No. 13-449

In The Supreme Court of the United States

THE FALLS CHURCH,

Petitioner,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

AMICI CURIAE BRIEF OF ST. JAMES ANGLICAN CHURCH; CAPINCROUSE LLP; AND NINE LOCAL CHURCH CONGREGATIONS IN SUPPORT OF PETITIONER

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LOCAL CHURCH CONGREGATIONS *AMICI*

All Saints' Anglican Church
Long Beach, California

Christ Church
Plano, Texas

Christ Church of Atlanta
Atlanta, Georgia

Grace By the
Sea Anglican Church
Oak Harbor, Washington

Journey Evangelical Church
Westminster, California

Grace Church
Pittsburgh, Pennsylvania

St. Charles Anglican Church
Poulsbo, Washington

St. David's Anglican Church
North Hollywood, California

St. John's Anglican Church
Petaluma, California

QUESTION PRESENTED

Whether the First Amendment requires state civil courts to enforce an alleged trust imposed on local church property by provisions in denominational documents, regardless of whether those provisions would be legally cognizable under generally applicable rules of state property and trust law.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici strongly believe that the law governing church property disputes – in particular what is meant by "neutral principles of law" – is uncertain, unpredictable, and inconsistently applied by lower courts, creating numerous problems in their organizations and congregations as they seek to fulfill their religious missions. Churches are uncertain about whether they really own the property to which they hold clear title, church members are withholding funds from capital campaigns to acquire new land and buildings or to maintain old structures, and accountants cannot properly audit financial records of nonprofit religious corporations.

These concerned *amici* include the following church congregations, and an accounting firm that serves religious organizations throughout the country:

St. James Anglican Church, Newport Beach, California incorporated in 1949 as a California nonprofit corporation. Since 1950, St. James has held record title to its property. In 2004, St. James, by

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[1] In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.2(b), counsel of record for all parties received notice at least 10 days prior to the due date of the intention of St. James Anglican Church and additional parties to file this brief. Petitioner and Respondents have granted their consent to file this brief.

overwhelming vote of its board of directors and members, changed its Anglican affiliation from The Episcopal Church ("TEC") and the Episcopal Diocese of Los Angeles to another branch of the worldwide Anglican Communion. Those organizations filed suit against St. James claiming that the property of St. James was impressed with a trust in their favor by virtue of TEC having purportedly adopted an internal rule or canon to that effect in 1979, even though St. James held clear record title to its property since 1950. The plaintiffs asserted that this internal church rule must be enforced in their favor under this Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979). After two appeals to the California Supreme Court, the trial court entered judgment in favor of the Episcopal parties on this ground. Unable to post an undertaking of close to $1 million to preserve the status quo during an appeal from this judgment, St. James was ordered to turn over its personal and real property to the Episcopal Church, forcing the congregation to worship elsewhere.

CapinCrouse LLP is a certified public accounting firm devoted to serving not-for-profit entities nationally, with 11 offices, 16 partners, and more than 140 associates. The firm serves more than 1000 not-for-profit entities including associations, community organizations, foundations, more than 300 churches, 50 denominations, 100 international organizations, and 75 colleges, universities and seminaries. Firm offices are located in Atlanta, Chicago, Colorado Springs, Columbia, Dallas, Denver, Indianapolis, Los

Angeles, New York City, Orlando, and San Diego. CapinCrouse LLP joins this brief because the petition raises concerns that relate to hundreds of churches and church denominations that the firm serves. In particular, CapinCrouse LLP is significantly concerned about the implications to ownership of assets under the reasoning of the Virginia Supreme Court's decision in this case. Such court decisions generate uncertainty for churches and their financial position in reporting, and also for any audited financial statement or disclosure by such churches.

All Saints' Anglican Church, Long Beach, California, and *St. David's Anglican Church, North Hollywood, California* withdrew from TEC in 2004. Despite holding record title to their properties for many decades, both churches were sued by the Episcopal Diocese of Los Angeles and TEC, both of which claimed that the local churches' properties were impressed with a trust in their favor. The suits against All Saints' and St. David's were coordinated with the suit against St. James, and St. David's has been ordered off of its property by the trial court. Both All Saints' and St. David's have since entered into settlement agreements with the Diocese, although not with TEC.

