

NO. 11-0332

IN THE SUPREME COURT OF TEXAS

ROBERT MASTERSON, ET AL.,
Petitioners,

v.

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

**On Petition for Review from the
Third Court of Appeals at Austin, Texas
No. 03-10-900015-CV**

Brief of Amicus Curiae The Episcopal Church

MARY E. KOSTEL
The Episcopal Church
c/o Goodwin|Procter LLP
901 New York Ave., N.W.
Washington, D.C. 20001
Tel: 202-346-4184
Fax: 202-346-4444
mkostel@goodwinprocter.com

Of Counsel

SANDRA C. LISER
State Bar No. 17072250
Naman, Howell, Smith & Lee, L.L.P.
100 E. 15th Street, Suite 320
Fort Worth, Texas 76102
Tel: 817-870-1976
Fax: 817-878-2573
sliser@namanhowell.com

COUNSEL FOR
THE EPISCOPAL CHURCH

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INTRODUCTION

The Episcopal Church (the “Church”) is a hierarchical church, comprised of 111 regional “dioceses” (including the Diocese of Northwest Texas (the “Diocese”)) and over 7,600 worshipping local “parishes” (including the Episcopal Church of the Good Shepherd, whose property is at issue in this case).¹ Like other hierarchical denominations, the Church has a central governing body which adopts rules that bind all its subordinate parts. *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, 240-41 (Ga. 2011) (describing Church’s “three-tiered” structure); *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 699 (1976) (hierarchical structure of Serbian Orthodox Church); *Watson v. Jones*, 80 U.S. 679 (1871) (hierarchical structure of Presbyterian Church); *Brown v. Clark*, 102 Tex. 323, 329, 116 S.W. 360, 361 (1909) (hierarchical structure of Cumberland Presbyterian Church); *First Born Church of the Living God v. Hill*, 481 S.E.2d 221, 222 (Ga. 1997) (hierarchical structure of First Born Church of the Living God); *Carnes v. Smith*, 222 S.E.2d 322, 324-25 (Ga. 1976) (hierarchical structure of United Methodist Church).

¹ Every court to have considered the question has concluded that The Episcopal Church is hierarchical. *See, e.g., Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002); *Episcopal Church Cases*, 198 P.3d 66, 85 (Cal. 2009); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008); *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1285 (Conn. 1993); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 931 (Mass. 1997); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003); *Bennison v. Sharp*, 329 N.W.2d 466, 472 (Mich. Ct. App. 1982); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 183 (Nev. 1980).

The Church respectfully submits this amicus brief in order to set out for the Court what impacts, both legal and practical, its decision in the present case may have for the Church and for all other hierarchical denominations in Texas.²

The Church respectfully urges the Court to retain Texas' long-standing "identity" (or "deference") approach for resolving disputes over church property, for several reasons. First, the U.S. Supreme Court has just this year signaled its continued approval of the "identity" approach for resolving such disputes. Any suggestion that the "identity" approach is not favored by the Court may now be ignored. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012). Second, because Texas applies an "identity" approach to resolve property disputes within *secular* hierarchical organizations, applying a different, and potentially less favorable, approach to *religious* hierarchical organizations would violate the First Amendment. Finally, even if the Court were to abandon the "identity" approach in favor of the "neutral principles" analysis, the question of the identity of the true representative of the local church will still have to be answered in some cases. Accordingly, in Texas, where "identity" jurisprudence is well-developed, nothing is to be gained, and much is risked, from adopting the "neutral principles" approach.

² This brief has been prepared by the Church's salaried in-house counsel with the help of Texas counsel Naman, Howell, Smith & Lee, L.L.P. Any fees paid for the preparation of this brief will be paid to Naman, Howell. TEX. R. APP. P. 11(c).

The Church supports the position set out in the amicus brief filed by representatives of the Church's Diocese of Fort Worth and other amici.

If the Court should decide to abandon its “identity” jurisprudence in favor of the “neutral principles” approach, the Church respectfully urges the Court to ensure that its application of that approach protects the Free Exercise rights of persons who form, maintain, and commit themselves to the authority of hierarchical churches. The U.S. Supreme Court made clear when it approved the “neutral principles” approach that it was a satisfactory alternative to the “identity” approach precisely because, under the “neutral principles” approach, hierarchical churches could ensure the protection of local church property – that is, they could ensure the same result that would obtain under the “identity” approach – by including in their governing documents provisions setting out the denominations’ interest in local property. The governing documents involved in this case (of both the Church and the Diocese) contain such provisions, and under “neutral principles” that is dispositive.

