No. 20-261

In the Supreme Court of the United States

JEFF SCHULZ, ELLEN SCHULZ, LIZ CEDERGREEN, DAVID MARTIN, LINDSEY MCDOWELL, GEORGE NORRIS, NATHAN ORONA, AND KATHRYN 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

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Which method of resolving church property disputes better respects religious autonomy and reduces government entanglement in religious questions—a rule of absolute deference to denominational authority or a rule applying ordinary principles of property and trust law to legal documents?

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. Becket has also represented numerous prevailing religious parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367 (2020).

Because the First Amendment protects the freedom of religious organizations to structure their own internal affairs, Becket has long supported resolving church property disputes by applying ordinary principles of property and trust law, not by placing a thumb on the scale in favor of one form of religious polity over another.[2] See, *e.g.*, Becket Fund Amicus Brief, *Timberridge Presbyterian Church, Inc.* v. *Presbytery of Greater Atlanta, Inc.*, 567 U.S. 916 (2012) (denying

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. All counsel of record received timely notice of intent to file this brief and have granted their consent.

[2] This brief uses the term "church" broadly to refer to religious associations of all different traditions, including non-Christian traditions.

certiorari), 2012 WL 1202303; Becket Fund Amicus Brief, *Congregation Jeshuat Israel* v. *Congregation Shearith Israel*, 866 F.3d 53 (1st Cir. 2017) (Souter, J.), cert. denied, 139 S. Ct. 1320, 2016 WL 5929129.

Becket thus has an interest in this case not because it favors any particular interpretation of religious doctrine, but because it seeks an interpretation of the First Amendment that will promote the maximum of religious liberty and the minimum of government interference for all religious organizations.

SUMMARY OF THE ARGUMENT

The First Presbyterian Church of Seattle ("FPCS") was formed in 1874. Throughout its history, it has always paid for, maintained, and controlled its own property. And, despite its affiliation with different denominations that have at various times attempted to declare (or have FPCS declare) a trust interest in its property, FPCS has always rejected putting such language in its governing documents. Instead, legal title has always been vested in its local trustees.

In 2015, when FPCS voted overwhelmingly to leave its latest denomination—the Presbyterian Church (U.S.A.) ("PCUSA")—the Presbytery of Seattle (part of the PCUSA) asserted control over FPCS's property (in contravention of the express terms of the property deeds) and asked a state court to enforce its claimed authority.[3] Based on its understanding of state law,

[3] For simplicity, this brief often refers to disputes between a local congregation and its (former) "denomination," "denominational authorities," or "denominational bodies." As we set out below, at II.A., this terminology is a poor attempt to capture the dynamics of the diverse religious polities present in the United States.

the court held that it must defer to the Presbytery's assertion of control instead of applying ordinary principles of trust and property law. Accordingly, the lower court ruled in favor of the Presbytery—despite no legal basis for finding that the property was held in trust for the PCUSA and despite legal documents saying the opposite.

The decision below thus squarely presents an important First Amendment question that has divided the lower courts: How should courts resolve church property disputes? Under one approach, courts generally resolve church property disputes in the same way they resolve property disputes between other organizations—by applying ordinary principles of property and trust law to civil legal documents like property deeds and written trust agreements. As this brief argues, such an approach fully protects the free exercise of religion, avoids government entanglement in religious questions, and provides maximum religious autonomy.

The alternative approach applied by the court below—of automatically deferring to *any* assertion of ownership by a denominational authority—violates the First Amendment. It undermines the autonomy of religious organizations by pushing them toward a more rigidly hierarchical structure and by making certain, more decentralized, forms of church polity impossible to maintain. And it entangles courts in religious questions by forcing them to resolve property disputes

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Here, for example, the legal dispute is between the local congregation's trustees and the Presbytery of Seattle (one of several intermediary bodies within the PCUSA polity), not the PCUSA itself.

based on contested interpretations of internal church documents, ecclesiastical customs, and religious expectations. Beyond that, this approach results in unequal treatment: some religious entities are treated worse than others (and worse than their secular peers), when they are denied access to ordinary state law procedures allowing for the straightforward resolution of property disputes. And it unsettles private property rights by making ownership turn on contested religious understandings, rather than readily accessible legal documents.

