

No. 13-449

In the Supreme Court of the United States

THE FALLS CHURCH,
PETITIONER,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE
UNITED STATES OF AMERICA, *ET AL.*,
RESPONDENTS.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA*

**BRIEF OF THE ANGLICAN CHURCH IN
NORTH AMERICA, THE AMERICAN
ANGLICAN COUNCIL, THE ANGLICAN
DIOCESE OF PITTSBURGH, THE DIOCESE OF
QUINCY, AND THE DIOCESE OF SAN
JOAQUIN AS *AMICI CURIAE* IN SUPPORT OF
PETITIONERS**

JOHN P. CUNNINGHAM

**Counsel of Record*

BRIAN L. WHISLER

STEVEN F. HILL

TREVOR N. MCFADDEN

Baker & McKenzie LLP

815 Connecticut Ave.

Washington, D.C., 20006

(202) 835-1677

John.Cunningham@bakermckenzie.com

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the First Amendment permits civil courts to retroactively impose a "trust" on local church property based on provisions in church canons that were never embodied in any secular instrument of property ownership, were not intended to be legally binding by the parties, and did not comply with state law at the time of their adoption.

TABLE OF CONTENTS

| | Page |
|--|-------------|
| QUESTION PRESENTED..... | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES..... | iii |
| INTRODUCTION AND INTERESTS OF <i>AMICI CURIAE</i> | 1 |
| REASONS FOR GRANTING THE PETITION..... | 6 |
| I. This Court Should Grant The Petition And Clarify the Status of Canons Which TEC Itself Has Long Acknowledged Are Not Legally Cognizable..... | 6 |
| II. This Court Should Grant The Petition And Clarify The Application Of <i>Jones</i> ' "Neutral Principles Of Law" Standard In Order To Reduce Church Property Litigation And The Burdens It Imposes On Congregations, Dioceses, and Denominations..... | 15 |
| CONCLUSION | 19 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| CASES | |
| <i>Bjorkman v. PECUSA Diocese of Lexington</i> , 759 S.W.2d 583, 586 (Ky. 1988)..... | 12 |
| <i>Jones v. Wolf</i> , 443 U.S. 595, 599 (1979)..... | <i>passim</i> |
| <i>Sohier v. Trinity Church</i> , 109 Mass. 1 (1871)..... | 8, 9 |
| OTHER AUTHORITIES | |
| <i>Bishops' Statement On The Polity Of The Episcopal Church</i> (April 2009) (http://anglicancommunioninstitute.com/wp-content/uploads/2009/04/bishopsstatement_pdf.pdf)..... | 16 |
| Colin Podmore, <i>A Tale of Two Churches: The Ecclesiology of the Episcopal Church and the Church of England Compared</i> , 8 International Journal for the Study of the Christian Church 124 (May 2008)..... | 17 |
| Edwin A. White & Jackson A. Dykman, <i>Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America</i> (Second Ed., Rev. 1954) (Seabury Press 1954)..... | 11, 12 |
| Edwin A. White & Jackson A. Dykman, <i>Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church</i> (Church Publishing Inc., New York 1981 & 1997 reprint)..... | 13, 14, 17 |

- Edwin A. White, *American Church Law: Guide and Manual for Rector, Wardens and Vestrymen of the Church Known in Law as "The Protestant Episcopal Church in the United States of America"* (1898) 8
- Edwin A. White, *Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Adopted in General Conventions 1789-1922, Annotated, with an Exposition of the Same, and Reports of Such Cases as have arisen and been decided thereunder* (New York: Edwin S. Gorham, 1924) 9, 10, 11
- James Dator, *Where Is The Locus Of Authority Within The Episcopal Church?*, 2 JOURNAL OF EPISCOPAL CHURCH CANON LAW 131 (February 2011) 18
- John Booty, *The Church in History* (Seabury Press 1979) 17
- Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States of America Assembled in a General Convention in 1871* (Printed for the Convention 1872) 8
- Mark McCall, *Is The Episcopal Church Hierarchical?* (September 2008), (http://www.anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf) 16,17
- Mark McCall, *The Episcopal Church and Association Law: Dioceses' Legal Right to Withdraw*, 2 JOURNAL OF EPISCOPAL CHURCH CANON LAW 191 (February 2011) 18

