No. 2015-000622

In the Supreme Court of the State of South Carolina

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA, ET AL.,
RESPONDENTS

v.

THE EPISCOPAL CHURCH (A/K/A THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA) AND THE EPISCOPAL CHURCH IN SOUTH CAROLINA,
APPELLANTS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS
HON. DIANE S. GOODSTEIN, CIRCUIT COURT JUDGE

BRIEF FOR 106 RELIGIOUS LEADERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

MICHAEL W. MCCONNELL
(pro hac vice pending)
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-1326
mcconnell@law.stanford.edu

STEFFEN N. JOHNSON
(pro hac vice pending)
CHRISTOPHER E. MILLS
(S.C. Bar. No. 101050)
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com
cmills@winston.com

Counsel for Amici Curiae

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INTRODUCTION

For over 300 years, since before the Founding of this Nation, members of the Respondents' congregations contributed land, money, and labor in reliance on settled South Carolina law—only to have this Court divest them of their property based on a canon unilaterally adopted centuries later by a national denomination. This outcome was possible only because the Court fashioned a new rule of law solely for this case, and this denomination. But that rule of law departs from this Court's precedents and imposes special burdens on religious associations relative to secular ones. Those burdens violate the First Amendment.

As the U.S. Supreme Court explained in *Jones v. Wolf*, courts resolving church property disputes may not "frustrate[] the free-exercise rights of the members of [the] religious association" before the court. 443 U.S. 595, 606 (1979). Instead, courts must "ensure that [the] dispute" is "resolved in accord with the desires of the members." *Id.* at 604. This Court, however, did precisely the opposite, trampling on the free exercise and associational rights of the local congregations by establishing a new rule of law that gives special preference to certain hierarchical denominations by freeing them alone from the most basic requirements of generally applicable South Carolina property, trust, and corporate law.

The Court should grant rehearing to clarify the free exercise rights of churches. The Court's decision improperly entangles civil courts in forbidden

questions of "religious doctrine, polity, and practice" (*id.* at 603) by making property rights turn on the court's interpretation of internal church issues. In so doing, the decision misreads U.S. Supreme Court precedent and conflicts with the decisions of other courts that have considered similar issues.

Moreover, the Court's fractured decision leaves church property law in this State in utter confusion. Given that the Court's opinions could not agree even on a bare *summary* of the relevant holdings (*compare* Op. at 49–50 n.27 (Hearn, J.), *with* Op. at 93–94 n.72 (Toal, J.)), it will be impossible for individuals, churches, denominations, lenders, insurers, or many others to structure their affairs in reliance on state law. Indeed, the U.S. Supreme Court has already been told—wrongly—that the Court's decision overrules *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 385 S.C. 428, 445, 685 S.E.2d 163, 172 (2009).[1] This confusion is a recipe for endless litigation.

The prevailing legal uncertainty affects multiple denominations, thousands of churches, and millions of their members. It also has several pernicious effects in addition to causing substantial litigation. It discourages churches from expanding. It skews their decisions whether to join or leave denominations. And even when title is clear, it keeps third parties, such as lenders and insurers, from ascer-

[1] *See* Petition for Certiorari, *Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian Church*, 2017 WL 4685352, at *14–15 (U.S. Oct. 16, 2017).

taining ownership without examining arcane church rules that could change without notice. Such uncertainty is inconsistent with the idea of "neutral principles," which ought to facilitate straightforward ownership determinations under "objective," "secular," and "familiar" concepts of civil law. *Jones*, 443 U.S. at 603.

South Carolina law and the First Amendment need not be thrust into conflict. A truly neutral approach to church property disputes—which requires courts to apply ordinary principles of contract and property law, and "to scrutinize the document[s] in purely secular terms"—will both free courts from the danger of entanglement in church affairs and better protect religious liberty. *Jones*, 443 U.S. at 604. Rehearing is urgently needed.

INTEREST OF THE *AMICI CURIAE*

As leaders in South Carolina's religious community, *amici curiae* prize its long and rich history of religious freedom.[2] The ability to gather freely and worship with those of common faith is what brought many of our ancestors to this land. The freedom to do so is a presumption on which all *amici*'s ministries rest today. Whether *amici* lead colonial Anglican parishes, Huguenots, Baptists, non-

[2] *Amici curiae* are listed in the Appendix. This brief is submitted pursuant to Rule 213, SCACR, in support of Respondents' Petition for Rehearing. All procedures required by Rule 213, SCACR, have been followed. No counsel for a party authored this brief in whole or in part, and no counsel, party, or any person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the brief, which was prepared by the undersigned counsel.

denominational or any other religious tradition, they share this in common. It is what has made the rich tapestry of religious diversity in South Carolina possible. But *amici* perceive that this freedom is now in jeopardy.

The fractured decision at issue would transfer nearly $500 million in church property from the congregations of the Diocese of South Carolina who created it for their ministry, to an unincorporated New York association that contributed nothing to its development. *Amici* believe that this decision undermines core principles of religious freedom, in violation of the Constitution.