Christ Church, Plano, Texas is an Anglican church that began in 1985 and has grown to serve an average of 2000 worshippers per week. Christ Church severed ties with TEC in September 2006 and is a member of the Anglican Church in North America ("ACNA"). Christ Church empathizes with those

churches that continue to be mired in the uncertainty of ownership of the very buildings and land that their parishioners acquired with their own funds. Moreover, Christ Church seeks to provide leadership and counsel to Anglican parishes to assist them in their efforts to grow and develop their ministries. The requested clarification from the Court would help Christ Church better advise these churches and focus on their ministerial mission without being distracted by issues of uncertain property ownership.

Christ Church of Atlanta has recently become a member of ACNA. Christ Church was formed in 1998 as an independent, de novo congregation. It has never received any financial support from ACNA or any other church body, and its worship services have been held in rented facilities since its inception. Christ Church established a building fund in 2002. Parishioners have contributed more than $1.9 million to the fund and have made pledges totaling several times that amount pending the identification of a suitable site. Although ACNA's current national and diocesan canons state that it will not claim an interest in congregational property, the current state of church property jurisprudence has a chilling effect on Christ Church's continued fundraising ability because an after-enacted canon asserting a trust in favor of ACNA might be enforced by a civil court.

Grace Church, Pittsburgh, Pennsylvania is part of the Anglican Diocese of Pittsburgh, which prior to 2008 was aligned with TEC. In 2008, the Anglican Diocese of Pittsburgh, with each of its constituent

parishes, ended its affiliation with TEC. All of the property of these churches is held in the name of each local church corporation. Nonetheless, the newly-formed Episcopal Diocese of Pittsburgh and TEC have asserted claims to ownership of these properties. These claims seriously compromise the work of these churches in their planning and mission work. A resolution of the issues before this Court will materially advance the ultimate disposition of the disputes between Grace Church and the Episcopal Diocese of Pittsburgh and TEC.

Journey Evangelical Church, Westminster, California ("JEC") is part of the Presbyterian Church (U.S.A.). While title to its property names the higher body, many of the funds that have built the buildings and the ministry of the congregation have been donated by its members. The uncertainty in the legal situation creates hesitancy for capital campaigns, and some JEC members are reluctant to donate even to the operating budget of the church. Doubts about church property status have hampered JEC's ability to express its beliefs and serve those who most need the church's ministrations.

St. Charles Anglican Church, Poulsbo, Washington and *Grace By the Sea Anglican Church, Oak Harbor, Washington* withdrew from TEC in 2004, placing themselves under the authority of the Anglican Diocese of Recife, Brazil. Under the North American realignment of Anglicanism, they became founding members of the Anglican Diocese of Cascadia in June 2009. Both churches continue to exercise full use of

their property because of a ten-year agreement with the Episcopal Diocese of Olympia, which is set to expire in 2014. Although the Episcopal Diocese granted both churches quitclaim deeds to their properties, and they have maintained and improved their properties at great cost and effort, they expect that the Diocese will commence litigious action upon termination of the agreements. If this happens, neutral principles of law may well govern the outcome; therefore, St. Charles and Grace By the Sea's desire that these principles be clarified by this Court to avoid the ongoing confusion caused by their misapplication.

St. John's Anglican Church, Petaluma, California ended its affiliation with TEC in 2003 over core theological differences. Church members continued to use the property they had maintained and improved from their own funds, and where generations of families had worshipped for the past 150 years. In 2006, TEC sued St. John's, seeking to take possession of its property, the church rectory, and all financial assets. After lengthy litigation, the court decided in favor of TEC by supposedly applying "neutral" principles of law. The congregation was forced to vacate the property and relinquish its bank accounts. St. John's, a thriving and healthy body of 175 congregants, now worships in a local community center. St. John's is concerned that under current law, a strong majority of those who have worshiped in a church for decades and developed and maintained their property without any support from a denomination can be forced out of their church home.

