No. 20-534

In the
Supreme Court of the United States

ALL SAINTS' EPISCOPAL CHURCH (FORT WORTH),

Petitioner,

v.

THE EPISCOPAL DIOCESE OF FORT WORTH, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF

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REPLY BRIEF

In endorsing the "neutral principles" approach in *Jones v. Wolf*, 443 U.S. 595 (1979), this Court did not tell state courts to go forth and apply state law über alles. It specifically told courts to enforce express-trust provisions in church governing documents, to defer to church authorities on ecclesiastical questions, and to avoid retroactive applications. Those were not simply helpful suggestions about how state courts should apply state law; they were federal-law instructions that were necessary to square the neutral-principles approach with the First Amendment (and equally necessary to answer the First Amendment complaints of the four dissenting Justices). The decision below violates all three of those admonishments, deepens an entrenched conflict, and deprives the vast majority of All Saints' parishioners of their sanctuary and rectory. The First Amendment bars that result, and if *Jones* allows it, then *Jones* must be overruled.

Respondents contend that the lower-court split is illusory, but that suggestion is hard to take seriously when courts and commentators alike have consistently acknowledged it. Respondents insist that this is all a matter of state law, but whether that is so is precisely the issue on which courts have split. On the merits, respondents concede that the Dennis Canon was adopted in direct response to *Jones* for the express purpose of preventing a result like this. But they nonetheless argue that the decision below is correct as a matter of Texas trust law, without meaningfully grappling with the obvious inconsistency with *Jones* and the First Amendment

right of a church to order its internal affairs. And there is no denying the importance of a decision transferring $100 million in church property and depriving petitioner of its sanctuary and rectory. This Court should grant review.

I. The Decision Below Deepens A Conflict Over Whether Courts Must Enforce Express-Trust Provisions In Church Governing Documents.

At least 14 state high courts have addressed whether *Jones* and the First Amendment require enforcement of express-trust provisions in church governing documents even if they fail to comply with state trust law. Respondents do not dispute that eight courts require adherence to state trust law, or that two (including the decision below) have done so in cases involving the Dennis Canon—despite acknowledging that the Canon was a direct response to *Jones*. But they suggest that this "disagreement" is "driven by factual and state law differences." BIO.11-12, 18. That claim makes no sense. The facts concerning the Dennis Canon do not vary from state to state. And the very question on which courts have divided is whether variances in state law should matter. On that critical question, the state high courts are divided, and Free Exercise rights hang in the balance.

1. *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008), exemplifies the approach of courts that have honored both *Jones* and the Dennis Canon. Respondents claim that the New York Court of Appeals "did not find the Dennis Canon controlling in spite of state-law provisions." BIO.15. But other courts beg to differ. *See, e.g.*, *Hope Presbyterian*

Church of Rogue River v. Presbyterian Church (U.S.A.), 291 P.3d 711, 721 (Or. 2012) (*Harnish* "f[ound] express trust provision in denominational church constitution dispositive after finding no support for creation of a trust in … state law"); *Episcopal Church in Diocese of Conn. v. Gauss*, 28 A.3d 302, 327 (Conn. 2011) (similar). And understandably so: After invoking *Jones*—a decision all about the First Amendment—*Harnish* stated that the Dennis Canon "clearly establish[ed] an express trust in favor of" TEC and deemed that "dispositive." 899 N.E.2d at 925.

Respondents' contention that *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009), did not "interpret[] *Jones* to mandate enforcement of the Dennis Canon 'as a matter of federal law'" is similarly perplexing. BIO.15. That court could not have been clearer that "[r]espect for the First Amendment free exercise rights of persons to enter into a religious association of their choice, as delineated in *Jones* …, requires civil courts to give effect to the provisions and agreements of that religious association"—there, the Dennis Canon. 198 P.3d at 82. Respondents seize on the court's invocation of a state statute. BIO.15. But they omit the court's clarification that this statute just confirmed its conclusion "as well." 198 P.3d at 82.

Respondents' effort to distinguish *Episcopal Church in the Diocese of Connecticut v. Gauss* is equally unavailing. BIO.15-16. After describing *Jones* as helping courts "avoid becoming entangled in first amendment issues," 28 A.3d at 312, the Connecticut Supreme Court reasoned (adding its own emphasis) that *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," *id.* at 325—a word lifted from *Jones* itself, *see* 443 U.S. at 606.

