petitioners did so unanimously and, although not legally required, FPCS's members overwhelmingly ratified the amendments.

Faced with these undisputed facts, the Presbytery lobbed a mishmash of far-fetched arguments below—contending, for example, that the trustees abolished the office of trustee in 2005, and that only a member vote could amend the bylaws. But the court below did not reach these strained arguments, which the Washington courts should address in the first instance.

When the smoke clears, all that matters under ordinary property law is that FPCS, a non-profit corporation, holds title to the disputed property and did not convey any trust interest to the Presbytery. That the

denomination asserts a contrary claim cannot, consistently with the First Amendment, be conclusive.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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