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

REPLY BRIEF FOR PETITIONERS

NEAL KUMAR KATYAL*
DOMINIC F. PERELLA
COLLEEN E. ROH
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com
*Counsel of Record
Counsel for Petitioners

[additional counsel listed on inside cover]

Additional counsel:

MARY E. KOSTEL
THE EPISCOPAL CHURCH
c/o GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001

DAVID BOOTH BEERS
GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001

Counsel for The Episcopal Church

JAMES E. HUND
HUND, KRIER, WILKERSON & WRIGHT, P.C.
P.O. Box 54390
Lubbock, TX 79453

GUY D. CHOATE
WEBB, STOKES & SPARKS
314 W. Harris
P.O. Box 1271
San Angelo, TX 79502

Counsel for the Diocese of Northwest Texas

THOMAS S. LEATHERBURY
DANIEL L. TOBEY
VINSON & ELKINS LLP
2001 Ross Ave., Suite 3700
Dallas, TX 75201

JOHN P. ELWOOD
VINSON & ELKINS LLP
2200 Pennsylvania Ave.
N.W., Suite 500 West
Washington, D.C. 20037

KATHLEEN WELLS
EPISCOPAL DIOCESE OF FORT WORTH
4301 Meadowbrook Drive
Fort Worth, TX 76103

FRANK HILL
HILL GILSTRAP
1400 W. Abrams Street
Arlington, TX 76013

JONATHAN D.F. NELSON
JONATHAN D.F. NELSON, P.C.
1400 W. Abram Street
Arlington, TX 76013

Counsel for the Local Episcopal Parties and the Local Episcopal Congregations

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

State high courts have created an entrenched split: Some hold that a general church's express-trust canons are dispositive regardless of state law, while others hold that state law trumps. Until this conflict is resolved, religious groups will be at risk of having civil courts literally cast them out of their houses of worship, rather than letting those houses be owned and operated according to the dictates of their faith.

Confronted with this precarious state of affairs, which is itself anathema to the First Amendment, Respondents simply pretend it doesn't exist. They

claim there is no split, even though the conflict has been repeatedly recognized by courts, religious groups, and commentators. And they misread the state high court decisions with which they disagree, even though the opinions on both sides are crystal clear. Only this Court can resolve the split and restore the predictability the First Amendment demands.

The decisions below also squarely present a second question critical to First Amendment freedoms: whether a court may retroactively apply the neutral-principles approach. Permitting such retroactive application, as the court below did, deprives denominational churches of the chance to make choices about who should control their houses of worship. Unable to dispute the momentousness of the issue, Respondents quibble—wrongly—over procedure. One Respondent says the retroactivity issue was not preserved, but that is clearly wrong, as the other Respondent and the opinions below recognize. Respondents also say application of neutral principles "will not be retroactive" because Texas has been applying it since the *Brown* decision in 1909, but that flatly contradicts their own prior assertions that *Brown* was a deference case and the admissions of the Texas Supreme Court below.

Finally, the case presents an ideal opportunity to reconsider "neutral principles" as a whole. That approach, borne of the fragmented *Jones* decision 35 years ago, has devolved into chaos, with denominational churches unable to predict how courts will rule and whether their internal arrangements will be honored—a severe burden on First Amendment rights. And Respondents' contention that the alternative—*Watson* deference—is a flawed means of

adjudicating religious issues is directly contrary to this Court's recent opinion in *Hosanna-Tabor* v. *EEOC*, 132 S. Ct. 694 (2012). The writ should be granted.

ARGUMENT

I. THE STATE HIGH COURTS HAVE SPLIT OVER THE EFFECT OF EXPRESS-TRUST PROVISIONS IN CHURCH GOVERNING DOCUMENTS.

Respondents doggedly contend that there is no split among the state high courts. That argument is untenable, and Respondents have offered no persuasive reason why the Court should not now settle the conflict.