Respondents fare no better in downplaying the three cases deeming other express-trust provisions dispositive. Respondents claim that *Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146 (Tenn. 2017), held that "trust language sufficient under state law must appear *somewhere*" in a church governing document "to create a valid trust." BIO.16. But the court never said anything even resembling that. After recounting that many courts had concluded that *Jones* and the First Amendment require courts to enforce express-trust provisions "even if this language of trust … does not satisfy the formalities that the civil law normally requires," 531 S.W.3d at 168, the Tennessee Supreme Court adopted that "approach," describing it as "most consistent with the analysis the Supreme Court reviewed and approved as constitutionally permissible in *Jones*," *id.* at 170.

Respondents' cursory discussion of *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 458 (Ga. 2011), is even less persuasive. Respondents suggest that the Georgia Supreme Court "simply applied neutral state-law principles to the documents and facts in that case." BIO.14. In reality, that court held that it would enforce an express-trust provision *despite* state trust law because "do[ing] anything else would raise serious

First Amendment concerns" and conflict with *Jones*. 719 S.E.2d at 458.[1]

Respondents have no real answer to *Cumberland Presbytery of Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417 (Ky. 1992), so they cast doubt on whether the court even applied the neutral-principles approach. BIO.17. The opinion speaks for itself: After explicitly invoking *Jones*' "neutral-principles approach," the Kentucky Supreme Court enforced the express-trust provision because the general church "followed" the *Jones* roadmap "to a T." 824 S.W.2d at 421-22.

In sum, six courts have clearly held that *Jones* and the First Amendment require enforcement of express-trust provisions, and respondents agree that eight others just as clearly make full compliance with state law indispensable. The split is real and undeniable, which explains why courts and commentators keep acknowledging it. *See, e.g.*, *L. M. Haley Ministries*, 531 S.W.3d at 168; *Rogue River*, 291 P.3d at 721; *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1107 n.7 (Ind. 2012); Michael W. McConnell & Luke W. Goodrich, *On Resolving*

[1] Respondents emphasize the Georgia Supreme Court's statement in a companion case that it "need not rely exclusively on the Dennis Canon" to rule in TEC's favor, *Rector, Wardens, Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia, Inc.*, 718 S.E.2d 237, 254 (Ga. 2011). BIO.14. But that statement plainly did not mean that Georgia courts would enforce express-trust provisions only if they comply with state trust law, which would have effectively overruled *Timberridge*. Instead, that statement just reflects the obvious notion that when both state law and *Jones* support enforcement of the Dennis Canon, the case is particularly straightforward.

Church Property Disputes, 58 Ariz. L. Rev. 307, 307 (2016).

2. Unable to refute the split, respondents assert two "vehicle" problems. BIO.21-22. Both are illusory.

Respondents argue that the decision below does not implicate "a split regarding the requisites to establish an enforceable trust" because it "turned on the fact that the Dennis Canon 'is revocable under Texas law because it was not made expressly irrevocable.'" BIO.21. But the actual split does not turn on distinctions between enforceability and revocability; it turns on "whether *Jones* and the First Amendment render express-trust provisions in church governing documents enforceable as a matter of federal law." Pet.25. If the answer is yes (as *Jones* and six state courts provide), then Texas-law "revocability" concepts are immaterial.

Respondents assert that "Texas has no statutes specifically favoring general-church trusts" and that, while still within TEC, they "disavowed [TEC's] interest in local property" (after willingly "acceding" to the Dennis Canon). BIO.6, 22. But setting aside the problem that subordinate units lack authority to "disavow" TEC's rules, Pet.7-8, again, if *Jones* and the First Amendment require enforcement of express-trust provisions, then state statutes about "general-church trusts" are irrelevant. This split thus is open, acknowledged, and squarely presented.

II. The Decision Below Is Profoundly Wrong.

Respondents' defense of the decision below is equally untenable. Cognizant of the First Amendment sensitivities inherent in resolving church-property disputes, *Jones* instructed courts applying the

neutral-principles approach to enforce express-trust provisions in church governing documents, to refrain from answering ecclesiastical questions, and to avoid retroactive applications. *See* 443 U.S. at 602, 605-06, 606 n.4. The decision below blew past all three commands.