This Court should resolve the split by holding that courts must respect the free exercise of religion, avoid religious entanglement, and ensure religious autonomy by applying ordinary principles of property and trust law to resolve church property disputes.

REASONS FOR GRANTING THE WRIT

I. Lower courts remain deeply divided over the appropriate legal standard for resolving church property disputes.

Almost every state supreme court has weighed in on this split, and the results confirm that the division is deep and intractable. The key question is how secular courts should resolve church property disputes. On the one hand, they can apply standard principles of state property and trust law to determine ownership of contested property when a dispute arises. On the other, they can first probe a particular denomination's polity and structure to determine whether it is "hierarchical" or "congregational" and then, if hierarchical, defer to assertions of denominational authority (or the church's dispute resolution process) when determining which religious entity owns the property. One

jurisprudential approach avoids religious questions; the other *requires* secular courts to ask and answer them.

As the petition sets forth, seventeen states have adopted either complete deference to denominational bodies or a hybrid approach that often acts, in practice, as "*de facto* compulsory deference." *Presbytery of Ohio Valley, Inc.* v. *OPC, Inc.*, 973 N.E.2d 1099, 1106 n.7 (Ind. 2012); Pet.32. In these states, civil courts vest in the denominational structures of religious bodies deemed "hierarchical" the authority to unilaterally declare the existence of a trust or otherwise control the disposition of church property, even when doing so contradicts ordinary legal documents (like the deed) and ordinary principles of property and trust law.[4]

On the other side, twenty-eight states and the District of Columbia apply ordinary principles of property and trust law to church property disputes. Pet.32. Under this approach, courts look to the legal documents evidencing property ownership and apply standard state property and trust law conventions to resolve any legal disputes. See *Jones* v. *Wolf*, 443 U.S. 595, 604 (1979) (courts should scrutinize church documents "in

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[4] Several of these courts have expressly acknowledged that, under normal principles of state trust and property law, a unilateral denominational trust would be invalid. See *Episcopal Church Cases*, 198 P.3d 66, 86 (Cal. 2009) (Kennard, J., concurring) ("No principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner."); *Rector* v. *Bishop of Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237, 244 (Ga. 2011); *Episcopal Church in the Diocese of Conn.* v. *Gauss*, 28 A.3d 302, 318 (Conn. 2011), cert. denied, 567 U.S. 924; *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008).

purely secular terms" looking for legally binding "language of trust").[5]

The split between these two approaches is square, entrenched, and intractable; only this Court can resolve it.

II. Church property disputes should be resolved by enforcing ordinary principles of property and trust law—not by automatically deferring to a denominational authority.

This split would be reason enough to grant certiorari here. But the underlying logic of *Jones* v. *Wolf*—and, more importantly, the First Amendment—goes further. It is not just constitutionally *permissible* to apply standard principles of trust and property law to resolve church property disputes (the only question presented in *Jones*); it is constitutionally *required*.

The principles this Court articulated in *Jones* v. *Wolf* confirm as much. First, *Jones* v. *Wolf* made clear that state law must allow churches to adopt any form of religious polity they desire. 443 U.S. at 606; see also *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 728 (1871) (recognizing the "right to organize voluntary religious associations"). Second, *Jones* v. *Wolf* emphasized that civil courts may not become entangled in questions of "religious doctrine and practice." 433 U.S. at 602; see also *Watson* v. *Jones*, 80 U.S. at 729 (rejecting "appeal to the secular courts" for resolution of "any religious doctrine"). Unfortunately, the deference approach fails

[5] This Court will likely soon see a petition for certiorari from the decision in *Episcopal Diocese of Forth Worth* v. *Episcopal Church*, 602 S.W.3d 417 (Tex. 2020), which rightly adopted the approach of applying ordinary principles of property and trust law to resolve church property disputes.

on both fronts. Instead of allowing religious entities to adopt any ecclesiastical form, it pressures them toward a more hierarchical structure. And instead of reducing entanglement in religious questions, it forces courts to dive deep into internal church documents, customs, practices, and the "intent" of religious bodies.