Under the First Amendment, the government cannot favor one religious group over another, and it cannot elevate non-religious over religious bodies by its treatment. Moreover, the First Amendment protects the freedom of association—which necessarily includes the freedom to disassociate. Some *amici* represent religious traditions whose very existence is predicated on this freedom. *Amici* believe strongly that churches freely associated with each other can also freely choose to disassociate. And the exercise of that freedom should not come at the price of the tools for ministry established by local sacrifice, often over the course of generations, where secular instruments of ownership confirm that title is vested in the disaffiliating bodies. When the vast majority of those so choosing—80% in this case—do so in full accord with and reliance on the existing State law and Supreme Court precedent, the courts must respect that decision.

STATEMENT OF ISSUE

Whether this Court should grant rehearing to clarify that applying "neutral principles of law" requires the application of generally applicable State law.

STATEMENT OF THE CASE

Amici adopt Respondents' statement of the case. The Court's decision is *Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church*, Op. No. 27731 (S.C. Sup. Ct. filed Aug. 2, 2017) (Shearouse Adv. Sh. No. 29 at 14) (hereinafter "Op.").

ARGUMENT

I. The Court did not properly apply neutral principles of law.

A. Precedent requires this Court to apply a pure neutral principles approach, and it failed to do so.

"[W]hen resolving church dispute cases, South Carolina courts are to apply the neutral principles of law approach as approved by the Supreme Court of the United States in *Jones v. Wolf*" and required "by this Court in *Pearson v. Church of God*." *All Saints*, 385 S.C. at 442, 685 S.E.2d at 171. This Court has held that "where a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so." *Id.*, 385 S.C. at 445, 685 S.E.2d at 172.[3] And as in *All Saints*, resolution of all issues presented by this case

[3] Though the Court's "lead opinion" here would have overruled *All Saints*, a majority refused to do so, and thus it remains binding law on all courts within the State.

were "achievable through the application of neutral principles of property, trust, and corporate law." *Id.*

But those principles were not applied by this Court. Instead, the Court fashioned a new set of principles that apply only to certain types of religious organizations, and in so doing violated this Court's precedents and the Supreme Court's decision in *Jones*.

Under *Jones*'s neutral principles approach, the enforceability of the Dennis Canon should turn on whether the canons are embodied in "legally cognizable form" under ordinary property and contract law. 443 U.S. at 606. Indeed, the whole point of the neutral principles approach is to avoid compelling courts to "defer to the resolution of ... the hierarchical church," or to its "laws and regulations." *Id.* at 597, 609. Instead, the neutral principles analysis "is completely secular," "relies exclusively on objective, well-established concepts of trust and property law," and facilitates "ordering private rights and obligations to reflect the intentions of the parties" as embodied in "legally cognizable form." *Id.* at 603, 606.

Of course, on "issues of religious doctrine or polity," courts must defer to "the highest court of a hierarchical church organization." *Id.* at 602. But property interests are independent of such issues. Questions of religious doctrine might involve, for example, whether a denomination changed its theology (*see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393

U.S. 440, 442–43 (1969)) or whether church figures may hold sacred offices (*see Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696 (1976)). Such doctrinal questions are inextricably intertwined with the religious beliefs and internal authority of a given religious organization.

But those types of questions are not presented here. The Court "is not being asked to adjudicate a matter of religious law, principle, doctrine, discipline, custom, or administration." *Pearson v. Church of God*, 325 S.C. 45, 53, 478 S.E.2d 849, 853 (1996). Instead, this case presents routine trust and property questions that arose between different churches—issues of State law that can and must be resolved fully by reference to neutral principles of law, *i.e.*, "under the law of the land." *Id.*, 325 S.C. at 52, 478 S.E.2d at 853 (quoting *Morris Street Baptist Church v. Dart*, 67 S.C. 338, 341–42, 45 S.E. 753, 754 (1903)). "[A]djudication of this matter does not require [the Court] to wade into the waters of religious law, doctrine, or polity." *All Saints*, 385 S.C. at 445, 685 S.E.2d at 172. Resolving this matter in any way other than through neutral principles would violate *All Saints* and impermissibly entangle the Court in religious affairs.