1. *Jones* provided a "minimal[ly]" "burden[some]" roadmap that a "hierarchical church" could follow to "ensure … that the faction loyal to [it] will retain the church property" in the event of a schism—namely, "the constitution of the general church can be made to recite an express trust in favor of the denominational church." *Id.* at 606. Respondents concede that TEC did just that in response to *Jones* by adopting the Dennis Canon for the express purpose of avoiding a dispute like this. BIO.5. That concession should end this dispute. Respondents' insistence that the viability of the Dennis Canon turns on full compliance with the niceties of Texas law cannot be squared with *Jones* or with the First Amendment, which no more leaves churches at the mercy of state trust law than state or federal employment law.

Respondents claim that treating express-trust provisions as enforceable as a matter of federal law would "turn *Erie* on its head." BIO.19-20. But that gets matters backwards. If all *Jones* was doing was freeing state courts to apply state law, even when churches adopted express trusts (or ecclesiastical questions and retroactive applications arise), this Court had no business making helpful suggestions about how state courts should apply state law. The admonitions in *Jones* make sense—indeed, are only legitimate—if they involve enforceable federal-law

instructions about how to make the neutral-principles approach consistent with the First Amendment. That is precisely what the Court was doing in providing its express-trust roadmap in direct response to the dissent's concern that the neutral-principles approach would "frustrate … *free-exercise rights*." 443 U.S. at 606 (emphasis added). Respondents can deride that as "federal common law" if they wish, but it is no more federal common law than any other principle of federal law announced by this Court in interpreting the federal Constitution. State law must yield to such constitutional principles under the Supremacy Clause. And nothing in *Erie* (or anything else) suggests the contrary.

Respondents' alternative view is plainly incompatible with "free-exercise rights." In their world, TEC and its adherents would have to not only adopt the Dennis Canon in direct response to *Jones*, but then ensure that it complies with every jot and tittle of the evolving trust law of the "36 states and D.C." that apply the neutral-principles approach. BIO.4. Respondents provide no assurance that running that 37-jurisdiction gauntlet is even possible. And either way, if TEC needs to keep 37 trust lawyers on retainer to provide updates on the evolving trust law of those jurisdictions, and a few additional lawyers to monitor the 11 states that are "unclear" about if or how they will apply the neutral-principles approach, BIO.4, then the resulting "burden on … the free exercise of religion … would not be minimal," as *Jones* promised, "but immense," *Timberridge*, 719 S.E.2d at 453.

2. *Jones* also emphasized that, even under the neutral-principles approach, courts must "defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." 443 U.S. at 602. Yet after erroneously refusing to enforce the Dennis Canon, the Texas Supreme Court resolved this case by deciding for itself "which faction of the splintered Episcopal diocese is the 'Episcopal Diocese of Fort Worth'?" Pet.App.2. TEC's ecclesiastical rules leave no doubt that the faction associated with TEC is its "true affiliate." BIO.26. By overriding those rules and awarding All Saints' property to the dissident faction, the court below plainly erred.

Respondents counter that the dissidents must own the property because "the parties arranged the diocese's affairs so that a majority of the diocese and its convention control the [diocese]." BIO.26. But that argument depends entirely on the premise that respondents are the "majority of the diocese," which in turn depends entirely on the answer to the ecclesiastical question of whether those who "unequivocally cho[o]se to disassociate from [TEC]" can nonetheless remain part of "the diocese" for purposes of controlling TEC property. BIO.26. TEC has already definitively answered that question in the negative. Under the First Amendment, that "ecclesiastical determination … is not subject to judicial abrogation." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 720 (1976).