These *amici* represent a diverse array of religious congregations and those who serve them. Some are currently affiliated with a mainline denomination, while others recently changed their affiliation. Some are currently defending their properties in court against suits brought by their former denomination, while others fear litigation in the future.

Some have been forced to leave their properties that generations of their members sacrificially gave to acquire and construct because under neutral principles of law a lower court ruled that it was required to enforce a unilateral denominational trust rule. Other congregations have walked away from their properties so they would not be diverted from their core religious mission by expensive and protracted litigation. They have watched while the remaining congregants have dwindled in number. Other *amici* have successfully retained their properties after a change of denominational affiliation, but have done so by repurchasing property they already own or are concerned that they might need to do so if litigation commences.

Despite their diversity, *amici* are united in their concern over the uncertainty generated by the lower courts' decisions in this area. In the absence of clear guidance, religious institutions must make decisions about their most important temporal and spiritual assets – their church buildings and sanctuaries – unable to predict how a court will ultimately rule. And as this Court has recognized, the "[f]ear of potential liability" has an unfortunate chilling effect

on "the way an organization carrie[s] out * * * its religious mission." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987).

Amici respectfully request that the Court grant certiorari to address this uncertainty.

SUMMARY OF ARGUMENT

Thirty-four years have passed since this honorable Court addressed the complex and competing constitutional issues inherent in church property disputes. *Jones v. Wolf*, 443 U.S. 595 (1979), commended the use of "neutral principles of law" (i.e., the same indicia of ownership used in secular property disputes) to resolve such disputes, because this method would be familiar to civil courts, produce predictable outcomes, operate in a "completely secular" way, and avoid the constitutional problems of establishment and entanglement.

Since *Jones*, however, the state of church property jurisprudence has deteriorated to the point where many, if not most, states now resolve church property disputes in a way that bears little resemblance to the straightforward and neutral manner this Court had envisioned. In practice, these deviations violate the Establishment Clause.

Most of the confusion and error stems from state courts (and sometimes legislatures) interpreting certain *dicta* in *Jones* as authorizing select denominations to self-create trusts in their own favor with

respect to property owned by affiliated, but separately incorporated, local churches. Principally, these self-created trusts have taken the form of provisions inserted in the denomination's governing documents (e.g., Constitution and Canons, Book of Order, etc.) by the denomination itself, often without notice to or consent by affected affiliates, and often decades after local churches have acquired land and buildings in their own name and with their own funds.

In most cases, these provisions lie dormant until a local church chooses to withdraw from the denomination (usually a lateral transfer from one brand of Anglicanism, Presbyterianism, etc., to another), at which point the denomination springs its self-created "trust" on the unsuspecting congregation and files suit. All too frequently, despite the fact that the local church is a separate legal entity holding clear record title to its property, the state courts enforce the denominational "trust rule" – *even where state law would not permit a secular beneficiary to self-create a trust in such a manner* – believing that this Court's decision in *Jones* authorizes, if not compels, that result.

This compulsion to enforce denominational trust rules as a constitutional mandate overlooks that many local churches were incorporated and acquired their property decades before such trust rules were ever passed, or decades before state laws (e.g., California Corporations Code section 9142(c)), purportedly giving effect to such rules were ever enacted. Seen as constitutionally mandated or authorized by *Jones*,

courts thus avoid thorny constitutional issues concerning the retroactive application of state statutes. *Terrett v. Taylor*, 13 U.S. 43, 52 (1815) (statutes may not "divest [an] Episcopal church" of "property already acquired under the faith of previous laws" without violating the "spirit and the letter of the constitution"). As in the case below, courts have tried to avoid the serious problems of notice and constitutionality with retroactively enforcing a denominational trust rule by delving into church polity to analyze the religious relationship between the parties, but that inquiry raises a host of entanglement problems. *Jones*, 443 U.S. at 604 ("special care [must be taken] to scrutinize [church] document[s] in secular terms").