Contrary to Appellants' argument (Return at 5), a majority of this Court recognized that the neutral principles approach was required in this case.[4] Further, under a pure neutral principles approach, there certainly were no express or constructive trusts created here, and Respondents should prevail. *See* Op. at 55 (Kittredge, J.) ("Were the Court in the instant case permitted to apply the law of express trusts as we ordinarily would, the suggestion that any of the thirty-six local churches created a trust in favor of the national church would be laughable."); *accord All Saints*, 385 S.C. at 449, 685 S.E.2d at 174 ("It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another."); *see generally* Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307,

[4] Relying on the supposed "use of the word 'masquerade' by the United States Supreme Court in *Milivojevich*," Justice Hearn recasts this property case as a theological one and says that "resolving this dispute would require us to decide which faction is the 'true' Episcopal Church," and would thus defer to the denomination. Op. at 37–38. As an initial matter, the word "masquerade" appears nowhere in *Milivojevich*. And as the rest of this Court recognized, there is no support for Justice Hearn's recasting of this case, which presents a pure question of property ownership between two different churches. Indeed, *Jones* rejected a similar argument. The petitioners in *Jones* cited the denomination's internal regulations and its ecclesiastical court's determination that the minority wing of the congregation was the "true" church. 443 U.S. at 607. But as the Court held, that a group is the "true" church for ecclesiastical purposes does not govern ownership of church property under civil law. *Id.* at 607–09. Courts applying neutral principles need not "defer to the resolution of ... the hierarchical church," or to its "laws and regulations." *Id.* at 597, 609.

345–54 (2016). That should have been the end of the matter: "the civil tribunal tries the civil right, and no more." *Pearson*, 325 S.C. at 51, 478 S.E.2d at 852 (quoting *Morris Street Baptist*, 67 S.C. at 341, 45 S.E. at 754).[5]

The problem is, based on a misunderstanding of *Jones*, the Court failed to properly apply the neutral principles approach. In some Justices' view, even a court applying a neutral principles approach is *not* "permitted to apply the law of … trusts as we ordinarily would." Op. at 55 (Kittredge, J.); *see also* Op. at 42–43 (Hearn, J.) (emphasizing "the unique nature of trusts as applied to religious organizations" and asserting that the denomination was not "required to obtain a separate trust instrument" for each property in accordance with State law). But that is precisely backwards. A court applying a neutral principles approach can *only* apply State law as it normally would; any other approach would be the opposite of neutral principles.

In the view of those Justices who adopted a modified neutral principles approach, *Jones*'s statement that "parties can ensure" which entity "will retain the church property" so long as they "embod[y]" this result "in some legally cognizable form" (443 U.S. at 606) means that parties need not adhere to the most basic

[5] Various opinions here relied on supposed accessions, but these accessions did not include a transfer of title in a form recognized under South Carolina law. *See* Petition for Rehearing at 18–22.

formalities that state law normally requires of all parties—secular or religious, private or public. These Justices rejected the notion that *Jones* requires "a *pure* application of neutral principles of law." Op. at 54 (Kittredge, J.) (emphasis added).

But that cannot be right. As many courts have agreed, a form is only "legally cognizable" if it actually satisfies neutral state law.[6] There is no halfway "legally cognizable" form; a form either complies with state law or it does not. A trust that is almost valid is not valid at all. A property interest that almost exists is not legally cognizable.

Any other holding would be inconsistent with Supreme Court precedent, and would present endless practical dilemmas. "[N]eutral principles of law" are those

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[6] *E.g.*, *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1107 n.7 (Ind. 2012) (*Jones* does not "requir[e] the imposition of a trust whenever the denominational church organization enshrines such language in its constitution"; "such a rule would result in de facto compulsory deference"); *All Saints*, 385 S.C. at 444, 685 S.E.2d at 172 (*Jones* "permits the application of property, corporate, and other forms of law to church disputes"); *Ark. Presbytery v. Hudson*, 40 S.W.3d 301, 309–10 (Ark. 2001) (*Jones* did not overturn "long held" state law barring "a grantor to impose a trust upon property previously conveyed"); *accord Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 525–26 (8th Cir. 1995); *Carrollton Presbyterian Church v. Presbytery of S. La.*, 77 So.3d 975, 981 (La. Ct. App. 2011); *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 589 (Mo. Ct. App. 2012); *cf. Hope Presbyterian Church v. Presbyterian Church* (U.S.A.), 291 P.3d 711, 722 (Or. 2012) (ruling for the denomination but recognizing that "the express trust provision in PCUSA's constitution cannot be dispositive"; any trust must be "'legally cognizable"' under state "trust laws"); *accord* McConnell & Goodrich, *supra*, at 319 ("[C]hurch constitutions have legal effect only when they are embodied in 'some legally cognizable form,' such as a trust document or a deed.").

"developed for use in *all* property disputes." *Presbyterian Church*, 393 U.S. at 449 (emphasis added). And *Jones* explicitly says that state courts should use "completely secular" and "well-established concepts of trust and property law familiar to lawyers and judges" to resolve these disputes, "thereby promis[ing] to free civil courts completely from entanglement in questions of religious doctrine, policy, and practice." 443 U.S. at 603, 606. But an "almost legally cognizable" approach would achieve none of those goals. Lawyers and judges are not familiar with how to adjudicate documents that might be almost valid. And the "almost" approach would certainly entangle courts in matters of religion and practice, as what counts as almost a trust in one denomination might be entirely different from what is almost a trust in another. The inevitable result of following an almost neutral approach would be judges "pick[ing] and choos[ing] which state laws to apply in order to justify a desired result." Op. at 43 (Hearn, J.).[7]

