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SUPREME COURT OF THE STATE OF CALIFORNIA

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EPISCOPAL CHURCH CASES

AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND
RESPONDENTS

Court of Appeal, Fourth Appellate District, Division Three
(Appeal Nos. G036096, G036408, G036868)
Superior Court of Orange County (04CC00647; JCCP 4392)
David C. Velasquez, Coordination Trial Judge

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Southern California and Hawaii

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I.

INTRODUCTION

This brief addresses the following two issues this Court framed when it accepted review of this case:

1. Should the "principle of government" approach, also known as the "highest church judicatory" approach, be used to resolve disputes between a local congregation and a national church or regional diocese over ownership of church property, or should these disputes be resolved using a "neutral principles analysis"?
2. What role does Corporations Code section 9142 play in the analysis and resolution of church property disputes?

A. The Court should adopt the "highest church judicatory" approach.

The United States Constitution strictly limits the jurisdiction of civil courts over the internal affairs and administration of hierarchical religious institutions such as the Episcopal Church. Therefore, civil courts must defer to decisions made by a hierarchical church organization regarding its doctrine, polity and ministerial selection and discipline. This includes where a denomination's regional supervisors choose which faction of a local church in schism is entitled to control and manage the church's affairs. This declared zone of autonomy for religious organizations reflects over one hundred years of case law.

In Catholic Charities of Sacramento v. Superior Court, 32 Cal.4th 527 (2004), this Court recently reviewed over a century of church property cases. This Court concluded that Watson v. Jones and the long line of church property cases properly applied that courts must defer to a hierarchical church's ruling body on matters of doctrine and governance.

In Jones v. Wolf, the United States Supreme Court held that each state was free to develop its own standard for resolving church property disputes. Under Jones, courts must defer to the highest church judiciaries in matters related to doctrine and polity but *may* apply applicable state law to resolve property disputes without regard to the determinations of the highest church judiciary. The application of neutral principles of law was declared to be a permissible *but not constitutionally mandated* method for resolving church property disputes.

The deference to the highest church judicatory approach is dispositive of this case. The complaint alleges that the St. James congregation had been in schism regarding theological issues for several years. The Episcopal Diocese of Los Angeles (the "Diocese") unsuccessfully attempted to reconcile the factions. Thereafter, applying its internal Constitution and Canons, the Diocese determined which faction was entitled to manage the affairs of St. James. The Diocese and others then filed a complaint in which they sought relief including a declaration of rights giving effect to this determination of church doctrine. Under the rule requiring deference to the highest church judiciary, the trial court should have deferred to the Diocese's decision.

Instead, the trial court ignored the complaint's allegations regarding trust and management and, instead, under the guise of neutral principles of law, focused exclusively on the separate issue of whether the Episcopal Church had proven a cognizable property interest in St. James' property. The trial court misapplied the "neutral principles of law" test, failing to take account of the trust clause in the Canons of the Episcopal Church, and found that the Episcopal Church did not have an interest in St. James' property.

The trial court's confusion demonstrates the difficulty inherent in a two pronged approach to church governance and property disputes. Applying a standard of deference to the highest church judiciary in deciding who manages the church, on the one hand, and applying a version of neutral principles analysis that does not defer to the Constitution of a hierarchical church in deciding who "owns" the church property, on the other hand, leads to contradictory results. Control of church property may rest with one party while nominal ownership may rest with another.

This Court should take a more consistent approach. Having endorsed deference to the decisions of the highest court judiciary in matters regarding doctrine and polity, this Court should also endorse the principles of government approach and honor the rules of the hierarchical church's constitution for determining ownership of church property. The Court of Appeal properly applied the principles of government approach and held, in accordance with the Constitution and Canons of the Episcopal Church, the property was held in trust for and subject to the control of the Diocese. The Court of Appeal declined

to use the neutral principles test, because that would be “overkill”.

B. If the Court adopts neutral principles, then it must consider Corporations Code § 9142.

If the Court is inclined to use a neutral principles analysis, then the analysis must be crafted to respect amendments to governing instruments of the denominations, including express trust clauses, adopted through the denomination’s established mechanisms of governance. In Jones, the Supreme Court invited denominations, such as the Episcopal Church, to amend their governing documents to include an express trust clause and assumed that such a provision would be honored under neutral principles. Similarly, the Legislature’s adoption of Corporations Code § 9142 mandates that the Court give effect to the trust clause found in the Episcopal Church canons.

Petitioners advocate a “pure” neutral principles analysis which ignores long-standing and duly enacted provisions of the denominational constitution and canons. Petitioners’ approach seeks to invalidate the accommodation of hierarchical denominations which both the Legislature and the Supreme Court endorsed by affording hierarchical denominations the opportunity to implement an express trust clause in their governing instruments through their existing mechanisms for change. Petitioners’ suggested “pure” neutral principles analysis does not recognize deference to church authority and should be rejected.

II

THE RECORD BELOW

A. The complaint sought a declaratory judgment affirming the Diocesan “true church” declaration.

The record before the lower court included the following. The Episcopal Church is organized into a three tier hierarchy. At the local level, the 7,600 parishes and missions are governed by their vestry. Every parish and mission belongs to a diocese, which promulgates governing rules. 5 AA 981-2 (declaration of Rev. Wright); 2 Diocese’s Appellant’s Index (“AA”) 420-421 (pages from the church’s Constitution and Canons). The General Convention governs the 110 dioceses. 5 AA 981. The General Convention maintains a Constitution and Canons that are binding on each diocese, parish and mission. 2 AA 420-421. Therefore, the Episcopal Church is an organization of churches with similar faith and doctrine, with a common ruling convocation or ecclesiastical head vested with ultimate ecclesiastical authority over the individual congregations.

The polity of the Episcopal Church prevents a local church from unilaterally voting to leave the denomination. A local church’s worshipping congregation is a parish, governed by its vestry. A parish within this Diocese is subject to its supervision and cannot unilaterally withdraw from the Diocese or the Episcopal Church. 5 AA 981 ¶ 9 (Wright decl.); 5 AA 102-115 (Diocesan Constitution).

Since 2003, the congregation of St. James Parish has been “torn apart” by a schism regarding ecclesiastical/theological issues. A portion of the congregation purported to declare that the church had left the denomination. 1 AA 75, ¶ 2, 78, ¶ 11, 91, ¶ 79. The Diocese attempted to reconcile the factions of St. James. 1 AA 8991. When it was unsuccessful, pursuant to the Constitution of the Episcopal Church and its Canons, the Diocese Standing Committee unanimously voted to “inhibit” the St. James reverends (strip them of authority to exercise priestly functions). Further, it determined which faction was the “true church,” entitled to control St. James Parish, appointed a priest-in-charge, and so informed St. James. 1 AA 76, ¶ 4 (verified complaint); 6 AA 1122, ¶ 15 (Declaration of David Tumilty) 1284. After the Petitioners refused to acknowledge that determination, the Diocese filed its complaint. The very first contention in the first cause of action for declaratory relief - in other words, the primary demand for relief in the entire pleading - explicitly alleged that the controversy between the parties included that:

“Plaintiff contends that the Episcopal Church hierarchy has already resolved the intra-congregational dispute between Plaintiffs and Defendants by determining (1) the congregants who are loyal to the Church are the true members of the Parish, (2) the true Parish leadership is the duly appointed Priest-in-charge and the reconstituted Vestry, and (3) the true Parish has the right to use, manage and control the Parish property in accordance with the Episcopal Church and Diocesan Canons and Supreme Court and California authority requires civil courts to defer to that ecclesiastical resolution to avoid

establishing one church over another in violation of the First and Fourteenth Amendments.

1 AA 93 (Verified First Amended Complaint, ¶ 91). The First Amended Complaint, in its prayer for relief, sought that same declaratory judgment. AA 0093, ¶ 129(a).

B. The trial court ignored the request for a declaratory judgment affirming the Diocesan “true church” determination.

The trial court, finding this was a “SLAPP” suit, dismissed the First Amended Complaint, ruling that plaintiffs had “not established a legally cognizable claim.” 7 AA 1497:14-15. In characterizing the nature of the First Amended Complaint, however, the trial court ignored the allegations of the First Amended Complaint described in Section II. A above. As the trial court erroneously wrote in its Statement of Decision, “all of the instant causes of action, except breach of contract, promissory estoppel and unjust enrichment, are based on the assertion the defendants hold parish property under an express trust for the benefit of plaintiff the Protestant Episcopal Church.” 7 AA 1492:1519 (Statement of Decision). The court then stated that its analysis of the First Amended Complaint was based exclusively on “neutral principles of law in resolving church disputes over church property.” 7 AA 1498:7-9. The trial court’s incorrect basis for its ruling in its Statement of Decision ignores these allegations of the First Amended Complaint seeking a judgment confirming that the civil court is bound to defer to this “true church” determination. 7 AA 1497-1502. As discussed below, a civil court is constitutionally prohibited from substituting its judgment

for the Diocese's decisions on these issues.

