NO. 11-0332

In The
Supreme Court of Texas

Robert Masterson, Mark Brown, George Butler, Charles Westbrook, Richey Oliver, Craig Porter, Sharon Weber, June Smith, Rita Baker, Stephanie Peddy, Billie Ruth Hodges, Dallas Christian and The Episcopal Church of the Good Shepherd,

Petitioners,

v.

The Diocese of Northwest Texas, the Rev. Celia Ellery, Don Griffis and Michael Ryan,

Respondents.

On Petition for Review from the Third Court of Appeals, Austin, Texas

BRIEF OF *AMICI CURIAE*

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INTEREST OF THE *AMICI CURIAE*

Amici are national, regional, and local representatives of religious denominations who consider this case of paramount importance to religious liberty, church autonomy, and a church's First Amendment rights to select its clergy and to determine the use of its churches and property.

The General Council on Finance and Administration of The United Methodist Church, Inc. ("GCFA"), an Illinois corporation, is the financial and administrative arm of The United Methodist Church ("UMC"). The UMC is a worldwide religious denomination with approximately 13,000,000 members. Through its various agencies, The UMC performs mission work in over 165 countries. The UMC is one of the largest religious denominations in the United States. It has approximately 35,000 local churches and nearly 8,000,000 members in the United States. There are approximately 804,000 United Methodist members and 1,966 United Methodist churches in the state of Texas. Under United Methodist polity, GCFA is the agency charged with protecting the legal interests of the denomination. United Methodist polity, set forth in ¶¶ 2501 *et seq.* of the *Book of Discipline of The United Methodist Church (2008)*, does not permit the pastor or members of a local church who choose to leave the denomination to take either the church's real or personal property with them. This fundamental principle is inextricably linked to other important aspects of the UMC's polity.

Gradye Parsons, the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). Gradye Parsons, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The

Presbyterian Church (U.S.A.) is a national Christian denomination with just over 2,000,000 members in more than 10,500 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the hundreds of years of PCUSA understanding of connectional churches and the religious trust inherent in our polity. The Stated Clerk appears here on behalf of the policies of the General Assembly only. The Stated Clerk is the highest ecclesiastical officer of the General Assembly. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes.

The Lutheran Church-Missouri Synod ("the LCMS") is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately 2,300,000 baptized members. There are 360 LCMS member congregations in Texas, with 132,673 baptized members. The LCMS is organized as a Missouri non-profit corporation under the laws of the State of Missouri without a parent or subsidiary, but with several affiliated corporate entities and District offices that are separately incorporated. The affiliated corporate entities include: Concordia Historical Institute, Concordia Publishing House, The Lutheran Church Extension Fund--Missouri Synod, The Lutheran Church--Missouri Synod Foundation and Concordia University System. The LCMS has a keen interest in preserving religious

liberty, church autonomy, and the church's First Amendment rights to select its clergy, to decide matters of church governance, and to determine the use of its property.

The Greek Orthodox Archdiocese of America. The Greek Orthodox Archdiocese of America is the organization with jurisdiction over all Greek Orthodox Parishes and faithful throughout the United States. It has over 540 parishes and over 1,000,000 faithful in its jurisdiction, and is responsible for the ecclesiastical and canonical matters of the Greek Orthodox faithful in the United States and under the ultimate jurisdiction of the Ecumenical Patriarchate in Constantinople. The Greek Orthodox Archdiocese of America is composed of an Archdiocesan District and eight Metropolises and is governed by the Archbishop and the Eparchial Synod of Metropolitans. The Eparchial Synod is headed by the Archbishop for the entire United States and is comprised of the Metropolitans and Bishops who oversee the ministry of each of the Metropolises. The mission of the Greek Orthodox Archdiocese of America is to proclaim the Gospel of Christ, to teach and spread the Orthodox Christian Faith, to energize, to cultivate, and to guide the life of the Church in the United States of America according to the Orthodox Christian Faith and Tradition.

The Right Reverend C. Andrew Doyle, Bishop of the Diocese of Texas, and the Protestant Episcopal Church Council of the Diocese of Texas. Organized in 1849 under the Constitution and Canons of The Episcopal Church, The Episcopal Diocese of Texas consists of 153 parishes and missions having over 78,000 worshippers located in 57 counties in central, east, and southeast Texas. Headquartered in Houston, the Diocese is led by The Right Reverend C. Andrew Doyle, the ninth Bishop of

Texas. Under the Constitutions and Canons of the Diocese and The Episcopal Church, all real property acquired for the use of parishes and missions in the Diocese is subject to the control of the Protestant Episcopal Church Council of the Diocese of Texas, a Texas non-profit, benevolent and charitable corporation also known as the Church Corporation. No parish or mission in the Diocese may convey or encumber its real property without the approval of the board of trustees of the Church Corporation. All real and personal property held by or for the benefit of the parishes and missions of the Diocese is held in trust for the Church and the Diocese.

The Right Reverend Gary R. Lillibridge, Bishop of the Diocese of West Texas, and Episcopal Church Corporation in West Texas. Organized in 1874 as the Missionary District of West Texas, the Episcopal Diocese of West Texas consists of 90 parishes and missions having over 26,000 worshippers located in 60 counties with geographical boundaries roughly from Brady to the north, Victoria to the east Brownsville to the south and Del Rio to the west. Headquartered in San Antonio, the Diocese is led by The Right Reverend Gary R. Lillibridge, the ninth Bishop of West Texas. Under the Constitution & Canons of the Diocese, all real property acquired for the use of the Episcopal Church in the Diocese, including parishes and missions, is subject to the control of the Episcopal Church Corporation in West Texas, a Texas non-profit, benevolent and charitable corporation also known as the Church Corporation, whether such real property is held in the name of the Church Corporation or in the name of the parish. No parish or mission may convey or encumber its real property without the approval of the board of trustees of the Church Corporation.

The Right Reverend Michael Vono, Bishop of the Diocese of Rio Grande, and The Trustees of Property of the Episcopal Church, Diocese of the Rio Grande, in Texas. Organized in 1952 under the Constitution and Canons of The Episcopal Church, the Diocese of the Rio Grande consists of 56 parishes and missions having over 5,362 worshippers located in the State of New Mexico and that portion of Texas lying west of the Pecos River. The Diocese's jurisdiction in Texas extends throughout El Paso, Hudspeth, Culberson, Jeff Davis, Brewster, Pecos, Presidio, Reeves, and Terrell counties, comprising almost 31,500 square miles in area. Headquartered in Albuquerque, New Mexico, the Diocese is led by The Right Reverend Michael Vono, the Bishop of Rio Grande. Under the Constitutions and Canons of the Diocese and The Episcopal Church, all real property acquired for the use of parishes and missions in the Texas portion of the Diocese is subject to the control of The Trustees of Property of the Episcopal Church, Diocese of the Rio Grande, in Texas, a Texas non-profit corporation, also known as the Church Corporation. No parish or mission in the Texas portion of the Diocese may convey or encumber its real property without the approval of the Church Corporation. All real and personal property held by or for the benefit of the parishes and missions in the Texas portion of the Diocese is held in trust for the Church, the Church Corporation and the Diocese. Similar rules apply to real property in the New Mexico portion of the Diocese, with a different New Mexico church corporation.

The Right Reverend Bishop C. Wallis Ohl, recognized by The Episcopal Church as Bishop of the Episcopal Diocese of Fort Worth, and The Reverend William Stanford, Robert Hicks, Robert M. Bass, Floyd McKneely, Shannon Shipp,

David Skelton, Whit Smith, Margaret Mieuli, Anne T. Bass, Walt Cabe, the Reverend Christopher Jambor, the Reverend Frederick Barber, the Reverend David Madison, the Reverend James Hazel, Cherie Shipp, the Reverend John Stanley, Dr. Trace Worrell, the Right Reverend Edwin F. Gulick, Jr., the Reverend Susan Slaughter, Elinor Normand, Martha Fagley, and Kathleen Wells, all recognized by The Episcopal Church as current and immediate past members of the Standing Committee of the Episcopal Diocese of Fort Worth, Trustees of the Corporation of the Episcopal Diocese of Fort Worth, or other officers of The Episcopal Church's continuing Episcopal Diocese.[1] Organized in 1838 as part of the "Missionary District of the Southwest" under the Constitution and Canons of The Episcopal Church, the Episcopal Diocese of Fort Worth was formed in 1982 by division of an existing Episcopal Diocese with the prior consent of the Church's General Convention. As a condition of Ordination, every Bishop of the Episcopal Diocese of Fort Worth has sworn in writing to "conform to the Doctrine, Discipline, and Worship of the Episcopal Church." As a condition of formation, the Episcopal Diocese of Fort Worth unanimously resolved to "fully subscribe to and accede to the Constitution and Canons of The Episcopal Church," including Canon I.7.4's requirement that all real and personal

[1] These are the individuals adjudged as the authorized leaders of the Episcopal Diocese of Fort Worth and its institutions by the Honorable Judge John P. Chupp, 141st District Court of Tarrant County, applying the ecclesiastical determinations of The Episcopal Church. This judgment has been superseded pending appeal. Bishop Ohl appears as an amicus in this case in his capacity as Bishop of the continuing Episcopal Diocese of Fort Worth, recognized by The Episcopal Church. While Bishop Ohl is not a named party to the *Masterson* case, he previously served as Bishop of the Diocese of Northwest Texas, including during the onset of this dispute, and in that separate capacity he made ecclesiastical determinations that are at issue in the present case.

property held by or for the benefit of the parishes and missions of the Diocese be held in trust for the Church and the Diocese. Subject to Article 13 of its new Constitution ("real property of all parishes and missions, as well as Diocesan Institutions, shall be held subject to control of the Church in the Episcopal Diocese of Fort Worth acting by and through a corporation known as 'Corporation of the Episcopal Diocese of Fort Worth'"), the Episcopal Diocese of Fort Worth thereafter accepted substantial real and personal property acquired by The Episcopal Church in 24 Texas counties over the preceding 144 years for its mission and ministry. In 2008, a breakaway faction of former diocesan and congregational leaders, including the then-bishop, left The Episcopal Church but continues to hold itself out as the "Episcopal Diocese of Fort Worth" and to spend and use its property.