The danger of constitutional infirmity in implementing neutral principles of law in name only is manifest. Instead of a method of resolution that is "completely secular in operation" (*id.* at 603), the perversion of neutral principles now operating in many states in fact does the opposite – it establishes certain religious denominations by granting them a special power not granted to secular voluntary associations, non-religious organizations, or other religious groups not deemed "hierarchical" or "denominational" enough by a state court judge. This unique and breathtaking power – to create a trust in another person's property simply by the enactment of an internal rule or canon – is not shared by any secular organization and tramples the property and free exercise rights of the affiliated (or formerly-affiliated)

religious organization whose property the denomination seeks once a dispute arises.

Unlike exempting religious bodies from certain laws (such as anti-discrimination statutes or income tax), which is consistent with the First Amendment's protection of religious freedom, no constitutional basis exists to give religious bodies (and only certain ones, at that) a *special* power in derogation of the ordinary principles of property ownership and trust law. This is not a situation where the government needs to accommodate religion by removing a significant government-imposed burden, as *Jones* said that the burden of complying with neutral property laws is "minimal." *Id.* at 606. In fact, deeds are commonly modified across the country every day to properly reflect property and trust interests. Instead, by subordinating neutral state laws governing property and trusts to rules passed by certain denominations, those denominations have been given preferential treatment. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").

While the totality of *Jones* is clear that this Court intended no such thing, the out-of-context reference in *dicta* that "the constitution of the general church can be made to recite an express trust in favor of the denominational church" (*Jones*, 443 U.S. at 606) has overwhelmed and obscured the central point of *Jones* – that *neutral* (i.e., non-religious) principles of law should be used to adjudicate church property disputes.

Since non-religious organizations have no right to create trusts in property owned by other entities simply by amending the organization's governing charter, religious organizations should have no such right either.

Certiorari is warranted to address the states' misapplication of neutral principles of law and the resulting conflicting decisions, and to confirm that any rule of decision or statute that grants special powers to religious denominations to self-create trusts violates the Establishment Clause. Denominations and local churches need relief from the legal uncertainty caused by conflicting state approaches to neutral principles of law as they seek to fulfill their religious missions and structure their affairs, raise donations, and acquire, mortgage or sell property.

ARGUMENT

I. Thirty-Four Years Ago, This Court Urged That Church Property Disputes Be Decided Using the Legal Principles "Developed For Use in All Property Disputes."

Although the holding of *Jones* was that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute" (*Jones*, 443 U.S. at 605), this Court clearly emphasized its preference for the use of the neutral principles method over other rules of decision. The *Jones* decision praised neutral principles as "completely

secular in operation," "flexible," and "objective." *Id.* at 603.

Most of all, however, this Court's praise of neutral principles was constitutionally based. *Jones* recognized that other rules of decision inherently tend toward establishing denominations by deferring to their own resolution of the dispute in which they are the claimant. Also, other methods entangle civil courts with religious matters by directing them to look for the locus of authority within the denomination, the nature of church governance, or to interpret religious documents such as spiritual rules or canons, or both. *See Jones*, 443 U.S. at 605 (other rules of decision would require courts "to examine the polity and administration of a church to determine which unit of government has ultimate control over church property" or engage in a "careful examination of the constitutions of the general and local church, as well as other relevant documents"). These methods would "require 'a searching and therefore impermissible inquiry into church polity.'" *Id.*, *quoting Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).

On the other hand, "inherent in the neutral-principles approach" is the "promise of nonentanglement and neutrality" because "[t]he neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity." *Jones*, 443 U.S. at 604-605. By resolving church property disputes using the same well-established indicia of ownership familiar to lawyers

and judges – deeds and other *secular* written documents like declarations of trust – establishment and entanglement are avoided, the parties have more certainty about their temporal affairs should a dispute arise in the future, and as far as property is concerned, religious organizations and entities stand in precisely the same position as secular parties.

II. Although the Neutral Principles Approach Has Been Adopted in Name, Many States Have Converted It Into Its Functional Opposite: A Rule of Deference to Denominational Rules or Canons.

