No. 20-261

IN THE

Supreme Court of the United States

JEFF SCHULZ AND ELLEN SCHULZ, ET AL.,
Petitioners,

v.

THE PRESBYTERY OF SEATTLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of Washington

BRIEF OF LAW AND RELIGION AND CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PAUL J. ZIDLICKY*
JACQUELINE G. COOPER
DANIEL J. HAY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pzidlicky@sidley.com

Counsel for Amici Curiae

* Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

LEGISLATIVE MATERIAL

SCHOLARLY AUTHORITIES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scholars of law and religion and constitutional law. They have a shared interest in the sound development of the law. A full list of *amici* is included as an appendix.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Schism is as old as organized religion itself. See, *e.g.*, *Genesis* 4. And when theological disputes arise and divide a religious community, property disputes often follow. These disputes raise an inevitable question: When courts face dueling claims of rightful ownership by two religious bodies, how should they decide who owns the property?

Review is warranted in this case because it squarely implicates a conflict among the lower courts regarding the constitutional standards for resolving religious property disputes. Lower courts each take one of three approaches to resolving such disputes: an ordinary principles approach (also called "neutral principles"),[2] a denominational deference approach, or a mixed approach that applies some elements of the other two. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998); Michael W. McConnell & Luke W.

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[1] All parties were timely notified of and consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] In *Watson* v. *Jones*, the Court referred to "ordinary principles." 80 U.S. (13 Wall.) 679, 725 (1872). In *Jones* v. *Wolf*, the Court referred to "neutral principles." 443 U.S. 595 (1979).

Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 327–28 (2016). While courts in a majority of States apply an ordinary principles approach to religious property disputes, there is a substantial minority that applies either a deference approach or a mixed approach. And despite diverging approaches, every State considers its approach to be the proper reading of this Court's decision in *Jones* v. *Wolf*, 443 U.S. 595 (1979).[3]

The majority approach resolves disputes by simply doing what courts do best—namely, applying ordinary principles of law and looking to deeds, trusts, and contracts.[4] This approach gives legal effect to the way adherents of a religion chose to memorialize their theological views about property ownership through ordinary legal instruments.

A minority of courts, however, resolve religious property disputes in a more troubling way. These courts do not simply apply ordinary property law. Instead, they presume upon religious doctrines to determine which

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[3] Compare *All Saints Parish Waccamaw* v. *Protestant Episcopal Church in the Diocese of S.C.*, 685 S.E.2d 163, 171 (S.C. 2009) ("reaffirm[ing]" the "neutral principles of law approach as approved by the Supreme Court of the United States in *Jones*"), with *Heartland Presbytery* v. *Presbyterian Church of Stanley, Inc.*, 390 P.3d 581, 595–96 (Kan. Ct. App. 2017) (emphasizing that *Jones* did not "repudiate the principle of hierarchical deference," overrule *Watson*, or "mandate the use of the neutral-principles approach").

[4] *E.g.*, *All Saints Parish*, 685 S.E.2d 163; *St. Paul Church, Inc.* v. *Bd. of Trs. of the Alaska Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541 (Alaska 2006); *Berthiaume* v. *McCormack*, 891 A.2d 539 (N.H. 2006); *In re Church of St. James the Less*, 888 A.2d 795 (Pa. 2005); *Ark. Presbytery of the Cumberland Presbyterian Church* v. *Hudson*, 40 S.W.3d 301 (Ark. 2001); see also *Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522 (8th Cir. 1995) (interpreting Missouri law).

religious faction's unilateral decisions should receive deference from civil courts.[5] This approach—recognized in *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872)—has improperly entangled courts in religious questions, and forced them to pick theological favorites in what ought to be purely intrareligious disputes. Applying this approach, courts have enforced the unilateral declaration of one religious faction—usually national church functionaries—that a denominational trust exists, and deprived local congregations of their property solely on this basis. What is more, they have done so even when such a purported denominational trust is not "embodied in some legally cognizable form" and in fact conflicts with secular legal instruments congregations created to safeguard property. *Jones*, 443 U.S. at 606.

This approach is not sanctioned by the Religion Clauses of the First Amendment. This case presents an ideal vehicle to bring uniformity with respect to an important and recurring issue of federal law by repudiating the denominational deference approach and declaring that, when it comes to disputes over a denomination's property, a court's sole function is to apply ordinary legal principles.