Those acts are the subject of a separate hierarchical church property case pending before this Court, on direct appeal from *The Episcopal Church v. Salazar*, Trial Court No. 141-252083-11; Texas Supreme Court Case No. 11-0265 ("*Salazar*").[2] In *Salazar*, the trial court granted partial summary judgment in favor of The Episcopal Church and the loyal, authorized leaders of its Episcopal Diocese of Fort Worth. The trial court denied the breakaway faction's motion for partial summary judgment and ordered it to desist from holding itself out as leaders of the Episcopal Diocese and to surrender all Diocesan property. This judgment has been superseded pending appeal. The Episcopal Church's Episcopal Diocese of Fort Worth is also plaintiff in *Episcopal Diocese of Fort*

[2] Restyled on appeal by the breakaway-faction appellants, unilaterally and without court approval, as *The Episcopal Diocese of Fort Worth v. The Episcopal Church.*

Worth v. the Rt. Rev. Jack Leo Iker (Civil Action No. 4:10-CV-700-Y in the United States District Court for the Northern District of Texas, Fort Worth Division) ("*Iker*").

Vinson & Elkins L.L.P. represents the plaintiffs recognized by The Episcopal Church as the authorized leadership of the Episcopal Diocese of Fort Worth in *Salazar*, and the Episcopal Diocese of Fort Worth in *Iker*.

Vinson & Elkins and Douglas Laycock represent all Amici in this matter on a pro-bono basis. No fees were paid or will be paid to Vinson & Elkins or Douglas Laycock for preparing this brief. Tex. R. App. P. 11(c).[3]

[3] Any fees paid to any additional counsel for amici were paid by amici and not by any parties to this case.

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Amici Curiae listed and described above respectfully submit this brief in support of Respondents The Diocese of Northwest Texas, the Rev. Celia Ellery, Don Griffis and Michael Ryan.

SUMMARY OF ARGUMENT

Amici represent religious denominations from across Texas and America that believe this case is of paramount importance to religious liberty. The judgment below should be affirmed, bringing closure to litigation that seeks to upend the parties' long-standing commitments and settled law, while siphoning limited resources from ministry.

The United States Supreme Court has recognized two constitutionally-valid methods for resolving intra-church property disputes: the "Deference" approach set forth in *Watson v. Jones*, 80 U.S. 679 (1871), and the four-factor "Neutral Principles" approach described in *Jones v. Wolf*, 443 U.S. 595 (1979). Petitioners ask this Court to apply a different approach, wrongly calling it "neutral principles," which bears little resemblance to either approved doctrine and violates the First Amendment.

1. Petitioners suggest that the question of which approach applies here is open under Texas law. It is not. For more than a century, Texas courts have "consistently followed the [*Watson*] deference rule in deciding hierarchical church property disputes[.]" *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc*., 710 S.W.2d 700, 705 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), *cert. denied*, 484 U.S. 823 (1987). This Court repeatedly has refused requests to abandon that approach. And churches across Texas have relied on that settled law to order their

affairs. In circumstances such as these, the doctrine of *stare decisis* is at its apex. The Court should reject Petitioners' request to abandon 103 years of settled precedent.

2. Even setting *stare decisis* aside, this Court should reaffirm the Deference rule because it is by far the better doctrine. The rule is simple, predictable, and constitutional. By contrast, the Neutral Principles test has proven difficult to apply and lends itself to doctrinal perversions – like the ones Petitioners propose here – that embroil courts in endless disputes over internal church governance. Texas should reaffirm its time-tested, indisputably constitutional Deference approach. As the U.S. Supreme Court held just last month, that approach "radiates a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694, 704 (2012) (citations and modifications omitted).

3. Even if the Neutral Principles doctrine were applied in Texas, that would change nothing on these facts because Respondents prevail under either test. Under Deference, Respondents prevail because they are the parties recognized by The Episcopal Church as the leadership of the Episcopal Church of the Good Shepherd, with a continuing right to its identity and property. Under Neutral Principles, Respondents prevail for at least two reasons. First, the Neutral Principles doctrine still requires courts to defer to churches on ecclesiastical issues within the case, and here the question of who controls the church property turns on just such ecclesiastical issues. Second, the loyal Episcopalians did exactly what churches must do to prevail under the Neutral Principles

test: They set forth in advance, in their governing church documents, how a dispute involving church property should be resolved. Straightforward application of the actual Neutral Principles test requires affirmance.

4. Finally, while the Court should never reach the question, Respondents would prevail under Petitioners' suggested approach – an approach that bears little resemblance to the actual Neutral Principles test and violates the First Amendment. Petitioners wish to use secular laws to erase their long-standing commitments to their church. While this approach is plainly unconstitutional, it also fails on its own terms.

* * *

In short, no matter what test is applied here, the outcome is the same: Petitioners are entitled neither to take the property of their former church nor to use civil courts to subvert their prior commitments to internal church governance. That outcome is required by law – and rightly so, for it is critical to the survival of ecclesiastical institutions. Local majorities come and go, but churches have an enduring right to their choice of structure. Allowing local factions to negate their commitments to church governance and property after the fact, by invoking secular doctrines, would wreak havoc on this right. As this Court has rightly observed: "All who unite themselves to [a religious] body do so with an implied consent to [church] government, and are bound to submit to it. But it would be a vain consent **and would lead to the total subversion of such religious bodies**, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Westbrook v. Penley*, 231 S.W.3d 389, 397 (Tex. 2007) (quoting *Watson*, 80 U.S. at 728-29) (emphasis added). Courts around the nation rightly reject such

attempts, and this Court should do so here.[4]

ARGUMENT

I. TEXAS COURTS HAVE EMPLOYED THE DEFERENCE APPROACH FOR MORE THAN A CENTURY, AND CHURCHES HAVE RELIED ON THAT CONSISTENT APPROACH.

For more than 100 years, Texas courts have applied the Deference approach to resolve intra-church property disputes. This Court has declined several opportunities in the 30 years since *Jones* to depart from that consistent approach. Texas strictly follows *stare decisis* in property cases. Where thousands of church deeds and local charters have already been drafted, the doctrine of *stare decisis* is at its apex. The Neutral Principles approach encourages churches to take additional steps to protect their property that are not required under Deference. And while some churches, such as Respondents', have taken such steps, not every church has. Nor *should* they have, when those churches had every right to rely on predictable and consistent Texas law. The Court should reject

[4] *See, e.g.*, *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237 (Ga. 2011); *Episcopal Church in Diocese of Conn. v. Gauss*, 28 A.3d 302 (Conn. 2011); *Calvary Episcopal Church v. Duncan*, No. 293 C.D. 2010 (Pa. Commw. Ct. Feb. 2, 2011, pet. denied) (mem. op.); *Diocese of San Joaquin v. Schofield*, No. 08 CECG 01425, Order on Pls.' Mot. for Summ. Adjudication (Cal. Super. Ct. July 21, 2009), *vacated on other grounds*, *Schofield v. Superior Court*, 118 Cal. Rptr. 3d 160 (Cal. Ct. App. 2010); *Convention of the Protestant Episcopal Church in Diocese of Tenn. v. Rector, Wardens & Vestrymen of St. Andrew's Parish*, No. 09-2092-11, Summ. J. at 11 (Tenn. Ch. Ct. Apr. 29, 2010); *In re Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009); *Grace Church & St. Stephen's v. Bishop & Diocese of Colo.*, No. 07 CV 1971, Ct.'s Order on Property Issues at 26 (Colo. Dist. Ct. Mar. 24, 2009); *Diocese of Cent. N.Y. v. Rector, Church Wardens, & Vestrymen of the Church of the Good Shepherd*, No. 2008-0980, 880 N.Y.S.2d 223, 2009 WL 69353 (N.Y. Sup. Ct. Jan. 8, 2009); *Daniel v. Wray*, 580 S.E.2d 711 (N.C. Ct. App. 2003); *Episcopal Diocese of Mass. v. Devine*, 797 N.E.2d 916 (Mass. App. Ct. 2003); *Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85 (Colo. 1986); *Bennison v. Sharp*, 329 N.W.2d 466 (Mich. Ct. App. 1982); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182 (Nev. 1980).

Petitioners' request to abandon 103 years of settled precedent.

A. Texas strictly follows *stare decisis* in property rights cases.

"[T]he doctrine of stare decisis is essential to the stability of the law. . . ." *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 779 (Tex. 2011). This Court adheres to its precedents for reasons of "efficiency, fairness, and legitimacy." *Grapevine Excavation, Inc. v. Md. Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000) (citation omitted). *Stare decisis* "results in predictability in the law, which allows people to rationally order their conduct and affairs." *Id.* Because of *stare decisis*, parties in Texas, including churches, can justifiably rely "on the principles articulated" in previous cases, preventing "speculative relitigation." *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995).

The U.S. Supreme Court held: "[S]tare decisis [is] at [its] acme in cases involving property . . . rights, where reliance interests are involved. . . ." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (citation omitted). As this Court held, "stare decisis has been and should be strictly followed . . . in cases involving established rules of property rights." *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 29 (Tex. 1978) (citing *Southland Royalty Co. v. Humble Oil & Ref. Co.*, 249 S.W.2d 914 (Tex. 1952); *Tanton v. State Nat'l Bank of El Paso*, 79 S.W.2d 833 (Tex. 1935)). And this Court noted over 130 years ago:

> [W]hen a decision has been recognized as the law of property, and conflicting demands have been adjusted, and contracts have been made with reference to and on faith of it, greater injustice would be done to individuals, and more injury result to society by a reversal of such decision, though erroneous, than to follow and observe it.

P.J. Willis & Brother v. Owen, 43 Tex. 41, 1875 WL 7493, at *4 (1875). Where courts of appeal have "predictably and consistently" applied a rule of law, *stare decisis* further warrants adherence to that precedent. *Grapevine Excavation*, 35 S.W.3d at 5.