And these are not the only problems with such deference. As explained below, deference in church property disputes impairs the free exercise of religion, entangles courts in religious disputes, infringes on religious autonomy, and creates uncertainty over private property rights—all with profound practical and spiritual costs.

A. Deference in church property disputes infringes the free exercise of religion.

A rule of deference to denominational authority in church property disputes infringes on the free exercise of religion in several ways. First, it assumes that churches are either "congregational" or "hierarchical." But in the real world, most churches are neither completely "congregational" nor "hierarchical," and a church's governing structure may offer little insight into how it intends to hold its property. Second, it subtly pressures churches toward a more "hierarchical" form of church government, contradicting the rule that churches should "decide for themselves, free from state interference, matters of church government." *Our Lady*, 140 S. Ct. at 2055 (internal quotation marks omitted).

1. In the religiously diverse American context, many churches and religious associations are neither "congregational" nor "hierarchical," and it is no easy task for a court to determine where along this

"spectrum" a given church lies—much less to lump all religious polities into one of these two categories. See *Jones* v. *Wolf*, 443 U.S. at 605 (noting that church government is often "ambiguous"). While some religious groups (like the Catholic Church on one hand or Quakers on the other) may be relatively easy to categorize, Pet.18-19, many are not. Take the PCUSA, of which the Presbytery of Seattle is a part. Despite its multi-tiered structure, the highest adjudicative body in the PCUSA has emphasized that "[w]hile the *Book of Order* refers to a higher governing body's 'right of review and control over a lower one' (G-4.0301f), these concepts *must not be understood in hierarchical terms*, but in light of the shared responsibility and power at the heart of Presbyterian order (G-4.0302)."[6]

What is more, presbyterial form alone offers little insight into how Presbyterian churches intend to hold property. Different Presbyterian denominations take different positions. The PCUSA now includes in its constitution a provision stating that all property of local congregations is held in trust for the denomination. [7] But the Presbyterian Church in America ("PCA"), with an ecclesial structure otherwise virtually identical to that of the PCUSA, affirms just the opposite: local congregations retain their properties if

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[6] *Johnston* v. *Heartland Presbytery*, Permanent Judicial Comm'n of the Gen. Assembly of the Presbyterian Church, Remedial Case No. 217-2, 7 (2004) (quoting *The Book of Order: The Constitution of the Presbyterian Church (U.S.A.) Part II* (2009)) (emphasis added), https://perma.cc/GM9Y-RPEE.

[7] See *The Book of Order: The Constitution of the Presbyterian Church (U.S.A.) Part II*, § G-4.0203 (2019-2021) ("All property held by or for a congregation * * * is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).").

they leave.[8] As one commentary has noted, "the mere outward presbyterial form—*i.e.*, a series of assemblies—does not necessarily import a functional hierarchy * * * ." Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L. Rev. 1142, 1160 (1962). And this problem is even more pronounced for "religious organizations [that] cannot be located on a hierarchical-congregational spectrum at all," like "Hindu temples, Islamic mosques, Sikh temples, and some Jewish groups." Pet.20.

Furthermore, it is nearly impossible to discern church polity from an organization's formal structure alone. Pet.22-23. Some constitutions are hortatory but widely ignored in practice, some are aspirational, and some are adopted without the agreement of (or against the will of) a large majority of local congregations or individual members.

The experience in this case drives home the point: among the materials considered below as part of the court's attempt to discern the church's polity were internal church communications, various versions of the Book of Order, a sworn declaration accompanied by numerous exhibits, and the minutes for the Seattle Presbytery from 1979. Pet.App.3a-7a; 15a-19a; 43a-50a. As the Washington Court of Appeals confirmed, "extensive documentation related to whether the church is hierarchical" (or at least whether the church can be *deemed* hierarchical by the court) was included

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[8] See *The Book of Church Order of the Presbyterian Church in America* (6th ed. 2007) §§ 25-9, 25-10 ("All particular [i.e. local] churches shall be entitled to hold, own and enjoy their own local properties, without any right of reversion whatsoever to any Presbytery * * * .").

in the record. Pet.App.20a. It is thus often no easy task to determine how a church should be classified.

