No. 13-1520

IN THE
Supreme Court of the United States

THE EPISCOPAL CHURCH, ET AL.,
Petitioners,

— v.—

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.,
Respondents.

THE DIOCESE OF NORTHWEST TEXAS, ET AL.,
Petitioners,

— v.—

ROBERT MASTERSON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF IN OPPOSITION OF RESPONDENTS ROBERT MASTERSON, ET AL.

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QUESTIONS PRESENTED

In two prior opinions addressing how civil courts should resolve church property disputes, this Court properly struck a balance between permitting courts to fulfill their traditional role of protecting property rights and avoiding excessive entanglement with religion: *Watson v. Jones*, 80 U.S. 679, 727 (1871), held that courts must defer to the decisions of church authorities on ecclesiastical questions. *Jones v. Wolf*, 443 U.S. 595, 604 (1979), held that courts can exercise jurisdiction over church property issues when they can resolve those issues by applying neutral principles of law.

In striking this balance, the Court was careful not to mandate a particular methodology or outcome in church property cases. The Court held that states may "adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters," because "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Id*. at 602 (emphasis in original).

Dissatisfied with the Texas Supreme Court's choice of approaches for dealing with the instant dispute, Petitioners seek review of the following questions:

1. Whether *Jones v. Wolf* created an amorphous new body of federal constitutional trust law that requires state courts to enforce any recitation of a trust in a church governing document, regardless of state statutory or common law requirements.
2. Whether the Texas Supreme Court retroactively adopted the neutral-principles approach and, in doing so, infringed free-exercise rights.
3. Whether the Court should resolve this case by discarding the doctrine of neutral principles endorsed in *Jones v. Wolf*, even though dozens of states have relied on the doctrine to resolve church property disputes.

LIST OF PARTIES

This brief in opposition is filed by petitioners (misidentified as appellants in the Petition) in the Texas Supreme Court in *Masterson, et al. v. The Diocese of Northwest Texas, et al.*, No. 11-0332. They are now Respondents on review: 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 Episcopal Church of the Good Shepherd, now named Anglican Church of the Good Shepherd.

The following were respondents (misidentified as appellees in the Petition) in the Texas Supreme Court in *Masterson, et al. v. The Diocese of Northwest Texas, et al.*, No. 11-0332. They are now Petitioners on review: The Diocese of Northwest Texas; The Rev. Celia Ellery; Don Griffis; and Michael Ryan.

CORPORATE DISCLOSURE STATEMENT

Episcopal Church of the Good Shepherd, now named Anglican Church of the Good Shepherd, is a nonprofit corporation incorporated under Texas law. There is no parent or publicly held company that owns 10% or more of the corporation's stock.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Robert Masterson, et al., respectfully request that this Court decline review of the judgment of the Texas Supreme Court.

OPINIONS BELOW

The opinions below relating to the Parties listed above are properly identified in the Petition and are in the Petition's appendix:

Masterson v. The Diocese of Northwest Texas, 422 S.W.3d 594 (Tex. 2014), *rev'g*, 335 S.W.3d 880 (Tex. App.—Austin 2012). The Texas court of appeals affirmed an unreported district court order. Pet. App. 1a, 98a, 126a.

JURISDICTION

Respondents do not contest the assertion of jurisdiction under 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

U.S. Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Tex. Prop. Code § 112.051(a): Revocation, Modification, or Amendment by Settlor

> (a) A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.

STATEMENT OF THE CASE

The Episcopal Church (the "General Church") is a hierarchical religious denomination with a representative government organized into three tiers: the Church's General Convention is the top tier; regional "dioceses" compose the middle tier; and local "parishes" make up the bottom

tier. Pet. App. 11a-12a. This case involves a dispute over church property in San Angelo, Texas, which was deeded to the local parish corporation without reservation. The Diocese of Northwest Texas claims title to this property, on behalf of the General Church. Pet. App. 5a-7a. The dispute arose after a majority of the parish members and the board of directors of the parish corporation voted to separate from the Diocese and the General Church. Pet. App. 6a-7a.

A. Good Shepherd Joined the Episcopal Diocese of Northwest Texas

In 1965, a group of worshippers in San Angelo filed an application with the Diocese of Northwest Texas (the "Diocese") to organize a mission named "The Church of the Good Shepherd" ("Good Shepherd" or "the Parish"). Pet. App. 100a. Good Shepherd established its mission church on property donated to the Trustees of the Diocese. Pet. App. 3a. In 1974, Good Shepherd achieved parish status, incorporated under the Texas Nonprofit Corporation Act, as required by the canons of the Diocese, and enacted bylaws acknowledging the authority of the Diocese. Pet. App. 4a. The corporation's bylaws provided for its management by a Vestry, elected by members of the Parish. Pet. App. 4a. The bylaws can be amended only by a majority vote of eligible members of the Parish. Pet. App. 4a-5a.

In 1979, after Good Shepherd became a parish and had adopted its organization documents and bylaws, the General Church amended its Canons, adding Canon I.7.4 (the "Dennis Canon") in an attempt to impose a trust in its own favor upon the local church property.[1] Pet. App. 48a, 134a-135a. In 1982, the Trustees of the Diocese conveyed the local church property to Good Shepherd by general warranty deed, without any reservation of title or interest. Pet. App. 5a. The Diocese did so in anticipation of the Parish's decision to borrow $150,000 to improve the property, given that the Diocese did not want to be obligated on the note and given the Parish's need to pledge the property, without qualification, to the lender as collateral for the loan. Masterson Resp'ts App. 1a-2a. In 2005, the Parish purchased an additional tract of land. Pet. App. 5a. Both the 1982 deed and 2005 deed were in the Parish

[1]Canon I.7.4 reads: "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons." Pet. App. 134a.

corporation's name, and neither deed provided for or referenced a trust in favor of the General Church or the Diocese. Pet. App. 5a.