Moreover, the practical difficulties with an almost neutral approach abound. How close to actually legally cognizable must a legal agreement be to qualify as sufficiently legally cognizable under this new almost neutral approach? Ninety

[7] Ironically, Justice Hearn went on to decry Justice Toal's "dogged effort to impose South Carolina civil law." Op. at 48 n.24. Yet by "impos[ing]" State law just as in any other property dispute, Justice Toal avoids the necessity of picking and choosing among a mishmash of state laws, internal church rules, and judicial preferences to decide this case. That necessity inheres in any halfhearted effort to impose the law.

percent? Eighty percent? Fifty percent? What are the bare minimums to create a trust that is sufficiently valid to be almost valid under otherwise applicable State law? How is a trial court judge supposed to collect evidence on how close a given agreement is to what is otherwise required by State law? Is it a question of law, or fact? Can the State legislature pass new almost valid trust requirements for use only when a court is applying "neutral" principles to a religious organization? Could such legislatively imposed different property burdens on religious organizations violate the First Amendment? If so, how can the judiciary impose such different burdens consistent with the Constitution? Once the Court abandons an actually neutral principles approach, there is no end to these difficulties.[8]

[8] Respectfully, *amici* disagree with Justice Kittredge that the neutral principles approach is "not really 'neutral' after all." Op. at 55. Justice Kittredge asked: "If it were, why would the Supreme Court have taken pains to mandate that the burden imposed on a religious organization be 'minimal'? And why would the Supreme Court have specified ways churches could establish an express trust, without indicating concern for whether those methods were valid under any state's existing trust law?" *Id.* (citation omitted). But the Court *did* express concern for whether the methods were valid under existing law, by saying that the method must be via a "legally cognizable form." *Jones*, 443 U.S. at 606. And the Court did not "*mandate*" that "the burden" of this form be "minimal"; rather, the Court offered the purely descriptive statement that "[t]he burden involved in taking such steps will be minimal" (*id.*)—a correct description of generally applicable state express trust law. *See* McConnell & Goodrich, *supra*, at 341 ("It is not a complex matter to insert a use restriction in a deed, execute a trust agreement, or transfer title to a denominational official.").

In short, this Court should grant rehearing to establish that a pure neutral principles approach is required in interchurch property disputes.

B. The Court's failure to apply neutral principles threatens religious liberty.

By holding that church law superseded secular indicia of intent and created a retroactive trust, the Court granted Appellants unilateral authority to override civil law—a right held by no other entity, secular or religious. But "both the Free Exercise and the Establishment Clauses compel[] the State to pursue a course of neutrality toward religion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (internal quotation mark omitted). The Free Exercise Clause proscribes laws that "impose special disabilities on the basis of ... religious status" (*Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)), and the Establishment Clause bars states from "vest[ing] in the governing bodies of churches" any "unilateral and absolute" power over others' property (*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117, 127 (1982)). By allowing denominations to strip local churches of their property, the Court's ruling is "inconsistent with complete religious liberty, untrammeled by state authority." *Pearson*, 325 S.C. at 52, 478 S.E.2d at 852 (quoting *Morris Street Baptist*, 67 S.C. at 341–42, 45 S.E. at 754).

Civil courts may not apply "neutral principles" in a manner that "frustrate[s] the free-exercise rights of the members of [the] religious association." *Jones*, 443 U.S. at 606. Protecting religious liberty requires courts to "give effect to the result

indicated by the parties." *Id.* Even under the deference analysis of *Watson v. Jones*, 80 U.S. 679, 722–23 (1872), denominational rules cannot trump grantor intent: "regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed." *Jones*, 443 U.S. at 603 n.3. Yet the Court's decision violates this principle.

Giving legal effect to trusts declared in denominational documents is not even mere deference. It is giving denominations power to rewrite civil property law. By stripping churches of their property via means available to no one but hierarchical denominations, such an approach "impose[s] special disabilities on the basis of religious status"—in violation of free exercise. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (internal quotation marks and ellipsis omitted). Moreover, the Court's approach in this case "puts a heavy thumb on the scales in favor of a more 'hierarchical' form of polity, contradicting the First Amendment rule that churches must remain free 'to decide for themselves, free from state interference, matters of church government.'"

McConnell & Goodrich, *supra*, at 327 (quoting *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).[9]

Requiring that denominational trusts be embodied in "legally cognizable form" (*Jones*, 443 U.S. at 606) is also necessary to avoiding establishment violations. As *Jones* confirmed, free exercise is not implicated by "neutral provisions of state law governing the manner in which churches own property"; the "burden" of complying with such provisions is "minimal." *Id.* Thus, allowing denominations to secure ownership of congregations' properties without complying with civil law cannot be defended as a religious "accommodation," which must alleviate "a *significant* burden" on religious exercise. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (emphasis added).