In short, the nature of a church's polity is a complex, nuanced question that members of the relevant church may struggle to define. Civil courts are not competent to resolve such questions. See *Watson* v. *Jones*, 80 U.S. at 729 ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own."). And forcing courts to resolve these questions in a binary way causes even more problems. Judges—unfamiliar with a religious tradition's unique customs and organization—are forced to shoehorn a diversity of religious polities into one of two buckets. This oversimplified division then conclusively determines how civil courts will interact with religious bodies when resolving church property disputes.

2. In addition to imposing a false dichotomy, the deference approach infringes on the free exercise rights of religious entities by making it impossible to adopt certain forms of church polity on a permanent basis—in particular, a form of polity that allows local bodies to affiliate with a denomination but keep their property if they leave.

Take, for example, the polity of the PCA, which combines ecclesiastical governance based on ascending judicatories with local congregational control of property in the event of a split. See *supra* note 6 and accompanying text. Under a deference regime, that church-law provision vesting property control in the local congregation can never be made truly binding. If at some point in the future the PCA's General Assembly (like the PCUSA's) reversed course and amended

its constitution to assert that all local property is held in trust for the denomination, a deference rule would leave local congregations no recourse. That is, even if the PCA fully intends *ex ante* to give local congregations ultimate control over their property—and existing local congregations join or remain with the denomination in full reliance on that promise—denominational deference bars the PCA from making that aspect of "congregational" governance binding upon itself.[9]

Thus, deference operates as a one-way ratchet, pressing religious bodies over time toward ever more hierarchical forms of government. Regardless of "the intentions of the parties," *Jones* v. *Wolf*, 443 U.S. at 603, all hierarchical aspects of church polity must be enforced as a matter of civil law, while any congregational elements may be canceled by a denominational authority unilaterally and at a moment's notice.

Funneling religious groups toward certain organizational structures conflicts with this Court's repeated assurance that religious organizations have a constitutional right to govern their own affairs—"to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady*, 140 S. Ct. at 2055 (quoting *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952)); accord *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622-623 (1984) (recognizing right of religious organizations to control "internal

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[9] This is not an isolated issue. In *Falls Church* v. *Protestant Episcopal Church in the U.S.*, 740 S.E.2d 530, 540-541 (Va. 2013), the state court *enforced* a unilateral denominational trust that was adopted after a formal recognition that no such trust existed.

organization or affairs"). That includes freely choosing a form of polity.

But blind deference is not just harmful to religious polities that fall somewhere between the "hierarchical" and "congregational" poles—it can infringe on the free exercise rights of all religious entities. Even the most hierarchical religious bodies have an interest in ensuring that courts respect their chosen, legally binding, polity. See *Roman Catholic Archdiocese of San Juan* v. *Feliciano*, 140 S. Ct. 696, 698 (2020) (Puerto Rico courts ignored the legal structure of various Catholic entities in Puerto Rico and instead invented a new legal entity, the "Roman Catholic and Apostolic Church in Puerto Rico," and held this entity liable for all pension obligations incurred by the Pension Plan for Employees of Catholic Schools Trust.).

And a rule of deference to a denomination's *highest* authority creates its own concerns by inviting courts to inquire (perhaps through discovery) into the lines of authority running through religious bodies deemed hierarchical. See 27 Lay Roman Catholics Amici Brief at 2, 5, 20, *Fulton* v. *City of Philadelphia*, No. 19-123 (Aug. 14, 2020) (claiming that Pope Francis, "as the ultimate hierarchical leader of the Roman Catholic Church," is an unrepresented "part[y] in interest" and invoking "the authority of the Pope and the Vatican" as opposed to the religious beliefs of the Archdiocese of Philadelphia); Lay Catholics Amici Brief at 5, *Roman Catholic Archdiocese of Indianapolis, Inc.* v. *Heiman*, No. 20S-OR-520 (Ind. Sept. 23, 2020) ("The [Archdiocese] and its *amici curiae* further assert that the Archdiocese is the ultimate authority. They pay scant if any attention to the Church's higher, ultimate authority in

Rome, or to the trial court's corresponding ruling that discovery is required on that front.").