Under the Religion Clauses, the denominational deference approach is deeply problematic for at least two reasons.

First, it forces civil courts to focus on theology to decide squarely theological questions. Under the denominational deference approach, courts examine religious

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[5] *E.g.*, *Episcopal Church in the Diocese of Conn.* v. *Gauss*, 28 A.3d 302 (Conn. 2011); *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446 (Ga. 2011); *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009); *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920 (N.Y. 2008).

doctrines to determine whether a particular religious body is sufficiently "hierarchical," such that deference to the organization's ecclesiastical statements is warranted. *Presbytery of Seattle, Inc.* v. *Rohrbaugh*, 485 P.2d 615, 619–20 (Wash. 1971). Not only does this false binary do violence to the complex ecclesiologies religious bodies actually use, but courts are neither empowered nor qualified to resolve such sensitive theological questions about church polity. That kind of entanglement strikes at the core of the Religion Clauses, which demand that civil courts neither interpret nor weigh church doctrines. *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969).

Second, the denominational deference approach violates principles of church autonomy. Most obviously, it advantages certain elements of hierarchical denominations—or, more precisely, of denominations that present themselves as hierarchical in litigation—by giving them power to create unilateral trust rights in a way no other entity can. Indeed, under this approach, elements of a hierarchical denomination are allowed to create unilateral trust rights in contradiction of express legal instruments others created regarding property. See, *e.g.*, *In re Church of St. James the Less*, 888 A.2d 795, 803, 810 (Pa. 2005). That preference also has perverse effects on a denomination's religious polity. Specifically, it incentivizes denominations to organize themselves in a more hierarchical fashion to receive the benefits of the deference approach, even if doing so may be in tension with the group's preexisting religious beliefs. See Brian Schmalzbach, Note, *Confusion and Coercion in Church Property Litigation*, 96 VA. L. REV. 443, 456–62 (2010); Eric G. Osborne & Michael D. Bush, *Rethinking Deference: How the History of Church Property Disputes*

Calls into Question Long-Standing First Amendment Doctrine, 69 SMU L. REV. 811, 826 (2016).

In contrast, an approach that interprets and relies on ordinary legal instruments is "flexible enough to accommodate all forms of religious organization and polity" without pushing churches into one kind of polity or another. *Jones*, 443 U.S. at 603. Because the ordinary principles approach turns only on the interpretation of familiar property and trust sources, it invites civil courts to focus on legal principles familiar to their domain: discerning the legal intent of corporate charters and documentary trusts.

This Court's latest word on resolving religious property disputes came forty years ago in *Jones*. While *Jones* glowingly approved of a "neutral principles" approach, it neither disavowed the denominational deference applied in *Watson* nor explained how such deference is consistent with the First Amendment. *Jones* has sown confusion in the lower courts at the same time that the Court's understanding of the Religion Clauses has become more historically grounded and moved away from the problematic aspects of *Watson*, the late-nineteenth century decision that first approved denominational deference. Given this uncertainty, the eroded position of parts of *Watson*, and the absence of legitimate reliance interests to the contrary, stare decisis principles support aligning this Court's approach to religious property disputes with its broader jurisprudence under the Religion Clauses.

ARGUMENT

I. THE RELIGION CLAUSES SUPPORT AN ORDINARY PRINCIPLES APPROACH TO RESOLVING RELIGIOUS PROPERTY DISPUTES.

When it comes to religious property disputes, the Establishment Clause and the Free Exercise Clause work in tandem toward the same goal: both Clauses prohibit the government from interfering with questions of religious doctrine or internal governance, see *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); from entangling itself in the role of deciding religious questions, see *Hull Memorial Church*, 393 U.S. at 449–50; and from preferring some religious forms over others, see *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Each of these prohibitions protects the free exercise of religion from the coercive power of the state. Yet, each is violated by a denominational deference approach to resolving religious property disputes.