1. Respondents assert that there is no split because "there are no cases in which the existence of an express-trust canon like the Dennis Canon ends the inquiry as a matter of federal law." Fort Worth Op. 14. They say, in other words, that courts in the first camp do not find express-trust provisions dispositive, but instead deem such provisions one factor among many under state law. Respondents are wrong. Their bid to explain away the split is contradicted by the state high courts' own understanding of these decisions and by the decisions' plain language.

a. The state high courts that have recently considered the issue read the cases as Petitioners do, and they explicitly take sides in this deep divide. The Oregon Supreme Court, for example, explained that "[s]ome courts have found an express-trust provision in the denominational church's constitution dispositive." *Hope Presbyterian* v. *PCUSA*, 291 P.3d 711, 721 (Or. 2012) (citing *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920, 924-925 (N.Y 2008)).

The Indiana Supreme Court likewise observed that several states' high courts have "read *Jones* as an affirmative rule *requiring* the imposition of a trust whenever the denominational church organization enshrines such language in its constitution." *Presbytery of Ohio Valley* v. *OPC, Inc.*, 973 N.E.2d 1099, 1106 n.7 (Ind. 2012) (citing *Episcopal Church in the Diocese of Conn.* v. *Gauss*, 28 A.3d 302, 325 (Conn. 2011); *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446 (Ga. 2011)). Having recognized those holdings, the Oregon and Indiana courts both rejected them and took the polar opposite approach: They joined six other states in holding that a denominational church's express-trust provision is *not* "dispositive" but instead can be overborne by state law. Pet. 19-22. That is a square split.

Churches and outside groups have similarly acknowledged the conflict. Indeed, the Anglican Church in North America (ACNA)—the Fort Worth Respondents' new parent organization—recently asked this Court to resolve the "confused state of the law" as to "whether the First Amendment requires civil courts to enforce denominational rules that purport to recite an express trust in favor of the hierarchical church." Brief of ACNA, *et. al.*, as *Amici Curiae* in Support of Petitioners 1, *Falls Church* v. *Protestant Episcopal Church in the U.S.*, No.13-449. Representatives of the Episcopal, Presbyterian, and United Methodist Churches likewise have recognized in this case that there is a "deep division among the state courts" on the issue. Amicus Br. of Episcopal Church in South Carolina *et al.* 5. Other commentators agree. *See, e.g.*, Brief of the Becket Fund for Religious Liberty as *Amicus Curiae*

in Support of Petitioners 6, *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, No.11-1101 ("there is an entrenched split of authority over the meaning of *Jones*").

b. All these courts and religious groups are not mistaken. Rather, the error lies in Respondents' reading of the state-court opinions on the side of the split Respondents seek to wish away. Respondents observe that the Georgia and California decisions finding express-trust canons dispositive point not only to those trust canons, but also to state laws. Fort Worth Op. 14-16; Masterson Op. 14-15. But Respondents ignore that, while both courts found that these state laws *reinforced* their decisions to honor the trusts, neither found them necessary.

In *Rector, Wardens, Vestrymen of Christ Church* v. *Bishop of Episcopal Diocese*, 718 S.E.2d 237 (Ga. 2011), for example, the Georgia high court did indeed look to state laws—but it understood those laws as merely "expressing this State's policy of looking to the mode of church government or rules of discipline in resolving church property disputes." *Id.* at 243 (citation omitted). Moreover, the court explained repeatedly that *it did not matter* whether each set of statutes to which the breakaway litigants pointed—express-trust statutes, *id.* at 244, implied-trust statutes, *id.* at 245, religious-trust statutes, *id.* at 243—had been complied with. Indeed, it did not even matter when the requirements of those statutes clearly "were *not* met." *Id.* at 245 (emphasis in original).[1] That was so because "requiring strict

[1] Respondents ignore all these aspects of *Rector, Wardens* and mention only that court's statement that it did "not rely exclu-

compliance" with such statutes "would be inconsistent with the teaching of *Jones* v. *Wolf*" that the burden on churches to arrange their affairs under neutral principles must be "'minimal.'" *Id.* at 244 (quoting *Jones*, 443 U.S. at 606). If churches had to meet the specific trust requirements of state law, "[t]he burden on the general churches, the local churches * * * and their members' free exercise of religion would not be minimal but immense." *Id.* at 245 (citing *Timberridge*, 719 S.E.2d at 453); *accord Episcopal Church Cases*, 198 P.3d 66, 80 (Cal. 2009).