Petitioners argue, nevertheless, that the Court should disregard the Church’s governing documents because they do not comply with Texas law governing private trusts and non-profit corporations. Their contention should be rejected: It would undermine the Church’s chosen governance structure, as well as that of all hierarchical churches in Texas, by refusing to enforce the rules of the highest governing body in the Church on its subordinate parts, and would place an enormous practical burden on all hierarchical churches by imposing statutory requirements on them that are meant for independent parties operating at arms-length. Both outcomes would violate the First Amendment and should be avoided.

I. TEXAS SHOULD RETAIN ITS “IDENTITY” APPROACH FOR RESOLVING PROPERTY DISPUTES INVOLVING HIERARCHICAL CHURCHES.

A. The U.S. Supreme Court Has Made Clear that the “Identity” Approach for Resolving Church Property Disputes Remains a Favored Approach.

Since 1909 and this Court’s issuance of *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909), Texas courts have applied an “identity” approach to resolve disputes over church property. Under that approach, where there is a dispute between two factions within a local church over control of the local church’s property and the local church is part of a larger, hierarchical denomination, Texas courts award control of the property to the faction that is loyal to the hierarchical denomination. Thus, in *Brown*, this Court held that a faction of a local Presbyterian church that disagreed with an action taken by the denomination’s governing body and accordingly realigned with another denomination (formed by dissenters from the original denomination) did not have the right to control the local church property; rather, “those members who recognize the authority of the [original denomination] [were] entitled to the possession and use of the property.” 102 Tex. at 334, 116 S.W. at 365.³

³ See also *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865, 871 (Tex. Civ. App.–Texarkana 1977, no writ) (“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.*”) (emphasis added); *Norton v. Green*, 304 S.W.2d 420, 424 (Tex. Civ. App.–Waco 1957, writ ref’d n.r.e.) (“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.*”) (emphasis added); *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975) (applying Texas law); *Green v.*

The “identity” approach adopted by this Court in *Brown* mirrored the approach followed by the U.S. Supreme Court nearly four decades earlier in *Watson v. Jones*, 80 U.S. 679 (1871). Like *Brown*, *Watson* involved a dispute between factions of a local Presbyterian congregation over control of church property. As in *Brown*, in *Watson* the Court concluded that the faction entitled to control the property was the one remaining loyal to the general Presbyterian Church. *Id.* at 734 (faction which “den[ies] [the hierarchical church’s] authority ... [has] no right to the property”).

The “identity” principle applied in both *Watson* and *Brown* reflects and respects the essential nature of hierarchical churches. A hierarchical church is one in which the “general church organization” has “a general and ultimate power of control more or less complete . . . over the whole membership of that general organization.” *Watson*, 80 U.S. at 722-23. By contrast, a “congregational” church, “by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.” *Id.* at 722. *See also Brown*, 102 Tex. at 332, 116 S.W. at 363 (distinguishing between “an independent church” and a “local congregation [that] 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”) (internal quotation marks and citation omitted). Thus, a

Westgate Apostolic Church, 808 S.W.2d 547, 552 (Tex. App.–Austin 1991, writ denied); *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197, 198 (Tex. App.–Amarillo 1988, no writ); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 706-07 (Tex. App.–Dallas 1986, writ ref’d n.r.e.), *cert. denied*, 484 U.S. 823 (1987); *Browning v. Burton*, 273 S.W.2d 131, 136 (Tex. Civ. App.–Austin 1954, writ ref’d n.r.e).

hierarchical church is, at its essence, a single, unified organization with a centralized governing body that exercises control over its multiple subordinate parts; a local unit of such an organization is the local manifestation of the larger organization and has no autonomous identity separate from the larger whole. It is this principle that *Watson's* and *Brown's* "identity" approach protects, by ensuring that the local unit of a hierarchical church – including that local unit's property – cannot be removed from the larger church without the consent of the larger body.

