NO. 11-0265

In the Supreme Court of Texas

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.

Appellants,

v.

THE EPISCOPAL CHURCH, ET AL.,

Appellees.

ON DIRECT APPEAL FROM THE 141ST DISTRICT COURT OF TARRANT COUNTY, TEXAS

CAUSE NO. 141-252083-11

AMICUS CURIAE BRIEF OF THE PRESBYTERIAN LAY COMMITTEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The Presbyterian Lay Committee respectfully submits the accompanying brief as *amicus curiae* in support of the application of neutral principles of law as set forth in *Jones v. Wolf*, 443 U.S. 595 (1979), rightly interpreted.

Established in 1965, the Presbyterian Lay Committee ("Lay Committee" or "PLC") is a nonprofit corporation whose mission includes informing Presbyterians about issues facing the denomination and equipping local congregations—and their members—in their interaction with the regional and national entities within the Presbyterian Church (United States of America) ("PC(USA)"). The Lay Committee regularly reports on judicial decisions concerning church property issues and publishes a related legal anthology: "A Guide to Church Property Law: Theological, Constitutional and Practical Considerations (2nd edition, Reformation Press, 2010)." Toward these ends the PLC also publishes *The Layman*, the most widely circulated hard copy periodical in the United States with a focus on Presbyterian concerns, and operates *The Layman Online*, an Internet resource that records approximately 30,000 hits daily. At the request of its constituents the PLC operates a fund for submitting legal briefs as an amicus, and the PLC has previously submitted amicus briefs with the state supreme courts in South Carolina, Virginia, Georgia, Indiana, California, and Oregon, and with the United States Supreme Court, in matters involving church property disputes.

As an entity dedicated to maintaining the integrity of traditional Presbyterianism, the PLC has a strong interest in this matter. The PLC seeks to promote a correct

understanding of the true diversity of polity within major denominations in our country, and in this state in particular, and to maintain the distinct characteristics of the polities which support the faiths practiced by the people in the pews. Blurring the distinctions between Episcopal polity, Presbyterian polity, and others will diminish the value of the separate faiths, and will ultimately harm the free exercise of religion in America.

Here, the PLC seeks to advocate the use of the neutral principles of law method, to counter any misrepresentations regarding what the U.S. Supreme Court said in *Jones v. Wolf* when setting forth how that method is to be rightly understood, and to enunciate key distinctions between Episcopalian and Presbyterian polity (ecclesiastical form of government) in order to assist the Court in avoiding overbroad characterization and oversimplification that can result in factually unsupported conclusions or incorrect legal treatment. The PLC does not support any party in this lawsuit, nor does it support any particular result. Rather, in the tradition of a true amicus brief, the PLC is simply asking for a proper rule of law to be applied, and thus clarified and established as the law in Texas.[1]

The significance of this case goes beyond the ownership and control of the local church properties at issue in the case before the Court. The principle question before this Court is which legal methodology is to be applied in deciding church property disputes in

[1] Although the PLC does not take a position in this particular case concerning the outcome when neutral principles of law are applied, it nevertheless adopts by reference the argument in support of the adoption and application of neutral principles of law set forth at Part II (pp. 12-19) in Petitioner's Brief on the Merits. The PLC also adopts by reference Part I (pp. 9-21) of the Appellant's Brief filed with this Court in the companion case of *The Episcopal Diocese of Fort Worth, et al v. The Episcopal Church, et al*, pending with this Court as Case No. 11-0265 on direct appeal from the 141st District Court of Tarrant County, Texas.

Texas. The ramifications go far beyond the case at bar, as the precedent will affect the rights of innumerable churches, synagogues, mosques, and other places of worship in Texas.

The PLC, as amicus, advocates on behalf of the application of neutral principles of law, which neither respect nor hinder one form of ecclesiastical polity over another, and merely asks religious organizations to follow the law common to all. Ecclesiastical entities should be decided in a manner no differently than property disputes between a religious entity and a secular entity, or as between two secular entities. In applying neutral principles of law, Texas courts will not be picking winners or losers based on their religious form of government, but on their adherence to straightforward state property laws.

I. INTRODUCTION

In the wake of this Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979), the General Assembly of the PC(USA) unilaterally attempted to assert a trust in its favor over local congregational property, even though legal title to local Presbyterian church property is virtually always held by the local church—and in the name of the local church—alone. Those local churches never assented to the would-be trust. Few, if any, formal property transfers followed in the wake of the General Assembly's unilateral actions. The Presbyterian Lay Committee holds that this unilateral assertion of a trust is inconsistent with the historical Presbyterian structure of governance. That well-established structure respects the autonomous property ownership and management of and by the local congregations. Unilateral attempts to superimpose a trust on local church

property improperly impairs the rights and interests of local congregants, and touches on the abilities of local church fiduciaries to manage and protect church assets according to the considered judgment of local church members.

The United States Constitution forbids preferential treatment of assertions of power by ecclesiastical entities in civil courts resolving purely civil disputes over such matters as title to local church property. Accordingly, title to properly held by a local religious corporation should be evaluated in the same manner as property held by any other legal entity. An assertion of a trust by a self-described trust beneficiary cannot properly be enforced under trust law principles applicable to every other person in civil society. That preferentially idiosyncratic rule should not be enforced merely because the self-described beneficiary occupies, for some purposes, a higher tier in a religious community. Clear enunciation of these principles by this Court will help preserve the basic legal expectations of Presbyterian—*and other*—congregations throughout Texas. Accordingly, the PLC submits its views on the constitutional analysis properly applicable to church property disputes and on the ramifications of the competing analyses to the bedrock religious freedoms of millions of Christians and other people of faith in Texas.

Clarification by this Court of the law to be applied in Texas is needed. In *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909), this Court addressed the issue of the law to be applied when resolving church property disputes. Until now, this Court has not granted writs since 1909 to revisit or clarify the matter and lower Texas courts have not been in agreement about the controlling law. This is in part due to the particular facts

that were presented in *Brown*. A brief look backward at *Brown* will help clarify the path to be taken as this Court goes forward.

Brown involved the reunion between two Presbyterian denominations, the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America (for convenience referred to as the "Presbyterian Church" and the "Cumberland Church"). The two denominations merged after the general assemblies of each found no impediment. Thereafter, dissenting members of the Cumberland Church's General Assembly who opposed the reunion filed suit to contest its validity and to contest the claim that the reunion had the effect of transferring possession of the local church property to a new session said to represent the Presbyterian Church. Those who opposed the reunion and who were seeking to have the property restored to their possession complained that no merger could properly have been made because of alleged doctrinal differences between the two denominations.

In *Brown* this Court held that the civil courts were without subject matter jurisdiction to decide the questions of alleged doctrinal differences, so the civil court was without authority to decide whether the reunion was legitimate. Deference on this issue must be given to the denomination.

Similarly, this Court in *Brown* held that civil courts lacked subject matter over another issue—whether the General Assembly of the Cumberland Church had the authority under its denominational constitution to consummate the reunion between it and the Presbyterian Church. In holding that the Cumberland Church's General Assembly had the authority to consummate the union, such that it was binding on its member

churches, *Brown* said "whenever the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them" *Brown* at 332 citing *Watson v. Jones* 80 U.S. 679 (1871).

Brown concluded from the provisions of the Cumberland constitution that the General Assembly of the Cumberland Church had the authority to determine whether it had the power to enter into union with the Presbyterian Church and, having so decided that it had such authority and having so acted upon that authority, "the civil courts have no power to review that action" *Brown* at 333, citing *Watson*. The General Assembly of the Cumberland Church had "exclusive jurisdiction of the question, and, having decided it, there is no ground for action by this court" *Brown* at 334.