B. Texas has consistently applied the Deference approach in church property cases for more than 100 years.

For more than a century, Texas courts have held that when there is a schism in a local church that is part of a larger hierarchical church, courts defer to the religious authorities recognized by both sides before the dispute arose to decide who represents the continuing church entity, with the right to control its identity and its property. This doctrine, known as Deference, was established by the U.S. Supreme Court in *Watson* and adopted by the Texas Supreme Court in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909). As the Dallas Court of Appeals observed more than a century after *Watson*:

> Our intermediate appellate courts have consistently followed the deference rule in deciding hierarchical church property disputes since the Texas Supreme Court ruling in *Brown v. Clark*. . . . Our state law requires deference to the Presbytery's identity of appellees, the loyal group, as the representative of the local church; consequently, it follows that appellees are entitled to possession and use of all church property.

Schismatic, 710 S.W.2d at 705, 707; *accord Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 551 (Tex. App.—Austin 1991, writ denied) ("Appellate courts have consistently followed the deference rule in deciding hierarchical church property disputes since the Texas Supreme Court adopted the rule in *Brown*.").

In *Watson*, the Walnut Street Presbyterian Church in Louisville, Kentucky was divided between anti-slavery and pro-slavery groups, each claiming to be the "true" local church with the exclusive right to its property. 80 U.S. at 717. The Supreme Court noted

that this property was not marked with any special trust, but rather was purchased in "the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government." *Id.* at 726.[5] Thus, "so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it [was] entitled to the use of the property." *Id.*

As a unanimous U.S. Supreme Court recently reaffirmed, discussing *Watson*: "The General Assembly of the Presbyterian Church had recognized the antislavery faction, and this Court . . . declined to question that determination." *Hosanna-Tabor*, 132 S. Ct. at 704 (citing *Watson*, 80 U.S. at 727). The *Watson* Court deferred to the Presbyterian Church's resolution of the schismatic dispute, "accept[ing] such decisions as final, and as binding on them, in their application to the case before them." *Watson*, 80 U.S. at 727. The parties recognized by the Presbyterian Church were thus, for civil law purposes, the authorized leaders of the continuing Walnut Street Presbyterian Church, with an enforceable right to its property.

In 1909, the Texas Supreme Court faced a similar intra-church property dispute in its seminal opinion, *Brown v. Clark.* In *Brown*, the Cumberland Presbyterian Church in Jefferson, Texas was divided over their mother church's decision to reunify with the Presbyterian Church of the United States of America. 116 S.W. at 361. Both parties

[5] Of course, the property in the instant case was indeed held in express trust for The Episcopal Church, pursuant to *Jones v. Wolf*. *See* Section II.D.1-2, *infra.* But under Deference, Petitioners have no right to take church property, even without acknowledging this express trust interest.

claimed to be the legitimate representatives of the local church, and the lawsuit concerned control of "certain lots which were deeded by different persons at different times to trustees for the Cumberland Presbyterian Church at Jefferson, Tex." *Id.* This Court found for the loyal group recognized by the highest authorities of the mother church, adopting and applying the *Watson* Deference approach:

> In *Watson v. Jones* the Supreme Court of the United States . . . said: "In the case of an independent congregation we have pointed out how this identity or succession is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments.["] . . . .
>
> **The Cumberland Presbyterian Church at Jefferson was but a member of and under the control of the larger and more important Christian organization, known as the Cumberland Presbyterian Church, and the local church was bound by the orders and judgments of the courts of the church. *Watson v. Jones*, 13 Wall. 727, 20 L. Ed. 666. . . . [T]hose members who recognize the authority of the Presbyterian Church of the United States of America are entitled to the possession and use of the property sued for.**

Brown, 116 S.W. at 363, 364-65 (emphasis added) (quoting *Watson*, 80 U.S. at 726-27).

In the 100 years since, Texas courts have consistently applied the Deference approach in church property cases. *See, e.g.*, *Green*, 808 S.W.2d at 551-52 (Austin); *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197 (Tex. App.—Amarillo 1988, no writ); *Schismatic*, 710 S.W.2d at 705, 707 (Dallas); *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865 (Tex. Civ. App.—Texarkana 1977, no writ); *Norton v. Green*, 304 S.W.2d 420 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.); *Browning v. Burton*, 273 S.W.2d 131, 134 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.); *Cussen v. Lynch*, 245 S.W. 932 (Tex. Civ. App.—

Amarillo 1922, writ ref'd); *St. Francis on the Hill Church v. The Episcopal Church*, Cause No. 2008-4075, Final Summ. J. at 1-2 (Dist. Ct.—El Paso Cnty. [210th Jud. Dist.], Dec. 17, 2010) (citing *Brown*); *The Episcopal Church v. Salazar*, Cause No. 141-252083-11, Am. Order on Summ. J. at 2 (Dist. Ct.—Tarrant Cnty. [141st Jud. Dist.], Feb. 8, 2011) (citing *Brown*), prob. jurisdiction noted (Texas Supreme Court Case No. 11-0265).

Indeed, as the Austin Court of Appeals explained eighty years after *Brown*:

> **Appellate courts have consistently followed the deference rule in deciding hierarchical church property disputes since the Texas Supreme Court adopted the rule in *Brown***. . . . Where a congregation of a hierarchical church has split, those members who renounce their allegiance to the church lose any rights in the property involved and the property belongs to the members who remain loyal to the church.

Green, 808 S.W.2d at 551, 552 (emphasis added).

As the Texarkana Court of Appeals held:

> When a division occurs in a local church affiliated with a hierarchical religious body, and a dispute arises between rival groups as to the ownership or control of the local church property, **the fundamental question as to which faction is entitled to the property is answered by determining which of the factions is the representative and successor to the church as it existed prior to the division, and that is determined by which of the two factions adheres to or is sanctioned by the appropriate governing body of the organization**. It is a simple question of identity.

Presbytery, 552 S.W.2d at 871 (emphasis added) (citing, *inter alia*, *Norton*, 304 S.W.2d at 424, citing in turn *Brown* and *Watson*) (emphasis added).

The Waco Court of Appeals has held:

> The basic question posed by the foregoing facts is whether a faction which secedes from a church organization is entitled to take with it the church property. We think the answer to this question is that where there has been a division in a congregation, those members who renounced their allegiance to the church lose any rights in the property involved, and the property and

> the use thereof belong to the members which remain loyal to the church. It is a question of identity.

Norton, 304 S.W.2d at 424 (citing, *inter alia*, *Brown*, 116 S.W. at 360; *Watson*, 80 U.S. at 679).

Applying Texas law, the Court of Appeals for the Fifth Circuit has held:

> Having concluded on what we have held to be adequate evidence that the local church was a member of and subservient to the national church, the District Court was correct in enjoining the dissident faction from attempting to exercise acts of possessory control over the local church property and from interfering with the local church property and with the conduct of services therein by the local faction loyal to the national church, and in holding that the deed to the newly created corporation was void.

Church of God in Christ, Inc. v. Cawthon, 507 F.2d 599, 602 (5th Cir. 1975) (citing, *inter alia*, *Watson*, 80 U.S. at 722, 726; *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 118 (1952)).

In 2010, the 210th Judicial District Court of El Paso County held:

> [T]he Court follows the long established Texas precedent governing hierarchical church property disputes, which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. Under the law articulated by the Texas courts, those are the individuals who remain entitled to the use and control of the church property.

St. Francis on the Hill Church, Cause No. 2008-4075, Final Summ. J. at 1-2 (citing *Brown*, 116 S.W. 360; *Presbytery*, 552 S.W.2d 865). In 2011, the 141st District Court of Tarrant County ruled similarly, applying *Brown* as the law "applied in Texas to hierarchical church property disputes since 1909. . . ." *Salazar*, Cause No. 141-252083-11, Am. Order on Summ. J. at 2.

C. Even breakaway parties now before the Texas Supreme Court have endorsed Texas's predictable and consistent Deference doctrine.

Even leaders from the current breakaway faction now before the Texas Supreme Court in *Salazar* have availed themselves of Texas's Deference doctrine. In the Tarrant County case on direct appeal, the leader of the breakaway faction is Defendant former-Bishop Iker. In 1994, former-Bishop Iker, while still Bishop of the Episcopal Diocese of Fort Worth, relied on Texas Deference law and endorsed the doctrine in affidavit testimony in a successful action against an earlier breakaway faction. As he testified:

> Those persons acting in concord with the Defendants [breakaway faction] have constituted themselves as the Schismatic and Purported Church of the Holy Apostles. **Such persons are not members of the true Church of the Holy Apostles because they have . . . abandoned communion with The Episcopal Church**. . . . **[T]he Schismatic and Purported Church of the Holy Apostles *is a new creation, having no relation to Holy Apostles and no right to its property***.

See Texas Supreme Court Case No. 11-0265, 25 CR 5544 (emphasis added).

D. This Court declined to change the law in the three decades since *Jones*.

In 1979, the U.S. Supreme Court decided *Jones v. Wolf*. The *Jones* Court was closely divided over which approach, Deference or Neutral Principles, would better prevent church-state entanglement. Four Justices would have required all states to use the *Watson* Deference approach as the only acceptable approach. Five Justices opted to let states choose their approach, so long as that approach was consistent with the First Amendment. Since 1979, this Court has at least twice declined to depart from Texas's predictable and consistent Deference approach, and churches have relied on this continuing, settled doctrine.

1. This Court declined to switch to Neutral Principles in *Schismatic.*

In 1986, the Dallas court of appeals placed this issue squarely before this Court, ruling against a breakaway ex-Presbyterian faction. The Dallas court wrote:

> **Appellants . . . urge us to depart from prior Texas law, which we have shown has consistently followed the deference rule, and to adopt the neutral principles of law rule approved by the United States Supreme Court in *Jones*.** We recognize that in 1909 the [Texas] Supreme Court may have felt compelled to follow the deference rule because it thought the *Watson v. Jones* decision required its application at the time *Brown v. Clark* was decided and that the lower courts felt compelled to follow *Brown v. Clark*. Even though the *Jones v. Wolf* decision now gives the states a choice of methods to resolve hierarchical church property disputes, our supreme court has nevertheless spoken on this issue. We are bound by that court's pronouncements on the law until it rules to the contrary. Where the law is settled, the obligatory course for an intermediate court is judicial self-restraint.