B. Good Shepherd Decided to Separate from the Diocese by a Majority Vote of its Members

In November 2006, the members of the incorporated Parish, by majority vote, chose to withdraw from the General Church and the Diocese and to revoke any trusts previously imposed on the Parish's property. They amended the corporation's bylaws to that effect and removed any reference to the General Church or Diocese. Pet. App. 5a-6a. The Parish corporation also filed amended articles of incorporation, pursuant to Chapter Three of the Texas Business Organizations Code, changing the corporate name to the "Anglican Church of the Good Shepherd". Pet. App. 6a.

The bishop of the Diocese, Bishop Rev. Wallis Ohl, rejected Good Shepherd's disassociation from the Diocese and attempted to override the Parish corporation's amendment of its bylaws. Pet. App. 6a. After a meeting with the faction of the Parish who wanted to remain in the Episcopal Church (the "minority faction"), Bishop Ohl appointed a Priest-in-Charge for them, supported their electing their own Vestry, and declared that they were entitled to operate Good Shepherd. Pet. App. 6a. Because the members and vestry of the Parish corporation

continued to possess and use the property titled in the Parish corporation's name, the Diocese and persons in the minority faction filed suit, seeking a declaratory judgment that would limit the use of the property to the Episcopal Church, void the corporate vote to withdraw, and give possession of the disputed property to the minority faction. Pet. App. 7a.

C. Legal Framework

This Petition relies on a line of Supreme Court and Texas precedent that prohibits courts from becoming entangled in disputes over religious doctrine, but recognizes that church property disputes—like other property disputes—are often about dollars rather than doctrine and can be resolved through the application of neutral legal principles.

The Court first considered this issue in *Watson v. Jones*, a case involving a property dispute between factions of a Presbyterian congregation. 80 U.S. 679 (1871). The Court articulated a rule of deference on matters of church doctrine, holding that "whenever the questions of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727. The Court simultaneously recognized,

however, that for non-ecclesiastical matters, "[r]eligious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law." *Id.* at 714.

Building on the distinction suggested in *Watson*, and further developed by state courts, between ecclesiastical questions and secular property disputes, the Court held in *Jones v. Wolf* that a State may apply "neutral principles of law," including state statutes and common law, to resolve church property disputes. 443 U.S. 595, 604 (1979). The Court reasoned that the neutral-principles approach offers parties "flexibility in ordering" their "rights and obligations to reflect" their intentions. *Id.* at 603. The Court recognized that although the method would not be "wholly free of difficulty," "the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application." *Id.* at 604.

In endorsing the neutral-principles method, without rejecting the deference approach articulated in *Watson*, the Court noted that a state may adopt "*any* method" of determining the group entitled to church property, "so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* at 608. The Court endorsed a diversity of approaches

because "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Id.* at 602.

D. The Decisions Below

Petitioners—who represent the minority faction recognized by the General Church—sued Respondents—the Good Shepherd Corporation and the members of the corporation's board of directors—to impose a trust on and acquire possession of the disputed property. The trial court, applying the deference approach articulated in *Watson* to resolve the dispute, granted summary judgment in favor of Petitioners and barred Respondents from the property. Pet. App. 132a. The intermediate appellate court affirmed the judgment for Petitioners on deference grounds. Pet. App. 98a-125a. Respondents appealed to the Texas Supreme Court.

The Texas Supreme Court reversed the decision of the court of appeals, clarified that Texas courts should apply "only the neutral principles construct" to resolve church property disputes, and remanded the case to the trial court for further proceedings. Pet. App. 26a, 30a. The Texas Supreme Court noted that its decision to endorse the neutral-principles approach was rooted in its precedent: The court first applied neutral principles, consistent with this Court's holding in *Jones*, more than a century ago in *Brown v. Clark*, 116 S.W. 360

(Tex. 1909). Pet. App. 19a. The court also noted that it preferred the neutral-principles approach to other alternatives because the approach permits courts to "exercise jurisdiction where it exists" and allows private parties to "structure their organizations and their property rights" to reflect their intentions. Pet. App. 24a.

In the opinion below, the Texas Supreme Court did not decide the property dispute at issue. Pet. App. 29a-30a. Instead, the court remanded the case to the trial court for the development of a record to which neutral principles of law could be applied. Pet. App. 30a. This was necessary because Petitioners had "neither pleaded nor urged as grounds for summary judgment that they are entitled to the property on the basis of neutral principles." Pet. App. 30a. The court did, however, address certain arguments raised by the parties to "assist the trial court" on remand. Pet. App. 31a.

While the court declined to decide, on the inadequate record before it, whether the trust provision at issue is sufficient under neutral principles of Texas law, the court did note that the Texas trust statute—unlike trust statutes in all but two other states— "requires *express* terms" to make a trust "irrevocable."[2] Pet. App.

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[2] Trusts are revocable unless expressly stated to be irrevocable only in Texas, California, and Oklahoma. Mark R. Siegel, *Unduly Influenced Trust*

29a-30a, 41a. Thus, even assuming that the Dennis Canon created a trust, the court determined that the *revocability* of that trust under Texas law was the critical issue. Pet. App. 41a.

The court also noted that the church hierarchy could not simply override the amendment of the Parish corporation's bylaws and articles of incorporation by the corporation's decisionmakers and members, who were entitled to do so under the bylaws, because secular principles of Texas corporation law dictate "how and when corporate articles and bylaws can be amended" and with what effect. Pet. App. 39a-40a.

