No. 13-1520

IN THE

Supreme Court of the United States

THE EPISCOPAL CHURCH et al.,

Petitioners,

v.

THE EPISCOPAL DIOCESE OF FORT WORTH et al.,

Respondents.

THE DIOCESE OF NORTHWEST TEXAS et al.,

Petitioners,

v.

ROBERT MASTERSON et al.,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Texas

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*[1]

Since its founding 32 years ago, The Rutherford Institute has become one of the nation's leading advocates of civil liberties and human rights, litigating and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties; and to educate the public on important issues affecting their constitutional freedoms, including freedom of religion. To that end, The Institute actively participates in cases addressing the First Amendment's religion clauses. The Institute served as *amicus curiae* in prior religious freedom cases before this Court, including *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), *Sossamon v. Texas*, 131 S. Ct. 1651 (2011); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); and *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987).

This case bears a strong resemblance to *Hosanna-Tabor*. There, the Court addressed a quintessential matter of internal church governance—the appointment of ministers—and reached a strong holding protecting churches' autonomy in selecting their spokespersons. This case concerns another

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[1] Pursuant to Rule 37.6, *amicus* certifies that no party's counsel authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have filed blanket letters of consent with the Court.

matter of internal church governance: the resolution of church property disputes. The Institute has concluded that state courts applying the so-called "neutral principles" approach to such disputes are improperly encroaching on church prerogatives in a manner that interferes with religious liberty and unnecessarily entangles secular courts in ecclesiastical matters.

The Institute presents this brief in the hope that it will assist the Court in bringing clarity to the law. By returning to the fundamental First Amendment principles that guided this Court before its decision in *Jones v. Wolf*, 443 U.S. 595 (1979), the Court can fashion a standard that is more protective of the important freedoms at stake, easier for the lower courts to apply without unwarranted interference with the internal affairs of religious organizations, and more predictable and principled in its outcomes.

SUMMARY OF ARGUMENT

This Court should grant certiorari to overrule or substantially clarify *Jones v. Wolf*, 443 U.S. 595 (1979). Experience and logic reveal that *Jones* is unworkable, and that the shortcomings of the "neutral principles" approach endorsed in that decision outweigh its benefits. The neutral principles approach has precipitated a substantial and unwarranted intrusion by secular courts into matters of religious doctrine and internal church governance. That is because church property disputes implicate more than simple ownership rights to buildings and chattels. Especially when, as here, these disputes arise out of a schism in the church over doctrine, the critical

question underlying the property dispute is often, "who is the true church?"

Put simply, there is no adequate "neutral" or secular way to resolve that question. In most cases, the answer will turn on the meaning of church documents—including constitutions, canons, and deeds to church property. Those documents are necessarily imbued with religious significance. In hierarchical church organizations, church authorities must have final say over what they mean. Permitting a secular court to decide these issues without deference to church authorities is tantamount to replacing church governance with the state or federal government, a proposition that threatens free exercise as well as the establishment of religion.

For these reasons, the rule in *Jones* is difficult to reconcile with this Court's more recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), and is an unusual departure from the deferential approach established in *Watson v. Jones*, 80 U.S. 679 (1871), and adhered to for more than a century thereafter. Certiorari is warranted to reconcile the state courts' aberrant approach to church property disputes with the more respectful posture embodied in a long line of this Court's decisions.

This Court's intervention is also warranted because uniformity is imperative in this area of the law. Many religious organizations span multiple states. But the states have adopted several versions of the neutral-principles doctrine, and varying express-trust statutes and rules. Compliance with this

patchwork of rules is burdensome and serves no beneficial purpose. A nationwide rule of deference ensures that the task of compliance with the law does not substantially interfere with free exercise, while minimizing entanglement between secular institutions and religious ones.

ARGUMENT

In *Jones v. Wolf*, 443 U.S. 595 (1979), this Court endorsed a departure from its prior rule that secular courts should defer to religious authorities—at least with regard to hierarchical churches—in order to resolve disputes over church property. A bare majority of the Court instead decided that courts could apply "neutral principles" of law, developed for use in secular property cases. *See id*. at 603. That approach is out of place in church property disputes, and its application has undermined the separation of church and state and the freedom of churches to govern themselves. This Court should grant certiorari to overrule *Jones* and adopt a uniform rule of deference to churches in matters of church governance.

I. The Neutral Principles Approach Is Unworkable And Results In Unconstitutional Interference In Church Governance.

1. Before *Jones v. Wolf*, courts in the United States resolved church property disputes by deferring to the church hierarchy. This deference had its genesis in *Watson v. Jones*, 80 U.S. 679, 727 (1872), where this Court recognized that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or

law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."