III.

THE COURT MUST DEFER TO CHURCH RULINGS AS TO THE MANAGEMENT OF CHURCH PROPERTY

A. The Episcopal Church is a hierarchical church.

The First and Fourteenth Amendments to the United States Constitution strictly limit the jurisdiction of civil courts over the internal affairs of hierarchical churches:

The First and Fourteenth Amendments of the federal constitution-and their counterpart in the California constitution (Cal. Const., art. I, § 4)-impose limitations on the jurisdiction of civil courts over the internal affairs and administration of ecclesiastical institutions. . . . Generally, civil jurisdiction is more limited with respect to hierarchical religious organizations than it is in the case of congregational or independent ones.

Concord Christian Center v. Open Bible Standard Churches, 132 Cal.App.4th 1396, 1409, 34 Cal.Rptr.3d 412 (2005), citing Watson v. Jones, 80 U.S. 679, 722-27 (1871).

A hierarchical church is defined as:

[O]ne in which individual churches are organized as a body with other churches having similar faith and doctrine[, and] with a common ruling convocation or

ecclesiastical head' vested with ultimate ecclesiastical authority over the individual congregations and members of the entire organized church.

Concord Christian, Id, citing Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 110 & fn. 15, 73 S.Ct. 143, 97 L.Ed. 120 (1952) and Watson v. Jones, 80 U.S. 679, 722-723, 13 Wall 679, 20 L.Ed. 666 (1871).

California courts have held that the Episcopal Church is a hierarchical church (see Protestant Episcopal Church v. Barker, 115 Cal.App.3d 599, 611, 171 Cal.Rptr. 541 (1981)), which does not appear to be in dispute in the merit briefs.

B. Jones v. Wolf requires courts to defer to internal policy decisions of hierarchical churches.

In a hierarchical church system, a local congregation is deemed to have agreed to be bound by the orders of the national church:

It has long been established that in such a hierarchical church, an individual local congregation which affiliates with the national church body becomes "a member of a much larger and more important religious organization . . . under its government and control, and . . . bound by its orders and judgments."

Concord Christian, 34 Cal. Rptr. 3d at 423 (ellipse in orig.), citing Watson v. Jones, 80 U.S. at pp. 726-727. Accordingly, the First and Fourteenth Amendments require civil courts to defer to rules of hierarchical churches for internal discipline and government:

In short, the First and Fourteenth Amendments permit hierarchical religious organizations internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding on them.

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 725, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976).

Jones v. Wolf, 443 U.S. 595 (1979), involved a dispute within the Presbyterian Church of the United States (PCUS). The denomination's regional body, the Presbytery, appointed a commission to resolve factional disputes at the Vineville Presbyterian Church, as expressly authorized under the denomination's charter, the Book of Church Order. The case presented issues including what standard of review a civil court should adopt in reviewing challenges to that action. The Supreme Court remanded the case back to the Georgia Supreme Court with directions on what were the constitutional limitations on the civil court's authority on that issue. The Court expressly held that, while it would be constitutional for a state to declare its common law to be based on the "neutral principles" model, that model could not be applied to overrule the Presbytery's exclusive authority to determine the "true church" faction within a schismatic church, entitled to the exclusive authority to manage the subject property:

All this may suggest that the identity of the 'Vineville Presbyterian Church' named in the deeds must be determined according to terms of the Book of Church Order, which set out the laws and regulations of churches affiliated with PCUS. Such a determination, however, would appear to require a civil court to pass on questions of religious doctrine, and to usurp the function of the commission appointed by the Presbytery, which already has determined that petitioners represent the 'true congregation' of the Vineville church.

Jones, 443 U.S. at 609.

In this case, the Court of Appeal's analysis of this critical passage from Jones v. Wolf is truly the heart of the decision. As the Court of Appeal wrote, though the Supreme Court declared that a state court could constitutionally adopt a decisional model which allowed a court to review the national charter, the local church's charter or its deeds, "the case wasn't over":

That is, Georgia neutral principles might declare the property to be controlled by the local congregation, but that still left the question of exactly who was the "true representative" of that congregation?

. . .

The Georgia courts, however, hadn't dealt with *that* problem. So the Jones majority assured them that a presumption of majority rule would be permissible under the First Amendment, but also noted that there were strains in Georgia law that might allow courts to ascertain the true representative of the local congregation based upon a civil court's

analysis of the Presbyterian Church's Book of Order, and *that* analysis was definitely impermissible given that the hierarchical Presbyterian Church had *already* made that decision in favor of the minority.

In Re Episcopal Church Cases, 152 Cal.App.4th 808, 867 (2007) (emphasis in original).

This rule controls this case. In other cases, it might not. For example, certain denominations have no established procedures by which a regional body can intercede to resolve factional disputes within a local church and determine which faction is the "true congregation." Perhaps even in denominations with such authority, the regional body does not always exercise that authority. Jones is clear, however, that where the denomination's leadership, acting pursuant to its internal rules, has already determined which faction of the congregation is its "true representative" or "true church", the civil court cannot overturn that decision.

C. California courts have universally followed the rule of deference in resolving factional disputes.

California courts have universally adopted the rule of deference cited in Jones. For example, the deference rule is the basis for Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific, 230 Cal.App.3d 480, 500, 281 Cal.Rptr. 396 (1991), also discussed extensively by the Court of Appeal in the present case. In Korean United, a local church's session voted to leave The Presbyterian Church (USA) ("PCUSA"), in violation of the PCUSA Constitution which requires the Presbytery to approve that decision. The Presbytery

empaneled an “administrative commission” to replace the session, just as in Jones, and as in the present case, where the Episcopal Diocese voted to reconstitute the vestry of St. James. The Presbytery then determined which faction of the local church was the “true church,” exclusively entitled to manage its affairs, just as the Episcopal Diocese did in the present case.

The trial court refused to recognize these ecclesiastical decisions. Instead, it issued a ruling favoring a majority vote of the local church congregation to leave PCUSA. Instead, the court of appeal reversed, holding that the trial court was absolutely required to defer to the Presbytery’s “true church” declaration. It was irrelevant that, following this vote, the prior session attempted to amend the church’s bylaws to sever its ties to the rules of governance set forth in the Presbyterian Church’s Constitution. The Court of Appeal therefore reversed the judgment of the lower court refusing to adhere to the Presbytery’s decision, and remanded with instructions to oust the dissident faction “through a writ of possession”. Korean United, 230 Cal.App.3d at 512. As the appellate court held, the lower court erred because, when a court is confronted with two factions of a local church vying for the use of a hierarchical church property, the court **must** defer to the hierarchical church’s resolution of the issue:

The Presbytery was the authoritative ecclesiastical body charged with the responsibility of determining which of the two factions of KUPC was the “true church.” It did so, and its decision became binding and conclusive on the lower court. **On this basis alone, the congregation designated by**

Presbytery as the true church became entitled to the use and enjoyment of the Church property.

Korean United, 230 Cal.App.3d at 503 (emphasis added).

It does not matter if the true church constitutes a minority of the congregation:

It is immaterial that the faction which Presbytery has designated as the true church is a minority of the original membership.

Korean United, 230 Cal.App.3d at 502.

Korean United, in so holding, cited to Jones, but also to a line of California cases, including First English E.L. Church v. Dysinger, 120 Cal. App. 139 (1920). In Dysinger, a pastor of First English Evangelical Lutheran Church ("FEELC") refused to abide by the discipline of the United Lutheran Church of America, a hierarchical church. He led a faction of FEELC which attempted to break away from the United Lutheran Church by amending the governing documents of FEELC and submitting that to a congregation vote. A portion of the congregation opposing the disaffiliation appealed the decision to the hierarchy of the United Lutheran Church. The hierarchy ruled in favor of the faction wishing to remain part of the United Lutheran Church and designated that faction as the true church. Dysinger, 120 Cal.App. at 143. The pastor's faction refused to recognize the ruling, so the true church sued. The lower court ruled in favor of the pastor's faction, and the true church appealed.

The Court of Appeal, relying on Watson v. Jones, held that the lower court should have deferred to the hierarchy's decision regarding the identity of the true church. Dysinger, 120 Cal.App. at 144-145. The Court of Appeal then held it was immaterial if the true church "constituted a large or small minority of the church members." Dysinger, 120 Cal.App. at 147-148.