The Texas Supreme Court refrained from deciding whether a retroactive application of neutral principles would violate the First Amendment because Petitioners did not raise the issue and the court's disposition of the case did not mandate its consideration. Pet. App. 30a n.7.

Revocations, 40 Duq. L. Rev. 241, 243 n.16 (2002). As will be discussed later, California adopted a specific statute (California Corporations Code section 9142) that imparts irrevocability to trusts relating to church property, leaving Texas and neighboring Oklahoma as the only states whose requirement of express irrevocability would ever apply to church property.

Petitioners' timely motions for rehearing were denied. Pet. App. 129a.

REASONS FOR DENYING THE WRIT

The Texas Supreme Court's decision to continue applying the neutral-principles method to resolve church property disputes does not implicate what Petitioners call an "entrenched" split in authorities, with some state courts allegedly rejecting state law in favor of constitutional property trusts and others refusing to do so. This so-called split in authorities is far from entrenched. The state court decisions on which Petitioners rely do not reject state law in favor of constitutional property trusts; instead, they apply neutral principles of state law to support their holdings. Even assuming there were a split in authorities, that split is not implicated here because unlike the decisions cited by Petitioners, this case turns on the revocability of the trust at issue, not its creation. This Court should, as it has consistently done before in similar circumstances, reject Petitioner's invitation to recognize a new body of constitutional trust law.

The Texas Supreme Court's decision likewise does not implicate, as Petitioners claim, the retroactive application of neutral principles. The Texas Supreme Court expressly stated that it need not decide the retroactivity question because Petitioners did not raise it below, and the court's disposition of the case did not require

consideration of it. Even if the retroactivity question had properly been raised and decided, the Texas Supreme Court made clear that there was no retroactivity concern because the court first applied a neutral-principles approach to decide a church property dispute nearly a century before this case. There is no need for this Court to take up a question that was not raised below or to second-guess the Texas Supreme Court's valid application of its own long-standing precedent.

Finally, this Court should reject Petitioners' request to give them the property they seek by throwing out *Jones v. Wolf* and decades of associated case law. A majority of states has adopted the neutral-principles approach endorsed by this Court in *Jones*, and significant reliance interests are thus at stake. Moreover, the many advantages of the neutral-principles method that this Court recognized and articulated in *Jones* remain intact. There is nothing about this particular case – in which the Texas court simply endorsed neutral principles – that would warrant rejecting *Jones*. This issue, like the others Petitioners raise, does not merit review.

I. THE COURT SHOULD DECLINE THE INVITATION TO CREATE CONSTITUTIONAL TRUST LAW, PARTICULARLY ABSENT A SPLIT ON KEY ISSUES.

Petitioners argue that the Court's intervention is necessary because of an "entrenched" split in state authorities on the issue of church property trusts. Pet. 21. They contend that the highest courts of four states—California, Connecticut, Georgia, and New York—have interpreted this Court's decision in *Jones v. Wolf* as creating federal constitutional trust law that supersedes contrary state law, while the highest courts of at least twice as many states, including Texas, have rejected the notion that *Jones* created substantive trust law under the First Amendment. Pet. 18-22. This so-called split in authorities, however, is not the divisive crisis that Petitioners suggest.

In all four opinions that Petitioners cite to support their constitutional trust claim, the state courts applied the neutral-principles approach endorsed by this Court in *Jones* and closely analyzed the trust provisions at issue under neutral principles of state law.[3] The

[3] Under the neutral-principles approach, courts look to, among other sources, state statutory and common law, the language of the deeds governing the church property, and the constitutions and

courts determined that those principles were consistent with, or at least not contrary to, the recognition of a trust in each case. Those courts did not reject state law in favor of federal constitutional trust law.

The California decision that Petitioners cite, *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009), *cert. denied*, 558 U.S. 827 (2009), is illustrative. In that case, the California Supreme Court, like the Texas court here, expressly endorsed the neutral-principles method. *Id.* at 70, 77-79. Applying that approach, the court determined that a state statute, California Corporations Code section 9142, expressly permitted church property trusts like the one at issue. *Id.* at 81-84. The trust, therefore, was consistent with state law, and the court based its decision largely on that consistency. *Id.* The "entrenched" split between states that purportedly have chosen federal constitutional trust law over contrary state law is not apparent in *Episcopal Church Cases*.

The same holds true for the Georgia decisions that Petitioners cite. In *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 458 (Ga. 2011), *cert. denied*, 132 S. Ct. 2772 (2012), for example, the Georgia Supreme Court analyzed the

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canons governing the operation of the church. *See Jones*, 443 U.S. at 601.

validity of the trust provision at issue under neutral principles of state law. The court determined that although the provision did not satisfy Georgia's "generic express trust statute," the trust was consistent with the policy reflected in another Georgia trust statute, Georgia Code section 14-5-46, as well as Georgia common law that did not require church trusts to comply with the express trust statute. *Timberridge*, 719 S.E.2d at 451-54, 458.[4] The court, in other words, determined that the disputed provision satisfied at least one method for creating a valid church property trust under Georgia law. The court did not reject state law in favor of federal constitutional trust law.[5]

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[4] In *Timberridge* the relevant trust provision preceded the deed to the local church, so that the court did not "need . . . [to] address the more difficult question of whether a general church may *amend* its governing documents . . . to add an explicit property trust provision and make that trust apply to the property of its existing members" 719 S.E.2d at 456. While the Canon trust also preceded the 1982 deed here, a similar "difficult" question arises in this case because Good Shepherd enacted its bylaws in 1974 before the General Church's adoption of trust language in its Constitution in 1979. Pet. App. 4a, 48a.

