

Supreme Court Copy

No. S155094

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

MAY 30 2008

EPISCOPAL CHURCH CASES

Frederick K. Ohlrich Clerk

Deputy

California Court of Appeal, Fourth Appellate District, Division Three,
Case Nos. G036096, G036408, G036868

Superior Court of California,
County of Orange, J.C.C.P. 4392, Case No. 04CC00647
Honorable David C. Velasquez

**APPLICATION OF THE PRESBYTERIAN LAY COMMITTEE
FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN
SUPPORT OF THE PETITIONERS AND BRIEF AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

RANDALL M. PENNER (101201)
LAW OFFICE OF PENNER,
BRADLEY & BUETTNER
1171 West Shaw Avenue -- Suite 102
Fresno, CA 93711
Telephone: (559) 221-2100

DONALD FALK (150256)
MAYER BROWN LLP
Two Palo Alto Square -- Suite 300
Palo Alto, CA 94306
Telephone: (650) 331-2000

EUGENE VOLOKH (194464)
MAYER BROWN LLP
350 South Grand Avenue -- 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500

Attorneys for the Amicus Curiae

RECEIVED

MAY 22 2008

CLERK SUPREME COURT

**APPLICATION OF THE PRESBYTERIAN LAY
COMMITTEE FOR PERMISSION TO FILE BRIEF AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

To the Honorable Ronald M. George, Chief Justice:

The Presbyterian Lay Committee (“PLC”) respectfully applies for permission to file the accompanying brief as *amicus curiae* in this matter in support of the petitioners. The reply brief in this matter was filed April 22, 2008. Accordingly, this application is timely under Rule 8.520(f)(2) of the California Rules of Court.

Established in 1965, the PLC is a non-profit corporation whose mission includes informing Presbyterians regarding issues facing the denomination and equipping local congregations and members in their dealings with the regional and national entities within the Presbyterian Church (United States of America) (PC(USA)). The PLC publishes the *Layman*, a magazine that historically had a circulation of more than 250,000, and operates *The Layman Online*, an Internet resource that records approximately 30,000 hits daily. The PLC also owns and operates PLC Publications and Reformation Press, a publishing house specializing in resource material on Reformed Theology. The PLC regularly reports on judicial decisions concerning church property issues and publishes a legal guide regarding disaffiliation and property issues: “A Guide to Church Property Law: Theological, Constitutional and Practical Considerations.”

As an entity that helps equip lay leaders to maintain the integrity of the Presbyterian denomination, the PLC has a strong interest in this matter. The PLC's donors and readership look to the PLC to maintain an advocacy position regarding denominational issues. The PLC has played a pivotal role in distributing accurate information to individual churches regarding their rights under the PC(USA) Constitution and the Constitution of the United States.

The PLC's views will assist the Court in understanding the true diversity of polity within major denominations in the Nation and this State. In particular, the PLC seeks to counter any material misrepresentations regarding the purported similarity between the Episcopal Church (USA)'s polity and the PC(USA)'s Presbyterian form of polity. Broad characterization and oversimplification risk creating improper legal treatment of religious organizations. The PLC is aware that a PC(USA) official filed an amicus brief before the Court of Appeal in this case improperly asserting that the EC(USA) and the PC(USA) had similarly structured polities. Were that factual misstatement to go uncorrected, this Court might mistakenly equate those two polities, and as a result might underestimate the range in polities among Protestant denominations that defy easy categorization as either hierarchical or congregational. That could lead the Court erroneously to minimize the practical significance of

its decision here—setting aside whether any effort at categorization requires improper judicial determination of disputes over ecclesiastical matters.

The PLC is vitally interested in the balance that has traditionally existed in the Presbyterian denomination between local congregations and the polity structure by which Presbyterianism historically has been organized. The fundamental unit within the Presbyterian polity is the local congregation, which is governed by a Session comprising the pastor and a number of elders elected by the congregation. Each Session sends one or more delegates to a regional Presbytery, which, in turn, sends delegates to a Synod (usually of state-wide scope) and to the nationwide General Assembly.

Legal title to local Presbyterian church property is almost always held by the local church and in the name of the local church alone. Throughout most of its history in the United States, Presbyterianism has been marked by the multiplicity of regional and national organizations that have come and gone, and among which local congregations have chosen to affiliate entirely based upon the dictates of the conscience of the congregants.

After the United States Supreme Court's decision in *Jones v. Wolf* (1979) 443 U.S. 595, the General Assembly of the PC(USA) unilaterally attempted to assert a trust in its own favor over local congregational property. Local churches never assented to the trust, and few, if any,

formal property transfers followed. The PLC believes that this unilateral assertion of a trust is inconsistent with the denomination's historical structure of governance, which respected the autonomous property ownership and management of the local congregations. Attempts to superimpose a trust interest on local church property improperly impairs the rights and interests of local congregants, and the abilities of local church fiduciaries to manage and protect church assets according to the desires of local church members. That is, the PC(USA)'s calls for deference to its "hierarchy" in fact call for deference to its *assertions* of hierarchy, assertions that in the PLC's view far exceed the power actually accorded under the Presbyterian polity. Indeed, the PC(USA) itself in its own public and internal documents has repeatedly denied that it is a hierarchy.