The court below, of course, reached the opposite conclusion, finding that the Dennis Canon's enforceability depends on the Canon's compliance with Texas law. Pet. App. 35a-38a; 79a. That is a clear conflict.

Respondents separately point to some language in the New York and Connecticut decisions with which the court below might not quarrel. But that misses the forest for the trees. Respondents cannot dispute that the Texas Supreme Court would find it impossible to agree with the New York Court of Appeals' analysis finding the Dennis Canon "dispositive" without any inquiry into that Canon's adherence to New York trust law. *Harnish*, 899 N.E.2d at 925. Nor could the Texas court agree with the Connecticut Supreme Court's assertion, in rejecting various trust- and property-law attacks on the Dennis Canon, that

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sively on the Dennis Canon." Fort Worth Opp. 15 (citing 718 S.E.2d at 254). But after making that statement, the Georgia court did not look to *state law* to complete the analysis, as Respondents suggest. It looked instead to *other Church canons*, which it said indicated an implicit trust relationship dating to 1789. 718 S.E.2d at 254.

"*Jones* * * * not only gave general churches explicit permission to create an express trust in favor of the local church but stated that civil courts would be *bound* by such a provision, as long as the provision was enacted *before* the dispute occurred." *Gauss*, 28 A.3d at 325.

2. Respondents suggest that this disagreement should not count because one of the Petitioners here (The Episcopal Church) opposed certiorari two years ago in *Gauss*. Masterson Op. 17; Fort Worth Op. 14, 17. But it was in post-*Gauss* opinions that the Indiana and Ohio high courts recognized a split on the issue, with the Indiana Supreme Court citing *Gauss* as creating a *Jones*-based "affirmative rule" of trust enforcement. *Ohio Valley*, 973 N.E.2d at 1106 n.7; *Hope Presbyterian*, 291 P.3d at 721-722. The Church's opposition in *Gauss*—which argued that many decisions that had issued at that time were in accord—does not contradict Petitioners' showing here that high courts in multiple states now hold that state trust law can trump general-church express-trust provisions enacted under *Jones*. *See* Pet. Br. 18-19. The law since *Gauss* leaves no doubt about the bitter conflict in state high courts.

That is why The Episcopal Church described the split in its more recent opposition to certiorari in *The Falls Church* v. *The Episcopal Church in the United States*, No. 13-449—something Respondents fail to mention. *See Falls Church* Op. 10. And the Texas court's decisions in this very case underscore that the state high courts do *not* agree about whether express trusts will be enforced despite state law. A split on such a fundamental First Amendment issue is intolerable.

3. Respondents' remaining arguments do nothing to dispel the conclusion that this Court's intervention is warranted. Respondents contend that the decisions below were correct because enforcing express-trust canons over contrary state laws would create an *Erie*-defying "federal common law of trusts." Fort Worth Op. 19-20; Masterson Op. 21-22. Of course, if states such as New York and Connecticut are running afoul of *Erie*, that simply underscores the need for this Court's review. But, in fact, this argument is a red herring. It is the *First Amendment*, not some nebulous "federal common law of trusts," that displaces state law in these cases: Because requiring churches to adhere to the multiplicity of state trust and property laws would impermissibly burden churches seeking to exercise First Amendment rights, state laws must give way.

Respondents also contend that any conflict as to the effect of express-trust provisions is not implicated because Texas's refusal to enforce the Dennis Canon "turned on a pure issue of state law"—the Canon's omission of the irrevocability language Texas law requires. Fort Worth Op. 20-24; Masterson Op. 18-19. But that is the very reason the Texas decisions squarely present the split: The Georgia, California, New York and Connecticut courts would not have allowed this "pure issue of state law" to prevent the Canon's enforcement.