3. *Jones* further cautioned against "retroactive[ly]" applying the neutral-principles approach. 443 U.S. at 606 n.4. Undeterred, the Texas

Supreme Court applied that approach despite conceding that courts had consistently read its precedent as embracing the deference approach. *See Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 605 & n.5 (Tex. 2013). Respondents claim that this Court cannot resolve the retroactivity question because it "would first have to reverse the *Texas* Supreme Court's understanding of *Texas* law." BIO.35. But once again, the question is not what Texas law is. *Jones* announced an alternative mode for complying with the First Amendment, subject to certain conditions, including an admonition against retroactive application. States are not free to "accept" the neutral-principles approach while rejecting those conditions. In doing so, the Texas Supreme Court was not interpreting state law; it was violating federal law.

4. If the neutral-principles approach really does countenance rejecting express-trust provisions and overriding churches' resolutions of ecclesiastical questions, then *Jones* should be overruled. *Jones* is an acknowledged departure from this Court's original deference approach, the lower courts have struggled with *Jones* for decades, and respondents' version of *Jones* would make it an outlier vis-à-vis more recent religious-liberty precedent.

Respondents complain that the deference approach is itself "fraught with [First Amendment] difficulty." BIO.29. But they cannot deny that courts managed to apply that approach for over a century, *see Jones*, 443 U.S. at 610 (Powell, J., dissenting), that several states still do, BIO.4, and that most religions present themselves as either expressly hierarchical or expressly non-hierarchical, leaving no interpretative

task for the courts. Respondents claim that lower courts have applied *Jones* "without complaint or difficulty." BIO.1. But roughly half of them are applying it incorrectly (no matter which view is right), and those courts that view *Jones* as simply freeing them to apply state law would have no basis to complain of difficulty. Finally, respondents suggest that *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020), and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), are irrelevant because "[m]atters of church property … are not inherently religious." BIO.34. But centuries of experience are to the contrary. This dispute is a case in point. One cannot divest a supermajority of a parish of their sanctuary and rectory without deciding—implicitly or explicitly—inherently religious questions or without obliterating free-exercise rights. Just as questions about church employment are not simply left to federal anti-discrimination law, the question of who owns the sanctuary cannot simply be left to state property law. If *Jones* really meant otherwise, then it cannot stand.

III. The Stakes For Religious Adherents And Civil Courts Are Substantial.

Respondents cannot deny that the question presented is immensely consequential. It squarely implicates one of the "[m]ost important[]" of First Amendment principles: the proper role of civil courts in resolving church-property disputes. *Jones*, 443 U.S. at 602. As *amici* have confirmed, that is a matter of "broad importance for all religious organizations." General Assembly of the Presbyterian Church (U.S.A.)

et al. *Amicus* Br.6; *see* Greek Orthodox Archdiocese of America *Amicus* Br.16-17.

This an ideal case to provide much-needed guidance. The Dennis Canon has featured in at least five of the 14 decisions that comprise the split, and the stakes here are profound. Absent certiorari, petitioner and the supermajority of its parishioners who voted to remain aligned with TEC will lose their sanctuary and rectory to a dissident faction that "unequivocally" rejects TEC. BIO.26. Respondents fault petitioner for "pass[ing] up the chance to maintain its property through an amicable separation." BIO.32. But this "amicable separation" would have required petitioner to pay respondents "indebtedness" and effectively recognize their authority to control the property, which is anathema to All Saints' religious beliefs. *See* 29-CR-10298; 30-CR-10532-33; 30-CR-10613. Respondents fault TEC for failing to take various steps that purportedly *would* have "ensur[ed] that local property would remain under hierarchical control in the event of schism." BIO.33. But TEC took the precise step—adopting an express trust—that *Jones* promised would suffice. If that was a false promise, this Court should say so.

Respondents accuse petitioner of "minimiz[ing] the harm to the majority in numerous other parishes" if this Court were to reverse. BIO.32. But under our Constitution, the majority in any congregation has every right to break away and worship as they please. But if they belong to a hierarchical church that adopted an express trust in response to *Jones* (and, again, respondents concede that TEC did just that with the Dennis Canon), then they do not have the

right to take the national church's property with them. That is the fundamental difference between All Saints' majority and the majority in other parishes. All Saints' parishioners belong to a national church that adopted an express trust to protect church property in the wake of *Jones*. The promise of *Jones* and the First Amendment is that All Saints' parishioners—the vast majority of whom want no break with the national church—cannot be forced to choose between their sanctuary and the national church. The decision below vitiates that promise. This Court's review is imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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