A majority of states have adopted the neutral principles of law method for resolving church property disputes. *Masterson v. Diocese of Northwest Texas*, 2013 WL 4608632, *11 n.6 (Tex. Aug. 30, 2013) (thirty "states have adopted neutral principles"); 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, 457 (2008) (appendix collecting cases). In practice, however, the courts of many of these states have morphed the preferred neutral principles method into denominational deference. These state courts have interpreted neutral principles of law to mean that if a plaintiff denomination has a provision in its own constitution or rulebook purporting to create a trust in its favor in the property of affiliated churches, that provision must be enforced *regardless* of whether that internal rule

complies with neutral principles of state property and trust law. Or, state courts have elevated denominational church rules over other indicia of the parties' intent, such as deeds and articles of incorporation.

For example, in the case below, the Virginia Supreme Court held that the Episcopal Church's Dennis Canon[2] did not create an express trust in local church property because when it was enacted a Virginia statute made such trusts invalid. *The Falls Church v. The Protestant Episcopal Church in the United States*, 285 Va. 651, 665, 667 (2013). However, the court "look[ed] no further than the Dennis Canon to find sufficient evidence of [a] fiduciary relationship" to make it enforceable over all of the local church's real and personal property. *Id.* at 669. The court rejected arguments by the local church that it had never assented to the denomination having any rights to the property (as neutral principles of property law would have required), in favor of finding an implied constructive trust birthed from the Dennis Canon and the religious relationship between the parties. *Id*.

In *Episcopal Church in the Diocese of Conn. v. Gauss*, 302 Conn. 408 (2011), the Connecticut Supreme Court purported to adopt neutral principles of

[2] "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which Parish, Mission or Congregation is located." Constitution and Canons of the Episcopal Church, Title I, Canon 7, Section 4 (adopted 1979).

law as the rule of decision: "Having considered these differences, we conclude that the neutral principles of law approach is preferable because it provides the parties with a more level playing field, and the outcome in any given case is not preordained in favor of the general church, as happens in practice under the hierarchical approach." *Id.* at 429. However, despite the fact that the deeds were in the name of the local church and there was no evidence that the local church had ever settled an express trust in plaintiffs' favor (*id.* at 433), the state court treated the Episcopal Church's "trust canon" as dispositive, citing the language in *Jones* that "the constitution of the general church can be made to recite an express trust in favor of the denominational church." *Id.* at 434. The ultimate ruling that "the Dennis Canon applies to defeat claims of ownership and control over parish property . . . even in cases in which record title to the property has been held in the name of the parish since before enactment of the provision," *id.* at 438, is impossible to square with a *true* application of neutral principles of law.

In *Episcopal Diocese of Rochester v. Harnish*, 11 N.Y.3d 340 (2008), the New York court claimed to have "adopted the neutral principles of law approach to church property disputes set forth by the United States Supreme Court in *Jones*." *Id.* at 350. However, it too proceeded to enforce the Episcopal Church's Dennis Canon, finding it "dispositive" against all other indicia of ownership. *Harnish*, 11 N.Y.3d at 351. The *Harnish* court did so despite the undisputed

evidence, under *neutral* principles of state law, that the local church and the local church *alone* held record title to its property, and the absence of any express written declaration by the local church to hold its property in trust.

Likewise, in *Episcopal Church Cases*, 45 Cal. 4th 467 (2009), the Supreme Court of California claimed to apply neutral principles of law. "[T]o the extent the court can resolve the property dispute without reference to church doctrine, it should use what the United States Supreme Court has called the 'neutral principles of law' approach." *Id.* at 473. But in actuality the court disregarded longstanding, neutral principles of state property and trust law by interpreting *Jones* as requiring enforcement of the Dennis Canon: "Thus, the high court's discussion in *Jones* . . . together with the Episcopal Church's adoption of Canon I.7.4 in response,[3] strongly supports the conclusion that, once defendants left the general church, the property reverted to the general church." *Id.* at 487. In doing so, the court avoided the problem of retroactive application of a state statute that could enforce the Dennis Canon – California Corporations

[3] *Episcopal Church Cases* was decided on appeal from a demurrer granted in favor of the local church, and therefore the California Supreme Court did not have a full factual record before it. Under this procedural posture, the court was required to accept as true the well-pleaded allegations of the Episcopal Church, including that it had adopted the Dennis Canon and that a statute – California Corporations Code section 9142(c) – applied to the dispute.