[5] The other Georgia case Petitioners cite, *Rector, Wardens, Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 718 S.E.2d 237, 241 (Ga. 2011), is similar. In that case,

The New York and Connecticut decisions that Petitioners cite are no different. *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008) and *Episcopal Church in the Diocese of Connecticut v. Gauss*, 28 A.3d 302 (Conn. 2011), likewise involve an analysis of relevant state law pursuant to the neutral-principles approach. The New York court, for example, looked to New York's Religious Corporations Law, and suggested that while the recognition of a trust in favor of the general church based on the church's governing documents was not conclusively established by the statute, neither was the trust prohibited under New York statutory or common law. *Episcopal Diocese of Rochester*, 899 N.E.2d at 924-25.[6]

The Connecticut Supreme Court similarly looked to the trust language in *Jones*, but did not reject state law in favor of federal constitutional trust law. The court based its decision on Connecticut law and facts specific to

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the Georgia Supreme Court again relied heavily on the policy reflected in Georgia Code section 14-5-46 and Georgia common law to recognize a church property trust. 718 S.E.2d at 243-45.

[6] No such religious corporation law exists in Texas. Texas Constitution article I, section 6 states in part that "no preference shall ever be given by law to any religious society."

that case.[7] *Gauss*, 28 A.3d at 318-24. The General Church has expressed agreement with this understanding of *Gauss*, stating in a prior filing with this Court that "the Connecticut court did not base its decision on constitutional law" but resolved the case "as a matter of state law." Br. in Opp. of Resp'ts Episcopal Church et al., *Gauss v. Protestant Episcopal Church in the United States of America*, No. 11-1139, 2012 WL 1829055, at *1 (May 18, 2012).

Significantly, the Connecticut Supreme Court in *Gauss* acknowledged that the neutral-principles approach it applied could produce "vastly different outcomes" across states because different courts rely on "idiosyncratic state statutes and common-law principles." *Gauss*, 28 A.3d at 316. The court also recognized that such a result was acceptable because "*Jones* [] implicitly approved of possibly different outcomes in different jurisdictions . . . ." *Id.* That some state courts have applied the neutral-principles approach and determined that a particular church trust provision is inconsistent with their state laws is not reflective of a split in authorities. The differing

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[7] The court found particularly persuasive, for example, the long-established practice of the local parish to seek "approval from the Diocese *each and every time* it wished to purchase, finance or sell real property," as well as the specific documents signed by congregation members. *Gauss*, 28 A.3d at 320-21.

outcomes are reflective of the different facts and laws that state courts consider when applying neutral principles.

There is no "entrenched" split between this case and the four decisions cited by Petitioners. The Texas Supreme Court, like courts in those decisions, simply endorsed the neutral-principles approach. Because the case has been remanded to the trial for further proceedings, it remains unclear whether Texas courts will ultimately determine the enforceability of any trust in this case and, thus, whether the result of this case differs from those cited favorably by Petitioners. Any differences that may arise, however, will not be based on some "entrenched" split over the existence of a body of federal constitutional trust law. They will be the result, as in other states, of the court's close examination of facts and neutral laws specific to the case and jurisdiction.[8] This is precisely the result anticipated and, indeed, embraced by this Court in *Jones*. *See Jones*, 443 U.S. at 602 ("[T]he First Amendment does not dictate that a State must follow a particular method of resolving church property disputes.").

One such neutral legal principle that will be critical to the proceedings on remand and that

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[8] Texas is one of three states in which a trust is revocable unless expressly made irrevocable. Tex. Prop. Code. § 112.051(a).

fundamentally distinguishes this case from those cited by Petitioners is the Texas statutory requirement that all trusts are revocable unless they expressly provide that they are irrevocable. Pet. App. 41a (citing Tex. Prop. Code § 112.051). Indeed, the Texas Supreme Court noted that "even assuming a trust was created by the Dennis Canon," the critical issue here is that the terms of the trust failed to make it expressly irrevocable, as Texas law requires. Pet. App. 41a. Hence, the Texas trial court may determine, based on the record developed, that even if the trust provision at issue properly created a trust, that trust was both revocable and properly revoked by a majority of the Parish corporation under Texas law.

Connecticut, Georgia, and New York laws, by contrast, typically presume that a trust is irrevocable unless it states otherwise. *See*, *e.g.*, Ga. Code Ann. § 53-12-40; N.Y. Est. Powers & Trusts Law § 10-10.8; *Goytizolo v. Moore*, 604 A.2d 362, 365 (Conn. 1992) ("General principles of trust construction require an express reservation of the right to modify, amend, or revoke a trust."). The courts in those states did not have to determine the effect of the presence or absence of irrevocability language in the trust provisions at issue. The decisions by those courts, therefore, are distinguishable from the instant case in a critical way.

The California decision that Petitioners cite is likewise fundamentally distinguishable. An

express statement of irrevocability is required for trusts in California, as it is in only two other states, Texas and Oklahoma. 60 Cal. Jur. 3d Trusts § 313 (a "trust is revocable, unless it is expressly stated to be irrevocable"). But the California court did not have to decide the impact of that principle on the Dennis Canon, because another California statute—California Corporations Code section 9142—exempted church property trusts from that otherwise applicable requirement of express irrevocability. *Episcopal Church Cases*, 198 P.3d at 81-84.