Similarly, in Metropolitan Philip v. Steiger, 82 Cal.App.4th 923, 931 (2000), the court affirmed judgment in favor of a national church whose internal Spiritual Court had ruled that the local church's affairs should be under control of the "true church" faction which did not vote to leave the denomination. Quoting Korean United, the court wrote, "the question of which group is the 'true church' is clearly ecclesiastical and therefore the ecclesiastical authorities' determination of the issue is binding and conclusive on the lower court." Accord, Singh v. Singh, 114 Cal.App.4th 1265, 1283, 9 Cal.Rptr.3d 4 (2004) (in cases involving a schism at a local church, court must defer to its internal "authoritative ecclesiastical body").

In Concord Christian, a national hierarchical denomination placed its local church under the jurisdiction of a regional supervising body pursuant to the denomination's ecclesiastical rules. The local church argued that the court should overrule that decision based on "neutral principles" of law. The lower court disagreed that this was the proper standard. Rather, it held that a "neutral principles" analysis applies only to claims against title to property. By contrast, the court must apply a strict rule of judicial deference in deciding who shall **control** that local church.

The Court of Appeal affirmed, emphasizing this clear limitation on the court's jurisdiction to overrule the denomination's decision on which faction shall control the affairs of one of its churches. While the claims regarding **ownership** of the local church's property had already been resolved by a pre-trial motion:

On the other hand, because the issues before the trial court affected the ultimate *control* of Concord Christian's property and assets, the trial court properly ruled that it had jurisdiction to adjudicate these issues to the extent it could do so without impinging on exclusive ecclesiastical authority . . . The "propriety of [the hierarchical church's] **regional supervision** as a matter of ecclesiastical polity" is one of the "issues which both the United States Supreme Court and the Courts of this state have traditionally applied **the ecclesiastical rule of judicial deference.**"

Concord Christian, 132 Cal.App.4th at 1412-1413, citing Serbian National, 426 U.S. at 709, 724.

D. The trial court erred by refusing to follow Jones.

The congregation of St. James was in schism for several years. 1 AA 75-76, 89. Ultimately, the Diocese determined which faction of St. James was entitled to control and manage the parish's affairs. It then filed its complaint that expressly sought a judgment that the Diocese had declared one faction of St. James to be the "true church," and that the civil court must "defer to that ecclesiastical decision." 1 AA 101:15-24 (first amended complaint). Yet, the trial court ruled that this complaint, and the evidence presented in opposition to the SLAPP suit

motion, did not present “a legally cognizable claim.” The Court of Appeal properly reversed that ruling, because the trial court applied the wrong legal standard and in so doing violated Respondents’ constitutional rights. In short, a civil court has no jurisdiction to conduct an independent analysis of claims to quiet title to church property, if doing so would overrule a hierarchical church’s internal decision over managing the local church’s affairs.

Therefore, the trial court erred in completely ignoring the portion of the complaint seeking a declaration that the civil court must apply the rule of judicial deference and affirm the Diocese’s decision regarding which faction of St. James was the true church. The Court of Appeal decision correctly determined that this error needed correction.

E. The trial court’s error infringes on Respondents’ constitutional rights.

The trial court not only failed to correctly apply the law, but in doing so it crossed over an important Constitutional bright line established to ensure that hierarchical religious denominations would be allowed to manage their internal affairs free of government interference. The separation of church and state demands that the government fully defer to a hierarchical church’s internal polity decisions. Paramount among those functions is the denomination’s authority to resolve disputes as between factions of a local church. It is essential that a hierarchical denomination retains the authority as the sole arbiter of internal disputes over church doctrine, management, discipline, or membership. One faction of a local church, even a

majority, cannot by fiat or litigation usurp the denomination's authority over these matters.

The Court of Appeal correctly reversed the trial court's decision on this basis. Trial courts in California are barraged by innumerable cases in which a dissident faction claims that it can ignore its denomination's imposition of regional supervision on the completely incorrect basis that its church's deed does not contain a trust reverter clause. This Court can do a great service to the lower courts by issuing a decision confirming the clear statement of the Court of Appeal that the entire "neutral principles" analysis of deeds, bylaws and corporate charters provides no basis for a court to overrule a denomination's internal decisions over the management of church affairs.

F. Petitioners place too restrictive a definition on matters of "internal discipline."

Petitioners address this analysis by arguing that "the 'deference to hierarchy' rule is limited to an 'intrachurch dispute' or cases which directly challenge, or cannot be resolved without entanglement in, questions of religious doctrine, discipline or polity." App. Opening Brief at 29. As seen above, that may be a loose statement of the law, depending on how one defines "religious polity" or an "intrachurch dispute." Under Jones, "polity" disputes expressly include situations where a hierarchical denomination resolves an "intrachurch dispute" by granting management of church assets to the "true church" group pursuant to the authority given it under its rules and procedures.

Petitioners cite in support of this position Presbytery of Riverside v. Community Church of Palm Springs, 89 Cal. App. 3d 910 (1979), arguing that the court in that case applied “neutral principles” to resolve the title to the local church in an “intrachurch” dispute within a hierarchical Presbyterian denomination, the UPCUSA. App. Brief at 26 The court in Riverside held that, however, under the UPCUSA Constitution, it was “**undisputed that a local church within UPCUSA may withdraw and terminate its affiliation.**” Presbytery of Riverside, 89 Cal.App.3d at 924.¹ Therefore, since the record indicated that the local church was allowed to leave, the court was free to look to secular sources of property rights such as the existence or absence of trust recitals in the property deeds.

Petitioners also cite to Barker, which relied on neutral principles to resolve issues of title to church property. The parties’ briefs have extensively discussed Barker. Amici will simply note that there is nothing in that opinion that contradicts the thesis of this brief. In Barker, the Diocese had not chosen to impose any regional supervision procedures over the local church. Therefore, the Barker court could resolve the case in front of it by reference to deeds to the church property, articles of incorporation and other secular indicia of ownership. Barker, 115 Cal. App. 3d at 625-26, see Concord Christian, 132 Cal.App.4th at 1412, n. 6 (expressly distinguishing Barker on these grounds).

¹ Amici do not endorse this as an accurate statement of the polity of the UPCUSA in 1979, but simply note that the court believed that this was the record presented to it on appeal, apparently a confusing record which the court noted was “difficult to organize”. 89 Cal. App. 3d at 929.

In fact, Korean United directly states that Presbytery of Riverside and Barker stand for the rule that the identification of a “true church” is a matter of internal church polity in which civil courts cannot overrule the internal church’s decisional body. As stated above, Korean United reversed a decision by the lower court refusing to give effect to the presbytery’s true church declaration, which the presbytery enforced by putting a regional board in place, supplanting the local church’s session.

As the court wrote:

“Thus, in rendering its judgment, the court, in effect, substituted its own judgment for the previous determination made by the Presbytery on a matter of religious doctrine and polity—the identity of the true church congregation. On this point, the court erred as a matter of law . . . The decision of the superior court violates the First and Fourteenth Amendments by substituting the court’s judgment for the judgment of the Presbytery regarding the identity of the particular church entitled to use and enjoy the church property, a question of church doctrine and polity. While the opinions in [cases including] Presbytery of Riverside Jones v. Wolf and Protestant Episcopal Church [Barker] support the use of neutral principles of law to resolve church property disputes, they also mandate that on ecclesiastical issues, including matters of religious doctrine or polity, civil courts must defer to the highest judicatory of the hierarchical church hearing and addressing the matter.”

Korean United, 230 Cal.App.3d at 500.

The analysis in these cases is consistent. Where a hierarchical denomination has imposed regional supervision over a church in schism and made a “true church” determination, the civil court must respect its ruling, as a matter of law. In Presbytery of Riverside, the trial court determined that the denomination expressly allowed any local church to unilaterally “withdraw and terminate its affiliation.” Similarly, in Barker, the denomination did not choose to take supervisory action over the local church to resolve a factional dispute. Those courts were therefore free to decide the case on the basis of the language in the local church’s constitution and property documents. By contrast, in Jones, Korean United, Dysinger, Steiger and Concord Christian, the courts all recognized that these documents are completely irrelevant if the denomination has exercised regional control over the management of the local church.

According to the record before the lower court, St. James belonged to a hierarchical denomination that forbid a local parish church from unilaterally quitting its Diocese. The Diocese made a “true church” declaration, as in Jones, Korean United, Steiger, Dysinger, and Concord Christian. Therefore, when the Diocese acted, the civil court lacked jurisdiction to disregard its declaration of church polity. The lower court erred when it dismissed this suit without even acknowledging that the complaint sought a judicial declaration giving effect to the Diocese’s “true church” declaration. The Free Exercise Clause demands the court affirm that declaration, not dismiss the suit without even acknowledging it. The Court of Appeal properly corrected this error.

IV.