Code section 9142(c) – which was enacted decades after the local church incorporated and acquired its property.

As the dissent in *Episcopal Church Cases* recognized, the enforcement of denominational trust rules in derogation of the local church's record ownership is *not* consistent with neutral principles of property and trust law, because the same result would not obtain were secular actors involved:

> 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. [citations omitted] If a neutral principle of law approach were applied here, the Episcopal Church might well lose because the 1950 deed to the disputed property is in the name of St. James Parish, and the Episcopal Church's 1979 declaration that the parish was holding the property in trust for the Episcopal Church is of no legal consequence.

Episcopal Church Cases, 45 Cal. 4th at 495 (Kennard, J., dissenting).

Georgia is yet another state that purports to use neutral principles of law, but permits denominational rules to create trusts that override deeds and other secular proof of ownership. In *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 290 Ga. 95 (2011),

the state court read *Jones* as fully empowering denominations to self-create trusts:

> Thus, while local churches may modify their deeds, amend their charters, or draft separate legally recognized documents to establish an express trust as set forth in [state statutes], that is not the only way the parties can ensure that local church property will be held in trust for the benefit of the general church. *Jones v. Wolf* said that it may also be done through the general church's governing law, for example, by making it "recite an express trust."

Id. at 102, *citing Jones*, 443 U.S. at 606.

This is a very narrow reading of one line of *dicta* from *Jones* which disregards the rest of the paragraph that the "parties" (plural) can arrange property rights in advance of a dispute as long as their understanding is in *legally* cognizable form. *Jones*, 443 U.S. at 606. "Legally cognizable form" must mean neutral state laws, or this language would be superfluous. Yet, in the cases above, and many others catalogued in numerous law review articles and petitions to this Court, many state courts that want to give preference to certain religious denominations read neutral principles of law as mandating that church rules be given *paramount* effect – even if most or all other "neutral principles" in play (e.g., deeds, absence of trust documents, state statutes vesting full title in the record owner, etc.) *break for the local church*. The

upshot of these cases is that despite their adoption of the neutral principles of law approach in name, the rule of decision has become adulterated in such a way that it functionally operates in the *very same manner* as the "rule of automatic deference" that this honorable Court disclaimed and disapproved in *Jones* when it commended the use of neutral principles of law.

As discussed in the petition, other state courts that read neutral principles of law in their broader context, and want to give both the local church and the denomination a fair and neutral playing ground for the resolution of property disputes, resort to church documents (and the attendant risks of trial court judges entangling themselves in them) only as a last resort, if at all.

Only this Court can sort out the confusion and set a clear constitutional path for the resolution of church property disputes.

III. The Neutral Principles Method, As Corrupted By Some State Courts, Now Violates the Establishment Clause.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. This is, literally, America's first freedom – the first words of the Bill of Rights. Establishment, as this Court has held for decades, means more than the actual creation of a state-approved or state-funded church. Establishment occurs when civil government provides a religious

organization with a power over others that a non-religious entity would not also have.

In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), this Court invalidated a Massachusetts statute giving churches and schools – *but only churches and schools* – an absolute veto over liquor licenses applied for within 500 feet of their premises. *Id.* at 117, *quoting* Mass. Gen. Laws, ch. 138, sec. 16(c) ("[p]remises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto").

> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith.

Larkin, 459 U.S. at 125, 127 (statute "substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications"). The concerns here are even more serious than in *Larkin* because local churches lose property in which they have vested interests.

The misinterpretation of neutral principles of law that has occurred over the past thirty-four years, and the consequent morphing of neutral principles back into the "rule of deference," presents the same constitutional violation. When states, either through case law or statute, confer on religious denominations or associations the power to create trusts in their own favor over property they do not own, through methods that have no precedent in the civil law dating back centuries, and that would not be effective if used by secular entities, those states have "established" those religious organizations in violation of the First Amendment.