The centrality of the revocability question in this case further underscores the conclusion that this case does not implicate an "entrenched" split between states on the issue of constitutional trusts. In the other cases cited by Petitioners, the key issue was the *creation* or *validity* of the trust. Here, the *revocability* of the trust is the critical question. *Jones v. Wolf*, did not address the revocability question, and there is no split on an issue that *Jones* and the cases cited by Petitioners did not consider or decide. Even if those cases had addressed the revocability question, that question turns on neutral principles of state law and not the First Amendment.

This court should decline Petitioners' invitation to use this case to fashion a body of federal constitutional trust law under the First Amendment, particularly where an "entrenched" split between this case and the

decisions cited by Petitioners on this issue is not apparent. Unless this Court were to expand its review of state court decisions, the adoption of such an amorphous body of law would leave states courts with no guidance on how to apply some generalized concept of federal trust law in disputes over church property with highly variable facts.

Moreover, the adoption of such a body of law would contradict this Court's own precedent, which holds that the Constitution does not create property interests. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution."); *see also Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (noting that "[b]ecause the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law'") (quoting *Roth*, 408 U.S. at 577).

Nor would the problem end with federal trust law. Another central question in this case on remand is whether Texas corporations law was followed in the amendment of Good Shepherd's bylaws and articles of incorporation, which revoked any trust held by the General Church. That poses the spectre of a later invitation to create federal constitutional corporations law in

church property disputes. And there is certainly no split on that issue either.

Such intransigent problems may have influenced the Court to deny review in other church property disputes. Regardless, if any split in authorities exists here, it is certainly no more "entrenched" than it was when this Court last denied certiorari on this issue. This Court has consistently denied certiorari in multiple cases that raised the same issues that Petitioners raise here, including a petition that this Court considered and denied just last term. *See*, *e.g.*, Pet. for a Writ of Cert., *The Falls Church v. The Protestant Episcopal Church in the United States of America*, No. 13-449, 2013 WL 5587932 (Oct. 9, 2013), *cert. denied*, 134 S. Ct. 1513; Pet. for a Writ of Cert., *Gauss v. The Protestant Episcopal Church in the United States of America*, No. 11-1139, 2012 WL 900636 (Mar. 14, 2012), *cert. denied*, 132 S. Ct. 2773; Pet. for a Writ of Cert., *Timberridge Presbyterian Church, Inc. v. Presbytery of Greater Atlanta, Inc.*, No. 11-1101, 2012 WL 755072 (Mar. 6, 2012), *cert. denied*, 132 S. Ct. 2772. There is no reason the Court should reach a different result in this case.

Realizing that, Petitioners try to distinguish this case from all the prior cases with the vague assertion that "[m]any of the prior petitions had fundamental vehicle flaws, and most were from decisions on the other side of the split." Pet. 23. Petitioners claim that this case, by contrast, is

an "ideal vehicle" because the opinion below "threw Texas's lot in" with several other states that reached a conclusion with which Petitioners disagree. Pet. 22. Even assuming that characterization to be accurate, it does not make this case a unique or "ideal" vehicle. The questions at issue here are similar to those raised in the prior petitions that this Court has uniformly denied, and the so-called split in authorities has not changed since the last time the Court considered and denied a similar petition.[9] The result here should be the same.

If there is any notable difference between this case and those in which the Court previously denied certiorari, it is decidedly against rather than in favor of review. As noted, the issue of property ownership remains undecided in this case. The Texas Supreme Court remanded the case, which had been developed by Petitioners solely as a deference case, for further proceedings to develop a record to which neutral principles could fairly be applied. Pet. App. 29a-20a. In all four of the cases that Petitioner cites to support its argument for a

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[9] Indeed, the most recent petition raising similar issues that this Court denied cited the Texas opinion at issue here in an unsuccessful attempt to persuade this Court to grant certiorari. *See* Pet. for a Writ of Cert., *The Falls Church v. The Protestant Episcopal Church in the United States of America*, No. 13-449, 2013 WL 5587932, at *21 (Oct. 9, 2013).

constitutional trust, by contrast, as well as the three prior petitions Petitioners cite, there was at least a final disposition of property. *See* Pet. 18-19, 23. The remaining uncertainty in this case, together with the other considerations set forth above, makes this case a fundamentally flawed vehicle. The Court should deny certiorari on the constitutional trusts issue, as it consistently has before.

II. THIS CASE DOES NOT INVOLVE A RETROACTIVE APPLICATION OF NEUTRAL PRINCIPLES.

Petitioners further contend that the Court should use this case to determine whether the retroactive application of the neutral-principles approach to resolve a church property dispute violates the Free Exercise Clause. Pet. 24-28. Petitioners' invitation is undermined by another vehicle problem: This case does not implicate the retroactive application of the neutral-principles approach. The Texas Supreme Court determined that it need not decide the retroactivity question because Petitioners did not raise it below, and the court's disposition of the case did not require a determination of the issue. Pet. App. 30a n.7. There is no reason for this Court to take up a question that the Texas Supreme Court justifiably determined it need not decide. *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("we do not

decide in the first instance issues not decided below.").

Even if the retroactivity issue had been properly raised and decided, however, this issue would not be worthy of certiorari in this case because no retroactive application of neutral principles is apparent. The Texas Supreme Court made clear that it first applied neutral principles to resolve a church property dispute more than a century prior to this case. Pet. App. 19a-26a. There is likewise no reason for this Court to reexamine the Texas Supreme Court's valid application of its own precedent.