Robert W. Pritchard, *The Making and Re-making of Episcopal Canon Law* (August 2009), <http://www.anglicancommunioninstitute.com/2010/02/the-making-and-re-making-of-episcopal-canon-law/>..... 8, 9

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This *amici curiae* brief is submitted in support of the Petitioners.¹ *Amici Curiae* the Anglican Church in North America, the American Anglican Council, the Anglican Diocese of Pittsburgh, the Diocese of Quincy, and the Diocese of San Joaquin² have a substantial interest in the granting of the Petition. This case presents an opportunity for this Court to address two issues that only it can resolve: when does the retroactive application of religious canons by a civil court infringe upon free-exercise rights, a question left open in this Court's last church property decision over three decades ago, *Jones v. Wolf*, 443 U.S. 595 (1979), and a long-standing split now involving thirteen state supreme courts over whether the First Amendment requires civil courts to enforce denominational rules that purport to recite an express trust in favor of the hierarchical church. *See* Pet. 1. As a result of these lingering questions, there is confusion across denominations, dioceses, and congregations as to their respective legal rights when one party alters its existing affiliations with others, and there is an increased probability that changes in such affiliations will lead to costly litigation as the

¹ Counsel of record for all parties received timely notice of the filing of this brief. Counsel for all parties have consented to its filing, and those consents are being lodged herewith. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

² These dioceses are referred to collectively herein as the "Amici Dioceses".

parties seek to determine unclear legal rights. This costly litigation involves not only congregations but also dioceses such as Amici. Further, some courts have interpreted *Jones* to permit or require judicial inquiries into questions of church polity. This Court's granting of the Petition and resolution of the split will directly benefit the Amici Dioceses and the many ACNA congregations (such as Petitioner) that have been embroiled in such litigation with TEC.

The *Anglican Church in North America* ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations and twenty-one dioceses (including the Amici Dioceses here) across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing seventy percent of the active Anglicans globally – in April 2009. The ACNA's Constitution and Canons were adopted at its initial Provincial Assembly in June 2009, completing its organization. A substantial majority of the congregations affiliated with the ACNA are either congregations that were previously affiliated with Respondent TEC or new congregations that were formed by individual clergy and congregants that had left TEC. More than a hundred congregations affiliated with ACNA or its dioceses have been drawn into or directly affected by protracted litigation with TEC and TEC dioceses over the past five years regarding the ownership of congregational or diocesan property upon disaffiliation from TEC. Due to the split among state supreme courts and the competing interpretations across lower courts over the application of the neutral

principles analysis, other ACNA congregations have surrendered their property to TEC or a TEC-affiliated diocese upon disaffiliation from TEC simply in order to avoid the substantial financial, spiritual, and practical burdens of defending against the litigation that Respondent TEC has routinely initiated against such congregations. Further, Amici believe that a number of congregations have been chilled from exercising their First Amendment rights to freely associate with *Amici* based upon the dictates of religious conscience due primarily to the confused state of the law that will apply to any legal actions initiated by TEC to obtain their congregational property.

The *American Anglican Council* ("AAC"), a nonprofit religious corporation founded in 1996, is a network of individuals (lay and clergy), parishes, dioceses, and ministries who affirm biblical authority and Christian orthodoxy within the Anglican Communion. Through advocacy and counsel, leadership development, and equipping the local church, the Council seeks to build up and defend "Great Commission" Anglican churches in North America and worldwide. The Council regularly assists Anglican churches in distress who are the subject of litigation by TEC and its dioceses. The Council also monitors such litigation and reports on it to the broader Anglican Communion. The Council seeks to represent the important perspective of local Anglican and other congregations in church property litigation where incorrect interpretations of the law could have a significant adverse impact upon congregational property rights. Consistent with its mission, the Council has a strong interest in seeing that neutral principles of trust and property law are

correctly and consistently applied to resolve church property disputes. The Council is particularly concerned that the decision below will have a significant chilling effect upon the ability of individual congregations-not only within the Anglican tradition but across a broad range of denominations-to acquire, maintain, and develop property, to use that property to carry out their important religious and charitable missions, and to affiliate with denominational entities on clear and unshifting terms and conditions.