That is especially clear where a purported "accommodation" burdens *other parties*—here, by stripping them of their property. Even where the burdens on third parties are far less severe, states may not grant "unilateral and absolute power" to "a church" on "issues with significant economic and political implications" for others' property rights. *Grendel's Den*, 459 U.S. at 117, 127.

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[9] Several opinions here are based on the incorrect "assum[ption] that all churches are either 'congregational' or 'hierarchical,' and that 'hierarchical' churches share the same notion of implied consent. But in the real world, not all churches are purely 'congregational' or 'hierarchical,' and a church's governing structure may offer little insight into how it intends to hold its property." McConnell & Goodrich, *supra*, at 327.

This Court's brand of "neutral principles" was particularly onerous: It not only gave effect to canon law; it did so *retroactively* by abandoning its *All Saints* approach—divesting Respondents of property conveyed hundreds of years before the law changed, and long before the denomination even existed. If that conception of "neutral principles" is correct, then no church can join a denomination without jeopardizing its property. The denomination can always pass rules transferring ownership, and a court can always make those rules effective retroactively. Such a legal regime would discourage churches from expanding their buildings, from acting in accordance with their conscience as to whether to remain in association with their current denominations, and from joining denominations in the first place—all at the price of religious freedom.

Rehearing is needed.

II. The Court's fractured opinion generates uncertainty in private property rights and creates practical difficulties for churches, denominations, and third parties.

Rehearing is also needed to provide adequate guidance to lower courts, churches, denominations, lenders, insurers, and many others. The Court's fractured opinion leaves this State's church property law in disrepair and confusion. Each Justice issued a separate opinion; two would overrule *All Saints*, at least in

part; others followed *All Saints* but differed in its application[10]; and the concurrence and dissent could not even agree on a basic summary of what the decision holds. *Compare* Op. at 49–50 n.27 (Hearn, J.), *with* Op. at 93–94 n.72 (Toal, J.). The Court's present rulings throw property law into massive confusion. In a case involving half a billion dollars' worth of property, the absence of a clear rule of law creates uncertainty for churches, denominations, and third parties.

As the Supreme Court explained in *Jones*, a State must provide for "the peaceful resolution of property" conflicts of all kinds. 443 U.S. at 602. In other words, the State must provide "a civil forum" where the ownership of property, including "church property," "can be determined conclusively"—which is possible because of *Jones*'s requirement that churches define their property rights in "legally cognizable" terms. *Id.* at 602, 606. These determinations of property ownership, and the accompanying property instruments, are necessary for sellers, buyers, lenders, and third parties, all of whom need to have clarity on who owns relevant property. Moreover, donors and congregants in local churches must be certain that

[10] Indeed, accomplished lawyers have (incorrectly) told the U.S. Supreme Court that "the Supreme Court of South Carolina recently reversed *All Saints*." Petition for Certiorari, *Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian Church*, 2017 WL 4685352, at *14–15. And in Justice Toal's view, the lead opinion and concurrence "overrule *Pearson* and its progeny in all but name." Op. at 78. Even Appellants do not know the status of *All Saints*: "*To the extent the Court's decision rests on overruling* All Saints, Appellants gave notice of their intent to argue against that precedent." Return at 7 (emphasis added).

their gifts of time and money are going to entities that embody their beliefs, without fear that those gifts will later be appropriated by a different body, without their consent.

Under the Court's decision, such certainty is impossible. "If ownership no longer turns on publicly recorded deeds and trust instruments, but on the meaning of internal church rules and relationships, no one can know for certain who owns church property." McConnell & Goodrich, *supra*, at 340. Any denomination could pass a retroactive internal rule that would appropriate congregants' gifts and church property. As Justice Kittredge aptly explained, "The message is clear for churches in South Carolina that are affiliated in any manner with a national organization and have never lifted a finger to transfer control or ownership of their property—if you think your property ownership is secure, think again." Op. at 62. Similarly, as Justice Toal put it: "If I were a member of a governing body of a religiously-affiliated hospital, for example, I would be gravely concerned, as the lead opinion declares today that different rules apply to religious organizations with respect to corporate organization and property ownership in this State." Op. at 88.

Without secure property ownership, many rounds of future litigation are inevitable. Yet many churches and denominations cannot afford to litigate. And both sides would prefer that limited resources now spent on litigation be spent on mission.

Moreover, the Court's ruling could eviscerate otherwise clear titles, driving up the costs faced by churches in buying or selling property and in obtaining insurance. The ruling harms the rights of lenders and insurers by rendering longstanding principles of State property law inoperative and potentially subjecting private property interests to a complex "course of internal church dealings" analysis. And such an analysis is nigh impossible given the fractured decision, with not a single Justice agreeing as to exactly how State title and property law apply in this dispute.[11]

This uncertainty is fundamentally inconsistent with the idea of the neutral principles approach, which is supposed to be predictable, "completely secular," and free from "examination of ecclesiastical polity." *Jones*, 443 U.S. at 603, 605. The "promise of nonentanglement and neutrality inherent in the neutral-principles approach" (*id.* at 604) is betrayed when courts treat church rules as superseding ordinary secular indicia of ownership. Churches and third parties seeing that neutral principles are "secular," "objective," and "familiar" would have no inkling that *canon law* might determine property ownership.