The Texas Supreme Court explained that it first applied a neutral-principles approach to resolve a church property dispute in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909). Pet. App. 19a-24a. *Brown*, like this case, involved a schism in a local church congregation and a dispute about the ownership of local church property. Pet. App. 19a-20a (citing *Brown*, 116 S.W. at 361-62). The parties presented two questions for the court to consider: First, was the action undertaken by the national Cumberland denomination to merge with another denomination proper; and second, how did this merger affect the ownership of the local church property? Pet. App. 20a (citing *Brown*, 116 S.W. at 363-64). The Texas court determined that the first question was an ecclesiastical issue within the exclusive jurisdiction of the church's highest court, and that, pursuant to *Watson*,

deference to the church's resolution of that issue was appropriate. Pet. App. 20a-21a (citing *Brown*, 116 S.W. at 363-64). Regarding the second question, the Texas court examined the deed at issue and held that the merged church continued to hold title under Texas property law. Pet. App. 21a-23a (citing *Brown*, 116 S.W. at 364-65).

In substance, the neutral-principles approach is precisely what the Texas court applied in *Brown* to resolve the property dispute. As the Texas Supreme Court noted below, "[the *Brown* court] addressed the merits of the title question [and] concluded that the deed transferred the property to the trustees of the local church that was a subordinate part of the merged [church], thus the believers recognizing the authority of that body were entitled to possession and use of the property." Pet. App. 23a. The Texas Supreme Court made clear that "[t]he method by which this Court addressed the [property] issues in *Brown*"—now called neutral principles—"remains the appropriate method for Texas courts to address such issues." Pet. App. 23a.

The *Brown* decision itself, as well as the Texas Supreme Court's valid application of that precedent in its opinion below, belie Petitioner's mistaken assertion that "[f]rom 1909 until 2013, Texas was a deference jurisdiction." Pet. 25. Indeed, the Texas Court of Appeals in this case recognized *Brown* as having applied neutral

principles. *See* Pet. App. 112a ("the analysis that the court conducted in *Brown* is consistent with the neutral-principles approach"). Prior Texas cases also recognized the propriety of the neutral-principles approach more generally. *See*, *e.g.*, *Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007) (recognizing the applicability of the neutral-principles approach to church property disputes); *Lacy v. Bassett*, 132 S.W.3d 119, 123-26 (Tex. App.—Houston [14th Dist.] 2004) (noting that "a state may adopt an approach, including neutral principles of law, for resolving church disputes that do not involve consideration of doctrinal matters"). The Texas Supreme Court did not, as Petitioners suggest, "convert black into white by *ipse dixit*." Pet. 27. The court simply applied analysis apparent in its precedent. Pet. App. 19a-26a.

Petitioners' claim that *Brown* could not possibly have applied neutral principles because *Brown* pre-dated *Jones* and was decided when *Watson* was controlling likewise lacks merit. Pet. 27-28. Aside from the obvious fact that the Texas Supreme Court is the final arbiter of its own precedent,[10] any disinterested reading of *Watson* reveals that the opinion did not mandate deference to ecclesiastical authority on

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[10] The Texas Supreme Court reads its opinion in *Brown* as applying neutral principles to decide the non-ecclesiastical issue in that case. *See* Pet. App. 22a-24a.

all secular questions of state property law. *See Watson*, 80 U.S. at 725 (noting that in certain cases, "the rights of [conflicting church] bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations"). *Jones*, meanwhile, did not operate as a reversal of *Watson*. *See Jones*, 443 U.S. at 602 ("'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters . . . .'"). Nor did *Jones* invent the neutral-principles approach. State courts prior to *Jones* had already applied a neutral-principles methodology, including the Texas Supreme Court in *Brown*.[11] *Jones* simply

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[11] *Jones*, for example, reviewed a line of Georgia state cases that had applied the neutral-principles method. 443 U.S. at 600-01 (noting that the Georgia Supreme Court had "adopted what is now known as the 'neutral principles of law' method for resolving church property disputes"). Furthermore, this Court referenced and applied the neutral-principles method prior to *Jones*. *See Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969) ("And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."); *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 367 (1970) (per curiam) (affirming a Maryland decision that "relied upon provisions of state statutory law governing the holding of property by

confirmed the validity of that approach. Petitioners' suggestion that the neutral-principles approach "did not yet exist" prior to *Jones* and that this approach is "inconsistent" with *Watson* is mistaken. Pet. 27-28.

Similarly, Petitioners' claim that in order to avoid retroactivity problems, "[a] jurisdiction must '*clearly enunciate*[] its intent to follow'" the neutral-principles approach lacks merit. Pet. 28. This Court has never established a "clearly enunciated" standard or clarified what such a standard would entail. This Court simply indicated in dicta in a footnote in *Jones* that in that case, the state supreme court had "clearly enunciated its intent to follow the neutral principles analysis." 443 U.S. at 606 n.4. Petitioners' unilateral attempt to establish a new standard based on that dicta should be unavailing. Even if such a standard existed, however, it would be more than satisfied here. For the reasons set forth above, Texas law prior to this case made clear that Texas courts applied neutral state law principles to resolve secular aspects of church property disputes.

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religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property.").

In sum, this case is not the proper vehicle for deciding whether a retroactive application of the neutral-principles method violates the First Amendment, because the case does not involve any such retroactive application. To hold otherwise would require the Court both to consider a question that was not implicated by the appeal below and to reexamine the Texas Supreme Court's valid application of its own precedent.

III. THE TEXAS SUPREME COURT'S CONTINUED ENDORSEMENT OF NEUTRAL PRINCIPLES IS NO REASON TO DISCARD *JONES V. WOLF* AND DECADES OF ASSOCIATED CASE LAW.