The *Anglican Diocese of Pittsburgh* encompasses sixty congregations and includes the current counties of Allegheny, Armstrong, Beaver, Butler, Cambria, Fayette, Greene, Indiana, Somerset, Washington and Westmoreland in the southwestern corner of Pennsylvania, as well as Dauphin County in Pennsylvania and locations in California, Illinois, Missouri and Tennessee. From 1865 until 2008, the Diocese was affiliated with TEC. At its annual diocesan convention in 2008, the Diocese voted to disaffiliate from TEC and affiliate with the Anglican Province of the Southern Cone. The Diocese was one of the founding jurisdictions that established the ACNA in June 2009, and its Bishop, Robert Duncan, serves as the Archbishop of the ACNA. The Anglican Diocese of Pittsburgh was a defendant in a lawsuit brought in 2003 by a church within the Diocese. After the Anglican Diocese of Pittsburgh withdrew from TEC in 2008, the lawsuit was joined first by a new “Episcopal Diocese of Pittsburgh” that was established at TEC’s behest, and then by TEC itself. In October 2011, the Pennsylvania Supreme Court declined to hear the Diocese’s appeal from adverse decisions of the lower Pennsylvania courts, which

ordered the Anglican Diocese of Pittsburgh to transfer all of its property to the new “Episcopal Diocese of Pittsburgh.”

The *Diocese of Quincy*, based in Peoria, Illinois, currently encompasses twenty-five congregations located in Illinois, Wisconsin, Colorado, Tennessee, and Florida. The Diocese came into existence in 1877, when the existing Diocese of Illinois was divided into three dioceses: the Diocese of Quincy, the Diocese of Springfield, and the Diocese of Illinois. The Diocese was affiliated with TEC from 1877 until 2008. At its Diocesan Synod in November 2008, the Diocese of Quincy adopted resolutions to disaffiliate from TEC and to affiliate with the Province of the Southern Cone. The Diocese was one of the founding jurisdictions of the ACNA. The Diocese of Quincy has been involved in protracted, complex, and expensive litigation with The Episcopal Church in the Illinois state courts. The central issue of this Illinois litigation is the ownership of the real and personal property of the Diocese. The Diocese of Quincy recently prevailed in this lawsuit after a full trial, but TEC has appealed this decision. Such costly litigation has severely stifled the ability of the Diocese of Quincy and its churches to perform the missionary and charitable works for which they were founded.

From 1961 to December 2007, the *Diocese of San Joaquin* was a member-diocese of TEC and comprised forty-seven congregations located in the Central Valley of California. On December 8, 2007, the highest legislative body of the Diocese, its Annual Convention, voted overwhelmingly in favor of a constitutional amendment that changed the Diocese's spiritual affiliation from TEC to the Anglican Province of the Southern Cone and, later, the ACNA.

Following the vote of the Diocese's Annual Convention, parishes were given the choice to stay with TEC along with permission to keep all of their own property. The vast majority of the Diocese's forty-seven parishes followed it out of TEC and into affiliation with the Anglican Province of the Southern Cone and the ACNA. Seven dissident parishes, however, chose to remain with TEC. The minority of parishes thereafter joined forces with TEC and filed ten lawsuits in an effort to seize property belonging to the Diocese and the majority of parishes that traveled with it into the new Anglican affiliation. These civil actions are currently pending in the California state courts.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant The Petition And Clarify the Status of Canons Which TEC Itself Has Long Acknowledged Are Not Legally Cognizable.

The court below gave dispositive weight to TEC Canons, finding that it “need look no further than the Dennis Canon” to create a constructive trust in favor of TEC, despite the fact that this canon could not have created a trust when it was enacted. Pet 42a, 15a. By giving substantial legal effect to the Dennis Canon, the ruling below is in direct conflict with the repeated admissions of TEC for more than a century that TEC’s canons have only moral and not legal effect, and therefore in conflict with *Jones*’ neutral principles requirement as well. TEC has made these admissions in resolutions of its legislative body and in the repeated statements of its authorized official commentary on the TEC Constitution and Canons. TEC has made these admissions both before and after

enactment of its 1979 “Dennis Canon” regarding congregational property, and has reaffirmed them as recently as 1997.