[11] Appellants say they are "aware of no[]" "evidence" that imposing a trust would "cause chaos for mortgage lenders and title insurers." Return at 10. Yet in *All Saints* itself, because of the dispute over church canons, "the congregation was unable to acquire title insurance." 385 S.C. at 438, 685 S.E.2d at 168.

Rehearing is needed, at a minimum, to provide adequate guidance as to what rules will be applied in church property disputes. Otherwise, hundreds of millions of dollars of South Carolina property will remain subject to intractable legal uncertainty.

CONCLUSION

If the ruling below is allowed to stand, no South Carolina congregation can avoid having its property expropriated by an affiliated denomination. The denomination can always transfer ownership simply by passing unilateral rules at church conventions. It does not matter who holds title, what the donor of the property intended, who paid for and maintained the property, whether the denomination's interest is publicly recorded, what the rules were when the congregation joined the denomination, whether the congregation then held title in its own name, or even whether the denomination then existed.

The Court's decision awards half a billion dollars of property to Appellants by applying internal canons that were never embodied in any ordinary contract or recorded in any deed, and that were instead unilaterally adopted centuries after local congregants purchased the property and founded their local churches. Effectively, the court applied implied trust theory by another name, granting Appellants all of the benefits of ownership and none of the burdens—like having to pay insurance costs or the mortgage, or facing liability for conduct or injuries occurring on

the property. No other private entity in South Carolina, secular or religious, enjoys that right. That establishment of a particular religious structure violates the First Amendment.

For the foregoing reasons, this Court should grant Respondents' Petition for Rehearing.

Respectfully submitted,

MICHAEL W. MCCONNELL
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-1326
mcconnell@law.stanford.edu

STEFFEN N. JOHNSON
CHRISTOPHER E. MILLS
(S.C. Bar No. 101050)
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com
cmills@winston.com

Counsel for Amici Curiae

NOVEMBER 10, 2017

APPENDIX

LIST OF *AMICI CURIAE*

Pastor Mitchell Adkins (Worship Pastor, Oakdale Baptist Church)
Pastor Bryan Alverson (Senior Pastor, Solid Rock Christian Church)
Pastor Justin Anderson (New Hope Baptist)
Pastor George Atkins (Hoffmeyer Road Baptist Church)
Pastor Bryan Ayer (Holmes Avenue Baptist Church)
Pastor David Barton (Creekside Church)
Pastor Timothy Bazen (Glory Land Baptist Church)
Pastor Todd Black (Senior Pastor, Turning Point Free Will Baptist Church)
Pastor Ronnie Blackwell (Northside Baptist Church)
Pastor Marshall Blalock (Senior Pastor, First Baptist Church)
Pastor Thomas Bowman (Ministry Leader, Rhema Word Restoration Ministries)
Mr. Jimmy Braddock (Director, Impact Families Ministries)
Pastor Tim Brittain (North Strand Community Church)
Dr. Carl Broggi (Senior Pastor, Community Bible Church)
Pastor Thomas Brookshire (Orangeburg Baptist Tabernacle)
Pastor Clark Carter (Portside Baptist Church)
Pastor Don Childers (Clyde Church of God)
Pastor Josh Claborn (Declaration Church)
Mr. Daniel Conley (State Director, Rock of Ages Ministries)
Pastor Brett Davis (First Baptist Church)
Prof. Stan Dawson
Pastor Joey Deese (Senior Pastor, Oakdale Baptist Church)
Mr. Adrian Despres (Evangelist, Forge Kingdom Building Ministries)
Dr. Wayne Dickard (Evangelist, Northbrook Baptist Church)
Mr. Melton Duncan (Church Administrator, Second Presbyterian Church)
Mr. Edward Earwood (Executive Director, Grace Baptist West Columbia)
Pastor Chris Edwards (Associate Pastor, Lebanon Free Will Baptist Church)
Mr. David Ellison (Executive Director, Vets for Jesus)
Pastor Robert Eubanks (Ridge Baptist Church)
Pastor Bobby Fields (Youth Ministry Director, Oakdale Baptist Church)
Pastor Darien Gabriel (Grace Christian Fellowship)
Pastor Mike Gonzalez (Senior Pastor, Columbia World Outreach)
Pastor Typriece Hanner (New Zion Deliverance Baptist Church)
Pastor Billy Harmon (The Church at Goose Creek)
Mr. Bob Healy
Pastor Gary Hensley (Covenant Baptist Church)
Pastor Albert Hinson (Stiefletown Baptist Church)