The United States and California Constitutions preclude preferential treatment for assertions of power by ecclesiastical entities in civil courts resolving purely civil disputes over matters such as property title. Accordingly, title to property held by a local religious corporation should be evaluated in the same way as property held by any other legal person. An assertion of a trust by a self-described beneficiary cannot be enforced under trust law principles applicable to every other person in civil society, and should not be enforced merely because the self-described beneficiary occupies, for some purposes, a higher tier in a religious organization. Because correct enunciation of these principles by this Court will help

preserve the autonomy of Presbyterian and other congregations throughout California, PLC submits its views on the constitutional analysis properly applicable to church property disputes and the ramifications of the competing analyses offered in the briefing.

CONCLUSION

The application for permission to file brief as *amicus curiae* in support of the petitioners should be granted.

May 22, 2008

Respectfully submitted.

RANDALL M. PENNER (101201)
LAW OFFICE OF PENNER,
BRADLEY & BUETTNER
1171 West Shaw Avenue – Suite 102
Fresno, CA 93711
Telephone: (559) 221-2100


DONALD FALK (150256)
MAYER BROWN LLP
Two Palo Alto Square – Suite 300
Palo Alto, CA 94306
Telephone: (650) 331-2000

EUGENE VOLOKH (194464)
MAYER BROWN LLP
350 South Grand Avenue – 25th
Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500

TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICUS CURIAE</i>	1
INTRODUCTION.....	1
ARGUMENT	9
I. Modern Establishment Clause Jurisprudence Requires The Use Of Strictly Neutral Principles To Determine Property Disputes.....	11
A. Developments In The Law And Practical Experience Require Civil Courts To Use Neutral Principles To Decide Property Disputes Between Religious Organizations	13
B. Because The Threshold Classification Of A Religious Polity As Hierarchical Or Congregational Is Closely Intertwined With Doctrinal Questions, The Establishment Clause Precludes Civil Courts From Basing Their Decisions On That Fundamentally Ecclesiastical Determination.....	17
C. Judicial Deference To Assertions Of Religious Hierarchy Would Unconstitutionally Favor Certain Forms Of Religious Belief And Organizational Structure	23
D. The Establishment Clause Requires The Use Of Strictly Neutral Principles That Provide No Procedural Or Evidentiary Preferences To Religious Organizations Or Asserted Hierarchies Within Them.....	26
E. The Mainstream View, And Clear Trend, In Other States Applies Neutral Principles To Property Disputes Between Affiliated Religious Organizations	32
F. The No-Preference Clause Reinforces The Need To Apply Strictly Neutral Principles.....	36

TABLE OF CONTENTS
(Continued)

	Page
G. Under The Doctrine Of Constitutional Avoidance, Corporations Code Section 9142 Should Be Construed In Accord With Generally Applicable Principles Of Trust Law	38
II. The Practical Consequences Weigh Heavily Against An Approach Deferential To Assertions Of Hierarchy	44
A. The History And Structure Of The Presbyterian Church Illustrate The Problems Encountered At Every Step Of An Analysis That Defers To Asserted Hierarchy.....	45
B. The Definitional Questions Regarding Presbyterianism Are Not Even The Tip Of The Iceberg In A Religiously Diverse Society.....	50
C. Additional Practical Considerations Support Application Of Strictly Neutral Principles.....	52
CONCLUSION	55

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adler v. Manor Healthcare Corp.</i> (1992) 7 Cal.App.4th 1110.....	10
<i>Bjorkman v. Protestant Episcopal Church in U.S. of Diocese of Lexington</i> (Ky. 1988) 759 S.W.2d 583	24
<i>Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet</i> (1994) 512 U.S. 687	40
<i>Boy Scouts of America v. Dale</i> (2000) 530 U.S. 640	42
<i>California-Nevada Annual Conf. of United Methodist Church v.</i> <i>St. Luke's Methodist Church</i> (2004) 121 Cal.App.4th 754 <i>passim</i>	
<i>Catholic Charities of Sacramento, Inc. v. Superior Court</i> (2004) 32 Cal.4th 5278	8, 16, 26, 30
<i>Central Coast Baptist Ass'n v. First Baptist Church of Las Lomas,</i> No. S156770 (Cal.)	51
<i>Cutter v. Wilkinson</i> (2005) 544 U.S. 709	24, 40, 41
<i>Dyer v. Martinez</i> (2007) 147 Cal.App.4th 1240	9
<i>East Bay Asian Local Development Corp. v. State of California</i> (2000) 24 Cal.4th 693	36, 37
<i>Employment Division v. Smith</i> (1990) 494 U.S. 872	22, 28
<i>Estate of Thornton v. Caldor</i> (1985) 472 U.S. 703	24, 40
<i>First Presbyterian Church of Schenectady v. United Presbyterian Church</i> <i>in the U.S.</i> (N.Y. 1984) 464 N.E.2d 454	25, 33, 42
<i>First Trust Sav. Bank of Pasadena v. Costa</i> (1948) 83 Cal.App.2d 368	10
<i>Fluker Community Church v. Hitchens</i> (La. 1982) 419 So.2d 445	35
<i>Fox v. City of Los Angeles</i> (1978) 22 Cal.2d 792	37