Thus, in addition to frustrating attempts by religious bodies to structure their property ownership in legally binding forms, a rule that requires courts to defer to a religious body's highest authority opens the door to probing discovery disputes over where religious authority in fact lies and creative judicial reimagining of that religious body's internal structure.

B. Deference in church property disputes entangles courts in religious questions.

A deference rule not only raises free exercise concerns, it also entangles courts in religious questions. As this Court has explained on numerous occasions, civil courts should avoid weighing in when disputes over doctrine arise. See *Our Lady*, 140 S. Ct. at 2070 (Thomas, J., concurring) ("This Court usually goes to great lengths to avoid governmental 'entanglement' with religion, particularly in its Establishment Clause cases."); *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.) ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."); *Jones* v. *Wolf*, 443 U.S. at 603 (noting as a benefit of the ordinary principles approach the "promise[] to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.").

But deference in church property disputes necessarily creates entanglement. As the Supreme Court explained in *Jones* v. *Wolf*, by applying a rule of deference, "civil courts would always be required to examine the polity and administration of a church * * * ." 443 U.S. at 605. Deference often requires courts to

review sensitive internal church documents, hear testimony regarding internal church discussions, and analyze internal church practices. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1886 (1998) (listing possibilities).

In some cases, examination of the administration of a religious body by civil courts "would not prove to be difficult." *Jones* v. *Wolf*, 443 U.S. at 605. But in others, "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." *Ibid*. (internal quotation marks omitted). In those cases, "the suggested rule would appear to require a searching and therefore impermissible inquiry into church polity." *Ibid.* (internal quotation marks omitted).

In the present case, for instance, the deeds are in the name of the local congregation, and a straightforward application of Washington trust law would result in a finding that there is no valid trust agreement in favor of the Presbytery or the PCUSA. Pet.35-37. But instead of engaging in this purely secular analysis, the lower court permitted the introduction of evidence regarding internal church discussions, the pastors' severance agreements, church financial statements, church bylaws, church constitutions, internal church votes, and the history of the church's polity. Pet.App.3a-7a; 15a-17a; 43a-50a. The court then made entangling factual findings about everything *but* the secular legal status of the disputed property.

The deference approach embraced by the Supreme Court of Washington will continue to embroil courts in

these fact-intensive inquiries regarding church polity and practice. Asking religious bodies to take the minimal steps necessary to legally effectuate a trust will allow them to structure their own relationships however they desire *ex ante* and thus keep courts from attempting to divine the precise nature of a religious body's structure once a dispute arises.

C. Deference in church property disputes undermines religious autonomy.

Some denominational authorities have attempted to justify deference in church *property* disputes by conflating deference with the way courts protect religious autonomy in *other* types of disputes, such as disputes over doctrine, employment, or ecclesiastical office. *E.g.*, Pet. at 35, *Episcopal Church* v. *Episcopal Diocese of Fort Worth*, 135 S. Ct. 435 (2014) (No. 13-1520), 2014 WL 6334170, at *35 (denying petition analogizing church property disputes to employment disputes). But this argument overlooks important differences in various types of disputes and the unique risks to religious autonomy posed by each one.

This Court has long held that civil courts have no authority to resolve disputes over "matters of church government as well as * * * doctrine." *Kedroff*, 344 U.S. at 116. Common questions of doctrine and governance include whether a denomination has departed from its previous theological commitments, see *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 442-443 (1969) (*Presbyterian Church I*), which church officials are entitled to hold sacred offices, see *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), or who should "transmit[] the * * * faith to the next generation." *Hosanna-Tabor Evangelical Church & Sch.*

v. *EEOC*, 565 U.S. 171, 192 (2012). To resolve such disputes, courts would necessarily pass judgment on questions of religious doctrine or governance. But courts have neither a legitimate interest in regulating such issues nor the competence to decide them. *Milivojevich,* 426 U.S. 696 at 714 n.8.