APPLICATION OF PETITIONERS' PROFFERED "PURE" NEUTRAL PRINCIPLES OF LAW DENIES FREE EXERCISE OF RELIGION AND CREATES IMPERMISSIBLE ENTANGLEMENT.

Petitioners assert that a so-called "pure" neutral principles of law approach to church property disputes is constitutionally required and otherwise preferable for policy reasons. Petitioners' Reply, p. 15. By neutral principles, Petitioners mean the factors articulated in Jones v. Wolf, 443 U.S. 595 (1979), the deeds, the local church charter, "state statutes governing the holding of church property" and the provisions of the general church constitution. Id. at 606. By "pure" neutral principles, Petitioners mean a variation on the formula presented in Jones. Petitioners' method disregards the provisions of the general church charter unless they are expressed in modern secular terms and the individual congregation has expressly consented to the provision at issue.

These deviations from the Supreme Court's guidance are fraught with violations of the First Amendment which stem from the very nature of at least some hierarchical churches. The governance of the Episcopal Church is similar to the United States. Both are multi-tiered representative democracies established through a constitution. Parishes which join or are formed as members of this system are bound by its rules and subordinate to their diocese and the Episcopal Church. The Episcopal Church's Answer Brief, pgs. 5-7. Similarly, states having joined the United States are bound by the constitution and subordinate to the authority of the federal government in matters

which affect the whole. The Presbyterian Church shares a similar system of representative democracy. Watson v. Jones, 80 U.S. 679, 726-727 (1871) (describing Presbyterian polity as the session over the congregation, presbytery over the session, the synod over the presbytery and the “general assembly over all”). To deny the Episcopal Church the authority over its constituent parishes established by its Constitution and Canons is no less hostile to its existence than allowing secession of States would be to the United States.

A. So-called “pure” neutral principles deny free exercise by coercing changes in polity.

Petitioners tout “pure” neutral principles because the method “avoids establishment of so-called hierarchical denominations, and instead respects the diversity of religious practices in our society.” Reply p. 1. The contradiction between the first and second parts of this statement highlights what is constitutionally suspect in Petitioners’ method. Hierarchical denominations are not an evil to be avoided but rather are one extremely prevalent form of post-reformation religious exercise. The very virtue which Petitioners extol, hostility to hierarchical religious organizations, is in fact a vice.

A denomination’s form of property ownership and polity is part and parcel of its members’ shared beliefs regarding the proper relationship among the individual, the individual’s minister, pastor or

priest, the constituent parts of the church, the church and God.² The Supreme Court described the integral connection between the community structure or “self-identification” of a religious association and theology as follows:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 343 (1987), Brennan conc.

One problem with Petitioners’ method is that it does not address the right of the diverse religious groups in our society to structure their voluntary association, or religious community, in a manner which reflects their beliefs. The method may work for an independent congregational church, or for a denomination where final decisions are made by a single leader. The method does not accommodate the needs of the Presbyterian or Episcopal denominations or others where the local congregation is “part of a larger and more important religious organization, and is under its government and control” and where the ecclesiastical government is through representative democracy. Watson v. Jones, 80 U.S. at 726-727 (describing Presbyterian polity).

² This point is illustrated by the description of the role of Presbyterian polity in the Report of the Special Committee on Historic Principles, Conscience, and Church Government approved by the General Assembly of the Presbyterian Church (U.S.A.) in 1983: “The basis of Presbyterian polity is theological. Our polity is not just a convenient way of getting things done; it is rather, the ordering of our corporate life which expresses what we believe. The connection between faith and order is inseparable. At its heart, the polity of the church expresses our Reformed theology. **What we do and the way we do it is an expression of how we understand our faith.**” [emphasis added].

Where governance is through representative democracy and the Church consists of more than one congregation, the local church is subordinate to the other, more inclusive, bodies in the hierarchical church.³ Such churches, as voluntary associations, have historically relied on their constitutions and other governing instruments to determine relationships among their constituent parts. This reliance has been judicially sanctioned since the Civil War.

The right to organize voluntary religious associations. . . is without question. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.

Watson v. Jones, 80 U.S. at 729.

The Supreme Court's meaning in Watson is made even more clear when one considers that Watson is a Civil War era case. The federal union, as a voluntary association established by the Constitution, faced the same peril as the Presbyterian Church--secession as a result of a social disagreement regarding slavery. The concept that a religious voluntary association is bound together by the implied consent of its members is not an anachronism. As recently as

³ Denominations with charters based more or less on this model include: The Church of God, see Polen v. Cox, 259 Md. 25, 267 A.2d 201 (1970); The United Methodist Church, see California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church, 121 Cal.App.4th 754, 17 Cal.Rptr.3d 442 (2005); The Protestant Episcopal Church in the United States of America, see Bishop and Diocese of Colorado v. Mote, 716 P.2d 85 (1986); the Protestant Reformed Church, see Second Protestant Reformed Church of Grand Rapids v. Blankspoor, 350 Mich. 347, 86 N.W.2d 301 (1957); the Reformed Church of Grand Rapids v. Blankspoor, 350 Mich. 347, 86 N.W.2d 301 (1957); and the Christian Reformed Church, see Borgman v. Bultema, 213 Mich 684, 182 N.W. 91 (1921).

2004 in Catholic Charities, this Court endorsed the concept of “implied consent” found in Watson by stating that “members of a church implicitly consent to the church’s governance in religious matters [citation omitted].” Catholic Charities, 32 Cal. 4th at 542.

For more than a century, the courts have acknowledged that the corporate form and name on the deed are secondary to the mechanisms of property ownership and polity declared in the instruments which govern the denomination. Given this stable environment, hierarchical denominations have not required local congregations to abdicate property ownership as a condition to membership. Moreover, to do so would be antithetical to the centuries old traditions of ecclesiastical governance of such churches. Petitioners’ method, by their own admission, would coerce the Presbyterian and Episcopalian “polity” into mirroring that of the Roman Catholic Church, with property held by the Bishop or the Archbishop in a corporation sole—a denial of the right to free exercise of religion if ever there was one. Reply p. 22.⁴ A rule of law coercing a group of religious organizations to so radically depart from their traditions, polity and expressions of religious community impermissibly interferes with the autonomy of religious organizations.⁵ Moreover, effecting this change for each and every one of the Episcopal Church’s 7,600

⁴ Petitioners’ approach is akin to requiring the United States to declare itself a monarchy to avoid secession of its states. Such a result would be hostile to authentic identity of the nation; requiring the Episcopal Church or the Presbyterian Church to structure themselves like the Roman Catholic Church is no less so.

⁵ Even if this Court might tolerate such an invasion of religious autonomy if mandated by the Legislature, in this case the Court is asked to create a burden on religious exercise through narrow readings of existing precedent and an incorrect construction of Corporations Code Section 9142.

parishes would be burdensome. See p. 30.

This invasion of “polity” or church governance crosses the line in the sand which the Supreme Court drew in Jones. “[T]he Amendment requires that civil courts defer to the resolution of issues of religious doctrine or **polity**. . .[emphasis added]” Jones, 443 U.S. at 602. One cannot defer to that which one has forced to change. In recognition of this reality, Jones made clear that the version of neutral principles which it permitted must be “flexible enough to accommodate all forms of religious organization and polity.” Id. at 603.

B. So-called “pure” neutral principles deny free exercise by ignoring established polity.

When a church is centuries old, the governing instruments will be somewhat arcane. Governing instruments drafted in the 1800’s, or frankly any time before Jones, may not include an express trust clause phrased in secular terms. This case is an example. Even the old fashioned language of the Canons makes clear subordination of the parish to the Episcopal Church and diocese, the agreement of the parish to adhere to the Constitution and Canons, and the authority of the General Convention to amend the Constitutions and Canons. (The Episcopal Church’s Answer Brief [the “Episcopal Answer”] p. 5-9). In 1947, St. James itself promised adherence to this structure and its articles and bylaws required adherence to the Constitution and Canons. Id. at p. 10. From 1947 until 2004, St. James understood itself to be a “member” of the Episcopal Church and subject to its governing documents, including the authority of the General Convention to amend

the Canons. In 1979, consistent with its declared polity or government, the Episcopal Church amended its Canons to declare an express trust. The trust was a belts and suspenders approach, in response to Jones, as the concept was already part of the Canons as of 1868. Episcopal Answer at p. 7.

Petitioners' "pure" neutral principles method requires individual consent to the express trust before a local church, like St. James, is bound by the provision. This approach disregards the 1868 language in the Canons which were in effect when St. James became a parish because it does not use the word "trust." Under Petitioners' method, a denomination's failure to address its property with secular, modern words is fatal, regardless of the intent evident in the governing instruments. This approach also disregards the authority of the General Convention to amend the Episcopal Church's governing instruments as applied to the parishes. St. James accepted and swore loyalty to the Episcopal Church's structure of government when it became a parish. Absent the ability of the General Convention to decide for the whole Episcopal Church, the Episcopal Church fragments and cannot maintain its identity, a violation of free exercise.