Left for decision, however, was the effect the merger had on local church property. Was that a matter of a religious or ecclesiastical nature, concerning which civil courts have no subject matter jurisdiction? If, on the other hand, it was a matter concerning which civil courts had jurisdiction, what rule or method should the courts follow in reaching a decision? This Court in *Brown* held that it had jurisdiction to address property issues. This topic was carved out of the class of topics, ecclesiastical and religious, that require deference to hierarchical church authority for lack of threshold subject matter jurisdiction by civil courts. "This is perhaps the only question in the case of which this court has jurisdiction" *Brown* at 334.

As for the *method* to be used by the civil court in reaching a decision on the question of a property trust, the Court in *Brown*, without calling the method it used "neutral principles" by name, nevertheless considered the kind of factors that courts consider under a neutral principles approach. The *Brown* Court examined the language in the property deeds to see to whom the property had been titled. It also examined the property deeds to determine whether there was any trust or limitation placed upon the title. It examined who paid for the property. It then concluded that no trust attached to the property and that the titleholder to whom the property originally had been deeded still owned the property.

The question then became which competing session was to be identified with the local church to which the property originally had been deeded and, thus, was still the owner? By what method were state courts, in the proper exercise of their subject matter jurisdiction, to follow in deciding this separate issue of ownership? The Court did not clearly say. The *Brown* Court merely noted that because the General Assembly of the Cumberland Church had the authority to authorize reunion with the Presbyterian Church, this had the legal effect of incorporating the former into the latter. As a result, the session representing the latter became the rightful successor-in-title for property that originally had been deeded to trustees of the former. *Brown* at 334, 335. This rationale seems to follow neutral principles, but happened to result in concurrence with the ownership determination made by the Presbyterian Church hierarchy. Because, under the facts presented, the apparent application of neutral principles resulted in the same outcome as if deference had been given to the higher ecclesiastical authorities, this contributed to

ensuing disagreement in the Texas appellate courts concerning the holding and rationale in *Brown*.

Brown properly held that civil courts do not have subject matter jurisdiction to address questions whose answers are religious. In such circumstances, deference must be given to religious organizations to decide matters that are inherently and uniquely religious in nature. But the Court's recognition that at times it should defer to a hierarchical religious organization because of a lack of subject matter jurisdiction does not automatically lead to or compel the conclusion that when courts do have subject matter jurisdiction they should adopt the hierarchical-deference method. As the competing briefs of the parties in this case indicate, Texas appeal courts have not always agreed with one another on what this Court did in *Brown*. Some have applied the deference method and some have applied neutral principles of law, with the weight of the more recent decisions favoring the latter method, as this Court itself appeared to do in *C.L. Westbrook, Jr. v. Penley*, 231 S.W. 389 (Tex. 2007).

II. ARGUMENT

1. Due To Developments In Post-*Jones v. Wolf* Jurisprudence And Substantial Changes In The Nation's Religious Makeup, The Deference Method Has Become Constitutionally Problematic And Practically Unworkable.

A. The Deference Method Entangles The Courts In Religious Doctrinal Disputes.

Studies show that approximately eighty percent of Americans consider themselves religious.[2] Not only are the American people overwhelmingly religious in their worldview, they are an astonishingly divided community of believers in the transcendent. According to a study by the Pew Forum on Religion & Public Life, the United States is among the most religiously diverse countries in the world. The nation boasts approximately twelve major religious groups, as well as literally hundreds of independent sects and small denominations. Pew Forum, *supra* note 2, at 10. With numerous communities of faith have come deep internal divisions and intra-church strife. These disagreements have led to schisms, realignments, and the formation of new religious communities.

This has been particularly true in the Protestant communities of faith, where the locus of control is not always fixed. Unlike the Roman Catholic Church, or the Church of Jesus Christ of Latter-Day Saints, where property is typically held by a superior body, many mainline Protestant communities allow their congregations to hold title to their property. Jeff 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, 405-06, 436 (2008).

Aside from increased litigation due to internal church divisions, immigration has significantly altered the nation's religious composition. Indeed, the country's religious composition is obviously different—and much more diverse—than in 1871 when the

[2] Barry A Kosmin & Ariela Keysar, American Religious Identification Survey 3 (Mar. 2009), available at http://www.Americanreligionsurvey-aris.org/reports/ARIS_Report 2008.pdf; see also Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey 5 (Feb. 2008), available at http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

hierarchical "deference method" was articulated in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

When the U.S. Supreme Court first articulated the principle of hierarchical deference in *Watson*, most church structures fitted neatly into two categories: hierarchical or congregational. That bipolar classification no longer captures the reality of America's vibrantly diverse religious groups. For example, among the Christian denominations in the United States today, a host of different organizational structures exist that combine both hierarchical and congregational principles. See Hassler, 35 Pepp. L. Rev. at 405-07. In light of that structural reality, some courts have determined that churches can be hierarchical for matters of doctrine and practice, but congregational for purposes of controlling property.[3] The deference method, when used, requires a threshold determination of whether the ecclesiastical polity of the parties is hierarchical or congregational—a simplistic bifurcation that distorts the reality of basic, distinguishing characteristics of Presbyterian, Episcopalian, and many other denominations. This two-fold classification system has become an anachronism in the wake of accelerated cultural developments during the last half of the Twentieth Century.

Over the years, courts have confronted significant difficulties when called upon to classify many faith communities into the bipolar categories of hierarchical or congregational. For example, there is a dispute as to the claimed hierarchical nature of the

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[3] *See Kelley v. Riverside Blvd. Indep. Church of God*, 358 N.E.2d 696, 704 (III App. Ct. 1976); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 241 A.2d 691, 703 (Md. 1968), vacated and remanded, 393 U.S. 528 (1969), *aff'd*, 254 A.2d 162, appeal dismissed, 396 U.S. 367 (1970); *Smith v. Church of God*, 326 F. Supp. 6, 12 (D. Md. 1971); *Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen*, 256 N.E.2d 212, 217 (Ohio 1970), *cert. denied*, 400 U.S. 827 (1970); *Dragelevich v. Rajsich*, 263 N.E.2d 778, 781 (Ohio Ct. App. 1970).

PC(USA). In particular, as the Presbyterian polity shows, a denomination may have one or more successive bodies with some responsibility for doctrinal consistency over geographic areas encompassing many local congregations, without having authority over economic matters such as property ownership. That an organization may have multiple tiers does not mean that its local congregations are subject to comprehensive hierarchical governance.

Courts have recognized that "classification based on a formula is not of much assistance, especially in the case of "an anomalous arrangement." *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 39 Cal.2d 121, 134 (1952). As one commentator observed, "[m]ainline Protestant denominations generally fall somewhere in between these two categories [i.e., hierarchical or congregational], defying easy classification and giving rise to thorny issues for members and non-members alike." Hassler, *A Multitude of Sins?* 35 Pepp. L. Rev. at 406. Many denominations have assemblies, conventions, or convocations that offer guidance on spiritual issues yet fall far short of the economic and doctrinal control generally attributed to the Roman Catholic Church, often considered the typical hierarchical Christian church structure. A simplistic "hierarchical" or "principle of governance" approach does not even begin to address the ever expanding diversity of religion in the United States, including the emergence of Islam, Buddhism, or other eastern religious traditions, or any number of other "anomalous," non-Christian polities. Even within traditional protestant Christianity there are substantial variances from the two-fold classifications formerly relied on by courts.