Civil courts cannot tell a church that they must retain certain employees (or punish them for failing to do so) without infringing on the church's internal governance. *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020) ("The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government."). Nor can a court determine whether a church departed from its doctrinal commitments (or whether it accurately interpreted ecclesiastical laws) without weighing in on one side or the other of a doctrinal dispute. *Milivojevich*, 426 U.S. at 717 ("[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern."). When such questions arise, religious autonomy forbids courts from resolving them; it is a sort of immunity. Otherwise, courts risk breaking into the sphere of religious sovereignty protected by the First Amendment. Authority over religious bodies must remain with religious bodies alone.

But church property disputes are not the same as disputes over doctrine, ecclesiastical office, or

employment of ministers; they are unique.[10] For one, when a dispute arises over the ownership of church property, courts cannot avoid resolving the dispute. As this Court noted in *Jones* v. *Wolf*, the State is obligated to provide for "the peaceful resolution of property" conflicts of all kinds, and it has a duty to "provid[e] a civil forum" where the ownership of property "can be determined conclusively." 443 U.S. at 602. See *Presbyterian Church I,* 393 U.S. at 449 (similar). Regardless of a court's approach, any church property decision (including a decision to defer to denominational authorities) necessarily results in the allocation of legal title of the property to one side or the other in the dispute. Deference does not provide an "out"; it is instead a decision in favor of the denominational authority.

Because courts must resolve disputes over church property, the question is *how* to do so while best respecting religious autonomy. See *Presbyterian Church I*, 393 U.S. at 449 ("[T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine."). On this score, the ordinary principles approach is superior.

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[10] Sometimes resolution of a church property dispute will turn on resolution of a religious or ecclesiastical question. In such cases, this Court has already made clear that religious autonomy prevents civil courts from answering these questions even if this has the practical effect of resolving a related church property dispute. See *Jones* v. *Wolf*, 443 U.S. at 604 ("If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."); *Milivojevich*, 426 U.S. at 720 (control of church property was an "incidental effect" of deciding who ran the church itself, an ecclesiastical question).

The ordinary principles approach allows civil courts to resolve these disputes without inquiry into (or interference with) the organizational structure of religious bodies. Instead, religious bodies remain free to organize their affairs and structure their legal relationships as they see fit. *Supra* pp. 10-13. And the ordinary principles approach also keeps courts out of the sphere of the religious, *supra* pp. 13-15, as courts look only to the binding legal documents agreed to by the parties to determine conclusive ownership. *Jones* v. *Wolf*, 443 U.S. at 603 (the ordinary principles approach "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice"); *Presbyterian Church I*, 393 U.S. at 449 ("Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property."). This lies in sharp contrast to a deference approach, which invites courts to rummage through a religious body's internal affairs before making factual findings about its polity, governance, and organizational structure—quintessential religious questions.

What is more, unlike employment disputes—where application of ordinary employment laws would conflict with a church's internal decision about who can be a minister—"[c]hurch property cases do not present a conflict between the civil law and an internal church decision; they present a conflict between two church entities over what the church's decision was in the first place." Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 336 (2016). This fundamental difference means that "[t]he laws of trust and property are not being used to thwart that decision but to discern what

it was and give legal effect to it." *Ibid.* The ordinary principles approach thus ensures that courts respect the autonomy of religious organizations to decide ecclesiastical questions and structure their internal affairs as they see fit, without pressure from courts pushing them toward one or another ecclesiastical form.

In short, across all disputes involving religious bodies, courts should seek to protect religious autonomy and avoid religious entanglement. In disputes over religious doctrine, personnel, and governance, this means courts are forbidden from second-guessing the religious body's decision on those matters. See *Our Lady*, 140 S. Ct. at 2060 ("[C]ourts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."). In disputes over church property, this means courts must discern the religious body's own decision on those matters—and the most reliable, least entangling way to do so is to apply ordinary principles of property and trust law to the civil legal documents that the religious body has created.

D. Deference in church property disputes deprives religious entities of the full benefits of property rights.

Deference not only violates the dual First Amendment guarantees of free exercise and non-entanglement, it also deprives churches of the property rights enjoyed by all other citizens.