The U.S. Supreme Court recently indicated its continued approval of the "identity" approach for resolving church property disputes. In *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012), the Court was faced with the question of whether the First Amendment bars employment discrimination actions brought against churches by certain church employees. In its discussion of the First Amendment, the Court reviewed its jurisprudence "in the context of disputes over church property" where, the Court said, "[o]ur decisions ... confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers." 132 S. Ct. at 704. Continuing on, the Court signaled that disputes over church property may continue to be resolved by determining which local faction is "recognized" by the hierarchical denomination, and then awarding control of the local church property to that faction, citing *Watson* with approval and describing it as follows:

"In *Watson v. Jones*, 13 Wall. 679 (1872), the Court considered a dispute between antislavery and proslavery factions over who controlled the property of the Walnut Street Presbyterian Church in Louisville,

Kentucky. The General Assembly of the Presbyterian Church had recognized the antislavery faction, and this Court ... declined to question that determination. *Id.* at 727. We explained that ‘whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.’” *Hosanna-Tabor*, 132 S. Ct. at 704.

The Court also cited *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), and *Serbian Eastern Orthodox Diocese for United States & Canada v. Milivojevich*, 426 U.S. 696 (1976), for the proposition that courts may not intrude upon a hierarchical church’s determinations regarding the identity of its leaders, even when such determinations are conclusive in disputes over property. *Hosanna-Tabor*, 132 S. Ct. at 704-05 (“[a]t issue in *Kedroff* was the right to use a Russian Orthodox cathedral in New York City”; “the controversy over the right to use the cathedral was ‘strictly a matter of ecclesiastical government’” into which civil law may not intrude) (quoting *Kedroff*, 344 U.S. at 115); 132 S. Ct. at 705 (*Milivojevich* involved “a dispute over control of the American-Canadian Diocese of the Serbian Orthodox Church, including its property and assets”; “by inquiring into whether the Church had followed its own procedures” in deposing the bishop who had control of those assets the state court had violated the First Amendment).

After *Hosanna-Tabor*, there can be no doubt that, to this day, the U.S. Supreme Court regards the “identity” approach as a viable approach for resolving church property disputes.

B. Abandoning the “Identity” Approach for Resolving Church Property Disputes Would Violate the First Amendment by Treating Churches Less Favorably than Secular Associations in Texas.

Texas courts have long applied the same “identity” approach outlined in *Brown* to property disputes involving secular associations. Under that approach, where two competing factions of a local unit belonging to a larger voluntary association are in a dispute over control of the local unit’s property, Texas courts have found that the faction remaining loyal to the larger voluntary association is the group entitled to control the property. See, e.g., *Minor v. St. John’s Union Grand Lodge of Free & Accepted Ancient York Masons*, 130 S.W. 893, 896-97 (Tex. Civ. App.—Galveston 1910, writ ref’d) (as between two factions of a local lodge affiliated with a “larger organization, known as the Grand Lodge,” the faction that “preserv[ed] their allegiance to the Grand Lodge” was “entitled to hold the property for the use of [the local] lodge”); *Progressive Union of Tex. v. Indep. Union of Colored Laborers of Tex., Lodge No. 1*, 264 S.W.2d 765, 768 (Tex. Civ. App.—Galveston 1954, writ ref’d n.r.e) (“[i]t is difficult to see how such persons [who had withdrawn their membership from the local unit of larger voluntary association] could withdraw as members and remain ... officers with powers to convey the [local] association’s property”). As in the context of churches, application of the “identity” approach to secular associations respects their essential nature. *Minor*, 130 S.W. at 896 (local lodge was “not an independent organization, existing solely for the benefit of its members, but ... part and parcel of a larger organization, known as the Grand Lodge, organized for specific purposes, which purposes are to be accomplished by and through such subordinate bodies as the local lodge”).

To be sure, as we explain below, the “neutral principles” approach also respects the nature of hierarchical churches, by guaranteeing that the rules of those churches that govern their subordinate parts are enforceable in court. Indeed, as we also show, in a case such as this, where the hierarchical denomination (the Church and the Diocese here) has rules ensuring that local church property remain in the denomination, the outcomes under the two approaches (“identity” and “neutral principles”) will always be the same: The local church property will remain in the control of persons remaining loyal to the denomination. But in those instances where the hierarchical church does not have such provisions, the outcomes under the two approaches may differ. It is in those instances where a decision by this Court to abandon the “identity” approach could have an unfavorable impact on hierarchical churches throughout Texas.