A. Resolving Religious Property Disputes Based On Ordinary Legal Principles Decreases Entanglement.

This Court has long recognized that government should avoid excessive entanglement with religion. See, *e.g.*, *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2068–69 (2020) (deciding whether a person is a "co-religionist" is impermissible because it risks "judicial entanglement in religious issues"); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 670 (1970)

(stating that the goal of First Amendment jurisprudence is to "avoid excessive entanglement" between government and religious entities).[6]

Some level of entanglement between religious entities and government is often unavoidable. As this Court observed in *Walz*, "the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement." 397 U.S. at 670. Federal and state tax regimes provide an apt example. As one commentator has noted, "[w]hen it comes to taxing or exempting the church, there are no purely disentangling choices." Edward A. Zelinsky, *Taxing the Church: Religion, Exemptions, Entanglement, and the Constitution* xviii (2017). Some degree of entanglement follows because either the government must police the boundaries of who qualifies for religious exemptions, or it must assign value to, place liens on, or even foreclose on religious property. *Id.*

Even if there are no purely disentangling choices, some disputes involving religious entities present asymmetrical entanglement concerns. The ministerial exception is illustrative. While asking courts to decide who counts as a church leader for purposes of the exception involves a de minimis degree of entanglement,[7]

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[6] This entanglement doctrine predates the *Lemon* test, and at least some aspects of it likely survive the *Lemon* test's demise. See, *e.g.*, Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701 (2020).

[7] See, *e.g.*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2069–71 (Thomas, J., concurring) ("[C]onsider[ing] whether an employee shares the religious organization's beliefs . . . 'would risk judicial entanglement in religious issues.' . . . . But the same can be said about the broader inquiry whether an employee's position is 'ministerial.'").

far more entanglement would result from courts dictating whom a church must select or maintain as its religious leaders. See, *e.g.*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2068–69. Ministerial exception disputes provide ready examples of lopsided entanglement concerns, in part because only one party in such disputes is a church.

Religious property disputes present a twist on this entanglement issue: *both* parties are religious entities claiming the mantle of theological autonomy and protection against government entanglement. Here it is the ordinary legal principles approach that results, in the broad swathe of cases, in the *least* amount of government entanglement with churches. As this Court recognized in *Jones*, this approach "free[s] civil courts" from "entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603.

In contrast, the denominational deference approach requires courts to answer far more problematic and entangling religious questions. This is so even though courts adopting a denominational deference approach have sometimes, as a justification for doing so, relied on avoidance of entanglement. See *Original Glorious Church of God in Christ, Inc.* v. *Myers*, 367 S.E.2d 30, 33 (W. Va. 1988) (per curiam) (adopting a deference approach "[d]ue to First Amendment entanglement considerations"); *Tea* v. *Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980) (same).

As this Court recognized in *Jones*, under an approach of automatic deference, "civil courts would always be required to examine the polity and administration of a church." 443 U.S. at 605. This entanglement arises first because courts must determine whether a denomination is "congregational" or "hierarchical." Not only does this false dichotomy lead to a

misguided inquiry, a court can only answer this question by interpreting religious documents *as such*, as well as practices relevant to church governance and polity. Courts must then make a judgment about the theological meaning of those documents or practices. See Pet. App. 14a–17a (scrutinizing the Presbyterian Church's internal church constitution and structure to determine whether the PCUSA is hierarchical, despite this being a disputed religious and doctrinal question between the dueling churches).

This inquiry also relies on a complicated factual assumption enmeshed in theology and religious intent—namely that hierarchical denominations consist only of local bodies that have consented to relinquishing control of their property to a wider denominational body with which they chose to affiliate. See *First Presbyterian Church of Schenectady* v. *United Presbyterian Church*, 464 N.E.2d 454, 460 (N.Y. 1984). Yet this assumption disregards the most important evidence concerning consent—the ordinary "civil legal documents" religious entities regularly use to "organize their affairs" and reflect their theological preferences. *All Saints Parish Waccamaw* v. *Protestant Episcopal Church in the Diocese of S.C.*, 685 S.E.2d 163, 171 (S.C. 2009).

Even for indisputably hierarchical denominations, sometimes these sorts of religious questions are far from straightforward. For example, in *Yali Acevedo Feliciano*, the Supreme Court of Puerto Rico impermissibly took it upon itself to define the Catholic Church as a single monolithic legal entity, while also refusing to acknowledge the separate legal status of any other Catholic organizations. See Application for Stay Pending Petition for Certiorari at 15-16, *Roman Catholic Archdiocese of San Juan* v. *Feliciano*, No. 18-921 (U.S. June 15, 2018). In doing so, the Supreme Court of

Puerto Rico imposed its own perception of the Catholic Church's religious polity.