Schismatic, 710 S.W.2d at 707 (emphasis added). The breakaway faction then petitioned this Court to discard Deference and adopt Neutral Principles. *See* Application for Writ of Error, No. C-5503 (July 11, 1986) (arguing that the court of appeals erred "in failing to apply the Neutral Principles of Law doctrine" and in "applying the 'Deference Rule' to determine the ownership of the church property") (capitalization removed). Finding no reversible error, this Court refused the breakaway faction's request, and Texas churches continued to rely on Texas's enduring, settled Deference doctrine.

2. This Court declined to switch to Neutral Principles in *Green.*

In 1991, this Court again denied a breakaway faction's application for writ of error in a church property case. In *Green*, appellants attempted to use state corporate law to trump their church's internal governance and choice of clergy, much like Petitioners here.

808 S.W.2d at 550. The Austin court of appeals rejected those maneuvers, finding that Texas courts "have consistently followed the deference rule in deciding hierarchical church property disputes. . . ." *Id.* at 551. The breakaway faction again put the issue before this Court. *See* Application for Writ of Error, No. 1319 at 4 and 12 (July 19, 1991) (arguing that the "neutral principles of law approach is the only workable solution" and that churches' bylaws must be "subservient" to the Texas Non-Profit Corporations act "as a matter of law"). More than a decade after *Jones*, this Court again declined to depart from a century of established doctrine. Churches across Texas continued to rely on this settled, thoroughly-litigated law.

3. This Court did not switch to Neutral Principles in *Westbrook.*

In the face of more than 100 years of consistent application of the Deference doctrine, Petitioners confusingly argue that, "in *Westbrook v. Penley*, [] the court treated 'neutral principles' in church property cases as part of Texas jurisprudence. The Texas Supreme Court has never opted to switch to the 'deference' approach. . . ." Pet. Br. on the Merits at 5. *Westbrook* says no such thing. *Westbrook* was not an intra-church property case; rather, it involved a professional negligence tort claim against a pastor. And this Court *declined* that petitioner's request to apply a so-called 'neutral principles' doctrine to her tort case, observing:

> The [United States] Supreme Court again addressed an intrachurch dispute over property ownership in *Jones* [and] held that states may adopt neutral principles of law as a means of adjudicating such disputes without running afoul of First Amendment concerns, so long as resolution of ownership entails no inquiry into religious doctrine. . . . [Appellant] urges us to apply the neutral-principles approach to her professional-negligence claim, contending her claim can be resolved under neutral tort principles without

> resorting to or infringing upon religious doctrine. But even if we were to expand the neutral-principles approach beyond the property-ownership context as [Appellant] requests, we disagree that free-exercise concerns would not be implicated.

Westbrook, 231 S.W.3d at 399. *Westbrook* did not state, as Petitioners suggest, that Texas had adopted the alternate *Jones* Neutral Principles doctrine to resolve hierarchical church property cases. Instead, the Court was responding to an appellant's request to take a church property doctrine and apply it to her church tort claim. The Court correctly stated that, after *Jones*, "states *may* adopt neutral principles of law as a means of adjudicating" "intrachurch property disputes." *Id.* (emphasis added). The Court did not state that Texas had done so or should do so. The Court then concluded, again rightly, that even if it were willing "to expand the neutral-principles approach beyond the property-ownership context as [Appellant] requests," it *could not* do so without implicating "free-exercise concerns." *Id.* Contrary to Petitioners' contentions, the *Westbrook* Court did not discard a century of settled law on an issue that was not even before the Court.

E. Churches in Texas have ordered their affairs around Deference.

Adherence to *stare decisis* is especially appropriate in this case because churches in Texas have long ordered their affairs around the Deference doctrine. Churches have drafted literally thousands of contracts and deeds over the last century in reliance on that doctrine and the test it puts in place to determine ownership of church property. To change church property law now would go against the core principles that justify *stare decisis* in the first place. *Grapevine*, 35 S.W.3d at 5.

Petitioners argue that departing from Deference would produce a different outcome in this intra-church dispute. That is incorrect under these facts. But such a change in outcome — in this or in any dispute — would be precisely the harm that *stare decisis* seeks to prevent. The Neutral Principles approach asks churches to take certain affirmative steps, such as adding language to their national or local charters or to local deeds, to indicate in advance how civil courts should resolve such disputes. *Jones*, 443 U.S. at 603-04. These additional steps are not required under Deference. And while Respondents' church has taken such steps, not every church in Texas has. Nor *should* they have done so, when they justifiably relied on a century of consistent, settled law to manage their intra-church property. Moreover, Petitioners here request a *third* approach, under the guise of 'neutral principles,' that bears no resemblance to the actual Neutral Principles test. No Texas church had reason to adjust its settled affairs to Petitioners' unconstitutional proposal.

F. A retroactive change in Texas church property law would be both inequitable and unconstitutional.

Even if the Court discarded a century of law, retroactive application of this change to existing disputes would be both inequitable and unconstitutional. As this Court has noted, while "decisions usually apply retrospectively, exceptions are recognized when considerations of fairness and policy dictate prospective effect only." *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

1. Retroactive application is impermissible because it would be substantially inequitable.

This Court has recognized that retroactive application of an unexpected change to well-established property law is patently inequitable, *even* in cases where such a law is "harsh and outmoded" and has been "severely criticized" by scholars. *Friendswood*, 576 S.W.2d at 28-29. The case against retroactivity is, of course, stronger here. Far from being outmoded, a unanimous U.S. Supreme Court recently *praised* the Deference doctrine. *See Hosanna-Tabor*, 132 S. Ct. at 704. Far from being harsh, the doctrine is entirely consistent with Texas's common law of voluntary associations. *See, e.g.*, *Progressive Union of Tex. v. Indep. Union of Colored Laborers of Tex.*, 264 S.W.2d 765, 768 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.) ("It is well settled that when a person ceases to be a member of a voluntary association, his interest in its funds and property ceases and the remaining members become jointly entitled thereto, **and this rule applies where a number of members secede in a body and although they constitute a majority and organize a new association**") (emphasis added).

To determine whether a decision should apply only prospectively, the Court considers several factors, including "whether the decision establishes a new principle of law by . . . overruling clear past precedent on which litigants may have relied" and "whether retroactive application of the rule could produce substantial inequitable results." *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4-5 (Tex. 1999). In *Friendswood*, this Court recognized that the law at issue was "an established rule of property law in [Texas], under which many citizens own[ed] land and water rights. [And

that the rule had] been relied upon by thousands of farmers, industries, and municipalities in purchasing and developing . . . tracts of land. . . ." 576 S.W.2d at 29. The Court explained, "[e]ven though good reasons may exist [to change the law], it would be unjust to do so retroactively." *Id.* Texas should abide by *stare decisis* and reaffirm its century of Deference law. But any change to this law should not be retroactive.

2. Retroactive application would also be unconstitutional.

Because the Neutral Principles approach asks churches to take certain steps before a dispute erupts, retroactive application to existing disputes denies churches this opportunity and interferes with free exercise. *Jones* itself recognized this harm, and the *Jones* Court took care to note: "Given that the Georgia Supreme Court clearly enunciated its intent to follow the neutral-principles analysis in *Presbyterian Church II* and *Carnes*, this case does not involve a claim that retroactive application of a neutral-principles approach infringes free-exercise rights." 443 U.S. at 606 n.4. As *Jones* makes clear, the Neutral Principles approach was only constitutional because churches could always set forth for courts, in advance, how their property disputes should be resolved, by taking certain affirmative steps such as placing a trust clause or other indications into the church's governing documents. *Id.* at 606-08 ("**Most importantly**, any [civil] rule of majority representation can always be overcome, under the neutral-principles approach," "before the dispute erupts," listing examples) (emphasis added). In a state that has consistently applied Deference in church property cases, a retroactive switch to Neutral Principles would violate churches' free exercise rights, because they could not take the steps suggested for states using Neutral Principles "before the dispute erupts." *Id.* at 606.

Thus, unless a state supreme court has "clearly enunciated," in prior cases, its intention to adopt Neutral Principles for intra-church property disputes, a retroactive change in the law may "frustrate the free-exercise rights of the members of [] religious association[s]." *Id.* This Court has yet to "clearly enunciate" its intention to apply Neutral Principles to such intra-church property disputes. *See supra* at I.D. Retroactive application of any such change to disputes already begun would be unconstitutional.

II. TEXAS HAS APPLIED THE DEFERENCE APPROACH TO CHURCH PROPERTY CASES FOR GOOD REASONS.

Jones gave states a choice of church property doctrines, and Texas chose well to adhere to the Deference approach. Deference is clear, predictable, and consistent. It is fair and tracks Texas's general principles of voluntary association law, while providing the First Amendment protections specifically appropriate to churches. Indeed, in *Jones*, four justices would have required *every* state to apply the Deference approach, as the only method ensuring that civil courts would decide such disputes "according to principles that do not interfere with the free exercise of religion in accordance with church polity and doctrine." 443 U.S. at 616-17 (Powell, J., dissenting). And, as the unanimous *Hosanna-Tabor* Court just made clear, the Deference doctrine is commendable, protecting religious organizations "from secular control or manipulation." 132 S. Ct. at 704.

In contrast, not every approach proposed by breakaway factions as "neutral principles" is constitutional. The *Jones* Court articulated a specific four-factor permissible Neutral Principles test, where civil courts look to (1) the provisions of the governing documents of the general church concerning the ownership and control of

church property, (2) the terms of the local church charters, (3) the language of the deeds, and (4) the state statutes governing the holding of church property, to "ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members," as set forth "before the dispute erupt[ed]." *Jones*, 443 U.S. at 603-04. To preserve free exercise, the *Jones* Court was clear that, "[a]t 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," and that the "burden involved in taking such steps will be minimal." *Id.* at 606.

While the requirements of *Jones*'s four-factor Neutral Principles test are clear, breakaway factions have used the apparent breadth of the phrase "neutral principles" to distort the doctrine and launch scores of lawsuits across the nation. Those cases have almost universally landed in the same place, affirming what the U.S. Supreme Court made clear in *Watson* and *Jones*: a breakaway faction cannot undermine its preexisting religious vows, commitments, and church governance by *ex post facto* civil law maneuvers. But such litigation has been time-consuming and expensive, costing churches valuable resources that could have been better used in mission and ministry. Texas was right to choose Deference, and good reasons counsel reaffirming that choice.