Here, the Episcopal Church is again not alone. Depriving the General Assembly of the Presbyterian Church of the authority conferred upon it in the denomination's Book of Order would have the same consequence. Other hierarchical denominations could be similarly affected. Adhering to the holding in Jones, which requires the courts to defer to the polity of a religious organization, including the articulated

mechanisms for change, avoids this consequence. (Jones, 443 U.S. at 602).

C. So-called “pure” neutral principles impermissibly entangle the judiciary in doctrine.

The Episcopal Church cannot govern doctrine and polity for its constituent parts if it cannot provide a place of worship for its adherents. Church schism cases, like this one, arise when a doctrinal decision is unpopular. Church schism cases also arise from other matters of internal church governance, including efforts by the church hierarchy to enforce denominational discipline upon local church leadership responsible for wrong doing. Petitioners’ approach entangles the courts in such matters, and undermines the authority of the denomination, through the back door. The disaffected simply take the church property and worship apart from the denomination. If asked to intervene, the courts review the formal title, a review which in a hierarchical church which governs itself as a representative democracy will favor the portion of the congregation which has physical control over the local property. Hence, the power of the state is indirectly invoked to resolve a doctrinal matter or other internal church concern generating free exercise and entanglement concerns.

Perhaps for this reason, this Court has endorsed the notion that “so-called church property cases” are properly decided under the rule that “states must accept the decision of appropriate church authorities on such matters.” Catholic Charities, 32 Cal. 4th at 541. In Catholic Charities, the Court once again approved of Watson and stated, “The first church property case to reach the United States Supreme Court,

[citation omitted] articulates the rule and illustrates its application.” Id. In doing so, the Court acknowledged that the ways a church governs its property are part of the zone of religious autonomy which is at the heart of the First Amendment.

D. So-called “pure” neutral principles entangle the judiciary by promoting litigation.

Petitioners’ method turns on subjecting centuries old documents to ex post facto modern drafting requirements while disallowing the established methods for amending such documents to which all members consented. If the denomination’s own mechanism for consent, here a democratic process binding on all, is disregarded, the courts will be left to decide what is and is not adequate express consent. Whether or not a trust exists on the property of a given parish in favor of the denomination will turn on the particular facts of each case. For a church where polity consists of representative democracy, the only “express consent” adequate to satisfy Petitioners’ approach may be to the governing instruments as they existed at the time the parish was formed or joined the denomination. Petitioners’ demand for individual “express consent” could require investigation into whether the local parish sent representatives to meetings at which amendments to the governing instruments were approved, and what votes those local parish representatives may have cast. In denominations which face significant dissent regarding social issues, this approach invites intensive fact based litigation and further judicial entanglement.

V.

THE PRINCIPLES OF GOVERNMENT APPROACH AND SECTION 9142 PROMOTE THE VALUES EMBODIED IN THE FREE EXERCISE AND ESTABLISHMENT CLAUSES.

Respondents argue that the principles of government approach is the law of the State of California. Under this approach, property rules adopted by a hierarchical church are respected. Respondents also argue that Corporations Code Section 9142 requires the courts to respect an express trust clause in the governing instruments of a hierarchical church to resolve disputes regarding the property of its member churches. Amici will refer to this correct interpretation of Corporations Code Section 9142 as "Section 9142." Under either approach, for a hierarchical church, the pronouncements in the governing instruments of the "general church" control the property of its "members."

In this case, if Section 9142 or the principles of government approach is applied, St. James' property is subject to a trust in favor of the Episcopal Church as a result of amendments to its governing instruments enacted after St. James was formed. Whether this result is dictated by Section 9142, or adherence to the principles of government approach, the result is not constitutionally infirm. Rather this approach promotes the values embodied in the Establishment and Free Exercise Clauses of both the federal and California constitutions.

A. The principles of government and Section 9142 approaches facilitate free exercise.

Jones is dispositive of Petitioners' free exercise argument. Jones holds that "a state is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." Jones, 443 U.S. at 604. The Jones view of neutral principles always contemplated that civil courts would examine "the provisions of the constitution of the general church concerning the ownership and control of church property." Jones, 443 U.S. at 603. Consistent with this formulation, the Supreme Court invited amendments to the denomination's governing instruments—like the one in this case:

Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denomination. The burden involved in taking such steps will be minimal.

Id. at 606.

How this invitation came to pass in the Supreme Court's opinion is telling. The language was inserted specifically to respond to the dissent's argument that compulsory deference is constitutionally required to protect the free exercise rights of hierarchical religious associations. In the view of the majority, the trust clause alternative accommodated the interests of these hierarchical churches and ensured that "the outcome of a church property dispute is not foreordained." Id. at 607.

As described at pages 26-29 Petitioners' "pure" neutral principles formulation undermines this accommodation by rendering the burden of adopting an "express trust" clause more than minimal and evaluating the efficacy of the trust clause through a congregation-by-congregation fact intensive litigation exercise. This case illustrates the magnitude of the potential burden where approximately 7,600 parishes would be required to manifest express consent to the trust clause. Theoretically, the Episcopal Church could be required to address factual issues in 7,600 separate proceedings under the varying law of the individual states. Episcopal Answer p. 5. Petitioners' "pure" formulation deprives neutral principles of the minimally burdensome "express trust" which made neutral principles flexible enough to satisfy free exercise requirements.

Even if California's principles of government approach or adherence to Section 9142 is not consistent with "neutral principles" as authorized by the Supreme Court, the California approach is still constitutional. In Jones, the Supreme Court took pains to note that "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters [citation omitted]." Jones, 443 U.S. at 602. "A presumptive rule of majority representation" would be acceptable under "neutral principles" so long as the presumption "may be overcome." Jones, 443 U.S. at 607-608. There is no reason to assume that a contrary presumption, in favor of the denomination, arising from actions taken prior to commencement of the controversy, is any more suspect. No consideration of doctrinal matters is involved. Any person who does not want to be a member of a religious association governed by a

representative democracy can choose to join a different type of church. Any congregation which does not want to be a member of a religious association governed by a representative democracy can simply not join. Either congregational or hierarchical property control and, hence, worship is possible and congregants are free to choose where they worship. ⁶

B. Petitioners' equal protection and establishment clause arguments rest on a flawed presentation of the substantive law.

Petitioners argue that the principles of government and Section 9142 approaches do not apply the same laws of property, trust and voluntary association to religious organizations as are applied to everyone else. Accordingly, Petitioners argue that these approaches are suspect either on equal protection or on establishment clause grounds. Petitioners do not correctly characterize the law applied to everyone else. When the law is correctly characterized, it becomes apparent that the trust created in favor of the denomination by application of either the principles of government or Section 9142 approach is consistent with law as applied to everyone else. It also becomes apparent that religious corporations are unique in ways which make literal application of the law which governs everyone else inappropriate.

⁶ Petitioners cite the free exercise clause in Article 1, Section 4 of the California State Constitution but provide no reason why it dictates a result different from that of the federal constitution. As this Court has stated, "[s]ection 4 has not so far played an independent role in free exercise claims." Catholic Charities, 32 Cal.4th at 561-562.

1. Petitioners' presentation of secular property law is incorrect.

Petitioners' equal protection and establishment clause arguments stem in part from purported differences in treatment between St. James and secular charitable trusts. Reply pp. 15 and 20. The argument rests on a misunderstanding of the laws of secular charitable trusts in California. A litany of statutory provisions appears at pages 27-28 of the Reply. Petitioners cite no cases which integrate these statutes in a holistic approach to secular multi-settlor charitable trusts. Instead, Petitioners' approach is to isolate each statute from the law of multi-settlor charitable trusts and to ignore contrary statutes to argue if the law as applied to secular trusts was applied in this case the result would be in favor of St. James. Accordingly, by Petitioners' argument, any other result is constitutionally suspect either on equal protection or on establishment clause grounds. Of course, this argument paradigm is fraught with the perils of self-selection.

Amici will start, instead, with an examination of the law of multi-settlor or multi-donor general charitable trusts. A parish takes in general donations for use in its religious mission from multiple donors or settlors over a number of years through its collection plate and otherwise.⁷ Accordingly, unlike the mixture of statutes cited by

⁷ Here, the real settlors of the trust on St. James' property are the parishioners who made general contributions to the church since 1947. It appears from the statement of facts, the only other contributor to St. James was the Diocese which transferred the property to St. James subject to a promise to abide by the Constitution and Canons. Episcopal Answer p. 10. Hence, absent the presence of parishioners who tithed over the decades there would be no barrier, under Petitioners' logic, to the Diocese simply revoking the trust and taking the property back.