By failing to consider these party admissions, the court below ignored *Jones*’ neutral principles analysis and gave legal effect to ecclesiastical statements that the parties involved did not intend or expect for the statements to possess.

1. *The 1868 Canon and 1871 Amendment.* The *Constitution* of TEC from its inception in 1785 through the present has never actually addressed congregational or diocesan property. To the extent that such property is addressed, it is addressed only in the *TEC Canons*. Yet the *TEC Canons* were silent as to congregational or diocesan property until after the Civil War. The first *TEC Canon* addressing congregational property was not adopted until 1868. Canon 21 of Title I provided that a consecrated Church could not “be removed, taken down, or otherwise disposed of for any ‘unhallowed, worldly, or common use’ without the previous consent of the Bishop of the Diocese, acting with the advice and consent of the Standing Committee of the Diocese....”

The *TEC General Convention* expressly recognized, in amending this canon in 1871, that such anti-alienation canons did not have any independent legal force. Rather, the *General Convention* adopted a formal resolution recommending that *Diocesan Conventions* should “take such measures as may be necessary, by State legislation, or by recommending such forms of devise or deed or subscription,” to secure parish property under this canon. *Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States*

of America Assembled in a General Convention in 1871 (Printed for the Convention 1872), at 372.

2. *The 1898 White Treatise*. This understanding that the TEC anti-alienation canons must be embodied in statutory law to have any legal effect was acknowledged by the leading expert on the TEC Constitution and Canons a quarter century later.⁷ In his 1898 treatise, the Rev. Edwin A. White stated:

Although the Canons of the Church require the consent of the Bishop and the Standing Committee to the alienation of the real property of the corporation, the Courts have decided that, to have any legal effect, it must also be a provision of the Statute Law. “Titles to property must be determined by the laws of the State.”

Edwin A. White, *American Church Law: Guide and Manual for Rector, Wardens and Vestrymen of the Church Known in Law as “The Protestant Episcopal Church in the United States of America”* (1898) 159, quoting *Sohier v. Trinity Church*, 109 Mass. 1 (1871). In taking this position, White’s treatise quoted a

⁷ As a leading historian of TEC has explained, the Rev. Edwin A. White was an attorney and Episcopal priest who “was a venerated senior scholar of the Church and the chair of the House of Deputies’ Committee on Canons.” Robert W. Pritchard, *The Making and Re-making of Episcopal Canon Law* (August 2009), <http://www.anglicancommunioninstitute.com/2010/02/the-making-and-re-making-of-episcopal-canon-law/> (accessed November 8, 2013) (hereinafter “Pritchard, *Episcopal Canon Law*”). TEC’s expert witness agreed at trial that White was “viewed as an authoritative source on Episcopal canons in the late 19th century” A7696.

Massachusetts Supreme Court decision that foreclosed any possible ambiguity on this point:

The canons of the Protestant Episcopal Church, which are referred to in the bill, requiring the defendants to obtain the consent of the bishop and standing committee, for removing, taking down, or otherwise disposing of a church, *do not affect the legal title to the property held by these defendants under the deeds above mentioned.* Titles to property must be determined by the laws of the Commonwealth. *The canons are matters of discipline, and cannot be enforced by legal process.*

Sohier, 109 Mass. 1, 23 (italics added).