A. Deference is indisputably constitutional.

There can be no question that Deference is constitutionally sound. The U.S. Supreme Court established the Deference doctrine in *Watson* in 1871. *See* 80 U.S. at 726-27, 734. The *Jones* Court reaffirmed the constitutionality of Deference in 1979, while holding that it was not the *only* constitutional method for a state to resolve intra-

church property disputes. *See* 443 U.S. at 602, 604-05. A unanimous *Hosanna-Tabor* Court discussed *Watson* again in 2012, with compelling approval. 132 S. Ct. at 704 ("[O]ur opinion in *Watson* radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" (citing *Kedroff*, 344 U. S. at 116) (quotation marks omitted)).

B. Deference is clearly defined and applied.

Under Deference, a hierarchical church's determination regarding which of two competing local factions, each claiming to be the "true" church leadership entitled to the property, controls. *See Watson*, 80 U.S. 679. Texas's Deference doctrine was specifically developed to address such a fact pattern in the context of two factions claiming to be the entity entitled to property. *See Brown*, 116 S.W. at 364-65.

Under this approach, courts need only to address the threshold question of whether a church is hierarchical or congregational.[6] Petitioners attempt to make this question seem as difficult as possible, but in practice it is not. Here, The Episcopal Church has a three-tier structure, with a General Convention, 111 subordinate regional Dioceses, and over 7,000 local parishes and missions. 1 CR 78-79.[7] Each level of this hierarchy made

[6] Of course the right to religious self-governance is and must be equally protected in congregational and hierarchical churches. The only difference is that self-governance plays out differently in the context of different governing structures. In a congregational church, the highest church authority is typically the congregation, an elected governing board, or occasionally, the pastor.

[7] Record citations and quotations are adopted from Respondents' Brief on the Merits, filed with this Court on October 10, 2011. In addition, amici adopt the Episcopal amici's description of The Episcopal Church's three-tier structure and polity.

numerous oaths and promises to those above, *see, e.g.*, Resp. Br. on Merits at 1-10. In this case, the local Episcopal congregation promised as a condition of formation: "[W]e promise conformity to [The Episcopal Church's] Doctrine, Discipline, and Worship. We promise conformity to the Constitution and Canons of the General Convention and the Diocese of Northwest Texas. In accordance with these obligations, we now ask privilege of being organized as a Mission. . . ." Resp. Br. on Merits at 7 (1 CR 122). **Every court in the nation to address the issue has found that The Episcopal Church is hierarchical, without exception**.[8] And while any opponent to a well-settled doctrine can raise the specter of close calls, in practice, the Neutral Principles approach has yielded far more speculative litigation and novel, unsupported arguments than Texas's Deference approach.

[8] *See, e.g.*, *Dixon*, 290 F.3d at 716; *In re Episcopal Church Cases*, 198 P.3d at 81-82; *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 469-71 (Cal. Ct. App. 2008); *Schofield*, No. 08 CECG 01425, Order on Pls.' Mot. for Summ. Adjudication at 5-6 ("[I]t is beyond dispute that the Episcopal Church is a hierarchical church."); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1285-86 (Conn. 1993); *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 48 (Ga. Ct. App. 2010), *aff'd*, 718 S.E.2d 237 (Ga. 2011); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 931-32 (Mass. 1997); *Devine*, 797 N.E.2d at 920-21; *Bennison*, 329 N.W.2d at 472-73; *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980); *Trs. of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 78 n.2 (N.Y. App. Div. 1999); *Tea*, 610 P.2d at 183-84); *In re Church of St. James the Less*, No. 953NP, 2003 WL 22053337, at *6-7 (Pa. Ct. Com. Pl. Mar. 10, 2003), *aff'd in relevant part*, 888 A.2d 795 (Pa. 2005). *See also Watson*, 80 U.S. at 729 ("Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with.").

Deferring to the duly-constituted religious authority accepted by both parties before the dispute erupted as to who represents the "true" continuing congregation, with a right to its identity and property, is the clearest, most straightforward approach. And it ensures a zone of religious liberty that prevents courts from becoming entangled in ecclesiastical disputes.

C. Not every so-called "neutral principles" approach is constitutional.

In contrast to Deference, not every approach proposed by breakaway factions as 'neutral principles' is constitutional. In *Jones*, the U.S. Supreme Court approved a specific four-factor Neutral Principles analysis, which contained explicit limitations to ensure that it did not violate a church's free exercise rights. And even in *Jones*, the Court noted that, while Georgia's neutral principles approach was constitutional "[a]t least in general outline," it "remain[ed] to be determined whether the Georgia neutral-principles analysis was constitutionally applied on the facts of this case." 443 U.S. at 602, 606. Indeed, the *Jones* Court concluded by cautioning that "there are at least some indications that under Georgia law the process of identifying the faction that represents the Vineville church involves considerations of religious doctrine and polity," remanding for "further proceedings not inconsistent with this opinion." *Id.* at 608, 610. Thus, even *Jones*'s permissible four-factor Neutral Principles analysis is not without risk, as applied, of invading a church's right to manage its government, clergy, discipline, and property in intra-church disputes.

And the U.S. Supreme Court has itself rejected other attempts by breakaway parties to apply so-called neutral principles to intra-church property disputes. In fact, in

2007, this Court, discussing *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevich*, 426 U.S. 696 (1976), rightly noted:

> *Milivojevich* involved an intra-church dispute over control of the property and assets of the Serbian Eastern Orthodox Diocese for the United States and Canada. **The Supreme Court rejected the Illinois Supreme Court's purported reliance on neutral principles of law** in its holding that the Diocesan reorganization and Milivojevich's removal as Bishop were invalid, and outlined the broad autonomy our Constitution affords churches in deciding matters that touch upon religious doctrine**.** Emphasizing that the First Amendment severely limits the role of civil courts in resolving "religious controversies that incidentally affect civil rights," the Court mandated judicial deference to the church if ownership determinations involve underlying questions of religious doctrine.

Westbrook, 231 S.W.3d at 399 (emphasis added) (citations omitted). Similarly, this Court in *Westbrook* refused to apply a requested neutral principles approach in a tort case against a congregational church, out of proper concern that it would implicate "free-exercise concerns." *Id.*

D. Petitioners urge this court to adopt a so-called "neutral principles" approach that is unconstitutional.

Petitioners' approach bears no resemblance to the four-factor Neutral Principles test approved in *Jones*. Petitioners' approach violates the free exercise safeguards of *Jones* and conflicts with multiple U.S. and Texas Supreme Court precedents.

1. The *Jones* Court established a specific, permissible Neutral Principles analysis.

As noted, the *Jones* Court articulated a four-factor permissible Neutral Principles test, where civil courts look to (1) the provisions of the governing documents of the general church concerning the ownership and control of church property, (2) the terms of the local church charters, (3) the language of the deeds, and (4) the state statutes

governing the holding of church property, to "ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members," as set forth before the religious dispute. *Jones*, 443 U.S. at 603-04; *see also Christ Church*, 718 S.E.2d at 241 (Georgia Supreme Court applying its doctrine approved in *Jones* and noting ultimate goal is to determine "'the intentions of the parties' at the local and national level regarding beneficial ownership of the property at issue as expressed 'before the dispute erupt[ed]'") (quoting *Jones*, 443 U.S. at 603, 606).

In *Jones*, the Court considered Georgia's apparent use of a presumptive rule of majority representation to resolve an intra-church property case.[9] The Court reasoned that this approach would not "inhibit the free exercise of religion" because, "[a]t 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." *Jones*, 443 U.S. at 606 (quotation marks omitted). The Court stated: "**Most importantly**, any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the [Church's] corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it." *Id.* at 607-08 (emphasis added).

Free exercise would not be infringed, the Court emphasized, because the "**burden involved in taking such steps will be minimal**" and "the civil courts will be bound to

[9] The Court inferred from the Georgia's Supreme Court's ruling that it had effectively applied a majority-rules presumption. *Id.* at 607, 610.

give effect **to the result indicated by the parties**, provided it is embodied in some legally cognizable form." *Id.* at 606 (emphasis added). The *Jones* Court gave examples of such legally cognizable forms: "[T]he parties 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." *Id.*

2. Courts around the nation find for The Episcopal Church and the loyal Episcopalians under the *Jones* analysis.

The Episcopal Church did precisely what the *Jones* Court recommended, in direct response to *Jones*, and amended the Church's national and local documents "to recite an express trust in favor of the denominational church." 443 U.S. at 606. In 1979, the Church adopted the Dennis Canon (Canon I.7(4)),[10] and in 1984, the Diocese adopted Diocese Canon 38.8, both of which provide that all real and personal property held by or for any congregation of the Church is "held in trust for this Church and the Diocese" in which it is located. *See* 1 CR 80-81, 90, 112.

Of course, these post-*Jones* steps reiterated property- and hierarchy-related canons dating back centuries. *See, e.g.*, Church Canons II.6(2) and (3), adopted in part in 1868 and in part in 1871, prohibiting parishes from encumbering, alienating, or disposing of property without consent of the Diocese, 1 CR 80, 97; *see also* Good Shepherd's promise upon formation of conformity to the Church's "Doctrine, Discipline, and Worship" and to

[10] "The National Episcopal Church enacted the Dennis Canon in response to the United States Supreme Court decision in *Jones v. Wolf* so as to make clear the National Episcopal Church's implied intention to hold a trust interest in parish property." *Christ Church in Savannah*, 699 S.E.2d at 52.

"the Constitution and Canons of the General Convention and the Diocese of Northwest Texas," including their numerous property provisions. 1 CR 122. In addition to abiding by these commitments for decades until the 2006 dispute erupted, the local congregation revised its bylaws in 1994, again reaffirming that the parish "accedes to, recognizes and adopts" the Church and Diocesan canons and constitutions, including the Dennis Canon above. 1 CR 207; 2 CR 375, 380.