The classification difficulties do not end there. Courts have even had to handle cases involving churches with no organized form of government. See, e.g., *Rosicrucian Fellowship v. Rosicrucian Fellowship*, supra. Consider, too, the case of *Concord Christian Center v. Open Bible Standard Churches*, 34 Cal. Rptr. 3d. 412, 423 (Ct. App. 2005), where the parties themselves disagreed over whether the church was congregational or hierarchical; indeed, substantial evidence by both parties pointed toward the validity of each of their respective arguments. See also *Master v. Second Parish of Portland*, 124 F.2d 622 (1st Cir. 1941) (Presbyterian church merged with local congregational church); *Malanchuk v. Saint Mary's Greek Catholic Church of McKees Rocks*, 9 A.2d 350 (Pa. 1939) (local congregation composed of merged congregations from denominations with different governing structures); *Singh v. Singh*, 9 Cal. Rptr. 3d 4 (Ct. App. 2004) (two competing boards in a Sikh Temple, one claiming to be appointed for life, and the other claiming their appointment was for a term only); *Clough v. Wilson*, 368 A.2d 231 (Conn. 1976) (congregation had ambiguous level of loyalty to Plymouth Brethren church leader in England).[4]

[4] The practical and constitutional problems that are presented by any method that relies on a judicial determination of ecclesiastical polity, and a simplistic choice between only two alternatives, hierarchical or congregational, are apparent from the many inconsistent rulings that dot the judicial landscape. For example, Baptist churches have generally been found to be congregational in nature, *Greenawalt*, 98 Colum. L. Rev. at 1878, yet one modern court classified a Baptist church as hierarchical, *Crumbley v. Solomon*, 254 S.E.2d 330 (Ga. 1979); see also *Chrapko v. Kobasa*, 114 A. 254 (Pa. 1921) (holding that the Greek Catholic Church was connected with the Roman Catholic Church, despite evidence that the church was independently organized); *Drozda v. Bassos*, 23 N.Y.S.2d 544 (App. Div. 1940) (holding Greek Catholic Church to be an independent congregation, not united with the Roman Catholic Church, despite testimony indicating association); compare *Mullins v. Elswick*, 438 S.W.2d 496 (Ky. 1968) (holding Free Will Baptist church is congregational because its governing power rests with members of the congregation), with *W. Conference of Original Free Will Baptists of N.C. v. Miles*, 129 S.E.2d 600 (N.C. 1963) (upholding a jury determination that a relationship between the local church and a Conference appointed to decide matters of doctrine was enough to show Free Will Baptist churches have

Cases such as these, where the locus of control is ambiguous, have beguiled courts into adjudicating questions of religious polity in violation of bedrock First Amendment principles. See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976). That constitutional infirmity lies at the heart of the hierarchical-deference method. The base inquiry under that method is whether the church is in fact hierarchical. But that inquiry can become a snare. "For every Christian church and probably every religious organization, forms of government relate to doctrine.... In religious institutions, government is not independent of belief; rather, it reflects an understanding of how God relates to human beings and how human beings seek religious truth." Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 Colum. L. Rev. 1843, 1877 (1998); see also Kathleen E. Reeder, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 Colum. J.L. & Soc. Probs. 125, 130 (Winter 2006).

It was in part because of this heightened potential for constitutional violation that the U.S. Supreme Court in *Wolf* strongly commended state court adoption of the neutral principles of law method for use in resolving church property disputes. *Wolf* said the

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a hierarchical structure); compare *Kemp v. Lentz*, 68 N.E.2d 339 (Ohio Ct. App. 1943) (holding Church of the Brethren is congregational, and that sending delegates to national conventions and giving money to parent church does not mean it is hierarchical), with *First Church of Brethren v. Snider*, 79 A.2d 422 (Pa. 1951) (holding Church of the Brethren to be hierarchical because its affiliation with General Conference and all ministers were duly ordained ministers of the Church of the Brethren); compare *Hayman v. St. Martin's Evangelical Lutheran Church*, 176 A.2d 772 (Md. 1962) (local church affiliated with Evangelical and Reformed Church through merger, but still held to be congregational), with *Immanuel Evangelical Lutheran Church v. Fromm*, 116 N.W.2d 766 (Mich. 1962) (holding church to be hierarchical because it "conducted business" as a part of the Evangelical and Reformed Church). As this illustrative recitation shows, courts find themselves reaching wildly inconsistent results in searching for a sort of jurisprudential Holy Grail. That should not be.

alternative method, of automatic deference to ecclesiastical authorities' assertion of a property trust, would involve more, not less, risk of civil court entanglement with religious doctrine, practice, and administration. In its critique of the dissenter's advocacy of the deference method, the majority opinion in *Wolf* said:

> **[C]ivil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and 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 ... In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity."**

Wolf at 605, citing *Serbian Orthodox Diocese*, 426 U.S. at 723.

Not only is the hierarchical *vel non* inquiry fraught with inherent constitutional difficulty, judges are profoundly ill-equipped institutionally to make the ultimate theological judgment whether a church is hierarchical. The problem is further compounded when precedent has been set by a court with one denominational polity before it, and subsequent lower courts improperly apply that ruling to litigants of another denomination. Any court ruling which factors in polity risks imposing that interpretation into other denomination's internal relationships. In ruling on a case in which an Episcopal parish is involved, for example, this Court should take care not to paint with too broad a brush and blanket its holding on other denominations that may have key polity provisions

in their separate denominational constitutions that are in fact not only dissimilar but contrary to those in the denominational governing documents in the case before it.[5]

Assuming a church is correctly found to be hierarchical in nature, sensitive problems still emerge. For example, The Episcopal Church claims to be the pinnacle of a hierarchy, but organizationally understood, TEC is not a singular entity with subordinate subunits. "Episcopalian" is Latin for "bishop", and Episcopalianism denotes a system of ecclesiastical governance that emphasizes that each bishop is his own highest, autonomous religious authority and each bishop's diocese is the highest authority unto itself. To which hierarchy, then, should the courts defer? To the bishop and his appointed diocesan committee? To a national entity such as the TEC (that has no actual ecclesiastical authority over a diocese)? Or to the head of the worldwide Anglican Communion (which disagrees on fundamental matters with its American affiliate, TEC?)

In happy contrast, the neutral-principles approach "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Jones*, 443 U.S. at 605. In *Jones*, the U.S. Supreme Court permitted (but did not require) courts to apply the neutral-principles test and expressly noted the numerous advantages of that inquiry. But that was a generation ago. The intervening history over the past thirty years has demonstrated not only the practical advantages of neutral principles, but has illuminated as well the constitutional mischief inherent in the hierarchical-deference methodology. A church property rule designed for nineteenth-century, more homogeneous America does not address the constitutional realities posed

[5] See part II.4, infra.

by religiously diverse twenty-first century America. By contrast, the neutral principles of law method, correctly understood, is sufficiently flexible to allow fair and constitutionally equal treatment to churches of all religious persuasions.

B. The Deference Method Creates Unequal, Preferential Treatment And Permits Grossly Unjust Results.

The constitutional incoherence of the hierarchical-deference rule is plain to see. Professor Kurt Greenawalt rightly noted that hierarchical deference "contains an anomaly that is so evidently impossible to justify, it will almost certainly not survive. The anomaly is the different treatment accorded congregational and hierarchical churches once their polity is determined." *Greenawalt*, 98 Colum. L. Rev. at 1866. This gaping inequality has not gone unnoticed by courts. As the Supreme Court of Kentucky observed in *Bjorkman v. Protestant Episcopal Church in the United States of America of Diocese of Lexington*, 759 S.W.2d. 583, 586 (Ky. 1988), "[I]n every case, regardless of the facts, compulsory deference would result in the triumph of the hierarchical organization."