3. *The 1924 Official TEC Commentary.* In 1919 and 1922, the TEC General Convention called for the creation of a definitive commentary on the TEC Constitution and Canons and appointed White to author it. See Pritchard, *Episcopal Canon Law*, at 10.⁸ In 1924, White published the first edition of this official commentary. Edwin A. White, *Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America Adopted in General Conventions 1789-1922, Annotated, with an Exposition of the Same, and Reports of Such Cases as have arisen and been decided thereunder* (New York: Edwin S. Gorham, 1924), iii. This official commentary on the TEC Constitution and Canons, in its exposition of this

⁸ At trial, TEC's expert, Professor Robert Bruce Mullin, called the 1924 Official TEC Commentary "a basic commentary" on the Constitution and Canons of the Episcopal Church. A7700.

canon (now renumbered as Canon 50), reinforced the conclusions of White's 1898 treatise that such canons have only moral and not legal effect:

The Canon requires no exposition except to call attention to the necessity of some provision of the statute law of the State requiring the consent of the Bishop and Standing Committee to the alienation of any real property of a religious corporation, if such requirement is to be made effective. The requirement of the Canon to that effect is only of moral value, and has no legal effect.

Id. at 785.

The 1924 official commentary explained the reasons for the 1871 amendment of this canon. In 1871, the rector of Christ Church in Chicago was deposed as a TEC priest, but subsequently went into the Reformed Episcopal Church. “[H]e took the property of Christ Church with him, and the Courts sustained the transfer, holding that there was no law to prevent it.” Although the General Convention amended the anti-alienation canon that same year to attempt to address such a situation, it “recognized that while this was as far as the Convention could legislate in the matter, it was not sufficient to prevent such alienation,” and therefore adopted the resolution “recommending that Diocesan Conventions take steps to procure legislative action by which such alienation could be prevented.” *Id.* at 786. No doubt, this approach was necessary because of states like Virginia, which historically prohibited hierarchical churches from relying on denominational trusts, whether express or implied. Pet. 10a.

This understanding that any anti-alienation or other property canons have only moral and not legal effect is reflected elsewhere in the 1924 official commentary. For example, the volume discussed a narrowly focused canon (Canon 25) applying only to religious communities (not congregations), which provided that the constitution of the religious community should include express language stating that the community's real estate "shall be held in trust for the community as a body in communion with this Church." *Id.* at 539. The commentary concluded that even such an express provision in the canons would not be legally cognizable:

It would seem to be the intention of this provision to secure the property of the Community from being alienated from the Church in case the Community should officially sever its connection with the Church. If that is the intention thereof, it is very imperfectly expressed, and *in any event it could only have moral weight. However expressed in a canon it would have no legal force.*

Id. at 542 (italics added).

4. *The 1954 Annotated Constitution and Canons.* In 1949, the TEC General Convention called for "publication of a new annotated edition of the constitution and canons." Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America* (Second Ed., Rev. 1954) (Seabury Press 1954) vol. 2, at iv. This was to be an updated version of White's 1924 commentary, to be prepared by the then-Chair of the General

Convention's Committee on Canons and carefully reviewed and approved by members of a special Joint Committee on behalf of the General Convention.⁹ *Id.* at v.

The resulting 1954 volume acknowledged that the “power of the General Convention over the disposition of real property is questionable, governed as it is by the law of the state in which it is situated.” *Id.* at 265. And it repeated White’s earlier discussion of the General Convention’s 1871 resolution recognizing that such canonical provisions were “not sufficient to prevent such alienation,” and “recommending that Diocesan Conventions take steps to procure legislative action by which such alienation could be prevented.” *Id.* at 431.

As the Kentucky Supreme Court concluded after its examination of these admissions, “the official commentary in the annotated constitution for PECUSA [TEC] indicates that the restrictions on transfer are of moral value only and without legal effect.” *Bjorkman v. PECUSA Diocese of Lexington*, 759 S.W.2d 583, 586 (Ky. 1988).

5. *The 1981 Annotated Constitution and Canons.* Notably, even after TEC’s adoption of the Dennis

⁹ The 1952 General Convention appointed a “Joint Committee to Supervise Publication of a New Annotated Edition of the Constitution and Canons” comprised of five bishops, five priests, and five laymen with particular expertise in theology and/or law. *Id.* at v-vi. In publishing the 1954 volume, the Joint Committee expressly stated that “pursuant to the mandate of the General Convention it has reviewed the proofs of this new annotated edition of the Constitution and Canons and has approved the text.” *Id.* at iv.