Courts around the nation have repeatedly held that The Episcopal Church's Dennis Canon and other governing national and local language are dispositive under *Jones*. Indeed, echoing the present dispute, the Georgia Supreme Court, whose Neutral Principles approach gave rise to *Jones*, recently held:

> As the trial court and the Court of Appeals similarly concluded, our review demonstrates that [the local Episcopal congregation] Christ Church has submitted to the authority of the parent church. . . . [and] the parent church has always had control over local church property, with that control becoming more and more explicit in the "legally cognizable form" of the Episcopal Church's governing canons, culminating in an express property trust provision (the "Dennis Canon") in 1979, just after the *Jones v. Wolf* decision invited hierarchical churches to clarify property control with such a provision.

Christ Church, 718 S.E.2d at 246.[11]

[11] *See also, e.g.*, *Gauss*, 28 A.3d at 319 (holding, based on the Dennis Canon and other church documents, that "it is clear that the disputed property in the present case is held in trust for the Episcopal Church and the Diocese"); *Convention of the Protestant Episcopal Church*, No. 09-2092-11, Summ. J. at 11 (ruling based on the relevant governing documents that parish property "is impressed with a trust in favor of the Diocese and The Episcopal Church" and individuals "who have disassociated from . . . the Diocese shall be enjoined from claiming any ownership interest [in] the [parish] real property"); *In re Episcopal Church Cases*, 198 P.3d at 84 (holding based on neutral principles, especially the Dennis Canon, that when majority of parishioners "disaffiliated from the Episcopal Church, the local church property reverted to the general church"); *Diocese of Cent. N.Y.*, 2009 WL 69353 (same); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) (holding that "the Dennis Canons clearly establish an

Here, under the Neutral Principles approach approved in *Jones*, the parties have set forth, prior to the dispute, in methods suggested by *Jones*, their clear and obvious choice of internal church governance and control of church property. The Episcopal Church followed *Jones*'s methodology to "ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members," set forth here *decades* before the dispute. 443 U.S. at 603-04. The Dennis Canon and other governing church language are binding under *Jones* and no further analysis should be conducted: "[T]he civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form." *Id*. at 606.

3. Petitioners' suggested approach is unconstitutional.

Petitioners ignore the four-factor *Jones* test and, instead, raise a panoply of state common law and statutes of general application, which, they claim, negate the parties'

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express trust in favor of the Rochester Diocese and the National Church"); *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) (holding that "the Dennis Canon 'merely codified in explicit terms a trust relationship' that was implicit in [the parish's] Charter") (citations omitted); *Daniel*, 580 S.E.2d at 718 (same); *Devine*, 797 N.E.2d at 923 (same); *Trs. of the Diocese of Albany*, 684 N.Y.S.2d at 81 (enforcing "trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the . . . Episcopal Church"); *Mote*, 716 P.2d at 108 (same). In contrast to this overwhelming authority, Petitioners rely on *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 685 S.E.2d 163, 172 (S.C. 2009) (applying "property, corporate, and other forms of law to church disputes"). But that court failed to follow the four-factor, constitutionally-permissible *Jones* test, and every case decided since has declined to follow it. *See, e.g.*, *Christ Church*, 718 S.E.2d at 255 & n.18 (*All Saints* "readily distinguishable" and "has not been followed in a church property case by any court outside [South Carolina]"); *Gauss*, 28 A.3d at 326 (*All Saints* "distinguishable" because court "specifically relied on South Carolina statutory and common law, including the law on trusts, relating to formal conveyance of title, and thus gave no weight to the [Church's canons]. … Moreover, the court did not examine documents signed by congregation members when they were seeking to become a parish, which might have indicated whether parish members had agreed to abide by the constitution and canons of the Episcopal Church.").

prior intra-church agreements, laws, vows, and doctrines. Petitioners' approach is unconstitutional for multiple reasons, and similar attempts are routinely rejected by courts in Texas and other states.

a. Petitioners violate *Jones*'s free-exercise protections.

Under *Jones*, the Neutral Principles approach is consistent with free exercise because a rule of secular application, such as "majority representation," is "defeasible" by the church with "minimal" burden. 443 U.S. at 603-07. Petitioners' approach would turn *Jones* on its head, suggesting that *after* the parties have followed *Jones* and stated their intentions, a disgruntled party could subvert those religious commitments by picking and choosing secular doctrines *after* the dispute erupts. As this Court has noted, such "vain consent [] **would lead to the total subversion of such religious bodies**." *Westbrook*, 231 S.W.3d at 397 (emphasis added) (quoting *Watson*, 80 U.S. at 729).

Petitioners would have this Court turn a hierarchical church into a congregational church. But church polity, structure, and discipline are at the core of First Amendment concern. Choices about forms of church governance have deep theological bases, *see, e.g.*, Michael W. McConnell, John H. Garvey, & Thomas C. Berg, *Religion and the Constitution* 314-15 (3d ed. 2011), and they were the subject of warfare and martyrdom during the wars of religion. Allowing local factions to negate their commitments to church government after the fact, by invoking secular doctrines, would wreak havoc on this right. Petitioners wish to treat the church property as though The Episcopal Church were congregational, when it is, and always has been, hierarchical.

Moreover, *Hosanna-Tabor* has removed any doubt that such doctrinal perversions of *Jones* are unacceptable. 132 S. Ct. 694. There, as here, a party tried to use a statute of general applicability to subvert a church's internal governance, incorrectly calling such an approach "neutral principles." The party tried to suggest that *Jones* had largely overridden the U.S. Supreme Court's line of intra-church property holdings championing Deference, from *Watson* to *Kedroff* to *Milivojevich*.[12] A unanimous court rejected such contentions, with a resounding reaffirmation of Deference and free exercise.

b. Petitioners violate *Jones*'s minimal-burden standard.

Petitioners argue that they can retroactively void their commitments to the Dennis Canon and other church laws because these religious laws did not follow the specific formalities of Texas rules governing private trusts, such as the statute of frauds and the "corporate requisites for trust." Pet. Br. at 21-22. And while this position fails on its own terms, the salient point here is that *Jones* requires no such scouring of the technicalities of drafting private trusts in all fifty states, as well as the myriad other laws raised by Petitioners. Such a view violates *Jones*'s condition that the burden placed on churches in stating such a term in their governing documents will be "minimal."

Indeed, a breakaway faction in Georgia attempted a similar subversion of *Jones*, and the Georgia Supreme Court held:

> [R]equiring strict compliance with OCGA § 53-12-20 [Georgia's express trust statute] to find a trust under the neutral principles analysis would be inconsistent with the teaching of *Jones v. Wolf* that the burden on the

[12] *See, e.g.*, Brief of Respondent Cheryl Perich at 42-43, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (No. 10-553) (claiming that "the Free Exercise Clause affords no protection against application of a neutral, generally applicable law to religious conduct").

> general church and its local churches to provide which one will control local church property in the event of a dispute will be "minimal." 443 U.S. at 606. . . . **[I]f hierarchical denominations like the Episcopal Church (and many others) must fully comply with [Georgia's express-trust statute] to enable the general church to retain control of local church property in the event of a schism and disaffiliation of a majority faction of a local congregation, then an enormous number of deeds and corporate charters would need to be examined and reconveyed or amended. The burden on the general churches, the local churches that formed the hierarchical denominations and submitted to their authority, and their members' free exercise of religion would not be minimal but immense. That is not how the *Jones v. Wolf* court envisioned that the neutral principles doctrine would be applied in conformity with the First Amendment**.

Christ Church, 718 S.E.2d at 244-45 (emphasis added) (citations omitted).

c. Petitioners violate *Jones'* s analysis of state religious property laws.

Petitioners attempt to rely on state statutes of general applicability while ignoring state statutes directly on point concerning religious organizations. Indeed, *Jones* itself, in discussing the proper application of the Neutral Principles approach, instructed an analysis of "the state statutes governing the holding of church property." 443 U.S. at 603. Texas has such a statute, and that statute expressly supports the free exercise conclusion that churches may form religious corporations that are subordinate to, and hold property under the control of, the denominational church. As the Texas Business Organizations Code states:

> To effect its purposes, a domestic nonprofit entity or institution formed for a religious . . . purpose may acquire, own, hold, mortgage, and dispose of and invest its funds in property **for the use and benefit of, under the discretion of, and in trust for a convention, conference, or association** organized under the laws of this state or another state with which it is affiliated **or by which it is controlled**.

Tex. Bus. Orgs. Code Ann. § 2.102 (emphasis added). Further, the "board of directors of

a religious . . . corporation may be affiliated with, elected, and controlled by an incorporated or unincorporated convention, conference, or association organized under the laws of this or another state, the membership of which is composed of representatives, delegates, or messengers from a church or other religious association." *Id.* § 22.207(a).[13]

While the statute is permissive, not mandatory, it authorizes precisely what the parties here *did* under the facts of this case. Good Shepherd's articles of incorporation require that its representatives "hold office in accordance with the Church Canons. . . ." 1 CR 204-05. Its bylaws confirm that the corporation is "a constituent part of the Diocese of Northwest Texas and of the Protestant Episcopal Church . . . [and] accedes to, recognizes, and adopts the General Constitution and Canons of that Church, and [] the Diocese of Northwest Texas and acknowledges the authority of the same." 1 CR 207. Officers must be "duly elected vestrymen," and vestrymen in turn must be "communicants in good standing . . . canonically resident in the Parish," who specifically commit to "conform to the doctrine, discipline and worship of The Episcopal Church." 1 CR 204-05, 109; *see also* 1 CR 95-96.

d. Petitioners violate the First Amendment by using corporate form to evade prior religious commitments.

Courts around the nation, including the U.S. Supreme Court, have specifically rejected Petitioners' position that a court applying Neutral Principles can artificially separate a property-holding corporation from the rest of the local religious organization, to the subversion of religious governance and discipline. This is particularly true where,

[13] Texas's predecessor statute contained substantially similar language. *See* Tex. Rev. Civ. Stat. Ann. art. 1396-2.02A(16), 2.14B.

as here, the corporation is expressly subordinate to the religious institution, and where leadership of the corporation turns on membership in, and approval by, the religious organization and its hierarchy. *See, e.g.*, 1 CR 204-05, 207, 95-96, 109 (here, corporate leaders must be "communicants in good standing" and "hold office in accordance with the Church Canons"). For example, in *Milivojevich*, the U.S. Supreme Court held:

> [T]he Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations. Resolution of the religious dispute over [the Diocesan Bishop's] defrockment therefore determines control of the property. Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.