That is profoundly wrong. Even in a situation where members of a local congregation both purchased and maintained property entirely with their own tithes, offerings, and other resources, then decided by unanimous vote to separate, the local congregation would lose its property to the national organization solely because of its denominational affiliation—and an affiliation frequently created in the distant past, and at a time that pre-dated the addition of an express trust clause in the denominational constitution. It is difficult in the extreme to identify any parallel anywhere else in American law.

Equally important, it is peculiarly the members of (so-called) hierarchical churches who will suffer from this legally-imposed structural inequality. Under the neutral-principles approach:

> **[B]ecause congregational churches and their members are dealt with by civil courts on the same terms as secular voluntary associations, aggrieved members may seek civil court protection of certain common-law rights in their relations with the church. Under the hierarchical-deference standard, members of hierarchical or semi-hierarchical congregations, on the other hand, may be deprived of all such rights as long as the denomination determines they should be.**

Hassler, 35 Pepp. L. Rev. at 428-29 (citation omitted). This starkly unequal treatment creates fundamental constitutional problems by granting preferential treatment—in civil courts—to some citizens over others. See Arlin. M. Adams & William IL Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291, 1294-95 (1980). That should not be. In addition, the hierarchical-deference approach confers litigation advantages on religious bodies that are not equally afforded to nonreligious associations. As then-Justice Rehnquist, joined by Justice Stevens, stated in dissent in *Serbian Eastern Orthodox:* "To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would create far more serious problems under the Establishment Clause." *Serbian Eastern Orthodox*, 426 U.S. at 734 (Rehnquist, J., dissenting).

In happy contrast to the hierarchical-deference approach, neutral-principles analysis applies the same standards to all religious and non-religious associations. The

upshot is this: the latter approach avoids tipping the scales in favor of one litigant over another.

C. By Contrast, The Neutral-Principles Method Embodies Sound Constitutional Principles And Is Highly Practicable In Its Operation.

The neutral-principles approach, as its name suggests, levels the litigation playing field. And it does so in an admirably practical way that achieves a vitally important constitutional value. As the U.S. Supreme Court stated in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 715 (1994), "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Neutral-principles analysis avoids such constitutional difficulties and works to ensure fairness for all.

The U.S. Supreme Court noted in *Jones* that, "[T]he primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." *Jones*, 443 U.S. at 603. For example, in denominations that are hierarchical for both theological and property purposes, such as the Roman Catholic Church, the potential for property disputes has largely been pretermitted by the vesting of title in the Bishop. See *Hassler*, 35 Pepp. L. Rev. at 405-06. That centralizing, dispute-avoidance tack is also employed by the Church of Jesus Christ of Latter-Day Saints. See Id. at 436. These churches would maintain current ownership structures under neutral principles by either holding title or using "appropriate reversionary clauses and trust provisions." *Jones*, 443 U.S. at 603. At the other extreme, a clearly congregational denomination, such as Baptist churches,

would continue to have disputes resolved as they have been in the past. All denominations would retain the prerogative through ordinary legal means to determine where property will end up in the event of a split. Id. at 603-04.

The "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); see also *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952). Automatic enforcement of a religious hierarchy's trust recital, through the deference method or its functional equivalent, runs afoul of both of these well-established principles. The deference method in whatever form discriminates between different religious sects and small denominations by favoring hierarchical church structures without a narrowly-tailored means of fostering a compelling interest. Further, it violates the Establishment Clause by advancing religion over nonreligion (and only certain religions at that) through an unconstitutional delegation of state power to churches. It does so by granting only hierarchical institutions the unilateral power to assert trusts over the properties of a congregation or parish without the consent of the local titleholder. In Larson v. Valente, the U.S. Supreme Court held that where a law violates the neutrality principle by discriminating among denominations, it becomes "suspect" and therefore subject to strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982); see also *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). The test for strict scrutiny requires that there exist a compelling governmental interest to justify the discrimination, and that the law in question be narrowly tailored to further that interest. *Larson* at 247.

A powerful governmental interest exists in giving religious bodies the power to rule autonomously. In order, though, to prevent judicial entanglement in ecclesiastical matters, the state's church property dispute-resolution methodology must be narrowly tailored—and the broad sweep of automatic deference to a denominational trust clause is, by definition, not narrowly tailored. Such automatic deference does nothing more than open the door for hierarchical churches to do what no other religious body can do.[6]

Subsequent to *Jones*, the U.S. Supreme Court has consistently held that the government may not delegate decision-making authority to religious institutions. In *Larkin, v. Grendel's Den*, 459 U.S. 116, 122 (1982), the Court rejected a state law that gave churches a veto over neighboring applications for liquor licenses, because the law "vest[ed] discretionary governmental powers in religious bodies." The Massachusetts legislature had granted churches a special benefit that it did not grant secular nonprofit organizations. The Court determined that the measure violated the Establishment Clause because it advanced religion by allowing churches to influence government use regulation. *Id.* at 120. This, however, is precisely the dubious function of hierarchical deference. It supplants the legislature's well-developed trust law and offers purportedly hierarchical churches—and no other organizations—the power to revoke the property rights of any subordinate parish or congregation. Not only does this usurp governmental authority, but it opens the door to the *Larkin* Court's fear that "the churches' power (ceded to them from the state) could be employed for explicitly religious goals." *Id.* at 125

[6] If the deference method encompassed congregational churches it would still violate the Establishment Clause because it would give a benefit to all religions that it does not give to similarly-situated nonreligious nonprofit associations.

(parentheses supplied). Granting hierarchical religious bodies such untrammeled authority over property rights poses this exact risk, especially when the local churches have not expressly yielded such authority. The power to decide who owns property, a core power of civil government, would be vested in religious bodies, which history shows can and will use that power for their own purposes—to enforce imagined orthodoxy and to stifle dissent.

The result in *Larkin* would have been different if the churches' veto power had been included in local covenants, conditions, and restrictions that were voluntarily agreed upon by the surrounding property owners. Under those circumstances, the churches would have enjoyed veto power under neutral principles of contract law. In the same way, a local congregation is free to grant its religious denomination the contractual right to resolve property disputes. Yet, the denomination cannot assume this right without a proper legal instrument executed by the grantor—in this case, the local congregation.[7] Allowing religious organizations to declare unilaterally trusts in their own favor effectively delegates governmental authority to religious institutions, which would then become free to dictate results in a way other parties cannot. The First Amendment does not allow such a law.

In short, it is difficult at best to reconcile automatic deference to trust recitals in denominational constitutions with state or federal guarantees of religious liberty and government neutrality. Indeed, at least one state supreme court has held that the

[7] By contrast, neutral principles, properly understood, requires that any such recital of a trust in a denominational constitution, in order to be given effect by civil courts, must be put in a form that is "legally cognizable", that is, consistent with the generally applicable trust law of the jurisdiction where the property is located. See discussion, Part II.3., infra.

deference method is incompatible with constitutional guarantees of religious liberty and government neutrality. In *Fluker v. Hitchens*, 419 So.2d 445 (La. 1982), the Louisiana Supreme Court held that not only was the neutral principles of law method constitutionally permissible, it was constitutionally required:

> **Indeed, we think the safeguards against laws establishing religion and prohibiting the free exercise thereof contained in the First Amendment and in Article I, Section 8 of our state constitution *necessitate* our adoption of the "neutral principles" approach. Whatever authority a hierarchical organization may have over associated local churches is derived solely from the local church's consent. Refusal to adjudicate its feud over property rights or contractual obligations, even when no interpretation or evaluation of ecclesiastical doctrine or practice is called for, but simply because the litigants are religious organizations, may deny a local church recourse to an impartial body to resolve a just claim, thereby violating its members' rights under the free exercise provision, and also constituting a judicial establishment of the hierarchy's religion.**

Fluker v. Hitchens at 445 (emphasis added).