Despite what judges might assume, in hierarchical denominations, lines of authority do not always flow in the way a civil court might anticipate.[8] It is dangerous to invite government actors into the business of interpreting what the hierarchical structure of a denomination means for specific outcomes. See, *e.g.*, 22 Annals of Cong. 982–83 (1811) (Madison's 1811 Veto Message objecting to civil law prescribing and limiting the structure of a denomination's polity); Brief for Petitioners at 10–11, *Fulton* v. *City of Philadelphia*, No. 19-123 (U.S. May 27, 2020) (government commissioner urging a Catholic organization to follow "the teachings of Pope Francis" rather than the archbishop's instructions).

Ultimately, the Religion Clauses require civil courts to refrain from the most problematic forms of entanglement: "the interpretation of particular church doctrines" or the weighing of "the importance of those doctrines to the religion." *Hull Memorial Church*, 393 U.S. at 450. Courts simply lack the competence or jurisdiction to do so. Yet that is precisely what a denominational deference approach requires.

B. Denominational Deference Interferes With Church Autonomy.

A denominational deference approach also interferes with church autonomy more than an approach that allows religious organizations the freedom to organize

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[8] See, *e.g.*, *1983 Code of Canon Law* c. 806, § 1 (stating that the diocesan bishop's prescripts for the general regulation of Catholic schools are valid for schools directed by religious orders "*without prejudice, however, to their autonomy regarding the internal direction of their schools*" (emphasis added)).

their property using ordinary legal principles. In matters of church autonomy, the Establishment Clause and the Free Exercise Clause are two sides of the same coin. The Free Exercise Clause ensures that all religious denominations may practice freely, and thus that "freedom for all religion [is] guaranteed by free competition between religions." *Larson*, 456 U.S. at 245. And the Establishment Clause prohibits the government from favoring any denomination, since freedom of exercise and competition "would be impossible in an atmosphere of official denominational preference." *Id.*

Not only must the government allow denominations to practice freely and refrain from favoring one sect over another, it must also ensure that denominations have a free hand "to decide for themselves, free from state interference, matters of church government." *Kedroff*, 344 U.S. at 116. Thus, state policies must "work deterrence of no religious belief," including beliefs about the internal affairs and organization of religious groups. *Larson*, 456 U.S. at 246 (quoting *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

Denominational deference violates these principles. The deference approach gives hierarchical religious organizations (or certain elements of them) unique legal advantages. The underlying case illustrates this interference. The decision below denied to some the ability to express and enforce their theological views regarding property with the secular legal tools available to them. Pet. App. 14a–17a. Indeed, the court below allowed their expressions of ownership to be overridden by a denomination-created property interest that would not qualify as a trust under Washington law, *id.* at 14a–21a, and that the national denomination tried and failed to get the local church to agree to. Pet. 9.

For courts to ignore ordinary principles of law and enforce what a religious body could not accomplish with its own religious power is a particularly troubling form of preferentialism.

Nor is this case unique. Other state courts applying the denominational deference approach or a hybrid approach have reached similar outcomes in disputes involving other denominations. See, *e.g.*, *Episcopal Church Cases*, 198 P.3d 66, 84 (Cal. 2009); *Church of St. James*, 888 A.2d at 807–08. This result denies churches in some denominations the same property rights as other churches, corporations, and voluntary associations. See *Fluker Cmty. Church* v. *Hitchens*, 419 So. 2d 445, 447 (La. 1982).

Elsewhere in the law, courts have rightly resisted resolving theological disputes in favor of one party and then forcing other parties to comply. *E.g.*, *Sharma* v. *Sharma*, 667 P.2d 395, 396 (Kan. Ct. App. 1983). Yet that is essentially what the court below did when it "prefer[red] one group of disputants to another" based on theological claims about religious polity that were not supported by, and indeed were in sharp tension with, express legal documents. *Schenectady*, 464 N.E.2d at 460. And the preference of one religious "polity over other forms . . . may indeed constitute a judicial establishment of religion." *Id.*