Petitioners, this is the body of law which would apply to impose and govern a trust on a religious organization's property if we treated churches like everyone else. In a secular context, courts address the proper application of these donations by focusing on donative intent and mission.

First, contrary to Petitioners' assertion, a general charitable trust like any multi-settlor trust is irrevocable, not revocable. Estate of Wernicke v. Wernicke, 16 Cal.App.4th 1069, 1074 (1993) (multi-settlor trusts are irrevocable absent consent of all donors notwithstanding the general rule of revocability set forth in Probate Code § 15400); Probate Code § 15003(a) (declaring provisions, including Probate Code § 15400, do not apply to constructive or resulting trusts). Nonprofit corporations have a presumptive "perpetual duration" and must preserve their assets for the original trust purpose, even if terminated. Corp. Code Sections 5120, 7120, 5130(b), 7130(b), 5142(a)(5), 7142(a)(5), 6716 and 8716.

Second, trusts of personal property need not be in writing. Probate Code § 15207. Constructive or resulting trusts are creatures of equity and need not be evidenced by writing or even by an express declaration. Probate Code § 15003 (a) (probate code provisions do not affect the substantive law of constructive or resulting trusts). See also Edwards v. Edwards, 90 Cal.App.2d 33, 40 (1949) (imposing constructive trust on real property based on oral promise; statute of frauds does not apply to constructive trust). Working from these statutory premises, in the secular context, courts do not require general charitable trusts to be express or in writing and will retroactively infer the existence of a trust years after the original donation.

By way of example, the court in Calistoga Civic Club v. City of Calistoga, 143 Cal.App.3d 111 (1983), applied the doctrines of constructive or resultant trust in finding that the real property of a civic club, structured as a nonprofit corporation, was subject to a trust and must be held as a library open to the public in perpetuity. Id. at 117-118. The court imposed the trust on the corporate record owner of real property without an express written manifestation of donative intent. Neither the deed in the name of the civic club nor the separate corporate existence of the civic club was dispositive. Instead, the court reached out to the totality of evidence to find donative intent. Id. at 113-114 (examining club minutes from 1914, purpose of borrowing recited in 1926 indenture, descriptions of purpose in charitable solicitations from the 1930's and building signage). See also, O'Hara v. Grand Lodge, Independent Order of Good Templars of State of California, 213 Cal. 131, 141 (1931) (finding general charitable intent of lodge to maintain property as orphanage based on the proceedings of the meetings and manner donations were collected); In Re Los Angeles Pioneer Society v. Historical Society of Southern California, (1953) 40 Cal.2d 852, 856, 858-861 (1953) (imposing charitable trust on assets of nonprofit corporation, historical society, through the mission declared in its articles of incorporation and course of conduct).

Third, secular nonprofit corporations and general charitable trusts are also subject to the cy pres doctrine whereby a court supervises any diversion of the trust res and either acts to ensure the res is used to continue the original mission, or if the mission has failed, applies the res to a comparable charitable purpose. Estate of Hinkley, 58 Cal. 457, 504-505 (1881) (explaining the function of the courts, under the cy pres

doctrine, to redirect trust funds in the event that it becomes impossible to carry out the original trust purpose); Grand Lodge, Independent Order of Good Templars, 213 Cal. at 141-143 (applying cy pres doctrine to orphanage property owned by corporation based on general charitable intent of donors); and Los Angeles Pioneer Society, 40 Cal.2d 865 (appointing new charitable trustee to carry-out original charitable intent rather than allowing dissolution of charitable corporation and reversion of assets to donors and members).

The second and third points show why the law of secular multi-settlor charitable trusts cannot be literally applied to property of religious organizations. This approach renders legally cognizable arguments for constructive or resulting trusts based on mission statements, adherence to original mission, parish newsletters, corporate minutes, pulpit statements of former ministers, verbal statements restricting use at the time of donation, etc. Judicial entanglement is inevitable. Invariably, the process of determining original donative intent in any authentic way will drag the courts into Lord Elrod's "departure-from-doctrine" theory which the Supreme Court rejected in Presbyterian Church v. Hull Church, 393 U.S. 440, 450 (1969).⁸

This Court should not trouble itself with the constitutional implications of failing to apply to St. James a purely fictional law of secular trusts, cobbled together by Petitioners. The Court is also poorly

⁸ If required to determine donative intent without considering "mission," the courts will be deciding competing claims to church property based on whether or not the court concludes generations of donors knew they were contributing to a separate corporation which held record title (Reply p. 13) or instead believed they were contributing to the Episcopal Church. The latter is more likely.

served by trying to determine how the case would come out under the secular multi-settlor charitable trust law. The inquiry required to make such determination is not constitutional in and of itself. Acknowledgment of the similarities between multi-settlor charitable trusts and local church property, however, highlights the fatal flaws in Petitioners' presentation of secular property law and the dangers of a rule of law that would give a majority of current local church congregants unfettered decision making.

2. Petitioners' presentation of religious corporation law is incorrect.

Petitioners also argue that "pure" neutral principles is a superior method because it respects St. James' separate identity consistent with the treatment of other forms of corporations. Reply p. 13. Here Petitioners overlook the very nature of a religious corporation under California law which is "something peculiar unto itself" and stands as the agent for the church of which it is a part. Wheelock v. First Presbyterian Church of Los Angeles, 119 Cal. 477, 482-483 (1897). When the Legislature adopted a separate set of statutes for religious nonprofit corporations, it did so for the express purpose of allowing religious organizations to incorporate without forfeiting this distinctive nature. Otherwise, no separate statutes treating religious nonprofit corporations were required. Nothing stops a religious organization from incorporating under the public benefit portion of the California non-profit corporation law, or under the general for-profit Corporations Code statutes. The Legislature made its intent clear in this regard when it enacted the part of the Corporations Code which addresses religious nonprofit corporations:

The Legislature hereby declares that the powers of the State of California with respect to the formation, existence, and operation of religious corporations shall be limited to those expressly provided in statutes duly enacted by this Legislature, **and that mere incorporation under the laws of California constitutes no waiver of the fundamental protections afforded religious bodies and individual freedom of worship.** Section 1 of Stats.1980, c. 1324. [emphasis added]

Religious organizations do not, however, generally incorporate as either nonprofit public benefit corporations or for-profit corporations because religious organizations do not want to lose the individual freedom and flexibility afforded by the nonprofit religious corporation law.

3. Petitioners' presentation of voluntary association law is incorrect.

Petitioners argue that the law of voluntary associations does not allow the larger organization to claim property of its members based on the provisions of the organization's constitution. Reply p. 29. Petitioners' argument rests on the assertion that California does not recognize implied trusts on real property. Petitioners cite Probate Code § 15206 to support this proposition. Amici previously demonstrated that under the express statutory provisions and applicable case law Probate Code §15206 does not limit trusts imposed through the doctrines of constructive or resulting trusts. Probate Code § 15003(a); see pp. 36-37.

Petitioners also cite Barker to support their position. Barker, however, does not stand for the proposition that implied trusts cannot exist in a secular context. Rather, Barker holds implied trusts cannot be applied to determine ownership of church property in a schism case because the courts become entangled in determining which group has adhered to the “true faith.” Barker, 115 Cal.App.3d at 617.

The actual law of secular voluntary associations authorizes an association’s constitution or governing instruments to create a trust on members’ property. In Hook v. Brown, 79 Cal.App.2d 781 (1947), the majority of the members of a local union lodge which was part of a hierarchical voluntary association voted to disassociate from the international union. Based on the provisions of the constitution of the international union, the court held that the international union was entitled to possession of the funds and property of the local union following the succession. Id. at 795. The court noted that:

Appellants have not cited a case which holds that where there is a constitutional provision providing for forfeiture to the parent organization, such parent organization cannot recover the forfeited property.

Id.

Here, Petitioners also fail to cite a single case which would prevent a secular voluntary association from claiming its members’ property based on the association’s constitution.

4. The laws of constructive or resultant trusts and voluntary associations are statutory.

Petitioners argue that their approach is superior because it relies on statutory provisions, instead of common law, and uniformly applies the statutes to everyone. Reply p. 2 and 27. Petitioners overlook the fact that Section 9142 is the more specific and controlling statute.⁹ Petitioners also overlook the fact that constructive or resulting trusts and voluntary associations are also statutory mechanisms which determine interests in property. Civil Code § 2224 and Corporations Code, Title 3, starting at § 18000 addressing unincorporated associations.¹⁰ Petitioners advance the value of upholding “statutory” as compared to “common” law. Even assuming Petitioners’ normative criteria is correct, Petitioners have applied only the statutes which are convenient to their position.