2. Automatic Enforcement Of Trust Provisions, Unilaterally Adopted By Non-Owners, Is Incongruous With The Expectations Of Local Church Owners, Donors, And Members.

For the overwhelming majority of people, church is fundamentally at the local level. People are connected to the members they attend church with—the people they are baptized, married, and buried among—not the religious hierarchy behind them. In his analysis of the religious expectations of American church members, Professor Greenawalt found that "[m]any Protestants now join a local church that seems suitable, with relatively little concern about the general denomination; they switch denominations freely and, regardless of denomination, may consider the congregational government of the local church as most important." *Greenawalt*, 98 Colum. L. Rev. at 1875. More

systematically, a study by the Pew Forum on Religion & Public Life confirms that approximately forty percent of Americans have switched religious allegiance since their childhood. Pew Forum, *supra* note 2, at 5. Thus, it is generally the case that when members donate money, time, or land to their church, they mean for it to support the activities at the local level. When courts operate under standards of hierarchical deference or enforce unilaterally adopted trust provisions, however, those expectations are dashed. Especially in situations where the congregation voted to leave a denomination by a lopsided vote, the people donated the land directly to the local congregation, and literally all costs associated with building and maintaining the church properly were paid by the very local members who voted to change affiliation. Constitutional freedom demands that the local congregation be allowed to retain ownership, custody, and control of their local property.

3. Neither The Free Exercise Clause Nor The Neutral Principles Of Law Method Commended In *Jones v. Wolf* Require Automatic Enforcement Of Trust Recitals Whenever They Appear In Denominational Constitutions, But Instead Respect Substantive Texas Property And Trust Law.

The amicus Presbyterian Lay Committee urges adoption and application of neutral principles of law to resolve Texas church property disputes, as those principles are set forth in *Jones v. Wolf*, 443 U.S. 595 (1979). It is important, though, to understand *Jones v. Wolf* properly if the Court is to avoid a particular distortion of that case which advocates of automatic trust enforcement sometimes espouse.

As this Court is aware, in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440 (1969), the inequitable results and constitutional

concerns that were present in the deference method led the U.S. Supreme Court to make clear that an alternative method, the "neutral principles of law" method, was also constitutionally permissible for state adoption. Ten years later, the U.S. Supreme Court elaborated on how to constitutionally apply the neutral principles of law method, in *Jones v. Wolf*, 443 U.S. 595 (1979). The neutral principles of law method resolves church property disputes:

> **[O]n the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property.**

Wolf at 603 (emphasis added), citing *Presbyterian Church v. Hull Church*, supra; *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 at 368 (1970), and; *Serbian Orthodox Diocese v. Milivojevich*, supra. In recommending the application of state statutes that govern the holding of church property and the application of standard trust law concepts, *Wolf* did not limit consideration to only church-specific statutes but also contemplated laws of general applicability. In rejecting the dissent's claim that applying general state law and trust concepts would infringe on the denomination's free exercise of religion, the majority opinion in *Wolf* said that applying well-established concepts of property and trust law that govern church and nonchurch property alike do not infringe on religious liberty "any more than do *other* neutral provisions of state law

governing the manner in which churches own property, hire employees, or purchase goods." *Wolf* at 606 (emphasis added).[8]

When considering the denominational constitution as one factor among several, courts are to take "special care to scrutinize the document in purely secular terms, and not rely on religious precepts in determining whether the parties have intended to create a trust." *Wolf* at 604. The neutral principles of law method "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine ..." *Wolf* at 605. The U.S. Supreme Court explained:

> **The (neutral principles of law) method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in question of religious ... polity. Furthermore, the neutral principles analysis shares the peculiar genius of private-law systems in general — flexibility in ordering private rights and obligations to reflect the intentions of the parties.**

Wolf at 603 (emphasis added).

Despite the plain language in *Wolf*, the ECUSA and PCUSA often argue that the mere existence of a trust clause (at G-8.0201[9] in the PCUSA Book of Order or the Episcopal Dennis canon) is automatically "dispositive". They contend that *Wolf* held that if a denomination adds a trust recital to its ecclesiastical governing documents then the First Amendment's free exercise clause *requires* that civil courts automatically enforce it.

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[8] In this respect, *Wolf* is similar to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which held that state law would generally govern substantive issues in cases in which federal-court jurisdiction is based on diversity of citizenship. Just as no one would seriously contend that *Erie* established substantive principles of contract, tort or property law, *Wolf* cannot be read to establish the substantive trust and property law governing church property disputes.

[9] All citations to provisions in the PCUSA Book of Order are as they were enumerated from 1983 to mid-July, 2011. In mid-July, 2011, revisions prompted different numerical designations. The former designations are used herein, though, for easy reference in existing case law. All cited provisions remain in the revised PCUSA constitution.

This argument is contradicted, though, by the unambiguous language in *Wolf*. *Jones v. Wolf* explicitly said that the neutral principles of law method requires examination of (A) the language of the deeds, (B) the terms of the local church charters, (C) the state's statutes governing the holding of church property, and (D) the provisions in the constitution of the general church concerning the ownership and control of church property. *Wolf* at 603. A, B, C, and D. The PCUSA and ECUSA advocates of *automatic* trusts ignore this language, though, and argue that D alone is "dispositive". *Wolf* said, however, that neutral principles of law "rely exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges". This necessarily means that under neutral principles those concepts are not to become automatically subordinate to contrary ecclesiastical edicts. In this key passage the *Wolf* Court said:

> **Under the neutral principles approach ... "At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, *the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The 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."**

Wolf at 606. Proponents of the view that a trust recital, when added to a denominational constitution, always control focus exclusively on only the italicized language and fail to acknowledge the evident meaning of the language that is underlined. It cannot be reasonably disputed, though, that the central point of *Wolf* was to authorize and encourage the application of normal, general principles of property and trust law, not

grant a religious exemption from them. The U.S. Supreme Court in *Wolf* could not have spoken more clearly in rejecting the notion that the free exercise clause mandates enforcement of denominationally-added trust clauses. "We cannot agree ... that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where there is no issue of doctrinal controversy involved." *Wolf* at 605. Any distorted interpretation of *Wolf* to the contrary turns that case on its head and snatches a twig without regard to the surrounding forest.

It cannot be denied, for example, that regardless of which pre-dispute alternative suggested in *Wolf's* dicta that the owner and the would-be beneficiary trust beneficiary might mutually agree upon, the U.S. Supreme Court expressly added a key, required proviso. The U.S. Supreme Court said that if the parties mutually chose any of the alternatives listed in *Wolf* at 606, the civil courts would only give effect to it if "it is embodied in some legally cognizable form". *Id.* If the would-be beneficiary only needed to recite an assertion of a trust in its own favor in its own constitution in order for the claimed trust to be "legally cognizable" and enforced, there would have been no reason for the Supreme Court to have added, "provided it is embodied in some legally cognizable form". This purposefully added condition, that any recited trust, to be given legal effect, must be in "legally cognizable form", is not grammatical surplussage. The "legally cognizable form" represents the "law" in "neutral principles of law". Absent this condition, the automatic enforcement of a trust clause whenever it exists in a

denominational constitution would convert the application of neutral principles of law into a de-facto form of the hierarchical-deference method.[10]

The U.S. Supreme Court's condition, that any intended trust, to be enforceable, must be in a form which generally applicable law recognizes as valid, is underscored, as previously noted, by the Court's statement that the neutral principles of law method "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Wolf* at 603. Advocates of automatic enforcement of denominational trust clauses try to skirt this language by lifting out of context other language in *Wolf* that says, "the burden involved in taking such steps will be minimal" (*Wolf* at 606). They argue that one of the three potential steps listed in *Wolf*, of reciting a trust in the denominational constitution, is no real alternative at all if *Wolf* is interpreted to mean compliance with ordinary trust and property law and with *mutual* intent. But that is precisely what *Wolf* says.