The Court should also decline Petitioners' invitation to resolve this case in their favor by taking the drastic measure of discarding this Court's decision in *Jones v. Wolf*, along with decades of associated case law across a majority of states.[12] Pet. 28-36. The Texas Supreme Court's endorsement of the neutral-principles approach in its opinion below, based squarely on the advantages that the approach continues to offer, Pet. App. 23a-26a, provides no basis for

[12] The Texas Supreme Court noted that at the time of its decision below roughly thirty states had adopted the neutral-principles method. Pet. App. 25a n.6.

reversing *Jones*. There is nothing about the case that should provide the impetus for throwing out decades of well-reasoned, settled precedent, including cases that Petitioners cite favorably to support their constitutional trust argument.[13]

A "primary advantage[]" of the neutral-principles method, as this Court recognized, is that it is "secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." *See Jones*, 443 U.S. at 603. The approach "shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties." *Id.* This flexibility provides churches and church members with a broad range of options, all without mandating a particular result. *Id.* at 603-04.[14]

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[13] Petitioners, it seems, are conflicted in their requests: They argue initially that this Court should adopt the reasoning of courts in four states that have adopted the neutral-principles approach. Pet. 17-24. A few pages later, however, they ask the Court to overrule such precedent by discarding *Jones*. Pet. 28-36.

[14] Indeed, under this approach, parties have the flexibility to structure their affairs such that the application of neutral principles actually leads to deference. Church members are free, for example, to agree that any dispute will be fully and finally

The neutral-principles method also has the advantage of allowing civil courts to do what they do best, by resolving disputes, where appropriate, on the basis of long-established, secular principles of statutory and common law. *Id.* at 603. This approach, therefore, "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 603.

The Texas Supreme Court, in endorsing the neutral-principles method, simply recognized and agreed with the advantages articulated by this Court. The court noted, for example, that the method "respects and enforces the manner in which religious entities and their adherents choose to structure their organizations and their property rights" and permits courts to exercise jurisdiction where they typically do. Pet. App. 24a-25a.

A majority of states, like Texas, have adopted the neutral-principles approach for similar reasons. Pet. App. 25a n.6. Consequently, the implications of Petitioners' request to toss out *Jones v. Wolf* stretch far beyond this case and implicate reliance interests across numerous

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decided by a specific church tribunal, just as commercial parties can agree to binding arbitration. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 679, 728 (1976) (Rehnquist, J., dissenting).

jurisdictions. These reliance interests weigh heavily against granting certiorari on this issue, particularly when there is nothing unique about this case, among all the cases that have adopted neutral principles, that would justify reversing *Jones v. Wolf*.

In their effort to persuade the Court to take the drastic action they seek, Petitioners launch a general attack on the "disparate results" stemming from state courts' application of the neutral-principles approach to resolve church property disputes. Pet. App. 29a. They claim that because of these "disparate results," the deference approach should entirely supplant the neutral-principles method. Pet. 34-35. This case, however, has not yet produced final results, let alone disparate ones.

In any event, this Court in *Jones* already anticipated and rejected Petitioners' argument. Under the neutral-principles approach, different results from cases with different facts in different states—where state laws might vary—are fully to be expected and do not create free-exercise burden. Far from ignoring or rejecting such variation, this Court embraced the approach, noting that "the First Amendment does not dictate that a State must follow a particular method of resolving a church property dispute. Indeed, a State may adopt *any* one of various approaches for settling doctrinal matters . . . ." *Jones*, 443 U.S. at 602 (internal citation omitted).

This Court also recognized that applying the neutral-principles approach would not be "wholly free of difficulty," but determined that "[o]n balance, . . . the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application." *Jones*, 443 U.S. at 604. This case does not put the careful balance struck by this Court in *Jones* in doubt.

Nor does this case somehow eliminate the potential difficulties associated with the deference approach for which Petitioners advocate. Under the deference approach, "civil courts" constantly risk entanglement with religion because they are "always . . . required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property." *Id.* at 605. In some cases, this inquiry may "require 'a searching and therefore impermissible inquiry into church polity.'" *Id.* at 605 (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976). The deference approach is not the panacea to entanglement concerns that Petitioners suggest. *See* Pet. 31-35.

Finally, the decision by this Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), does not, as Petitioners argue, suggest that *Jones* should be overruled. Pet. 35-36. That case, as Petitioners acknowledge, did not reference

Jones. Pet. 35. This is not surprising given that *Hosanna-Tabor* is readily distinguishable from *Jones*: *Hosanna-Tabor* involved a dispute over a church's decision to terminate the employment of a member of its clergy and thus focused on the "ministerial exception" to federal employment laws. *See Hosanna-Tabor*, 132 S. Ct. at 705-07. The case did not involve a dispute over church property.[15]

The decision by the Texas Supreme Court to continue following the neutral-principles approach to resolve church property disputes does nothing to alter the balance between flexibility, nonentanglement, and ease of application struck by this Court in *Jones* and recognized and relied upon by a majority of states. This Court, therefore, should decline Petitioners' invitation to use this case to discard that precedent.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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[15] Petitioners suggest that *Hosanna-Tabor* is "flatly inconsistent" with the dicta in *Jones* that "courts could apply 'neutral principles of state law governing the manner in which churches . . . hire employees.' 443 U.S. at 606." Pet. 35. *Hosanna-Tabor* addressed the employment of *clergy*, not church "employees" in general, which was the subject of the *Jones* dicta.