Washington's standard property and trust rules are clear and well-settled: a trust is created only if "[t]he trustor has [the] capacity to create a trust" and "[t]he trustor indicates an intention to create the

trust." Wash. Rev. Code 11.98.011 (2012). These rules are in accord with the broader body of trust law nationwide, which holds that one cannot declare oneself to be a beneficiary of a trust in someone else's property. See Restatement (Second) of Trusts § 18 cmt. a (1959) ("[O]ne who has no interest in a piece of land cannot effectively declare himself trustee of the land."); George T. Bogert, *Trusts* § 9 at 20 (6th ed. 1987) ("In order to create an express trust the settlor must own or have power over the property which is to become the trust property."). These rules provide a clear framework for the creation and transfer of property interests.

But deference to the assertions of denominational authorities upends this framework to the detriment of religious bodies. Deference allows religious authorities in a denomination deemed "hierarchical" to unilaterally change ownership of property, without the consent of local religious bodies like FPCS and without public notice, simply by changing their internal religious documents. This destabilizes property interests. Courts and private parties cannot definitively determine church property ownership based on publicly recorded property deeds or trust documents. Rather, church property rights under this rule would be uniquely in flux and uncertain, unable to benefit from standard trust and property law principles.

Making property ownership turn on ecclesiastical law instead of civil law also frustrates religious bodies' ability to hold title to their property free and clear. See McConnell & Goodrich, 58 Ariz. L. Rev. at 333-337 (explaining how an ordinary principles approach better protects the settled expectations and interests of the parties). If property ownership turns on church law,

potential purchasers or lenders can never know who actually owns a given property until they examine all relevant church laws and ecclesiastical precedents—not to mention statements of church leadership and declarations and minutes from the church hierarchy. See p. 9, *supra*.

Worse, *even if* the deed were in the name of a local congregation with no apparent encumbrances, the congregation would not necessarily be able to claim clear title. Any title would be held subject to denominational laws that may or may not be known to the local congregation. This system makes title insurance more difficult (if not impossible) for local congregations to obtain. Cf. *All Saints Parish Waccamaw* v. *Protestant Episcopal Church*, 685 S.E.2d 163, 168-169 (S.C. 2009) (congregation unable to obtain title insurance). And even certainty *today* does not guarantee certainty *tomorrow*, as ownership interests could be changed unilaterally by the denomination without any notice.

III. Without clear guidance from this Court, lower courts will increasingly find themselves implicated in theological controversies when asked to settle church property disputes.

Church property disputes rarely begin with bricks and mortar. Rather, they originate in theological, pastoral, or moral disagreements within communities of faith. Intractable differences regarding religious beliefs can turn into controversies over ecclesiastical identity. But, regardless of how tensions arise, these disagreements within religious organizations frequently involve dollars and deeds. And, unfortunately, they often end up in civil courts.

For example, an ongoing schism is fracturing America's third-largest denomination, the United Methodist Church, with individual congregations choosing sides and trying to take their assets—including their churches—with them. See Sarah Barringer Gordon, *Why the split in the Methodist Church should set off alarm bells for Americans*, Washington Post (Jan. 16, 2020, 6:00 AM), https://perma.cc/22DU-79QE.

These disputes can either be resolved cleanly and efficiently or can embroil courts in deeply emotional, constitutionally fraught, and politically charged litigation. On the one hand, if lower courts consistently apply ordinary principles of civil law to these disputes, religious bodies can use ordinary instruments of property and trust law, like deeds and trust agreements, to embody their intent in legally cognizable form at the outset, removing any legal uncertainty. And, as the law surrounding these disputes becomes more predictable, the lower courts (and this Court), will find themselves confronting fewer of these disputes. *Jones* v. *Wolf*, 443 U.S. at 604 (explaining how the ordinary principles approach increases certainty over time). See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1, 14-16 (1984). If, on the other hand, lower courts routinely permit a searching inquiry into ecclesiastical structure, litigants will continue to dredge up these materials and present them to courts in expensive, decades-long litigation, and lawsuits over church property will multiply.

While it may *sound* like a good way to avoid religious disputes, deference in church property litigation actually thrusts judges into the middle of hotly

contested theological issues. But it need not be this way. Adopting a uniform rule requiring courts to apply ordinary principles of trust and property law will allow judges to determine, based on well-understood secular legal concepts, who owns disputed property without a built-in bias favoring one side (or one form of polity) over another.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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