The First Amendment “protect[s] religious observers against unequal treatment.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (alteration in original) (internal quotation marks and citation omitted). Thus, any law subjecting religious organizations to a more onerous standard than that imposed on secular organizations “must undergo the most rigorous of scrutiny.” *Id.* at 546. To satisfy the commands of the First Amendment, such a law “must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” *Id.* at 546 (internal quotation marks and citations omitted). *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating state law prohibiting ministers from serving as legislators);

Falwell v. Miller, 203 F. Supp. 2d 624 (W.D. Va. 2002) (invalidating state law prohibiting churches from incorporating).⁴

There is no reason – much less one that would survive strict scrutiny – for Texas law to treat hierarchical churches less favorably than it treats secular associations in the resolution of disputes over local property. Accordingly, unless the Court intends to overturn longstanding Texas law governing property disputes within secular associations, abandoning the “identity” approach here would violate the First Amendment by discriminating against all hierarchical churches in Texas. Such a result should be avoided.

C. Abandoning the “Identity” Approach Will Not Avoid the Question of Which Local Faction Is the True Representative of the Local Church.

The “neutral principles” approach approved by the U.S. Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979), determines whether a hierarchical denomination has an enforceable interest in the property of one of its local churches, even where a majority of the congregation of the local church wishes to remove the property from the denomination. *See id.* at 600 (approach aims “to determine whether there [i]s any basis for a trust in favor of the general church”). Where application of the “neutral principles”

⁴ Indeed, if anything, the U.S. Supreme Court’s recent decision in *Hosanna-Tabor* suggests that religious organizations deserve, in at least some instances, *more favorable* treatment than do secular associations. *See Hosanna-Tabor*, 132 S. Ct. at 706 (rejecting argument that the First Amendment’s Religion Clauses provide no additional protection to religious groups beyond that Amendment’s separate guarantee of freedom of association: “That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.”).

approach reveals that the larger denomination has such an interest, that is the end of the inquiry.

However, where, as in *Jones*, a court concludes under “neutral principles” that the larger church does *not* have an enforceable interest in the local church property, that does not end the matter. Rather, the question then becomes, which of two, disputing local factions is the true representative of the local church? Thus, in *Jones*, where the Supreme Court of Georgia had determined under the “neutral principles” approach that the larger Presbyterian Church had no enforceable interest in the property of the local Presbyterian church, the U.S. Supreme Court, after approving Georgia’s “neutral principles” approach as constitutional, *remanded* the case to the Georgia court for a determination of the essential “identity” issue, that is, which local faction was the “true representative” of the church, entitled to control the property. 443 U.S. at 606-10.

Following *Jones*, the Supreme Court of Colorado has described this two-step process as follows: “If, after applying neutral principles of law, . . . rights of ownership or control [of local church property] are determined to be vested in the general church, there will be no need to assess how property of the local church is controlled. If, on the other hand, such an analysis results in a determination that ownership or control of the disputed property is vested in the local church, it then may be necessary to determine how control over that property is to be exercised. This is so because, as the United States Supreme Court recognized in *Jones v. Wolf*, determination of control of the local church in cases involving a dispute between contending groups within that church may be necessary to resolve internal differences concerning the use and disposition of the

property of the local church.” *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 99-100 (Colo. 1986) (footnote omitted).

Accordingly, even if the Court were now to abandon the “identity” approach as its first line of inquiry in resolving church property disputes, in some cases Texas courts will nevertheless have to answer the question of which local faction is the true representative of the church, and is therefore entitled to control church property.

Moreover, if the Court were to (1) abandon the “identity” approach, and (2) conclude under the “neutral principles” approach that the provisions in the Church’s governing documents governing Episcopal parish property are not sufficient to prohibit a local congregation from removing such property from the larger Church (which, as we show below, it should not do), the Court should then (3) apply Texas’ longstanding “identity” approach – even after having abandoned it in favor of the “neutral principles” approach as the first line of inquiry – to determine the “identity” of the true local church representatives entitled to control the local church and its property. In this case, as the lower courts held, that approach dictates that the local faction remaining loyal to the Church and its Diocese of Northwest Texas is entitled to control the disputed property.

II. A CONCLUSION UNDER THE “NEUTRAL PRINCIPLES” APPROACH THAT THE CHURCH’S RULES DO NOT SUFFICIENTLY ESTABLISH AN ENFORCEABLE INTEREST IN LOCAL EPISCOPAL PARISH PROPERTY WOULD VIOLATE THE FIRST AMENDMENT.

A. Failure to Enforce a Hierarchical Denomination’s Property Rules Would Violate the First Amendment by Undermining the Denomination’s Chosen Governance Structure.