Because elements of hierarchical religious organizations receive preferential treatment under a deference approach, such a rule creates coercive legal incentives. That rule encourages certain religious factions on one side of a dispute to describe the religious practice of their denomination in a manner that may be inconsistent with their preexisting theological requirements. And that very act of self-description in civil litigation, encouraged by the denominational deference approach, can then even affect the development of the

religious organization's doctrine outside the courts. Mixed-polity denominations, like the Presbyterian Church for example, face pressure to look more hierarchical rather than congregational in order to protect their assertions of ownership of church property under the deference approach. That is true even when such a position might be in tension with their theological beliefs.[9]

In that way, the deference approach operates as a one-way ratchet toward ever more hierarchical forms of religious government. Such external government pressure on congregational denominations cannot be reconciled with principles of church autonomy. See *Espinoza* v. *Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2256 (2020) (noting that the "Free Exercise Clause protects against even 'indirect coercion'"). In contrast, relying on ordinary legal principles provides all types of religious denominations with exactly the same access to a wide range of legal tools that can clearly express their theological preferences regarding property ownership and consent.

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[9] See Decision and Order at 1, *Johnston* v. *Heartland Presbytery of the Presbyterian Church (U.S.A.)*, Remedial Case 217-2 (Permanent Judicial Comm'n of the Gen. Assembly of the Presbyterian Church (U.S.A.) Oct. 18, 2004), http://oga.pcusa.org/media/uploads/oga/pdf/pjc21702.pdf ("A higher governing body's 'right of review and control over a lower one' must not be understood in hierarchical terms, but in light of the shared responsibility and power at the heart of Presbyterian order."); see also Evangelical Lutheran Church in Am., *Constitutions, Bylaws, and Continuing Resolutions* ch. 5 § 5.01(c) (rev. ed. Nov. 2019), https://download.elca.org/ELCA%20Resource%20Repository/Constitutions_Bylaws_and_Continuing_Resolutions_of_the_ELCA.pdf?_ga=2.40699745.238470090.1601571828-1848354684.1601571828 ("The congregations, synods, and churchwide organization of this church are interdependent expressions sharing responsibly in God's mission.").

Moreover, the ordinary legal principles approach provides sufficient protection for hierarchical churches. Take, for example, the Catholic Church. In the late-eighteenth and nineteenth centuries, disputes flared between diocesan bishops and individual parishes over the prerogative to dismiss parish priests and other administrative concerns. See Patrick W. Carey, *Catholics in America: A History* 27–29 (2004). Under state law, some parishes had been organized in the name of local lay trustees, who held title to the parish property and were responsible for its administration. *Id.* at 27–28. Clashes erupted when lay trustees, heedless of the wishes of their local bishop, sought to dismiss unpopular priests and then turned to civil courts to enforce their decisions. *Id.* at 28. Rather than rely on rules of deference, however, the Catholic Church instead turned to ordinary legal principles. By using religious carrots and sticks like threats of interdict or excommunication—rather than resort to the civil legal system—parishes were persuaded to transfer title into the name of diocesan bishops and bring their ordinary legal documents into line with the church's theology. *Id.* at 28–29.

In much the same way today, hierarchical denominations retain both legal and extralegal tools to ensure that their property is held in a way that reflects their desire for hierarchical control, obviating the need for religious deference. Thus, hierarchical denominations have the ability to protect themselves adequately under the less entangling legal regime.[10]

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[10] It is true that there is an unfortunate older history of denying some religious entities the freedom to use the ordinary legal tools of contract, property, and trust law. *E.g.*, *In re St. Mary's Church*, 7 Serg. & Rawle 517, 540 (Pa. 1822) (opinion of Tilghman, C.J.); see also Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162

II. STARE DECISIS PRINCIPLES SUPPORT ALIGNING THIS COURT'S APPROACH TO RELIGIOUS PROPERTY DISPUTES WITH ITS BROADER JURISPRUDENCE UNDER THE RELIGION CLAUSES.

While the ordinary principles approach best comports with the commands of the First Amendment, the issue in this case is not one of first impression. When deciding to follow precedent, factors like reliance interests, the quality of the original decision, and legal developments since that decision are all important considerations. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019)). None of these factors stands in the way of adopting the ordinary principles approach here.

A. This Court's Reasoning Supporting A Denominational Deference Approach Is Ripe For Reconsideration.

The Court has long recognized the First Amendment values of church autonomy and preventing entanglement, and it should now extend these principles to their logical conclusion. In *Watson*, this Court held that there are essentially only two forms of denomination polity: hierarchical and congregational. 80 U.S. (13 Wall.) at 722–25. And it further held that if a denomination is hierarchical, courts are obligated to defer to the resolution reached by the denominational tribunals, including the resolution of property disputes. *Id.* at 728–29.