426 U.S. at 709. Texas courts are in accordance. For instance, in *Greanias v. Isaiah*, the First Court of Appeals held:

> Appellants argue, in effect, that this controversy involves a simple determination of which by-laws apply and the application of the TNPCA's [Texas Non-Profit Corporations Act's] provisions to the corporate organization. They assert that, in this case, "[c]ompeting church members are arguing about who are the proper directors" and that "[t]his dispute does not involve the question of who are the church's ministers, elders, deacons, *et cetera*. . . . In sum, appellants argue that the issues in this case may be decided under purely neutral principles of law, without involving consideration of issues of religious discipline, faith, or ecclesiastical rule, custom, or law.
>
> **We disagree**. The controversy inherently and inextricably involves a presiding hierarch's power to discipline a local parish council; his power to determine whether that council's members have violated their oath to obey the church's hierarchy, discipline, and canons; and an archdiocese's right to insist on what by-laws may be adopted by its subordinate parishes. Those are ecclesiastical matters that the First Amendment forbids courts to adjudicate. These issues are inextricably intertwined with appellants' requests for a declaration that the local by-laws controlled and that they were improperly removed and thus represented the Cathedral even after

> their removal. This intertwining prevents our resolving this dispute on purely neutral principles of law.

No. 01-04-00786-CV, 2006 WL 1550009, at *7-8 (Tex. App.—Houston [1st Dist.] June 8, 2006, no pet.) (bold emphasis added) (citations omitted). The Texas Business Organizations Code itself recognizes that religious corporations remain subject to the religious organizations that formed them as subordinate vehicles to effect their purpose.

Numerous other courts have reached this same conclusion.[14] As one court in a Neutral Principles state held:

> [W]e must defer to the acts of the representatives of the Episcopal Church in determining who were the true members of the church, **and, under canon law, who were the lawful directors of the Parish corporation**. These are matters of "credentials and discipline" and "polity and administration." As such, as a matter of law the trial court erred in determining that "there was no valid basis for Bishop Mathes' removal and replacement of the board of directors of the corporation; the purported election on Aug. 7, 2006 of a new board was invalid." We must defer to the Episcopal Church's decision on this ecclesiastical matter, even if it incidentally affected control over church property.

Kroeger, 84 Cal. Rptr. 3d at 485 (emphasis added).

Thus, Petitioners cannot avoid their obligations by drawing a false distinction between a parish and its subordinate corporation. The question of who constitutes the religious corporation's duly-authorized directors and members turns on ecclesiastical

[14] *See Harnish*, 899 N.E.2d at 922 n.4, 925 (changes to corporate documents did not preclude holding that parish property held in trust for Church and the Diocese); *Huber v. Jackson*, 96 Cal. Rptr. 3d 346, 358 (Cal. Ct. App. 2009) (rejecting argument that religious corporation was separate from parish and existed outside Church and diocese), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (Ct. App. Sept. 17, 2009), *cert. denied*, 130 S. Ct. 1690 (Mar. 1, 2010) (No. 09-708); *id*. at 361 (religious corporation subordinate to ecclesiastical body); *First Born Church of the Living God, Inc. v. Hill*, 481 S.E.2d 221, 222 (Ga. 1997) ("[a]s a matter of constitutional law" local church members have "no legal right [under Georgia corporations code] to wrest the governing of the Church from the [duly elected Church leaders]").

matters for the Church to decide, and civil courts must apply those determinations "as final, and as binding on them, in their application to the case before them." *Watson*, 80 U.S. at 727; *accord Hosanna-Tabor*, 132 S. Ct. at 704 (quoting *Watson*, 80 U.S. at 727).

E. Under these facts, a constitutionally-valid Neutral Principles approach is consistent with Deference.

As the Court of Appeals correctly noted in this case, a proper Neutral Principles analysis, under these facts, is consistent with *Brown* and its application of *Watson* Deference. Deference errs on the side of free exercise and non-entanglement. Neutral Principles, by contrast, examines four factors to see if the parties have indicated, prior to the dispute, how property is to be controlled within the church. But crucially, under *Jones*, 443 U.S. at 608, if ecclesiastical questions arise during this Neutral Principles analysis, at that point, civil courts must defer on such questions, even if that deference also determines property rights:

> All this may suggest that the identity of the "Vineville Presbyterian Church" named in the deeds must be determined according to terms of the Book of Church Order, which sets out the laws and regulations of churches affiliated with the PCUS. Such a determination, however, would appear to require a civil court to pass on questions of religious doctrine, and to usurp the function of the commission appointed by the Presbytery, which already has determined that petitioners represent the "true congregation" of the Vineville church. Therefore, if Georgia law provides that the identity of the Vineville church is to be determined according to the "laws and regulations" of the PCUS, **then the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination of that church's identity**.

Id. at 609 (emphasis added).

As the U.S. Supreme Court held in *Milivojevich*:

> Resolution of the religious disputes at issue here affects the control of church property in addition to the structure and administration of the

> American-Canadian Diocese. This is because the Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations. **Resolution of the religious dispute over [the Diocesan Bishop's] defrockment therefore determines control of the property**.

426 U.S. at 709 (emphasis added). And, as the Supreme Court again noted in *Hosanna-Tabor*, discussing *Kedroff*:

> [T]he controversy over the right to use the cathedral was strictly a matter of ecclesiastical government, the power of the Supreme Church Authority . . . to appoint the ruling hierarch of the archdiocese. . . . Accordingly, we declared the law unconstitutional because it directly prohibited the free exercise of an ecclesiastical right, the Church's choice of its hierarchy.

132 S. Ct. at 705 (discussing *Kedroff*, 344 U.S. at 115-19) (quotation marks and modifications omitted). As Justice Frankfurter put it, in his concurrence in *Kedroff*: "And so, when courts are called upon to adjudicate disputes which, though generated by conflicts of faith, may fairly be isolated as controversies over property and therefore within judicial competence, **the authority of courts is in strict subordination to the ecclesiastical law of a particular church prior to a schism**." 344 U.S. at 122 (Frankfurter, J., concurring) (emphasis added).

This Court has rightly noted the same. Discussing the U.S. Supreme Court's rejection of another state's "purported reliance on neutral principles," this Court observed: "Emphasizing that the First Amendment severely limits the role of civil courts in resolving 'religious controversies that incidentally affect civil rights,' **the [U.S. Supreme] Court mandated judicial deference to the church if ownership determinations involve underlying questions of religious doctrine**." *Westbrook*, 231 S.W.3d at 399 (emphasis added) (citations omitted).

Even in Neutral Principles states, therefore, cautious judicial deference to the church's ecclesiastical resolutions is required. As one court in a Neutral Principles state (California) put it:

> **[W]e must defer to the acts of the representatives of the Episcopal Church in determining who were the true members of the church, and, under canon law, who were the lawful directors of the Parish corporation**. These are matters of "credentials and discipline" and "polity and administration." As such, as a matter of law the trial court erred in determining that "there was no valid basis for Bishop Mathes' removal and replacement of the board of directors of the corporation; the purported election on Aug. 7, 2006 of a new board was invalid." **We must defer to the Episcopal Church's decision on this ecclesiastical matter, even if it incidentally affected control over church property**.

Kroeger, 84 Cal. Rptr. 3d at 485 (emphasis added). And as another court in a Neutral Principles state (Massachusetts) held:

> Though the Diocese sought by its complaint to establish its right to control the church property, the action was precipitated by the displaced leaders' refusal to recognize the bishop's authority to remove them and their unwillingness to surrender keys to the property. **Because the question of the right to use and possess the St. Paul's church property is inextricably intertwined with the question of which individuals hold authority to act on behalf of St. Paul's (a question that essentially depends on the authority of the Diocese and its bishop over the mission or parish), we consider the matter to be inappropriate for determination by application of neutral principles of law**.

Devine, 797 N.E.2d at 921-22 (emphasis added).

In sum, when a civil issue, including a property issue, turns on ecclesiastical questions, such as church discipline,[15] internal organization,[16] matters of church

[15] *Patterson v. Sw. Baptist Theological Seminary*, 858 S.W.2d 602, 605-06 (Tex. App.—Fort Worth 1993, no writ) (citing *Milivojevich*, 426 U.S. at 713).

[16] *Id.*

government,[17] the church's choice of ministers,[18] the structure, leadership, or internal policies of a religious institution,[19] or matters relating to the hiring, firing, discipline, or administration of clergy, including bishops,[20] a Neutral Principles analysis *requires* deference.

Thus, in this case, the Court of Appeals correctly observed: "[T]he essence of the dispute before us can be seen as an inherently ecclesiastical question: which parishioners—the loyal Episcopalian minority or the breakaway Anglican majority—represent Good Shepherd, in whose name the disputed property is held?" 335 S.W.3d at 891. As the Court of Appeals correctly concluded, under these facts, a Deference approach and a Neutral Principles approach would be consistent:

> Under either methodology, giving due deference to the Diocese's resolution of the ecclesiastical questions bearing on this appeal, we conclude that when the Former Parish Leaders and the other parishioners aligned with them disaffiliated from the Episcopal Church, the church property remained under the authority and control of the Episcopal Church.

Id. at 892.

III. RESPONDENTS ARE CORRECT UNDER DEFERENCE *OR* NEUTRAL PRINCIPLES: A BREAKAWAY PARTY CANNOT VIOLATE PRIOR AGREEMENTS AND TAKE CHURCH PROPERTY.

Courts across the nation, including eight state supreme courts, have consistently and repeatedly found on behalf of the loyal Episcopalians and against breakaway factions

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[17] *Hosanna-Tabor*, 132 S. Ct. at 705 (quoting *Kedroff*, 344 U.S. at 115-19).

[18] *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.).

[19] *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877, 889 (Tex. App.—Dallas 2000, pet. denied) (citing *Milivojevich*, 426 U.S. at 709).