Even if the Court should decide to abandon the “identity” approach for resolving church property disputes in favor of the “neutral principles” approach, the outcome in the present case – and in every case where a hierarchical denomination has rules protecting local church property against removal from the denomination – should be the same: The local church property at issue should remain in the control of persons loyal to the denomination (here, The Episcopal Church and its Diocese of Northwest Texas). As noted above, where a hierarchical church has provisions in its governing documents ensuring that local church property will remain within the denomination, the “neutral principles” approach requires enforcement of those provisions.

The U.S. Supreme Court made clear in *Jones* that a hierarchical church can conclusively effect an interest in local church property by amending its governing documents, which bind its subordinate units in a manner that is enforceable in civil courts. In that case, Justice Powell, writing in dissent and joined by Chief Justice Burger and Justices Stewart and White, expressed the concern that application of Georgia’s “neutral principles” approach could potentially violate the First Amendment rights of individuals “who have formed the [hierarchical church] and submitted themselves to its authority” by depriving them of access to church property. *Jones*, 443 U.S. at 618

(Powell, J., dissenting); *see also id.* at 613 n.2 (expressing concern that the “neutral principles” approach could unconstitutionally “impose a form of church government and a doctrinal resolution at odds with that reached by the church’s own authority”) (Powell, J., dissenting).

In responding to that First Amendment concern, the majority of the Court noted that such rights would be protected under the “neutral principles” approach because

“[a]t any time before [a] dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. *And the civil courts will be bound to give effect to the result indicated by the parties*” *Jones*, 443 U.S. at 606 (emphases added).

Thus, according to the *Jones* Court, the “neutral principles” approach complies with the First Amendment in part because, under that approach, inclusion of a trust provision in a hierarchical church’s governing documents will “ensure . . . that the faction loyal to the hierarchical church will retain the church property.” *Id.*

Any suggestion that this reading of *Jones* would bestow on hierarchical denominations an unseemly amount of power over their local units misses the point: By definition, a hierarchical church *already has* that kind of power over its subordinate parts. *See, e.g., Watson*, 80 U.S. at 722-23 (hierarchical church has “*general and ultimate power of control more or less complete . . . over the whole membership of that general organization*”) (emphasis added); *see id.* at 726-27 (local unit of hierarchical church “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”) (emphasis added); *Brown*, 102 Tex. at 332, 116 S.W. at 363 (same). *Jones* merely ensures that a hierarchical church’s authority within the denomination is not undermined by secular courts; indeed, the U.S. Supreme Court’s recent decision in *Hosanna-Tabor* echoes the same concern that courts not undermine the internal decisions of religious organizations. *Hosanna-Tabor*, 132 S. Ct. at 707 (expressing doubt about constitutionality of “government interference with an internal church decision that affects the faith and mission of the church itself”). Put another way, *Jones* requires enforcement of a hierarchical church’s internal rules in order to protect the First Amendment rights of persons to join, organize, and maintain hierarchical denominations.

The hierarchical authority of The Episcopal Church is evident in the present case in, for example, the governing documents of the Church and the Diocese, showing pervasive governance by the larger denomination over local parishes, including the parish whose property is at issue, and the parish’s own documents, showing repeated acknowledgment and acceptance of its subordinate position in the Church’s hierarchy. And, the Church’s and the Diocese’s rules (a) forbid the alienation of Episcopal parish property without the consent of the larger Church and (b) declare that such property is held in trust for the Church and the Diocese. *Jones*, and the First Amendment, require their enforcement.⁵

⁵ Every one of the highest state courts to have applied the four-factor “neutral principles” approach has found that these rules effect an enforceable interest in local Episcopal parish property. See *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 718 S.E.2d 237; *Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d

- B. A Determination that a Hierarchical Denomination’s Property Rules Are Not Enforceable Because They Do Not Comply with State Law Governing Trusts and Non-Profit Corporations Would Violate the First Amendment by Imposing a Tremendous Practical Burden on Such Denominations Seeking to Protect Local Church Property.

Petitioners suggest that the “neutral principles” approach includes the application of Texas law governing private trusts and non-profit corporations to this case. In their view, hierarchical churches and their subordinate units should be regarded as independent entities operating at arms-length – essentially converting the subordinate parts of hierarchical churches into “congregational” churches – and thus any enforceable interest in the property of one should be created by the steps required in those statutes.