Pastor Keith Hinson (Woodward Baptist Church)
Dr. Gary Hollingsworth (Executive Director, South Carolina Baptist Convention)
Pastor Tim Huckaby (Burnsview Baptist Church)
Pastor Micah Hucks (Bread of Life Tabernacle)
Pastor Larry Hutto (Living Waters Fellowship)
Mr. Don Johnson (Minister of Church Administration, Harbour Lake Baptist Church)
Pastor Mark Kannarney (First Baptist Church)
Pastor Randy Keasler (Westminster Baptist Church)
Mr. Josh Kimbrell
Pastor Gregory Kronz (Reverend, St Luke's Episcopal Church)
Pastor Tim Larrimore (Liberty Freewill Baptist Church)
Pastor Brad Lindsey (Associate Pastor/Song Leader, Gethsemane Baptist Church)
Dr. Peter Link (University Professor)
Pastor Joel Logan (Tabernacle Baptist Church)
Mr. K.C. Lombard (Deacon, James Island Christian Church)
Mr. Joe Long (Deacon, Heritage Presbyterian Church (PCA))
Mr. Brandon Lynch (Associate Pastor, Sumter Baptist Temple)
Pastor Ray Martin (Grace Chapel Baptist Church)
Dr. John Matthews (Pastor, Cornerstone Fellowship Freewill Baptist Church)
Pastor Shane McDaniel (Broadacres Baptist Church)
Pastor Kyle Meyer (Great Commission Ministries)
Dr. Bill Monroe (Senior Pastor, Florence Baptist Temple)
Mr. J. Ronald Moock (Canon to the Bishop Ordinary, Reformed Episcopal Diocese of the SE)
Pastor Chad Moore (Second Baptist Belton)
Mr. Mike O'Dell (Executive Director, York Baptist Association)
Pastor Skip Owens (Calvary Baptist Church)
Pastor Wayland Owens (First Free Will Baptist Church)
Pastor Michael Parnell (Call To Life Family Worship Center)
Pastor Carl Parrott (Rhema Word Restoration Ministries)
Pastor Rob Pierce (Summerton Baptist Church)
Pastor Michael Pittman (Youth Pastor, Living Water Community Church)
Pastor Bryan Plyler (The River Church)
Pastor David Pohto (First Baptist Church)
Pastor Anthony Queen (His Church)
Pastor Troy Query (Holmes Avenue Baptist Church)
Pastor Bill Rigsby (North Anderson Baptist Church)
Pastor Jeremy Rivers (Body of Christ Overcomer Ministries)
Pastor Samuel Rivers (The Voice of the Lord International Church)

Dr. Glen Robinson (Pastor, Holy Temple Church of Deliverance)
Pastor Kevin Rogerson (Joel Baptist Church)
Pastor Bradley Seaton (St. John Freewill Baptist Church)
Pastor Bryant Sims (Union Baptist Church)
Pastor Bart Smith (Sanctuary of Life Outreach Center)
Mr. Chris Smith
Pastor David Snodgrass (First Church of the Nazarene)
Pastor Charles Sprouse (Senior Pastor, First Baptist Church)
Pastor Timothy Squire (Pastoral Care Minister, Stono Baptist Church)
Pastor Nate Staton (Anothen Church)
Pastor Tony Stephens (Associate Pastor, Harbour Lake Baptist Church)
Pastor Sam Stevens (New Kirk Baptist Church)
Mr. Sid Stewart (Former CEO, Haven of Rest Ministries)
Mr. Joshua Stone (Director of Multimedia & Music, Community Bible Church)
Ms. Jennifer Thompson (Director, Lighthouse for Life Ministries)
Pastor Chris Todd (SC Free Will Baptist Association)
Pastor Horst Trojahan (Blythewood Baptist Church)
Pastor Darren Truel (Gethsemane Baptist Church)
Dr. Thomas Tucker (Pastor, Sisk Memorial Baptist Church)
Pastor David Ussery (Mt. Dearborn United Methodist)
Pastor Randy Valandingham (Rejoice Fellowship)
Mr. Mike Wallace (Associate Director of Missions, York Baptist Association)
Pastor Rod West (Friendship Baptist Church)
Pastor Mike Westmoreland (Sumter Baptist Temple)
Mr. Earl Whiteley (Deacon, Deer Park Baptist Church)
Pastor J.D. Wilson (Mt. Zion Baptist Church)
Pastor Steve Winburn (Faith Holiness Church)
Mr. Brian Winebrenner (Youth Pastor, Turning Point Free Will Baptist Church)
Pastor Bob Woodard
Rev. Richard Yow (Pastor, North Cheraw Baptist Church)
Pastor Robert Zdziarski (Associate Pastor, Solid Rock Baptist Church)

PROOF OF SERVICE

I, Christopher E. Mills, an attorney, certify that on this day the foregoing was served on all counsel of record listed below via electronic mail:

Blake A. Hewitt
John S. Nichols
Bluestein Nichols Thompson & Delgado
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Thomas S. Tisdale, Jr.
Jason S. Smith
Hellman Yates & Tisdale
tst@hellmanyates.com
js@hellmanyates.com

R. Walker Humphrey II
Willoughby & Hoefer
whumphrey@willoughbyhoefer.com

David Booth Beers
Goodwin Procter LLP
dbeers@goodwinlaw.com

Wallace K. Lightsey
John C. Moylan, III
Matthew T. Richardson
wlightsey@wyche.com
jmoylan@wyche.com
mrichardson@wyche.com

D. Reece Williams, III
Callison Tighe & Robinson, LLC
ReeceWilliams@callisontighe.com

Allan R. Holmes Sr.
Timothy O. Lewis
Gibbs & Holmes

aholmes@gibbs-holmes.com
timolewis@gibbs-holmes.com

Charles H. Williams
Williams & Williams
chwilliams@williamsattys.com

John B. Williams
Williams & Hulst, LLC
jbw@williamsandhulst.com

David S. Cox
Barnwell Whaley Patterson & Helms, LLC
dcox@barnwell-whaley.com

Thomas C. Davis
Harvey & Battey, PA
tdavis@harveyandbattey.com

Francis M. Mack
fmmack@windstream.net

Harry R. Easterling Jr.
Easterling Law Firm, PC
hreasterling@gmail.com

William A. Bryan
Bryan & Haar
billbryan@bryanandhaar.net

P. Brandt Shelbourne
Shelbourne Law Firm
brandt@shelbournelaw.com

C. Pierce Campbell
Turner Padget Graham & Laney, PA
pcampbell@turnerpadget.com

G. Mark Phillips
Susan P. MacDonald

Jim K. Lehman
mark.phillips@nelsonmullins.com
susan.macdonald@nelsonmullins.com
jim.lehman@nelsonmullins.com

Robert R. Horger
Horger Barnwell & Reid LLP
rhorger@hbrllp.com

W. Foster Gaillard
Henry E. Grimball
Womble Carlyle Sandridge & Rice LLP
fgaillard@wcsr.com
hgrimball@wcsr.com

I. Keith McCarty
McCarty Law Firm, PC
ikeithmccarty@gmail.com

William A. Scott
Pederson & Scott, PC
bscott@pslawpc.com

George J. Kefalos
George J. Kefalos, PA
george@kefaloslaw.com

Mark V. Evans
mevans14@bellsouth.net

Steven S. McKenzie
Coffey, Chandler, Kent, P.A.
steve@cckmlaw.com

Thornwell F. Sowell III
Bess J. DuRant
Sowell Gray Robinson Stepp &
Lafitte, LLC
bsowell@sowellgray.com
bdurant@sowellgray.com

C. Alan Runyan
Andrew S. Platte
Speights & Runyan
aplatte@speightsrunyan.com
arunyan@speightsrunyan.com

David B. Marvel
Marvel Et Al, LLC
dave@marvel.lawyer

Oana D. Johnson
Oana D. Johnson, Attorney at Law
oana@odjlaw.com

Stephen A. Spitz
Stevens & Lee
sasp@stevenslee.com

David L. De Vane
David L. De Vane, Attorney At Law
LLC
david@devanemacklaw.com

Saunders M. Bridges, Jr.
Aiken Bridges Elliott Tyler & Saleeby, PA
smb@aikenbridges.com

John F. Wall III
NCGS, Inc.
jwall@ncgs.com

Henry P. Wall
Bruner Powell Wall & Mullins, LLC
hwall@brunerpowell.com

Lawrence B. Orr
Orr Elmore & Ervin LLC
lbo@orrfinn.com

Allan P. Sloan III
Joseph C. Wilson IV
Pierce Hems Sloan & Wilson LLC
chipsloan@phswlaw.com
joewilson@phswlaw.com

Robert S. Shelton
The Bellamy Law Firm
rshelton@bellamylaw.com

Harry A. Oxner
Oxner & Stacy, PA
hoxner@oxnerandstacy.com

C. Mitchell Brown
Nelson, Mullins, Riley & Scarborough, LLP
mitch.brown@nelsomnullins.com

William C. Marra
Charles J. Cooper
Cooper & Kirk, PLLC
wmarra@cooperkirk.com
ccooper@cooperkirk.com

Henrietta U. Golding
Amanda A. Bailey
McNair Law Finn
hgolding@mcnair.net
abailey@mcnair.net

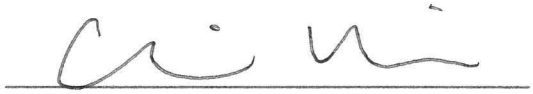
Dated: November 10, 2017

Christopher E. Mills

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211, SCACR, I, Christopher E. Mills, an attorney, certify that the foregoing complies with the length and formatting requirements of Rules 211 and 267, SCACR.

Dated: November 10, 2017



Christopher E. Mills