Canon regarding congregational property in 1979,¹⁰ TEC continued to admit, in its subsequent revisions of its *Annotated Constitution and Canons*, that “[t]he power of the General Convention over the disposition of real property is questionable, governed as it is by the law of the state in which it is situated.” Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church* (Church Publishing Inc., New York 1981 & 1997 reprint) at 297 (hereinafter the “*1981 Annotated Constitution and Canons*”).¹¹ This recognition is especially apropos in the instant case, given that Virginia law at the time the Dennis Canon was announced did not recognize express and implied trusts for hierarchical churches. Pet 10a. State laws control the conveying and encumbering of real estate, as recognized by the exception at the end of the Canon, which gives diocesan conventions power “to make provision by local canon for the encumbrance or alienation of real

¹⁰ TEC Canon I.7.4.

¹¹ The statements in the 1981 *Annotated Constitution and Canons* (reprinted in 1997) constitute admissions by Respondent TEC. The TEC General Convention directed the editing, updating, publication, and sale of the *Annotated Constitution and Canons*. *Id.* (Foreword to the 1997 Reprint). The volume was “revised and updated by the Standing Commission on Constitution and Canons of the General Convention.” *Id.* It is explicitly presented “as an authoritative expression of the meaning of the Constitution and Canons of the Episcopal Church as they exist at this time.” *Id.* And the stated copyright is in the name of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, the nonprofit corporation that holds title to TEC property. *Id.* (copyright notice).

property, differing from that prescribed by this canon, and so adapt the process to local law.” *Id.* at 297.

The *1981 Annotated Constitution and Canons* acknowledges that TEC’s Dennis Canon is not “declaratory of existing law” – that is, it does not simply memorialize a previously recognized denominational trust interest in congregational properties – but rather was adopted by the TEC General Convention in 1979 in response to the decision in *Jones v. Wolf*. *Id.* at 301. The *1981 Annotated Constitution and Canons* also admits that the “neutral principles of law” approach set forth in *Jones* permits a congregation to disaffiliate from TEC while nevertheless continuing to own and occupy its property:

This approach gives great weight to the actions of controlling majorities, and would appear to permit a majority faction in a parish to amend its parish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish—and its property—with a new ecclesiastical group.

Id. at 301.

Thus, at the time the Dennis Canon was announced, both TEC and The Falls Church and its fellow Episcopal churches shared a mutual understanding that such canons had no legal effect. Indeed, in Virginia, such an express denominational trust could not have legal effect due to the then-applicable legal environment. Pet. 15a-16a. But, despite the shared and accurate understanding of the parties as to the legal significance of the Dennis Canon at the time, the court below has breathed unnatural life into it some three decades later under

the rubric of applying neutral legal principles. Such an *ex poste facto* transformation could happen in no secular legal setting, and, under *Jones*, it should not happen here.

II. This Court Should Grant The Petition And Clarify The Application Of *Jones*' "Neutral Principles Of Law" Standard In Order To Reduce Church Property Litigation And The Burdens It Imposes On Congregations, Dioceses, and Denominations.

The conflict and uncertainty in the law arising from competing interpretations of *Jones*' "neutral principles of law" analysis impose real and substantial burdens upon dioceses and denominations, including these Amici, no less than upon congregations such as Petitioner. In the majority of states, there has been no definitive application of the *Jones* analysis by the state supreme court, leaving the legal rights of a diocese or a congregation in the event of disaffiliation in question. Moreover, the 13 state supreme courts and one federal circuit court that have considered *Jones* have taken differing views of the "neutral principles of law" analysis, thereby adding to this confusion.¹² The absence of clarity about and consistent nationwide application of the "neutral principles" analysis gives rise to increased litigation by congregations, dioceses and denominations seeking to determine their respective legal rights in the event of disaffiliation. Such litigation often results in the added difficulty and incongruity of a court evaluating questions of and enforcing one party's understanding

¹² See Pet. at 19-28 for a detailed discussion of these differing approaches to *Jones*.

about the polity of a particular church, ironically in the name of applying *Jones*' "neutral principles of law . . . developed for use in all property disputes." *Jones*, 443 U.S. at 599, 602 -603.