This view ignores the protections the First Amendment gives hierarchical churches. In addition to ensuring the authority of a hierarchical church to govern the

302 (Conn. 2011); *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009); *Episcopal Diocese of Rochester*, 899 N.E.2d 920; *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005); *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish*, 620 A.2d 1280; *Bishop & Diocese of Colo.*, 716 P.2d 85.

All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 685 S.E.2d 163 (S.C. 2009), is distinguishable because the court there did not apply the four-factor “neutral principles” test approved in *Jones*, see *id.* at 172 (applying “property, corporate, and other forms of law to church disputes”), nor did it consider the hierarchical relationship between the local church and the larger denomination. *Id.* at 163 *ff.* (failing to mention such relationship). Indeed, every case decided since *All Saints* has declined to follow it. See, e.g., *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 718 S.E.2d at 255 & n.18 (*All Saints* decision “is readily distinguishable” and “has not been followed in a church property case by any court outside [South Carolina]”); *Episcopal Church in the Diocese of Conn.*, 28 A.3d at 326 (deeming *All Saints* “distinguishable” because court “specifically relied on South Carolina statutory and common law, including the law on trusts, relating to the 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.”).

subordinate parts within its denomination generally, the First Amendment also guarantees that such churches need take only “minimal” steps to protect their property against removal from the denomination. Thus, in *Jones*, in discussing the various steps that hierarchical churches may take to protect local church property from being removed from the denomination, and that courts must deem to be sufficient under the “neutral principles” approach to achieve that goal, the Court stated that “[t]he burden involved in taking such steps *will be minimal.*” 443 U.S. at 606 (emphasis added).

Accordingly, the Supreme Court of Georgia recently refused to apply the state’s express trust statute in resolving a dispute over Episcopal parish property because such an application would violate *Jones*: “[R]equiring strict compliance with [the 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 general church and its local churches to provide which one will control local church property in the event of a dispute will be ‘minimal.’” *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 718 S.E.2d at 244. The Court continued:

“Thus, while local churches *may* modify their deeds, amend their charters, or draft separate legally recognized documents to establish an express trust as set forth in [the state’s express trust statute], that is not the *only* way the parties can ensure that local church property will be held in trust for the benefit of the general church. *Jones v. Wolf* said that it may also be done through the general church’s governing law, for example, by making it ‘recite an express trust.’ ... [I]f hierarchical denominations like the Episcopal Church (and many others) must fully comply with [the 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." *Id.* at 244-45 (citations omitted).

As a practical matter, the burden on The Episcopal Church, and all other hierarchical denominations in Texas, would indeed be "immense" if this Court were to find that the Church's governing rules were not sufficient to ensure that property cannot be removed from the denomination because they do not satisfy statutory requirements. The Episcopal Church has over 250 parishes within its Texas dioceses. Many parishes in the Church hold multiple parcels of real property. In the light of these facts, requiring the Church to comply with state trust or other property laws in order to protect local Church property from removal would impose an "immense" burden on the Church, and undoubtedly on all other hierarchical churches in Texas, in violation of *Jones* and the First Amendment. The Court should reject Petitioners' view.

CONCLUSION

For the reasons stated herein, The Episcopal Church respectfully urges this Court to retain Texas' "identity" approach for resolving church property disputes, and affirm the decisions of the lower courts ordering that the local church property at issue here remain in the control of Episcopalians. If the Court should adopt the "neutral principles" approach instead, the Church urges the Court to enforce the provisions in the Church's and Diocese's governing documents prohibiting the removal of local church property from the denomination without the consent of the larger Church, affirming the lower courts' decisions on that alternative ground. Finally, if the Court were to conclude, under

“neutral principles,” that the larger Church has no enforceable interest in the local church property at issue, it should apply the “identity” approach to determine which local faction is entitled to control the property, and award that control to the faction remaining loyal to the larger Church.

Respectfully submitted,

/s/ Sandra C. Liser
Sandra C. Liser
State Bar No. 17072250
Naman, Howell, Smith & Lee, L.L.P.
100 E. 15th Street, Suite 320
Fort Worth, Texas 76102
Tel: 817-870-1976
Fax: 817-878-2573
sliser@namanhowell.com

Of Counsel:

Mary E. Kostel
The Episcopal Church
c/o Goodwin Procter LLP
901 New York Ave., N.W.
Washington, D.C. 20001
Tel: 202-346-4184
Fax: 202-346-4444
mkostel@goodwinprocter.com

COUNSEL FOR
THE EPISCOPAL CHURCH