TABLE OF AUTHORITIES
(Continued)

Cases	Page(s)
<i>From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church</i> (Md. 2002) 803 A.2d 548	35
<i>Frey v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23	39
<i>Gonzalez v. Archbishop</i> (1929) 280 U.S. 1	13
<i>In re Church of St. James the Less</i> (Pa. 2005) 888 A.2d 795	16, 30
<i>In re Marriage Cases</i> , No. S147999 (Cal. May 15, 2008)	39
<i>Jenkins v. Trinity Evangelical Lutheran Church</i> (Ill.Ct.App. 2005) 825 N.E.2d 1206 (Ill.Ct.App.), <i>app. denied</i> (Ill. 2005) 839 N.E.2d 1025	36
<i>Jodo Shu Betsuin v. Jodoshu North American Buddhist Missions</i> , 2d Dist. No. B192869	50
<i>Jones v. Wolf</i> (1979) 443 U.S. 595	<i>passim</i>
<i>Joyhl v. Gurie Nanak Sikh Temple</i> , 3d Dist. No. C052412	50
<i>Laird v. Capital Cities/ABC, Inc.</i> (1998) 68 Cal.App.4th 727.....	54
<i>Larkin v. Grendel's Den</i> (1982) 459 U.S. 116.....	15
<i>Larson v. Valente</i> (1982) 456 228.....	41
<i>Lemon v. Kurtzman</i> (1971) 403 U.S. 602	41
<i>Maktab Tarighe Oveyssi Shat Maghsoudi, Inc. v. Kianfar</i> (9th Cir. 1999) 179 F.3d 1244.....	19, 51
<i>Maryland & Virginia Eldership of the Churches of God v. Sharpsburg Church of God, Inc.</i> (1970) 396 U.S. 367.....	26, 27
<i>Medlock v. Medlock</i> (Neb. 2002) 642 N.W.2d 113	36
<i>Meshel v. Olzev Sholom Talmud Torah</i> (D.C. 2005) 869 A.2d 343.....	36

TABLE OF AUTHORITIES
(Continued)

Cases	Page(s)
<i>Mummert v. Security-First Nat'l Bank of Los Angeles</i> (1960) 183 Cal.App.2d 195.....	10
<i>Presbyterian Church in the United States v. Hull Memorial Presbyterian Church</i> (1969) 393 U.S. 440	12, 22, 31
<i>Presbytery of Beaver-Butler v. Middlesex Presbyterian Church</i> (Pa. 1985) 489 A.2d 1317	19, 34
<i>Presbytery of Riverside v. Community Church of Palm Springs</i> (1979) 89 Cal.App.3d 910.....	31, 32
<i>Protestant Episcopal Church v. Barker</i> (1981) 115 Cal.App.3d 5999, 16, 31, 41	
<i>Reagh v. Kelly</i> (1970) 10 Cal.App.3d 1082	10
<i>Reorganized Church of Jesus Christ of Latter Day Saints v. Thomas</i> (Mo. Ct. App. 1988) 758 S.W.2d 726.....	35
<i>Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church</i> (1952) 39 Cal.2d 121	17, 51
<i>Sands v. Morongo Unified School Dist.</i> (1991) 53 Cal.3d 863.....	8, 36, 37
<i>Self-Realization Fellowship Church v. Ananda Church of Self-Realization</i> (9th Cir. 1995) 59 F.3d 902.....	50
<i>Serbian Eastern Orthodox Diocese v. Milivojevich</i> (1976) 426 U.S. 696..	14
<i>Serbian Orthodox Church Congregation of St. Demetrius of Akron, Ohio v. Kelemen</i> (Ohio 1970) 256 N.E.2d 212.....	34
<i>Smith v. Nelson</i> (1846) 18 Vt. 511	45
<i>Synanon Foundation, Inc. v. California</i> (1979) 444 U.S. 1307	51
<i>Texas Monthly, Inc. v. Bullock</i> (1989) 489 U.S. 1	19, 40, 41, 42
<i>Thomas v. Review Bd.</i> (1981) 450 U.S. 707	22