The language in *Wolf* where the word "minimal" is found refers to "such steps". The U.S. Supreme Court listed three: modifying the deeds, modifying the local articles of incorporation, or modifying the denominational constitution to add an express trust

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[10] The ECUSA and PCUSA's skewed interpretation of *Jones v. Wolf*, is contradicted by numerous decisions by the U.S. Supreme Court—decided both before and *after Wolf*— that hold that property rights emanate from and are created by an independent source in state law. See, *Davies Warehouse Company v. Bowles*, 321 U.S. 144, 155 (1944) ("The great body of law in this country which controls acquisition transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state."); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (legally cognizable property interests do not arise from any source of federal law but "rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law... ".); *Mitchell v. W.T. Grant Company*, 416 U.S. 600, 604 (1974) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several states".); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 370 (1977); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998), ("[T]he Constitution protects rather than creates property interests"). See also, n. 7, supra.

clause. Only the local church owner or local church corporation can modify the local deeds or the local articles of incorporation. The U.S. Supreme Court said the burden involved in taking either one of those two alternatives would be minimal—even though they obviously call for local action, one owner and one church corporation at a time. And if the burden involved in taking *those* steps was deemed by *Wolf* to be minimal, then establishing trusts by the local action of individual church property owners acting as the "settlor" (as well-established concepts of trust and property law would require) was likewise regarded by the *Wolf* Court to be minimal. The *Wolf* Court said "such steps", referring to all three alternatives.

Despite all of the plain language in *Wolf*, some who advocate that even when neutral principles of law are applied the free exercise clause nevertheless *requires* that denominational trust recitals be enforced cite in alleged support of their position the recent decisions in *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, ____ Ga. ____, ____ S.E.2d ____ (Case No. S11G0587, November 21, 2011, Slip op.); *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia Inc.*, _____ Ga. _____, _____S.E.2d _____ (Case No. S10G1909, November 21, 2011, Slip op.); *Episcopal Church in the Diocese of Connecticut v. Gauss*, 28 A.3d 302 (Conn. 2011), and; *Episcopal Church Cases*, 45 Cal. 4th 467, 198 P.3d 66, on second hearing, *Rasmussen v. Superior Court* (dec. May 5, 2011) 2011 WL 1676631 (S182407). Respectfully, however, these cases do not support such a distorted understanding of *Wolf*.

In *Timberridge*, a sharply divided 4-3 opinion, the majority predicated its opinion on an interpretation of a Georgia statute (O.C.G.A. § 14-5-46) which the majority found gave rise to an implied trust recognized under Georgia law. In its neutral principles analysis, the majority found that the statute's reference to "mode of (church) government" operated as a de facto, legislative adoption of the deference method. *Timberridge* was not decided simply by finding that an express trust clause existed in the PCUSA constitution and then holding that under neutral principles of law the free exercise clause automatically required enforcement.

In *Christ Church Savannah*, a tandem decision issued by the Georgia Supreme Court on the same day it issued *Timberridge*, the majority devoted 18 pages of its 45 page opinion (pp. 19-37) to chronicling the local parish's compliance with Episcopal canons that required the permission of the Bishop and Diocese before the local church could do anything with its property. The Georgia Court found that this compliance evidenced the owner's consent to an implied trust that Georgia law recognized as valid. The Court's decision was not based on an automatic, required enforcement of the Dennis canon. Notably, the older Episcopal canons, compliance with which the Court based its decision, state the *opposite* of common Presbyterian provisions, discussed infra in Part II.4. Unlike their Episcopalian brethren, many Presbyterian churches have the option, within the four corners of their denomination's own constitution, to negate the trust clause by timely use of an exception clause that is also contained within the denominational constitution and which allows them to retain their traditional, exclusive and plenary right to determine the disposition of locally-owned church property,

unfettered by any newly asserted right by the presbytery, via a trust, to determine the disposition of that same property.

In *Gauss*, as in *Christ Church Savannah*, the Episcopal governing documents differed starkly from Presbyterian governing documents. The Connecticut Supreme Court in *Gauss* noted that even before the enactment of the Dennis canon in 1979, the Episcopal Church canons included provisions that required the written consent of the Bishop and the Standing Committee of the Diocese before the local parish could encumber or alienate local property. The *Gauss* Court noted that the parish "sought approval from the Diocese *each and every time* it wished to purchase, finance or sell real property in succeeding years. See Part I.A. of this opinion." *Gauss* at 13 (emphasis in original). The reference to "Part I.A. of this opinion" is the *Gauss* Court's summary of the "relevant real estate transactions" in which it surveyed six specific transactions both before and after the 1979 enactment of the Dennis canon in which the parish sought and received the consent of the Bishop and Standing Committee before acquiring a loan to finance, purchase, re-mortgage, acquire, or sell property. *Gauss* at p. 3. Under these circumstances the Court found consent to an implied trust and to the express trust of the Dennis canon. The *Gauss* Court did *not* simply note the existence of the Dennis canon and then purport that *Wolf* held that the free exercise clause required enforcement.

Episcopal Church Cases also does not support the distorted understanding of *Wolf* which some trust advocates urge. The award of the property to the diocese by the California Supreme Court in *Episcopal Church Cases* was based on two factors, one which was unique to that case and one which has no application in Presbyterian contexts.

The first basis for decision was an *implied* trust under California law that arose from the mentioned Episcopal canons that require permission by the bishop and diocese prior to any sale or encumbrance of local parish property—and thus state the *opposite* of common Presbyterian provisions, discussed in Part II.4, infra. The second basis for decision in *Episcopal Church Cases* was a one-of-a-kind California statute, Section 9142 of the California Corporations Code. This statute is central to the rationale in *Episcopal Church Cases*. The California Court specifically cited the unique California statute *no less than seventeen (17) times*. The California Court did *not* end its inquiry by merely finding an express trust clause and then holding that the free exercise clause required enforcement.[11]

In *Heartland Presbytery v. Gashland Presbyterian Church* WD 73064, Missouri Court of Appeals, Western District (dec. Jan. 10, 2012) the court considered the argument that *Wolf* allegedly held that the First Amendment's free exercise protections required enforcement of denominational trust clauses. The Missouri court examined *Timberridge*, *Christ Church Savannah*, *Gauss*, and *Episcopal Church Cases*, and held that even if those Courts adopted such an understanding of *Jones v. Wolf*, it was not persuaded that this is at all what *Jones v. Wolf* actually said. The Missouri court explained:

> **Heartland reads the quoted passage from *Jones v. Wolf* far too broadly.[15]**
>
> **[[15]We recognize that some courts have adopted Heartland's reading of this passage from *Jones*. *See, e.g., Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, ____ S.E.3d ____, ____, 2011 WL 6091198, at *7 (Ga. Nov. 21, 2011); *Episcopal Church in the***

[11] On second hearing, the California Supreme Court held that its prior opinion was limited on the record then before it and remanded the matter for further proceedings to consider evidence pertaining to the *mutual* intentions of the parties (specifically, a 1991 letter from the bishop that the parish contends waived any trust). See Rasmussen v. Superior Court, supra.