Respectfully submitted,

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APPENDIX

APPENDIX — AFFIDAVIT OF CRAIG PORTER

AFFIDAVIT

STATE OF TEXAS
COUNTY OF TOM GREEN

Before me, the undersigned authority, on this day personally appeared Craig Porter, who being by me first duly sworn, upon oath stated as follows:

"I am a resident of San Angelo, Texas, having resided in such City since February 1951. I am an attorney and have practiced law in San Angelo since such time. Upon establishing residence in San Angelo, my wife and I became communicants of Emmanuel Episcopal Church where, over the period of a number of years, I was a member of the Vestry, the Sunday School Superintendent and a Lay Reader. In the early 1960's my wife and I became original members of a Mission Church of the Episcopal Diocese of Northwest Texas, that being the Church of the Good Shepherd, in the west part of San Angelo. I am now a member of Anglican Church of the Good Shepherd, a member of the Vestry and I am one of the defendants sued by the Diocese of Northwest Texas, the Reverend Celia Ellery, Don Griffis and Michael Ryan, now pending in the 51st District Court of Tom Green County, Texas.

In April 1974, I joined Donald W. Griffis and the Reverend Robert A. Buck, then the Rector of the Episcopal Church of the Good Shepherd, as Incorporators forming a Texas non-profit corporation of the Episcopal Church of

the Good Shepherd. I am not sure but I think that I may have been a member of the Vestry of such Parish at the time of the incorporation of such non-profit corporation. I do not recall what event or circumstances prompted the creation of such non-profit corporation.

In 1981 and 1982 the Episcopal Church of the Good Shepherd was desiring to increase the size of its capital improvements, by building that which we refer to as a Parish Hall, with some office space, a large kitchen and a few Sunday School rooms. I was either on the Vestry or on the Building Committee with respect to this project, or perhaps a member of both. In any event, I recall that the Parish determined that it needed to borrow on a long-term payment basis the money necessary for the capital improvements which were then planned. That amount was determined to be $150,000. I was personally aware of the possible source for borrowing funds at a low rate of interest, this being from a trust created by Mr. Joe Crump, then deceased, of Midland, Texas, who had created by his will a trust of a substantial amount of property, the trust having the purpose of aiding Episcopal churches in the building of capital improvements through the extension of low interest rate loans. I recall that the Trustee of the Trust was Fort Worth National Bank, in Fort Worth, Texas.

By way of explanation of my knowledge about the Joe Crump Trust, I state that I had become acquainted with Mr. and Mrs. Joe Crump, as a young child living in Colorado City. Mr. and Mrs. Crump lived one block from my aunt and uncle in Midland, these being Don C. Sivalls

and Fannie Best Sivalls, parishioners of the Holy Trinity Episcopal Church in Midland. Mr. and Mrs. Crump were also Communicants of such church. The Crumps had no children but became very fond of my two cousins, the daughters of my aunt and uncle. In the late 1930's I had the occasion to visit in the home of Mr. and Mrs. Crump on a number of occasions, along with my cousins. This acquaintanceship continued into the years of World War II and in the Spring of 1943, while I was in pilot training with the U.S. Army Air Corps at Moore Field, in the Rio Grande Valley, I spent the greater part of a number of weekends with Mr. and Mrs. Crump. During those years, while still maintaining a residence in Midland, they owned a citrus orchard and maintained a home in the Rio Grande Valley. Mr. Crump would pick me up at the airbase on Saturday afternoon, I would spend Saturday night with them and on Sunday we would attend their little Episcopal mission church, which they had helped establish and which served the communities of Pharr, San Juan and Alamo, there in the Rio Grande Valley.

As I recall, Mr. Joe Crump died in the early years of the 1960's. My aunt, Fannie Best Sivalls, then went to work on a regular basis as a bookkeeper for Mrs. Jess Crump, a position which she held for many years thereafter. By virtue of these circumstances, I was aware of the fact that Mr. Crump had created a trust by his will, a trust of substantial amount, which had as its primary function the making of loans to Episcopal missions and parishes for the building of capital improvements. By virtue of my previous friendship with Mrs. Crump and my having an aunt working for her at the time, I believed that I could

get the Trustee of the Trust to give our loan application preferential status and I believe that this did occur.

The Trustee of the trust, Fort Worth National Bank, required a first mortgage on the property being improved to secure the payments of a loan we had applied for. At the time I had a close personal acquaintanceship with the Rt. Rev. Sam B. Hulsey, Bishop of the Diocese of Northwest Texas, who had previously been the Rector for many years of Holy Trinity Episcopal Church in Midland. I am not sure of what capacity I may have had with respect to our local Parish at the time. Nevertheless, I recall having correspondence with Bishop Hulsey and I think I had telephone conversations with Bishop Hulsey concerning the requirement that the property being improved was required to be mortgaged to the Trustee of the Crump Trust in order for it to make a loan for the construction of improvements. I have no copies of correspondence passing between me and Bishop Hulsey with regard to this.

I have examined the deed dated April 14, 1982 signed by Sam B. Hulsey, as President of the Northwest Texas Episcopal Board of Trustee, a copy of which is attached hereto. I prepared this deed, and then it was sent to Bishop Hulsey for consideration and execution by the Board of Trustees. The financing arrangement with Fort Worth National Bank, Trustee was then carried out by our local non-profit corporation, and neither the Diocese of Northwest Texas, the Northwest Texas Episcopal Board of Trustees, nor the Episcopal Church executed the loan documents to become liable for repayment of the loan.

Dated this 3rd day of June, 2009.

/s/ Craig Porter
Craig Porter, Affiant

Subscribed and sworn to before me, the undersigned authority, by the said Craig Porter on the 3rd day of June, 2009.

/s/ Tawana L. Jacoby
Notary Public, State of Texas