In subsequent cases, this Court reiterated that "*Watson* 'radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor*, 132 S. Ct. at 704 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

2. In *Jones*, this Court deviated from *Watson*, permitting courts to attempt to resolve church property disputes by applying secular principles instead of deferring to the church. *See* 443 U.S. at 603. The Court thus permitted lower courts to scrutinize church documents for language establishing a trust in favor of the general church over the local one, while avoiding any inquiry into religious doctrine. *See id*. at 604. The *Jones* majority recognized that this instruction would be difficult to follow as courts interpreted deeply religious texts, including church constitutions. *See id*. But the majority nevertheless speculated that it should be possible for general churches, "[t]hrough appropriate reversionary clauses and trust provisions," to "specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal

controversy." *Id*. at 603. For example, the Court explained, "the constitution of the general church can be made to recite an express trust in favor of the denominational church." *Id*. at 606. The majority further predicted that "[t]he burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form." *Id*.

As this case and others relating to the Episcopal Church demonstrate, the *Jones* experiment has failed on its own terms. Notwithstanding the adoption of the Dennis Canon, which was the Episcopal Church's direct reaction to *Jones*, courts have taken varying positions regarding the general church's claim to property after a schism. *See* Pet. 19-22, 30-33 (comparing cases debating the significance of church canons). The upshot is that in some jurisdictions, church canons are not sufficient to govern the disposition of church property unless a secular court deems those canons to be "embodied in some legally cognizable form." *See Jones*, 443 U.S. at 606. Religious organizations are thus required to draw up their global governing documents to accommodate secular legal standards—which themselves vary from state to state. That burden, standing alone, is at odds with the First Amendment's religion clauses, as interpreted in *Watson* and its progeny.

More deeply, church property disputes are inherently matters of church government because they often turn on who the church considers to be the rightful possessor of church property. It is difficult to

imagine a more important question to communities of faith. Although religious beliefs are individually held, they typically are exercised in community. Houses of worship provide a space for adherents to receive ministry, exchange ideas, develop their convictions, and engage in charitable works—all of which are critical to their exercise of religion. It is no surprise, then, that religious spaces are revered by adherents, and are themselves imbued with deep religious or spiritual significance.

And indeed, the issue is even more fundamental than that because church property disputes typically are not only about the ownership of the building, but control of the pulpit as well. The outcome of these disputes will determine who assumes the mantle of the true church. The problem is especially acute when, as here, a property dispute arises after a dispute over religious doctrine. It is extremely difficult for courts to take sides in the property dispute without at least giving the impression that they are taking sides in the underlying doctrinal conflict. No matter how courts try to engage in a secular analysis, by picking the winners and losers—sometimes at odds with the decision of the church itself—the state courts have effectively become parties to these conflicts.

These types of conflicts—where the likelihood of entanglement is high—are precisely the sorts of controversies that this Court has always placed in the hands of church organizations, and not in secular courts. Indeed, even in *Jones* itself, the majority hoped out loud that religious organizations themselves would provide the answers, *see* 443 U.S. at 603, 606—but it

nevertheless inexplicably authorized secular courts to second-guess those answers, and to reject them. In that critical respect, *Jones* is internally inconsistent: it admonishes courts to avoid intruding on matters of religious polity, without acknowledging that church property disputes almost always fall within that category.

The "neutral principles" approach thus presents a real threat to free exercise. By rejecting a rule of deference and requiring secular courts to interpret religious documents, including church constitutions, according to secular principles, *Jones* does violence to the principal of religious self-governance. It also unnecessarily entangles secular courts in matters of church governance by permitting judicial decisions to supplant religious ones.

3. *Jones* is also difficult to reconcile with subsequent authority—especially *Hosanna-Tabor*, in which this Court recognized "a ministerial exception" to employment discrimination statutes. 132 S. Ct. at 706.

Hosanna-Tabor was the first time the Court had ever addressed the import of the First Amendment's religion clauses to the selection of ministers. Without precedent directly on point, the Court relied, tellingly, on cases involving church property. Thus, to find that churches have a right to select their ministers free from secular interference, this Court first reaffirmed the principles set forth in *Watson* and *Kedroff*: in order to freely exercise their religions, churches must have plenary authority to govern themselves. *See* 132 S. Ct. at 704.

Relying on these authorities, the Court found a ministerial exception. It reasoned that:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 706.

The Court also distinguished its holding in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." The Court acknowledged that the statute at issue in *Hosanna-Tabor* (the Americans with Disabilities Act) was "a valid and neutral law of general applicability." 132 S. Ct. at 707. But it concluded that a different result was warranted because "government interference with an internal church decision that affects the faith and

mission of the church itself" presented special concerns. *Id*. The Court never cited or discussed *Jones*.