The conferral of such unilateral authority is not necessary to protect the free exercise rights of the religious denominations in question. They could create trusts (or require affiliating congregations to create them) in a manner consistent with civil law – i.e., by getting the actual owner of the property to retitle property in the name of the denomination or sign an express written declaration of trust. Such a transfer of ownership could be a condition for affiliation. Some denominations, in fact, do so. The use of such "pure" neutral principles of law actually accommodates a much broader range of religious choices than a so-called neutral principles approach that, through preferential statutes and judicial deference to denominational rules, tilts the balance decidedly toward often-disputed assertions of so-called "hierarchical" structure or authority. *Cf.* K. Greenawalt, *Hands Off! Civil Court Involvement In Conflicts Over*

Religious Property, 98 Colum. L. Rev. 1843, 1851 (1998) (noting that the deference-to-hierarchy approach "effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals").

A "pure" neutral principles approach is also more consistent with this Court's recent religion clause jurisprudence. The hallmark in current Free Exercise doctrine is "valid and neutral laws of general applicability." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). One of the standards under the Establishment Clause is non-preferentialism. *See, e.g., Rosenberger v. Rector*, 515 U.S. 819, 880 (1995) (Thomas, J., concurring) ("the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others"). Although this Court in *Jones* did not explicitly derive its neutral principles of law method "from standard free exercise and establishment tests," Greenawalt, *supra*, at 1845, the resemblance is clear, and appropriate.

IV. The Uncertainty Caused By Differing State Court Interpretations of Neutral Principles of Law Has Impinged Upon Religious Freedom.

Since *Jones* commended the use of neutral principles of law thirty-four years ago, mainstream denominational churches in the United States and

affiliated religious congregations have undergone historic shifts of membership and theology. No longer are religious affiliations based principally on geography and history, but with the recent advent of rapid global communications, new international alignments and religious communities are forming based on common interests and beliefs. Non-denominational churches have exploded in recent years as membership in mainstream denominational churches has waned. As these new flexible church structures have quickly developed, the law governing church property disputes has not.

For decades, local churches considering an alignment with a general church or denomination, or contemplating realignment with a new structure, have assumed – often incorrectly – that they could structure their affairs and plan for their future with the understanding that neutral principles of state law would apply to any property dispute. But recent and differing church property opinions from the supreme courts of numerous states have crystallized the brewing conflict. Denominations, local churches, attorneys and trial courts are now uncertain about the legal status of local church property. Indeed, similarly situated local churches in two different states, both affiliated with the same denomination, may have completely different outcomes in a property dispute based on how their supreme courts have interpreted or will interpret neutral principles of law. At risk are properties owned by thousands of local churches throughout the country.

Even local churches with clear record title, quitclaim deeds in their favor, and church rules which are silent about church property at the time of affiliation, are now at risk of losing the property they think they own and whose members sacrificially gave to build. As in the case below and in *Episcopal Church Cases*, 45 Cal. 4th at 487, this concern has broad and serious implications where local churches were formed or incorporated, and property acquired, well before any denominational trust rule, or state statute purporting to give effect to a rule, was ever passed, thus giving the rule retroactive effect.

Unrecorded property interests also adversely affect balance sheets, insurance, capital funding and fundraising. These risks are based not on congregational decisions and votes, record title, or on any voluntary conveyance of their property, but simply on the quiet passage of internal rules by denominations to which local churches have never expressly consented. Such uncertainty oppressively burdens the ability of local churches to raise funds, grow, expand, and nurture generations of families in their religious traditions. As the *amici* demonstrate, this situation is intolerable for churches and religious institutions that are attempting to structure their affairs, raise donations, acquire, mortgage or sell property, and so forth.

CONCLUSION

The numerous petitions for certiorari filed in this Court in the past few years, arising from different faith groups, evidences the need for this Court to provide clarity and certainty to the law of church property. In an era of religious diversity and world-wide realignments of congregations and religious groups, the time is ripe for this Court to clarify neutral principles of law, and particularly whether states must (or indeed can) find an enforceable trust in favor of a religious denomination based on that denomination's own self-serving adoption of a "trust rule" or "trust canon," when such would not suffice to bestow any interest on a secular, non-religious entity.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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