This false binary categorization of denominations is in deep tension with the modern Court's recognition

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U. PA. L. REV. 307 (2014). It is a premise of the argument here that all religious organizations are allowed access to those tools.

that the free exercise of religion is a constitutional protection for all Americans, regardless of what religion they profess (or whether they profess any religion at all). If the hierarchical-versus-congregational classification in *Jones* is a rule only for Christian religious organizations, then it would conflict with the Establishment Clause. Alternatively, that classification might be understood as dividing all religious or quasi-religious entities—Buddhist, Christian, Hindu, Jewish, Muslim, secularist, and so on—into being "hierarchical" or "congregational." As inapt as that nineteenth-century classification is even for Christian denominations, it was certainly not developed for the full religious tapestry of the contemporary United States. When it is imposed on non-Christian religious organizations, there may be a pronounced lack of fit, and at the same time the classification would exert its coercive pull on their litigating positions and perhaps even their religious practices.

This Court later took steps to correct *Watson* in *Jones* v. *Wolf*, when it recognized that courts could resolve religious property disputes even for hierarchical denominations under "neutral principles of law," that is, "objective, well-established concepts of trust and property law familiar to lawyers and judges." 443 U.S. at 603–04. But *Jones* did not rule out denominational deference.

However, in *Jones*, this Court had before it only the question of the constitutionality of the ordinary principles approach. *Id.* at 601. This Court upheld the ordinary legal principles approach on grounds that called into question the denominational deference approach. For example, this Court acknowledged first that it is constitutionally disfavored for civil courts to decide cases "on the basis of religious doctrine and

practice"; and second, that government should not favor any particular form of hierarchical organization. *Id.* at 602. The Court found that the ordinary principles approach was superior to the denominational deference approach in these respects. The logical conclusion would seem to be that the denominational deference approach is unconstitutional. But the Court in *Jones* did not have the question before it, and stopped short of answering it.

In essence, with respect to the denominational deference approach, *Jones* left *Watson* a dead case walking. Perhaps that is why the majority of States now accept the ordinary principles approach. The Court today should finish what the *Jones* Court started. This case presents an opportunity for this Court to complete the trajectory of that important constitutional reasoning.

B. Legitimate Reliance Interests Are Not A Reason To Preserve The Denominational Deference Approach.

Reliance interests are not a reason to preserve the denominational deference approach. That is so because any religious organization may use the existing ordinary tools without relying on denominational deference.

Because stare decisis is meant to "promote[] the evenhanded, predictable, and consistent development of legal principles," *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991), one way to measure reliance interests is to assess the degree to which overruling a precedent will "upset settled expectations." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009). And few could describe expectations founded on denominational deference as "settled." That is so because the Court in *Jones* moderated *Watson*'s compulsory deference approach, holding that

a State *may* "adopt neutral principles of law as a means of adjudicating a church property dispute." 443 U.S. at 604. Denominations have thus been "on notice" that "state courts no longer are required to defer to the denominational church's decision in a property dispute," and are thus not at risk of unfair surprise. *Hope Presbyterian Church of Rogue River* v. *Presbyterian Church (U.S.A.)*, 291 P.3d 711, 721 (Or. 2012).

Even if one religious faction may be said to rely on denominational deference, the other may be said to rely on the express language of the deeds and trusts. Nor is that latter reliance merely a mistake. It is rooted in a salutary adherence to ordinary legal formalities, and it is particularly understandable given the confusion in the wake of *Jones*, the use of hybrid regimes in some States, and the uncertainty under the denominational deference approach about whether a court might classify a particular religious organization as hierarchical or congregational. Scholars have noted that "the present law is highly unpredictable" for religious bodies that choose to associate with other religious bodies. Greenawalt, *supra*, at 1902. Indeed, "the idea that members give implied consent to whatever the hierarchy does is not tenable for many members of many churches," who believe they own the property as reflected in the relevant deeds and secular documents. *Id.* at 1874.