Diocese of Conn. v. Gauss, 28 A.3d 302, 324-25 (Conn. 2011); *Episcopal Church Cases*, 198 P.3d 66, 80 (Cal. 2009).]

The intent of the quoted passage was to explain that, contrary to the dissent's characterization, a "neutral-principles" approach would not impose a particular property-rights regime on the parties, or infringe upon the rights of a denomination's adherents to order their affairs as they saw fit. Instead, like the discussion earlier in the Court's opinion, the quoted passage simply makes clear that, like "private-law systems in general," the application of neutral principles of state property and trust law would afford "flexibility in ordering private rights and obligations *to reflect the intentions of the parties*." *Id.* at 604 (emphasis added). The recitation of the particular documents which might be employed to accomplish the parties' intentions can only be read as illustrative. We will not read the quoted passage as itself establishing the substantive property and trust law to be applied to church-property disputes, particularly where the very same passage contemplates (in its reference to "*other* neutral principles of state law") that the applicable law-like American property and trust law in general–would be *state*, rather than *federal*, law. Further, the statement that "the civil courts will be bound to give effect to" the parties' expressed intentions was explicitly conditioned on those intentions being "embodied in some legally cognizable form"–precisely the issue we address in this opinion.

Gashland at p. 19. The Missouri court also said:

The courts of numerous other States have expressly recognized that the "neutral principles of law" to which *Jones* refers are rules of *state law*, or have applied generally-applicable principles of state law to church-property disputes without further comment. See e.g., *Gauss* 28 A.3d 302, 316 (Conn. 2011) ("the neutral principles approach has resulted in different outcomes in different states because of unique state statutes); *Episcopal Church Cases*, 198 P.3d 66, 74 (the United States Supreme Court has made ... clear ... [that] how state courts resolve church property disputes is a matter of state law); *All Saints* 685 S.E.2d 163, 174 (S.C. 2009) (applying general principles of state law that "[a] trust 'may be created by either declaration of trust or by transfer of property"); *In re Church of St. James the Less*, 888 A.2d 795, 806 (Pa. 2005) (courts are to apply the same principles of law as would be applied to non-religious associations); *From the Heart Church Ministries*, 803 A.2d 598, 565 (Md. 2002) (neutral principles of law applicable not only to religious bylaws, but to public and private lay

organizations and to civil governments as well); *Daniel v. Wray*, 580 S.E.2d 711, 719 (N.C. App. 2003) (discussing state law defenses).

Gashland at p. 21, n. 17.

To the extent *Timberridge*, etc. may be read to say that *Jones v. Wolf* held that the First Amendment requires that denominational trust recitals always be enforced, such decisions are "outliers" that are in conflict with the great weight of authority, as an examination of some other state supreme court decisions indicate.

In *All Saints Parish, Waccamaw, et al v. The Protestant Episcopal Church in the Diocese of South Carolina, et al*, 385 S.C. 428, 448, 685 S.E.2d 163, 174 (S.C. 2009) the South Carolina Supreme Court emphasized, "It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another ... or transfer legal title to one person for the benefit of another." (holding that under the neutral principles of law method the Dennis canon—the Episcopalian counterpart to PCUSA G-8.0201—did not automatically create an enforceable trust interest in favor of the diocese or denomination.)

In Re: Church of St. James the Less, 585 Pa. 428 (Pa. 2005) the Pennsylvania Supreme Court said, "[A]ccording to the well-established legal principles governing trusts, courts may only find that a trust exists where there is clear and unambiguous language or conduct indicating that the settlor intended to create a trust." *Id.* at 446. The Pennsylvania Supreme Court did not limit its analysis to the existence of the express trust clause of the Dennis canon. Amendments by the local church to its articles of incorporation, together with the local church's practice of adhering to other canons, gave

rise to an implied trust recognized under Pennsylvania state trust law. Those other canons required the permission of the bishop and diocese before the local parish could buy, sell, or encumber local church property (i.e., they stated the *opposite* of PCUS § 6-8, discussed infra at Part II.4). See *St. James the Less*, 585 Pa. 428, 450 and 450 n. 29.

In *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, (PA. 1985) the Pennsylvania Supreme Court declared that the mere existence of an express trust clause in a denominational constitution did not result in an enforceable trust. The Court said that "the primary focus must be on the intent of the settlor at the time of the creation of the alleged trust... A trust must be created by clear and unambiguous language or conduct, it cannot arise from elusive statements admitting possible inferences consistent with other relationships" Id. at 1324, 269. The Court continued, "The Commonwealth Court's reliance on selected passages from the Book of Order was misplaced and the Court ignored the overall intent of that Book as a means of overseeing the spiritual development of member churches. In addition, the selected provisions, which at most evidence the putative trustee's desired interpretation, are far from constituting the clear, unequivocal evidence necessary to support a conclusion that a trust existed." Id. at 1325, 269, 270.)

In *Bjorkman v. Protestant Episcopal Church in the United States of America of the Diocese of Lexington, Kentucky, Supr.*, 759 S.W.2d 583, 586-87 (1988) the Kentucky Supreme Court used the neutral principles of law approach to find no evidence of either an express or constructive trust that was enforceable in favor of the national denomination.

In *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E.2d 454, 459-60, cert. denied, 469 U.S. 1037 (1984) the New York Supreme Court applied neutral principles of law to find no express or implied trust in favor of the general church.

See also, *Arkansas Annual Conf. of AME Church Inc. v. New Directions Praise and Worship Center, Inc.*, 291 S.W.3d 562 (Ark. 2009).

4. The Neutral Principles Of Law Method Includes Examination Of The Constitution Of The General Church (i.e., Denomination), Scrutinized In Purely Secular Terms Without Reliance On Religious Doctrine Or Polity. In Such An Examination Courts Should Take Cognizance Of Significant Distinctions Between Differing Denominational Constitutions And Consider All Relevant Provisions.

The case before this Court involves an Episcopalian parish and diocese—but the law to be clarified or established by this Court in deciding this case will necessarily have wide ranging ramifications to other denominations and worshiping communities from an indeterminate number of religious traditions. It is therefore important when this Court examines the governing documents and canons of the diocese and ECUSA that it not draw conclusions broader than required and which may be inapt in other contexts involving ecclesiastical governing documents that may be very different from those now before the court.

In *Jones v. Wolf* the U.S. Supreme Court said that in undertaking an examination of church constitutions civil courts "must take special care to scrutinize the documents in purely secular terms, and not to rely on religious precepts in determining whether a document indicates that the parties have intended to create a trust." *Wolf* at 604. This

admonition, coupled with the *Wolf* Court's warning that a "searching inquiry" into denominational governing documents to determine the "locus of control" could be an "impermissible" entanglement, should suffice to eliminate resolving church property disputes on the basis of the form of ecclesiastical government (when neutral principles of law are applied). Reasoning that locally purchased and owned property should be awarded to the denomination simply because the denomination is purportedly "hierarchical" and its constitution contains a trust clause is an improper basis for enforcing the trust clause when neutral principles of law are genuinely applied. Such an analysis would not be the application of neutral principles of law at all. It would instead simply be a de facto version of the deference rule.