⁹ We note that Jones does not instruct courts to consider all statutes governing property as part of a neutral principles analysis. Rather, Jones focuses specifically on “state statutes governing the holding of church property.” Jones, 443 U.S. at 595.

¹⁰ An unincorporated association is an “unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not.” Corp. Code §18035. Persons include corporations, other unincorporated associations and any other form of entity. Corp. Code §18030. An unincorporated association’s “governing principles” are those stated in its governing instruments or, if there are no such written principles, those which the association has used for five years without material deviation. Corp. Code §18010.

C. Principles of government and Section 9142 approaches do not violate equal protection.

1. Petitioners' equal protection critique fails because it is not based on a government classification and does not compare similarly situated parties.

Petitioners contend application of "pure" neutral principles fosters equal protection. In contrast, Petitioners contend application of the principles of government or Section 9142 results in disparate treatment of (1) secular compared to religious property owners, (2) members of hierarchical denominations, compared to members of congregational denominations, and (3) hierarchical denominations compared to congregational denominations. Reply p. 15.

Not all instances in which parties are treated differently are suspect. Equal protection does not deny the government the power to treat "different classes of persons in different ways (citation omitted)." Johnson v. Robison, 415 U.S. 361 (1974). (citation omitted). "Once the plaintiff establishes **governmental classification**, it is necessary to identify a '**similarly situated**' class against which the plaintiff's class can be compared [emphasis added]." Rosenbaum v. City and County of San Francisco, 484 F.3d 1142, 1153 (9th Cir. 2007). Absent a government classification and similarly situated control group, an equal protection analysis simply fails. Petitioners' equal protection arguments fail for these reasons.

In Rosenbaum, Christian evangelists who were denied city event permits challenged the permit process as violating equal protection.

The court found the challenge failed because the evangelists did not identify a similarly situated “bona fide control group” which was granted permits (i.e., one consisting of events of similar size, to be held at similar times and similar locations). Id. See also Brown v. Borough of Mahaffey, Pa., 35 F.3d 846, 850 (1994) (“in order to maintain an equal protection claim with any significance independent of the free exercise count . . . the plaintiffs must also allege and prove that they received different treatment from other similarly situated individuals or groups”).

To the extent that Petitioners are comparing the rights of religious property owners to those of secular property owners, they are not comparing parties who are similarly situated. For equal protection purposes, the distinctions between religious and secular organizations, in the first instance, are sufficient to justify disparate legislative treatment. In New York State Club Association v. City of New York, 497 U.S. 1 (1988), the Supreme Court addressed an equal protection challenge to a law which prohibited private clubs with 400 or more members from discriminating but exempted religious organizations. The court held that the parties challenging the statute had the burden of proving that religious organizations were not “different in kind.” New York State Club, 497 U.S. at 18. The court noted that there was:

“ . . . no evidence in the record to indicate that a detailed examination of the practices, purposes, and structures of benevolent orders and religious corporations would show them to be identical. . . to the private clubs that are covered . . . without any such showing, appellant’s facial attack on the law under the Equal Protection Clause must founder.”

Id.

Here, as a religious nonprofit corporation property owner, St. James is, in fact, different from any other secular charity which owns property. The distinctions include: differences in the Attorney General's supervisory powers (broad for all charitable trusts and corporations other than religious corporations; see Uniform Supervision of Trustees and Fundraisers for Charitable Purpose, Gov. Code §§ 12580 and 12581); the class of persons who have standing to enforce a trust (broader for religious corporations than for secular nonprofit corporations or other charitable trusts),¹¹ constitutional constraints on doctrines of implied trust, resultant trusts and constructive trusts (applicable to religious corporations but not to secular charitable property owners, see p. 38); constitutional requirements to facilitate both hierarchical and congregational forms of organization which have no counterpart in the worlds of secular nonprofit corporations and charitable trusts, see pp. 32-33; and judicial supervision of the on-going charitable missions of secular nonprofit corporations and unincorporated charitable trusts which is not imposed on religious corporations, see pp. 37-38.

Congregations which are members of a hierarchical denomination and congregations which are members of a congregational denomination are not similarly situated. One congregation is a part of a denomination which declares its members are subject to the authority of the denominational church, and the other is not. One congregation

¹¹ Members of nonprofit public and mutual benefit corporations must bring derivative actions and former members have no enforceable rights. Corp. Code §§ 5142(a)(1) and 7142(a)(1). For other general charitable trusts, only the trustees, settlors (if a power to revoke is specifically retained) and beneficiaries have standing. Probate Code §§ 17200 and 15800. Standing does not extend to those who have a right to use or benefit from the trust res in common with others. Pratt v. Security Trust & Savings Bank, 15 Cal.App.2d 630, 640 (1936) (holding that a member of the public had no cause of action for failure to use charitable trust res as a public park).

consists of individuals who chose to join a church that is subject to the authority of the denominational church and the other congregation consists of individuals who chose to join a church that is not subject to the authority of a denominational church. Here the differences in the congregation's choices – and the congregants' choices - regarding the nature of the denomination of which they are a part, or to not be part of a denomination at all, make them not similarly situated. The law respects, not imposes, these choices. Likewise, a hierarchical denomination is not similarly situated to a congregational denomination. One has language in its constitution which recites that its congregations are subordinate to the authority of specified bodies within the denomination (i.e. the diocese and the Episcopal Church) and the other does not. Again, the law simply respects, not imposes, these choices. These self-chosen differences are as meaningful, or more meaningful, than the event size, place and time distinctions relied upon in Rosenbaum, 484 F. 3d. at 1153.

2. Petitioners' equal protection critique fails because there is a rational basis for Section 9142.

Assuming this Court performs an equal protection analysis, the next question is which standard of review applies - - rational basis, strict scrutiny, or some intermediate standard. Here, Petitioners allege that heightened scrutiny results because the classification is based on the religion. Reply p. 15-16. The Supreme Court, however, has consistently held that where a party's First Amendment rights are not violated, scrutiny is not heightened for equal protection purposes, even where First Amendment rights are implicated. Locke v. Davy, (2004) 50

U.S. 712, 721, Fn. 3 (applying “rational-basis scrutiny” to a statute prohibiting aid to students pursuing theology degrees); Johnson v. Robison, 415 U.S. at 375, Fn. 14 (evaluating a statute denying veterans benefits to conscientious objectors; if “the Act does not violate appellee’s right of free exercise of religion” the “rational-basis test” applies); see also Tombs v. Allen, 827 F.2d 563, 568 (1987) (standard for inmate who observes a minority religion is “reasonable opportunity of pursuing his faith comparable to opportunity afforded fellow prisoners”).

Here, the statute at issue, Section 9142, was enacted as part of an over-all legislative scheme designed to serve several legitimate governmental purposes. The litany includes: facilitating the free exercise of religion; accommodating religion by providing property rules which make hierarchical control one possible outcome; and avoiding judicial entanglement in religious affairs. (See pp. 29, 32, 33 and 38). Each of these purposes is not only legitimate but relates to protecting a fundamental right declared by the United States and California State Supreme Courts.¹²

¹² Petitioners also cite Cal. Const., Article 1, §7 as grounds for their equal protection challenge. California courts regard federal decisions as “persuasive authority to be afforded respectful consideration” in defining fundamental rights found in both the state and federal constitutions, including equal protection. Serrano v. Priest, 18 Cal.3d 728, 764 (1976). Petitioners have the burden of showing that California law is substantively different to overcome this persuasive effect. “We have long emphasized that there must be cogent reasons for departure from a construction placed on a similar constitutional provision by the United States Supreme Court.” East Bay Asian Local Dev. Corp. v. California, 24 Cal.4th 693, 719 (2000). Petitioners have not met this burden, so a federal analysis suffices.

D. Principles of government and Section 9142 do not result in impermissible entanglement.

Petitioners argue that both the principles of government and Section 9142 approaches promote entanglement in religious questions. Reply pp. 16-18. As argued above at pp. 32-33, in Jones, the Supreme Court authorized use of a version of neutral principles of law which included analysis of the constitution of the general church. The Supreme Court relied on the flexibility to amend the constitution to include a trust clause to rebut the dissent's view that "compulsory deference" was constitutionally required to protect the free exercise of hierarchical churches.