Nor is there any merit to Respondents' awkward attempt to narrow the split to one about the effect of state laws governing trust creation rather than trust revocation. Fort Worth Op. 22. The constitutional problem that drives the split arises from making express-trust enforcement dependent on *any* state-specific trust or property law. Indeed, the impermis-

sible burden on free exercise derives from the wide variety of state trust restrictions that make it nearly impossible for a church to enact a single trust provision that will be honored nationwide. This Court should grant certiorari now to make clear that the First Amendment bars courts from placing religious groups in this untenable position.

II. THE DECISIONS BELOW SQUARELY PRESENT THE RETROACTIVITY QUESTION JONES LEFT OPEN.

Respondents do not deny that *Jones* reserved an important question: whether a court's retroactive application of neutral principles violates the First Amendment. Contrary to Respondents' assertions, the decisions below present an ideal vehicle to address this issue.

1. The Masterson Respondents assert that the retroactivity question is not squarely before the Court because it was not raised below. Masterson Op. 24. The Fort Worth Respondents admit the issue was raised, but say it is not ripe because the trial court still has to retroactively apply neutral principles on remand. Fort Worth Op. 24-25. Neither assertion is correct. The Texas Supreme Court acknowledged that retroactivity was raised below. Pet App. 30a-31a; 79a. And it has already both held that neutral principles will apply retroactively to this case and dismissed the constitutional objections with the unconvincing claim that there is no retroactivity problem because *Brown* v. *Clark*, 116 S.W. 360 (Tex. 1909), "substantively reflected the neutral principles methodology." Pet App. 30a-31a; 79a. Because the retroactivity question was pressed and passed upon below, it is ripe for this Court's review.

2. Respondents seek to defend the Texas Supreme Court's limp effort to deny the retroactivity problem, but to no avail. While Respondents and the lower court engage in copious *post-hoc* analysis to tease out neutral-principles intimations in *Brown*, there is no question that until the decisions below, Texas was a deference state. The Texas court itself admitted as much, acknowledging that "[c]ourts of appeals have read *Brown* as applying a deference approach, and generally have applied deference principles to hierarchical church property dispute cases." Pet. App. 22a. And this Court has explicitly read *Brown* as a *Watson* deference case. *Shepard* v. *Barkley*, 247 U.S. 1 (1918) (mem). Indeed, even *Respondents* admitted as much until now: Below, they characterized the issue as "[w]hether Texas courts should apply Neutral Principles * * * or revert to *Brown*'s Loyalty Rule," which they said was "borrowed from" *Watson* v. *Jones*, 80 U.S. 679 (1871). Statement of Jurisdiction 5, 15, *Episcopal Diocese*, No. 11-0265 (June 1, 2011). *See also* Reply 4, *Episcopal Diocese*, No. 11-0265 (Mar. 23, 2012) (arguing that "Texas should *adopt* the neutral principles approach" (emphasis added)).

The Church cannot possibly have been expected to second-guess the Texas state courts' consistent holdings. Nor was it required to. *Jones* rightly put the burden on states to "clearly enunciate" their choice of doctrine to churches in advance to protect "free-exercise rights." *Jones*, 443 U.S. at 606 n.4. Because the Church justifiably relied on Texas's status as a deference state, it was deprived of its First Amendment right to organize its affairs in order to ensure that its property would be used in accordance with Church dictates.

III. THE NEUTRAL-PRINCIPLES APPROACH IS RIPE FOR RECONSIDERATION.

This case presents a prime opportunity for the Court to revisit *Jones* in light of the numerous problems with the neutral-principles approach. Respondents' efforts to rehabilitate that approach are unpersuasive, and their criticisms of the alternative deference approach fly in the face of *Hosanna-Tabor*.