Scrutinizing the denominational constitution (the governing documents of the denomination) in "purely secular terms" means something other than a civil court trying to ascertain for itself the form of ecclesiastical polity. The form of church government is itself an expression of religious faith or doctrine, and *Wolf* warned that a searching inquiry by a civil court on that topic raises constitutional problems. Denominational constitutions may, however, contain many provisions that are useful to the civil court's proper task and which, when considered in purely secular terms, pose no threat of excessive entanglement. The Presbyterian Lay Committee wishes to point out some basic features of the constitution of the PCUSA and its predecessors and some of the distinctive features in those constitutions that have contributed to differing legal outcomes.

An express trust clause first appeared in the PCUS constitution (the Book of Church Order) in the last year of that denomination's existence, at § 6-3 of the 1982/1983 edition of the PCUS Book of Church Order—long after many Presbyterian congregations acquired all of their real property and built on it at their own expense. Prior to 1982, no Presbyterian denomination contained in its constitution an express trust clause, nor did an implied trust exist over local church property that ran automatically in favor of the denomination.[12] The PCUSA's current assertion of a trust relies on a clause, PCUSA G-8.0201, that was included in the PCUSA constitution (the Book of Order) when the PCUSA first came into existence in mid-1983.

In addition, though, to the express trust clause at G-8.0201, the PCUSA Book of Order also includes an exception clause, PCUSA G-8.0701, that allows local churches, upon timely vote and report to the presbytery, to opt out of any property-related trust provision if the local church was *not* subject to a similar provision in the constitution of

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[12] In *Watson v. Jones*, 80 U.S. 679 (1871) the U.S. Supreme Court was confronted with two competing trust assertions. One party contended that in Presbyterianism an implied trust always existed in favor of the local congregational majority. The opposing party contended that in Presbyterianism an implied trust always existed in favor of the national denomination (called "the general body" in *Watson*). The U.S. Supreme Court rejected both contentions. It said that prior to 1813 the courts had not settled on any definite rule. In 1813, though, the House of Lords, in a case arising in Scotland, rejected both contentions, in *Craigdallie v. Aikman*, 2 Bligh, 529; 1 Dow. Since that time, *Watson* went on to say, *Craigdallie's* ruling "has been accepted in all cases of this nature in England, Scotland, and America". *Watson* at 705. *Watson* said that any potential implied trust that existed ran only in favor of "that part of the society (whether local or national) ... adhering to and maintaining the original principles upon which it was founded". *Id.* Because civil courts could not make such an intrinsically religious decision about who is being most doctrinally faithful, *Watson* authorized state courts to adopt the hierarchical-deference method, which a few states still follow today. In sharp contrast with a trust in favor of the doctrinally faithful that was recognized in *Watson*, the express trust clause in the PCUSA Book of Order purports to always run in favor of the PCUSA.

The historical absence of any implied trust always in favor of the noticed denomination was noted by the Georgia Supreme Court in *Presbyterian Church v. Eastern Heights Church*, 225 Ga. 259, at 261, 167 S.E.2d 658 (1969) ("Presbyterian Church II") and by the Pennsylvania Supreme Court in *The Presbytery of Beaver-Butler, et al v. Middlesex Presbyterian Church, et al*, 507 Pa. 225, 489 A.2d 1317 (Pa. 1987).

the denomination of which it was a part immediately prior to the 1983 formation of the PCUSA. Although PCUS § 6-3 and PCUSA G-8.0201 are substantially similar, PCUSA G-8.0501 and PCUS § 6-8 of the 1982/83 edition of the PCUS constitution state the opposite.

PCUS § 6-8 states:

> **Nothing in this chapter shall be construed to require a particular church to seek or obtain the consent or approval of any church court above the level of the particular church in order to buy, sell, or mortgage the property of that particular church in the conduct of its affairs as a church of the PCUS.**

Section 6-8 of the 1982/83 edition of the PCUS Book of Church Order. In commenting on the effect of timely use of G-8.0701, the Louisiana First Circuit Court of Appeal observed:

> **As the district court recognized in written reasons for issuance of a preliminary injunction, "the unfettered right to dispose of all of one's property is mutually exclusive of any right by a third party to dictate the disposition of that same property." In other words, in allowing Carrollton to fall back on § 6-8, G-8.0701 negated any express trust as provided by G-8.0201.**

Carrollton Presbyterian Church v. Presbytery of South Louisiana of the Presbyterian Church (USA), 2011 WL 443357 , ____ S.3d ____ (La. App. 1 Cir.) Case Number 2011-CA-0205 (Sept. 14, 2011); writ denied, ____ S.3d ____ (La.) No. 2011-C-2590 (February 17, 2012).[13]

[13] In its Application for a Writ of Review to the Louisiana Supreme Court, the Presbytery of South Louisiana relied on *Timberridge*, *Christ Church Savannah*, *Gauss*, and *Episcopal Church Cases*, discussed supra. The Louisiana Supreme Court was not convinced, and unanimously denied the Application. Like the Missouri Court of Appeal in *Heartland Presbytery v. Gashland*, supra, the Louisiana Supreme Court was not persuaded that those cases actually said what the presbytery alleged they said, or if they did, that those cases correctly interpreted *Jones v. Wolf*.

Presbyterian governing documents are also distinctive in other important ways. The Book of Order repeatedly states that the authority of the PCUSA and the application of its constitution (The Book of Confessions and the Book of Order) is strictly limited to spiritual matters only, and is not to reach to temporal matters. Indeed, the Book of Order expressly states that provisions of the denominational constitution are not to be enforced through the power of civil courts. Section G-1.0307 says the PCUSA's power is only ministerial. The next Section, G-1.0308, says, "ecclesiastical discipline must be purely moral or spiritual in its object and not attended with any civil effects" (emphasis added). G-1.0301(1)(b) states, "We do not even wish to see any religious constitution aided by the civil power, further than may be necessary for production and security, and at the same time, be equal and common to all others." G-9.0102 reiterates, "Governing bodies of the church ... have no civil jurisdiction or power to impose civil penalties. They have only ecclesiastical jurisdiction." If the PCUSA's authority is by its own declaration limited to spiritual matters only, then applying generally applicable state property and

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In its discussion of *Carrollton*, supra, the amicus PLC does not suggest that the absence of a provision like PCUSA 6-8, or the presence of its opposite in some of the older Episcopal canons, requires the conclusion that an implied trust *is* present, or that an implied trust must be enforced. The northern Presbyterian branch (the UPCUSA) that merged with the southern branch (the PCUS) in 1983 to form the PCUSA did not contain a counterpart to 6-8. It contained a provision which stated the opposite, and that required the permission of the presbytery before a local church could buy, sell or encumber property. In this respect, that UPCUSA provision, carried forward into the PCUSA constitution and still applicable to former UPCUSA churches, is like the Episcopal canons that require the permission of the bishop and diocesan committee. To the best of the PLC's knowledge, though, there is no reported case in the United States that holds that this has the effect of creating an implied trust that is enforceable against local *Presbyterian* church property. As for the Episcopal canons that require approval by the bishop or his designee, the reported case law appears to be split on whether this gives rise to an implied trust. Some courts have held that it does while other courts have held that compliance with such a provision does not constitute the clear and unequivocal evidence required to establish owner consent to a trust.

trust laws to determine control of a civil corporation's temporal property cannot reasonably be said to intrude on the PCUSA's religious freedom.

III. CONCLUSION

For the foregoing reasons, the amicus Presbyterian Lay Committee respectfully urges this Honorable Court to clarify and establish that neutral principles of law are to be applied by Texas courts whenever church property disputes can be resolved without reliance on questions of religious doctrine, practice, and polity, as those principles are set forth in *Jones v. Wolf*, 443 U.S. 595 (1979) and explained herein.

Respectfully submitted,

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