[20] *Lacy v. Bassett*, 132 S.W.3d 119, 123 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also Milivojevich*, 426 U.S. at 713.

seeking to take Church property in violation of their prior religious oaths and laws.[21] And courts have made that determination in states employing the Deference approach[22] *and* in states employing the Neutral Principles approach.[23] Under either approach, the result should be the same — a finding in favor of Respondents.

A. Respondents prevail under both constitutional approaches.

Under Deference, every court in the nation to consider the issue, without exception, has determined that The Episcopal Church is hierarchical. *See* n. 8, *supra.* It is indisputable that The Episcopal Church has identified Respondents, the group loyal to their pre-dispute religious vows, as its continuing Episcopal Church of the Good Shepherd, with a right to its identity and property.

Under Neutral Principles, Respondents prevail for multiple reasons. First, this dispute inherently centers on which clergy and lay leaders represent the true continuing Episcopal Church of the Good Shepherd, in whose name the disputed property is held. This question turns on which local leaders are "communicants in good standing" and

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[21] *See, e.g., Christ Church*, 718 S.E.2d 237; *Episcopal Church in Diocese of Conn. v. Gauss*, 28 A.3d 288 (Conn. 2011); *In re Episcopal Church Cases*, 198 P.3d 66; *Harnish*, 899 N.E.2d 920; *Parish of the Advent*, 688 N.E.2d 923; *Mote*, 716 P.2d 85; *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish*, 620 A.2d 1280; *Tea*, 610 P.2d 182; *Graves*, 417 A.2d 19; *Diocese of Newark v. Burns*, 417 A.2d 31 (N.J. 1980). The Pennsylvania Supreme Court recently denied a petition for review in another case finding for The Episcopal Church. *Episcopal Diocese of Pittsburgh v. Calvary Episcopal Church*, 13 A.3d 1055 (Pa. Commw. Ct. 2011, pet. denied).

[22] *See, e.g., Dixon*, 290 F.3d at 718-19; *Bennison*, 329 N.W.2d at 473; *Tea*, 610 P.2d at 184; *Graves*, 417 A.2d at 24.

[23] *See, e.g., Christ Church*, 718 S.E.2d at 244-45; *In re Episcopal Church Cases*, 198 P.3d at 70-71; *Kroeger*, 84 Cal. Rptr. 3d at 479-82, 485-86; *Mote*, 716 P.2d at 96, 103; *Gauss*, 28 A.3d at 318; *Bennison*, 329 N.W.2d at 475 (noting that, even under the neutral principles approach, the breakaway parish had no entitlement to the property at issue); *Graves*, 417 A.2d at 24 (same); *Harnish*, 899 N.E.2d at 923-25; *Trs. of the Diocese of Albany*, 684 N.Y.S.2d at 79-82.

"hold office in accordance with the Church Canons," 1 CR 95-96, 109, 204-205, and these are core ecclesiastical matters of church governance, discipline, and doctrine. And so under *Jones* and *Milivojevich*, and consistent with *Westbrook*, a civil court must defer to the hierarchical church's choice of its local leaders, applying those ecclesiastical determinations as "final, and as binding on them, in their application to the case before them." *Milivojevich*, 426 U.S. at 710 (quoting *Watson*, 80 U.S. at 727). Under these facts, resolution of the religious dispute over control of the local church "therefore determines control of the property" in the civil case before the Court. *Id.* at 709. *See also Jones*, 443 U.S. at 609; *Westbrook*, 231 S.W.3d at 399.

Second, under the constitutionally-valid, four-factor Neutral Principles analysis of *Jones*, The Episcopal Church, its Diocese of Northwest Texas, and its Episcopal Church of the Good Shepherd set forth, decades before the dispute, in the legally cognizable forms suggested in *Jones*, that property is held by the local church for the benefit and use of, under the control of, and in trust for, the Church and its Diocese. Texas statutes governing church property explicitly allow subordinate religious corporations to hold property under the control of a national church and its recognized leadership. *See* pp. 29-32, *supra*; *see also* 1 CR 80-81, 90, 97, 112, 122; 2 CR 375, 380. The parties have indicated, in national and local church documents and before the dispute erupted, that church property cannot be alienated from The Episcopal Church, and civil courts are bound to enforce that outcome under the First Amendment.

Third, even if there were not extensive, dispositive language indicating the parties' pre-dispute intent in national and local governing documents (and there is), Neutral

Principles would consider the local deeds. These deeds also contain explicit statements again signaling the parties' pre-dispute intent (*e.g.*, pledging property to the Diocese "secured from the danger of alienation, either in whole or in part, from those who profess and practice the Doctrine, Discipline, and Worship of [the Episcopal] Church," 1 CR 165). And they are all held by the subordinate Church corporation, which is controlled only by the authorized Church representatives. Moreover, these deeds simply beg the question as to which faction represents Good Shepherd and its incorporated entity. This question is again an ecclesiastical one that has been answered by Church authorities, whose answer must be applied as final in the case, even under Neutral Principles.

B. Though the Court should never reach the question, Respondents prevail under Petitioners' squarely unconstitutional approach.

As shown, Petitioners' post-hoc attempt to litigate around their prior Church commitments and vows is unconstitutional, even if this Court were to abandon Deference and adopt the constitutionally-permissible Neutral Principles approach of *Jones*. Nevertheless, it bears brief mention that secular law, no less than religious law, would prevent Petitioners' attempt to undo its intra-church commitments under these facts, albeit while placing new and unconstitutional burdens on churches and religious denominations.

For instance, Petitioners argue that Texas's common law of associations would allow them to withdraw from the Diocese. But in Texas, a local chapter of a general organization "is not an independent organization, existing solely for the benefit of its members, but . . . it is a part and parcel of a larger organization . . . organized for specific

purposes, which purposes are to be accomplished by and through such subordinate bodies. . . ." *See Minor v. St. John's Union Grand Lodge of Free & Accepted Ancient York Masons*, 130 S.W. 893, 896 (Tex. Civ. App.—Galveston 1910, writ ref'd). Moreover, "[i]t is well settled that when a person ceases to be a member of a voluntary association, his interest in its funds and property ceases and the remaining members become jointly entitled thereto, **and this rule applies where a number of members secede in a body and although they constitute a majority and organize a new association**." *Progressive Union of Tex.*, 264 S.W.2d at 768 (cited in 6 AM. JUR. 2D *Associations and Clubs* § 24 (Rights of members in organization's property and assets—Effect of loss or termination of membership) (emphasis added).

Petitioners also argue that churches are governed by private trust law and are not subject to public charitable trust law. But Texas law recognizes a charitable trust on money or property donated to a charitable organization in favor of the purposes of the organization. The parish is a charitable organization. Property donated to or acquired by Good Shepherd Episcopal Church or its corporation is held in trust for the charitable and religious purposes of the Church and its Diocese, as provided in the parish's governing documents. "We conclude that property transferred unconditionally to a non-profit corporation, whose purpose is established as or determined to be a public charity . . ., is nevertheless subject to implicit charitable . . . limitations defined by the donee's organizational purpose. . . . Such a corporation has legal title to the property but may use it only in furtherance of its charitable purposes." *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

Petitioners argue that the parties' express trust in favor of the mother church does not satisfy the requirements of the Texas Trust Code, or that any express trust was later revoked. But a valid express trust was created pursuant to the Texas Trust Code and could not be revoked. The Diocese deeded the parish property to the parish corporation in 1982 subject to the trust requirements of the Dennis Canon. 1 CR 80-81, 90, 112, 220-22. The Diocese transferred the property to the parish corporation as trustee for The Episcopal Church and its Diocese with the "intention to create a trust" because the parish was subject to the Dennis Canon. Tex. Prop. Code §§ 112.001(2), 112.002. The trust is supported by written evidence because the Diocese validly deeded the property to the parish corporation in writing, both the Diocese and parish acceded to the Constitution and Canons of Church in writing, and the Diocese validly enacted Diocesan Canon 38.8 in writing. The parish reaffirmed in writing its acceptance of all of the above in its 1994 revisions to its bylaws, again "acced[ing] to, recogniz[ing], and adopt[ing]" the Church's and Diocese's constitutions and canons. 1 CR 207; 2 CR 375, 380. The breakaway faction cannot revoke the trust because the breakaway faction does not represent the Church, the Diocese, or its Church of the Good Shepherd under voluntary association law and did not create any of the relevant trust interests.

Petitioners argue there are no implied trusts in Texas, but the Texas Trust Code did not purport to abrogate any implied trusts, and none of Petitioners' cited cases hold that it did so. If the Court determines that charitable trusts do not apply and no express trust exists, a "resulting trust" or other implied trust may be implied based on the history, organization, and governing documents of the Church, the Diocese, and the parish. "[A]

trust intentional in fact is an express trust; one intentional in law is a resulting trust; and one imposed irrespective of intention is a constructive trust." *Mills v. Gray*, 210 S.W.2d 985, 987-88 (Tex. 1948) (quoting 54 AM. JUR. 22, § 5).

Most importantly, Petitioners' hodgepodge of state doctrines, applied to unsettle church governance, shows just how disruptive this unconstitutional vision of neutral principles would be. Dissident factions would continue to drain resources from religious denominations, by citing ever more doctrines to subvert their past religious vows, oaths, and commitments. This is inconsistent with a church's right to "independence from secular control or manipulation[,]" *Hosanna-Tabor*, 132 S. Ct. at 704 (citations omitted), and "would lead to the total subversion of such religious bodies." *Westbrook,* 231 S.W.3d at 397 (quoting *Watson*, 80 U.S. at 728-29). Petitioners' approach is unconstitutional and should be rejected.

CONCLUSION

This case was rightly decided by the trial court and the court of appeals. Under any constitutionally-permissible approach, a dissident group is free to leave its church, but it cannot use civil laws, after the fact, to undo its long-standing commitments to internal church government, discipline, and law, in order to take property. While Texas should reaffirm its century of settled Deference doctrine, lauded just last month by a unanimous U.S. Supreme Court, this case reached the right result under either constitutionally-valid approach, and the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 20th day of February, 2012, the foregoing brief was filed electronically and as such, this document was served on all counsel who are deemed to have consented to electronic service. All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by facsimile through CFX.

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