Moreover, the real value of the denominational deference approach in litigation is, to be frank, a kind of hierarchical ambush. In a clearly and thoroughly hierarchical religious organization, there will often be a corresponding use of the ordinary legal tools to reflect that ecclesiastical polity (as in, for example, the Church of Jesus Christ of Latter-day Saints' practice of holding property in the corporation sole). See, *e.g.*, *Late Corp. of the Church of Jesus Christ of Latter-Day*

Saints v. *United States*, 136 U.S. 1, 41 (1890); 1 W. Cole Durham Jr. & Robert T. Smith, *Religious Organizations and the Law* § 9:2 (2d ed. 2017).[11] For a clearly congregational denomination, the choice between denominational deference and ordinary principles will often make no difference (apart from some increase in litigation costs if there is a lack of clarity).

The decisive impact of denominational deference is when a church's polity is intermediate, unsettled, or a matter of religious contestation. In those cases, one faction (typically the central hierarchy) might have tried to get its understanding reflected in the relevant deeds and trusts, but failed—perhaps even because there was disagreement about what kind of polity the church had. Indeed, that was true in this case. Pet. 9. And in other cases, the central hierarchy may not have even tried, perhaps because it knew that its coreligionists would not consent to being divested of their property.

But the denominational deference approach allows that very faction to subsequently recover in civil litigation what it did not achieve, and sometimes did not even attempt, through the ordinary tools of contract, property, and trust law. The denominational deference approach allows and even invites an ex post shift, in litigation, toward a more hierarchical self-conception—one that might generate surprise among co-religionists, and at any rate is a self-conception about

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[11] It may be noteworthy that a recent brief of the United States Conference of Catholic Bishops asks for the Court *either* to apply deference *or* to enforce "ordinary principles of civil law" in a religious property dispute, indicating that either approach would have adequately protected the Catholic Church's property interests. U.S. Conference of Catholic Bishops as *Amicus Curiae* at 4, *Roman Catholic Archdiocese of San Juan* v. *Feliciano*, No. 18-921 (U.S. Feb. 15, 2019).

which there was no previous consensus. Whatever type of reliance there may be in the possibility of benefitting from this maneuver, it is certainly not a "legitimate reliance interest." *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) (alteration omitted) (quoting *United States* v. *Ross*, 456 U.S. 798, 824 (1982)).

Where a religious organization and its members truly want hierarchical control of property, there is generally nothing stopping them from using ex ante, clear, transparent ordinary legal principles to accomplish the desired result. *Jones*, 443 U.S. at 606. As this Court noted in *Jones*, "[t]hrough appropriate reversionary clauses and trust provisions, religious societies can 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 603–04. "In this manner," the Court explained, "a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members." *Id.*

If a denomination has declined to avail itself of secular tools at its disposal, and instead has chosen to rely on a mandatory rule of deference—which was either optional and unpredictable at best, see *id.* at 602, or constitutionally suspect at worst—then it has little room to cry foul if it loses the benefit of this preferential rule. Reliance interests thus pose no obstacle to this Court adopting an ordinary principles approach.

CONCLUSION

As the Petition explains, the lower courts have settled into an entrenched split on the interpretation of *Jones* v. *Wolf*. This case presents an ideal vehicle to repudiate the denominational deference approach and declare that, when it comes to disputes over church property, a court's sole function is to apply ordinary principles of law. The Petition should be granted.

Respectfully submitted,

PAUL J. ZIDLICKY*
JACQUELINE G. COOPER
DANIEL J. HAY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pzidlicky@sidley.com

Counsel for Amici Curiae

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* Counsel of Record

APPENDIX—LIST OF *AMICI* *

Stephanie H. Barclay
Associate Professor of Law & Religious Liberty Initiative Scholar, Notre Dame Law School

Samuel L. Bray
Professor of Law, Notre Dame Law School

Richard A. Epstein
The Laurence A Tisch Professor of Law, The New York University School of Law; The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; The James Parker Hall Distinguished Service Professor Emeritus and Senior Lecture, The University of Chicago

Kellen Funk
Associate Professor of Law, Columbia Law School

Chaim Saiman
Professor of Law & Chair in Jewish Law, Charles Widger School of Law, Villanova University

Anna Su
Associate Professor, University of Toronto Faculty of Law

Eugene Volokh
Gary T. Schwartz Distinguished Professor of Law, UCLA School of Law

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* Institutions and titles are listed for affiliation purposes only. *Amici* are participating in their individual capacity, not on behalf of their institutions.