In reviewing church documents, the Supreme Court acknowledged that the applicable instruments might incorporate religious concepts and could "require a court to resolve a religious controversy." Jones, 443 U.S. at 604. In such instances, the solution advanced by the Supreme Court was very simple, namely defer to "the authoritative ecclesiastical body." Id. The Supreme Court did not sanction minimizing the role of the constitution of the general church to avoid this problem precisely because under neutral principles an examination of the church constitution is the pivotal accommodation of hierarchical religion and the reason the neutral principles method does not violate the free exercise clause. In other words, the Supreme Court weighed the potential for entanglement in document review against free exercise concerns, and free exercise won. Moreover, as we have argued, "pure" neutral principles of law is fraught with even greater potential for judicial entanglement. See pp. 29-31.

E. Principles of government and Section 9142 do not unconstitutionally prefer or establish certain religious denominations.

Petitioners argue that the principles of government approach unconstitutionally prefers or establishes certain religious denominations. Reply p. 18. In Petitioners' view, deference to the governing structure disadvantages the dissenters relative to the leaders. Reply p. 9. As Amici previously argued, in Jones, the Supreme Court sanctioned presumptions favoring either the minority or the majority so long as the law left room for a different result. See p. 33 Here, a parish or parishioners who do not want to worship as part of a hierarchical denomination can simply choose not to join a hierarchical denomination. Certainly, the governing instruments of some organized religion make it clear that each congregation remains independent, but that is not the case here.

Petitioners advance this argument on the alternative ground that some denominations are favored over others. In Petitioners' view, some denominations are accommodated by benefit of a special trust rule while others remain subject to ordinary secular property and trust rules. Petitioners' assertions regarding the nature of ordinary property and trust rules as applied to secular charitable trust are wrong, and their argument fails for this reason. See pp. 33-34.

Assuming this Court finds some merit in Petitioners' premise, in Catholic Charities, this Court held that a statute does not violate the establishment clause merely because it distinguishes between religious denominations, conferring an accommodation on some but not on

others. The Court rejected the argument that an exemption from a law requiring contraceptive coverage in an employer's prescription benefits impermissibly discriminated between religious organizations by exempting only those organizations promoting "inculcation of religious values" as distinct from those which engage in "works of mercy." Catholic Charities, 32 Cal.4th at 554 (citing Health & Safety Code, § 1367.25, subd. (b)(1)(A)). The Court approved the accommodation in the statute, which did not extend to all religious employees because there was no "explicit distinction between religious denominations" even though the law affected different religious groups and portions of the same religious group differently. Id. at 554.

Section 9142 or the principles of government approach is like the statue considered in Catholic Charities in that the accommodation of honoring the governing instruments of a superior church does not benefit a single religious denomination. On its face, Section 9142 speaks in terms of "churches" and is facially neutral between denominations. Petitioners have made no showing that the statute was secretly designed to benefit "Presbyterians" or "Episcopal" or any other denomination. There is no religious gerrymandering. Similarly, the principles of government approach has no secret desire to benefit a single denomination. Some churches are hierarchical and some are not, just as some church organizations promote "inculcation of values" while others engage in "works of mercy."

F. Principles of government and Section 9142 do not violate the Establishment Clause because they meet the Jones tests.

Petitioners correctly cite the Lemon test as the general rule for evaluating alleged Establishment Clause violations. Lemon v. Kurtz, 403 U.S. 602 (1971) Reply p. 16. Allegations of Establishment Clause violations, however, come in a variety of flavors. Courts have encountered cases about school prayer, aid to parochial schools, religious symbols and monuments on state property, religious invocations at state events, exceptions for religious organizations or practices in otherwise generally applicable statutes and statutes which directly seek to accommodate religion - - all in the context of Establishment Clause challenges. In considering cases, the Supreme Court focuses on the most closely analogous prior cases. The Supreme Court does this sometimes in lieu of and at other times to inform its analysis of the otherwise generally applicable Lemon test and its progeny.

In Lynch v. Donnelly, 465 U.S. 668 (1984), the Supreme Court was called upon to decide whether or not permitting a nativity display in a city park violated the Establishment Clause. The court declined to rigidly apply the Lemon test, reasoning that:

In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed . . . In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an

excessive entanglement of government with religion. Lemon, supra. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. In two cases, the court did not even apply the Lemon “test.” We did not, for example, consider that analysis relevant in Marsh, supra. [a case involving the opening of legislative sessions with prayer]. Nor did we find Lemon useful in Larson v. Valente, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), where there was substantial evidence of overt discrimination against a particular church.

Lynch, 465 U.S. at 678-679.

In the 1979 Jones decision, the Supreme Court declared that consistent with the “First Amendment” a state may use “neutral principles of law” to settle church property disputes. Jones, 443 U.S. at 602. The Supreme Court reached this conclusion without even a nod to the Lemon test, notwithstanding the fact that Lemon was decided in 1971. The Supreme Court relied instead on a long and vigorous line of cases specifically addressing the role of the First Amendment in church property disputes. This Court should similarly rely on Jones and the other church property cases to articulate the First Amendment rules of the road for Establishment Clause purposes. As set forth above, the statute and the principles of government approach meet the standards articulated in Jones and the other church property cases and are accordingly constitutionally permissible.

Simpson v. Chesterfield County Board of Supervisors, 404 F. 3d 276 (4th Cir. 2005), provides direct authority for this approach. In Simpson, the court considered an Establishment Clause challenge to the exclusion of practitioners of the Wiccan religion from the list of those entitled to provide non-sectarian invocations at county counsel sessions. The court analyzed whether the applicable test was found in Larson (a case involving statutory discrimination directed at a single religious denomination), Marsh (a case involving an invocation at the commencement of legislative sessions), or Lemon. The court declined to apply either Larson or Lemon, reasoning as follows:

We think [plaintiff's] reliance on these cases is misplaced and conclude that Marsh v. Chambers controls the outcome of this case. First, Marsh deals directly with legislative invocations, **the specific issue before us**. . . Second, Marsh was decided after both Lemon and Larson, and it declined to apply either of them. Marsh mentioned Lemon only once, and then only to note that the court of appeals, which the Supreme Court reversed, had relied on it. [emphasis added]

Simpson, 404 F.3d at 280-281.

The ill-matched assortment of cases cited by Petitioners does not justify looking beyond the decisions of the Supreme Court and this Court which directly address church property disputes. Reply pp. 18-19. Everson v. Board of Education, 330 U.S. 1 (1947), (state may pay for transportation to parochial school); Commission for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), (state may not provide

financial aid to parochial schools or the parents of students who attend parochial schools); School District of Abington Township v. Schempp, 347 U.S. 203 (1963), (state may not mandate school prayer); and Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995), (state may permit the Klu Klux Klan to erect a Latin cross in a plaza adjacent to the capitol). In each instance, Petitioners provide no analysis of how the circumstances presented in the case are analogous to the circumstances of this case.

VI.
CONCLUSION.

The Court of Appeal correctly applied the principles of government approach to this dispute and overturned the trial court decision. The trial court clearly erred when it simply ignored the portions of the complaint that demanded that it enter judgment giving effect to the Diocese's determination of the true church. Not only was that a plain error of law, it violated the constitutional rights under the Free Exercise Clause of the Episcopal Church to manage its internal affairs free from governmental interference. Similarly, the trial court should have considered the express trust clause and other provisions of in the Canons of the Episcopal Church in determining who owns the property of St. James. Failure to do so, again, disregarded the constitutional rights of the Episcopal Church.

Dated: May 21, 2008

Law Offices of George S. Burns

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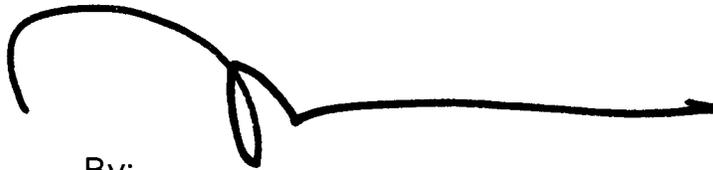
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1))

I certify under penalty of perjury under the laws of the State of California that I have fully complied with all applicable provisions of the California Rules of Court, Rule 14(c)(1) that appellate counsel state the number of words in the brief.

The attached brief contains 13,412 words. This information is based on the word count of the computer program used to prepare the brief.

Dated: May 21, 2008

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PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of George S. Burns, 4100 MacArthur Boulevard, Suite 305, Newport Beach, California 92660.

On May 22, 2008, I served a copy, including all exhibits, if any, of the following document(s):

AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND RESPONDENTS

on the parties in this action listed in the attached Proof of Service List, which is incorporated herein by this reference, by the following means:

- X **(BY MAIL)** I caused each such envelop to be sealed and placed for collection and mailing from my business address, which is located in the county where the mailing is described below took place. I am readily familiar with the practice of the Law Offices of George S. Burns for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business mail is deposited with the postage thereon fully prepaid in the United States Postal Service the same day as it is placed for collection. I am aware that upon motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

- X **(DISTRICT)** I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on May 22, 2008, at Newport Beach, California.



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