1. Respondents do not dispute the primary difficulty with neutral-principles: Inconsistent and unpredictable results have made it impossible for religious organizations to determine the steps necessary to ensure their places of worship remain in the correct hands. Pet. 29-31. Instead, Respondents argue there is nothing wrong with that result because *Jones* permitted "various approaches" to adjudicating property disputes. Masterson Op. 33 (quoting *Jones*, 443 U.S. at 602); Fort Worth Op. 31.

But permitting a variety of approaches is a far cry from permitting a variety of unpredictable results. Indeed, in the very portion of the opinion that has engendered the express-trust split, *Jones* made clear that free-exercise *requires* that a denominational church be able to structure its affairs to control the disposition of church property. 443 U.S. at 606. Religious organizations cannot do so if they cannot anticipate how courts will decide church-property cases.

2. Respondents remarkably claim neutral principles poses no entanglement difficulties because in many cases—including this one—ownership of religious property has no doctrinal implications. Fort Worth Op. 27-28. This assertion ignores the central role places of worship play in almost every

faith. *See, e.g.*, Amicus Br. of Greek Orthodox Church 10. "[T]he brick-and-mortar building" in many faiths is consecrated and "is inseparable from the faith it represents." *Id.* Accordingly, a Church decision about who should control that building is doctrinal to its core.

Indeed, the outcome of this very case has deprived numerous Episcopalians of their ability to worship in their home churches. Respondents try to minimize this effect, inaccurately claiming that "at most of [the disputed properties], not a single worshiper wished to affiliate with the General Church." Fort Worth Op. 8. In fact, 47 congregations appear in this suit represented by Episcopalians seeking their churches back. *See* Plaintiffs' Amended Petition, *Episcopal Church* v. *Salazar*, No. 141-252083-11, Table A (141st Dist. Ct. Tarrant Cnty. Tex., July 15 2014). For these plaintiffs, and countless others across the nation, being cast out of the places where they have prayed and congregated strikes at the heart of First Amendment freedoms.

3. Finally, Respondents' attack on the *Watson* deference approach, *see, e.g.*, Fort Worth Op. 29-30, runs directly contrary to this Court's recent First Amendment precedent. In *Hosanna-Tabor*, this Court confirmed the continuing vitality of *Watson* and its progeny, and found that those cases establish the proper standard for ensuring that courts do not improperly embroil themselves in religious matters. 132 S. Ct. at 704-705. Significantly, *Hosanna-Tabor* made no mention of *Jones*. While *Hosanna-Tabor* involved a religion's choice of ministers, there is no reason that a religion's choices with respect to who is entitled to occupy its houses of worship should be susceptible to different analysis. A return to *Watson*

deference would bring back the predictability the First Amendment requires, and in a context where the stakes for worshippers across the country are immense.

CONCLUSION

For the foregoing reasons and those in the Petition, certiorari should be granted.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
DOMINIC F. PERELLA
COLLEEN E. ROH
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

MARY E. KOSTEL
THE EPISCOPAL CHURCH
c/o GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001

DAVID BOOTH BEERS
GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001

THOMAS S. LEATHERBURY
DANIEL L. TOBEY
VINSON & ELKINS LLP
2001 Ross Ave., Suite 3700
Dallas, TX 75201

JOHN P. ELWOOD
VINSON & ELKINS LLP
2200 Pennsylvania Ave. N.W., Suite 500 West
Washington, D.C. 20037

KATHLEEN WELLS
EPISCOPAL DIOCESE OF FORT WORTH
4301 Meadowbrook Drive
Fort Worth, TX 76103

FRANK HILL
HILL GILSTRAP
1400 W. Abrams Street
Arlington, TX 76013

JONATHAN D.F. NELSON
JONATHAN D.F. NELSON, P.C.
1400 W. Abram Street
Arlington, TX 76013

JAMES E. HUND
HUND, KRIER, WILKERSON & WRIGHT, P.C.
P.O. Box 54390
Lubbock, TX 79453

GUY D. CHOATE
WEBB, STOKES & SPARKS
314 W. Harris, P.O. Box 1271
San Angelo, TX 79502

Counsel for Petitioners

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