That omission, coupled with the Court's rationale for distinguishing *Smith*, is revealing. The very premise of *Jones* is that neutral principles of law, developed for secular property disputes, can adequately resolve controversies relating to church property. But if church property disputes implicate critical matters of internal church governance—and the Petition and supporting *amicus* briefs demonstrate that they do—then there is no reason, consistent with *Hosanna-Tabor* and the authorities cited therein, to continue to adhere to the neutral principles approach espoused in *Jones*. Equally telling, the government's interest in *Hosanna-Tabor*—that of preventing employment discrimination—was extremely strong, and yet this Court unanimously found that it should yield when matters of church governance are concerned. This case presents an ideal opportunity for the Court to reconcile its cases by reaffirming what it held only two years ago, and distancing itself from the contrary principles espoused in *Jones*.

4. The foregoing points are forcefully set forth in the Petition and other *amicus* briefs. One key point that has not yet been emphasized is that the implications of allowing *Jones* to stand extend beyond church property disputes. Just as *Watson* "radiates . . . a spirit of freedom for religious organizations" by recognizing their "power to decide for themselves, free from state interference, matters of church government," *Kedroff*, 344 U.S. at 116, the opposite is true of the rule displacing *Watson*. The signal sent by

Jones is that religious organizations are not, in fact, free to draft their governing documents according to religious precepts, and that religious organizations' governing bodies are not necessarily the final word on matters of church polity.

To be sure, that signal is unintentional, as the *Jones* majority disavowed any such intent. But it is clear nonetheless. It would have been a relatively modest leap from the interpretation of *Jones* adopted by some state courts to the conclusion that there is no ministerial exception in employment law. Likewise, *Jones* could be taken as support for the proposition that a court may inquire as to whether a religious official was properly selected, *e.g.*, as to whether elections for officials were held in conformity with state corporate law. *See, e.g.*, *Singh v. Singh*, 114 Cal. App. 4th 1264, 1275 (Cal. Ct. App. 2004) (relying on *Jones* to affirm trial court order requiring religious organization to conduct an election in congregationalist organization). Or, under *Jones*, a court might question a church's membership decisions, as long as it frames its questions in sufficiently secular terms. *See, e.g.*, *Park Slope Jewish Ctr. v. Stern*, 491 N.Y.S.2d 958, 961-62 (N.Y. Sup. Ct. 1985) (relying on *Jones* to hold that synagogue was forbidden from amending membership policy).

Such decisions are a threat to the free exercise of religion. Although *Jones* did not expressly authorize a secular court to approve or disapprove of a religious doctrine, the neutral principles approach necessarily entangles secular courts in the interpretation and judgment of religious texts, and with the inner

workings of religious governance. Especially when, as here, the matter concerns a hierarchical church organization, there is no warrant for such interference. This Court should grant certiorari to send a strong signal in favor of deference to religious organizations.

II. A National Rule Of Deference Is Preferable To The Current State-By-State Patchwork Of Rules.

As the Petition explains, the states are irreconcilably divided over the proper rule to apply to church property disputes. Some states permit hierarchical religious organizations to create express trusts favoring the general church in their constitutions or canons, while others do not. In the states that do not, the requirements differ from state to state, and the inquiries are often fact-intensive and unpredictable.

That division means that national religious organizations cannot achieve what *Jones* promised: a simple, minimally burdensome solution that ensures that church property will end up in the right hands. Instead, they must conform, state by state, with idiosyncratic rules. It would be far better for this Court to restore the national rule of deference that persisted before *Jones*. That result would provide national and local churches with predictability, cutting down on litigation and thus reducing the overall entanglement of secular courts in religious affairs.

A national rule of deference is, in fact, the only way to solve this problem because many church deeds were executed either prior to *Jones*, or prior to the date

that states like Texas, relying on *Jones*, switched away from a deference regime. As the Supreme Court of Georgia explained, if churches in those jurisdictions were to attempt to reconcile their conveyances with the shifting norms of state law, they would have to examine all of their deeds and corporate charters, amending and reissuing them as necessary—a burden that "would not be minimal but immense." *Rector, Wardens, Vestrymen of Christ Church v. Bishop of Episcopal Diocese*, 718 S.E.2d 237, 245 (Ga. 2011). The effort and expense of such revisions would be daunting, and would divert resources away from both the ministry and from the many charitable projects that religious organizations undertake on a daily basis.

This foregoing discussion also highlights a critical point: there is simply no way that the *Jones* majority intended to precipitate the current wave of litigation and confusion. Indeed, *Jones* did not even express a desire to alter the outcome in any particular church property dispute. Instead, *Jones* simply sought a more facially neutral way for courts to achieve the same results that the deference doctrine had already achieved. But whether one considers that objective laudable or not, it is clear that the unintended consequences of the *Jones* neutral principles rule have outweighed its benefits, creating substantial burdens for religious organizations, and little, if any, commensurate benefit. The *Jones* majority's desire to create a more neutral, secular regime for these disputes has backfired.

Fortunately, this Court can solve the problem with the stroke of a pen. It should grant certiorari and clarify that when, as here, the top of the religious hierarchy speaks to an issue of church governance, secular courts should defer to that judgment—even if that issue involves a church property dispute.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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August 27, 2014