These burdens have harmed Amici here. All of the Amici Dioceses have been involved in protracted, burdensome, and costly litigation with TEC and others about the ownership and control of each Diocese's real and personal property. Two of these Amici, the Diocese of Quincy and the Diocese of San Joaquin, remain in active litigation against TEC in their respective state courts over control of diocesan and related congregational property. (The Diocese of Quincy recently prevailed at the trial court level.) Many ACNA congregations likewise continue in similar litigation. In fact, just earlier this month, TEC filed suit against four additional churches in the Diocese of Quincy. If this Court grants the Petition and clarifies the correct application of "neutral principles of law" under *Jones*, that will have a positive, direct, and immediate impact upon resolution of such lawsuits.

The problems of increased judicial evaluation of issues of church polity are similarly magnified in the case of dioceses such as these Amici. There is substantial historical evidence and legal and scholarly analysis demonstrating that the diocese, not the denomination, is the fundamental unit of Episcopal polity.¹³ Among other things, the dioceses

¹³ See, e.g., *Bishops' Statement On The Polity Of The Episcopal Church* (April 2009) 17 (http://anglicancommunioninstitute.com/wp-content/uploads/2009/04/bishopsstatement_pdf.pdf) accessed November 8, 2013); Mark McCall, *Is The Episcopal Church Hierarchical?* (September 2008), at 73

that established TEC pre-existed TEC chronologically, conceptually, and legally. It was the dioceses (then co-extensive with the newly-independent states) that created TEC's Constitution and General Convention in 1785, and thus that created TEC.¹⁴ Indeed, TEC's official commentary on its constitution and canons states that “[b]efore their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent,” and describes the national body they created as “a federation of equal and independent Churches in the several states.”¹⁵ Yet

(http://www.anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf (accessed November 8, 2013)).

Other scholars have concluded that congregations, rather than the denomination or even dioceses, are the fundamental unit of Episcopal polity in the United States. *See, e.g.*, Colin Podmore, *A Tale of Two Churches: The Ecclesiology of the Episcopal Church and the Church of England Compared*, 8 *International Journal for the Study of the Christian Church* 124, 129 (May 2008) (“The state churches (later called dioceses) and the General Convention were constituted in the 1780s by pre-existing parishes and congregations uniting in ‘voluntary associations’, and, in that sense, the congregations are the fundamental units of The Episcopal Church – precisely the opposite of the position in the Church of England.”); John Booty, *The Church in History* 71 (Seabury Press 1979) (“Dioceses and national convention possessed power in relation to and for the sake of parishes.”).

¹⁴ Mark McCall, *Is The Episcopal Church Hierarchical?* (Sept. 2008), at 13 (http://www.anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf) (accessed November 8, 2013).

¹⁵ *Id.*, quoting Edwin A. White & Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church* (Church Publishing Inc., New

Respondent TEC continues to dispute this evidence and analysis, and there continues to be scholarly debate over these historical facts and their present implications.¹⁶ But these disputes about and judicial inquiries into church polity can largely be avoided if this Court grants the Petition and clarifies the correct application of the “neutral principles of law” analysis under *Jones*.

Three decades after *Jones* was decided, these issues continue to sow confusion and uncertainty within churches and courts, resulting in expensive and unnecessary litigation. This Court can and should resolve the ambiguity.

York 1981 & 1997 reprint), at 12, 19. For a more detailed discussion of this official commentary, *see supra*.

¹⁶ Compare, e.g., Mark McCall, *The Episcopal Church and Association Law: Dioceses’ Legal Right to Withdraw*, 2 JOURNAL OF EPISCOPAL CHURCH CANON LAW 191 (February 2011), with James Dator, *Where Is The Locus Of Authority Within The Episcopal Church?*, 2 JOURNAL OF EPISCOPAL CHURCH CANON LAW 131 (February 2011).

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. CUNNINGHAM
**Counsel of Record*
BRIAN L. WHISLER
STEVEN F. HILL
TREVOR N. MCFADDEN
Baker & McKenzie LLP
815 Connecticut Ave.
Washington, D.C., 20006
(202) 835-7000
John.Cunningham@
bakermckenzie.com

Counsel for Amici Curiae

NOVEMBER 2013