TABLE OF AUTHORITIES
(Continued)

Cases	Page(s)
<i>Tran v. Farmers Group, Inc.</i> (2002) 104 Cal.App.4th 1202	54
<i>United States v. Ballard</i> (1944) 322 U.S. 78	22
<i>Watson v. Jones</i> (1871) 80 U.S. (13 Wall.) 679.....	14, 20, 45, 48
<i>Wheelock v. First Presbyterian Church</i> (1897) 119 Cal. 477.....	32
<i>Wisconsin Conference Bd. of Trs. of United Methodist Church, Inc.</i> <i>v. Culver</i> (Wis. 2001) 627 N.W.2d 469	36
<i>Wolf v. Rose Hill Cemetery Ass'n</i> (Colo. Ct .App. 1995) 914 P.2d 468.....	36
Constitutions, Statutes and Rules	Page(s)
U.S. Constitution, Amendment I.....	39, 43
California Constitution, Article I, Section 4	25, 36, 43
Civil Code § 1213	9, 11
Civil Code § 1214	9, 11
Civil Code § 1215	9, 11
Civil Code § 1624	9
Civil Code § 1627	9
Corp. Code § 9142	38, 39, 41
Corp. Code § 9142(c).....	<i>passim</i>
Corp. Code § 9142(c)(2)	38, 43
Corp. Code § 9802	41
Evid. Code § 662.....	9

TABLE OF AUTHORITIES
(Continued)

Constitutions, Statutes and Rules	Page(s)
Probate Code § 15200	9
Probate Code § 15200(a).....	10
Probate Code § 15201	9, 10
Probate Code § 15206	9
Probate Code § 15400	11, 43
Other Authorities	Page(s)
MILLARD J. ERICKSON, INTRODUCING CHRISTIAN DOCTRINE (1992).....	46
JOAN S. GRAY & JOYCE C. TUCKER, PRESBYTERIAN POLITY FOR CHURCH OFFICERS (3d ed. 1999).....	48
Jeffrey B. Hassler, Note, <i>A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intrad denominational Strife</i> (2008) 35 Pepp. L. Rev. 399	18, 33
<i>Johnston v. Heartland Presbytery</i> (2004) Permanent Judicial Comm'n Remedial Case 217-2.....	48
John Knox, <i>The Scots Confession</i> (1560) ch. 20, in THE PROPOSED BOOK OF CONFESSIONS OF THE UNITED PRESBYTERIAN CHURCH OF THE UNITED STATES OF AMERICA (1966)	47
NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW [2d ed.]	33
Presbyterian Church (USA), BOOK OF ORDER 2004/2005 (2004) ..	18, 46, 48
Presbyterian Church (USA), <i>Legal Resource Manual 2004-2007</i> (2d ed. 2005) <i>Basic Organization of the Presbyterian Church</i> [available at http://www.pcusa.org/legal/basic.htm]	48

TABLE OF AUTHORITIES
(Continued)

Other Authorities	Page(s)
Presbyterian Church (USA), <i>The Successor to Peter</i> (2000).....	47
Restatement 2nd (Trusts)	10
ROBERT ELLIS THOMPSON, A HISTORY OF THE PRESBYTERIAN CHURCHES IN THE UNITED STATES (1895; 2003 ed)	46, 47
13 WITKIN, SUMMARY OF CAL. LAW (2005) <i>Trusts</i>	9

INTEREST OF THE *AMICUS CURIAE*

The Presbyterian Lay Committee (“PLC”) is a non-profit corporation established in 1965—before the 1983 formation of the Presbyterian Church (United States of America) (“PC(USA)”). The PLC’s mission includes informing Presbyterians regarding issues facing the denomination and assisting local congregations in maintaining the tradition of freedom of conscience for local congregations (as determined by a majority of their elders acting in Session). The interest of the *amicus* is described more completely in its application for leave, *ante*.

INTRODUCTION

The significance of this case goes far beyond the ownership of the St. James Parish property. To decide that question, the Court first must adopt a constitutionally permissible legal analysis that can resolve property disputes between any religious organizations that dispute their relationship to each other and to the property. That analysis cannot be one that works only “under these particular facts” (as the Diocese suggests (Ans. Br. 37)), because it will govern disputes between religious organizations with far different structures and histories than those now before the Court.

To decide who owns the property here, this Court should apply the rules that would govern any other case involving a challenge to a titleholder’s ownership by another party claiming that the property in fact is held in trust for the challenger’s benefit—neutral legal principles that apply

irrespective of the identity of the parties. This Court has observed that “our nation’s position of governmental neutrality on religious matters stands as an illuminating example of the true meaning of freedom and tolerance.” (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 884.) Because the Constitution prohibits “subtle departures from neutrality” as well as obvious ones (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 552), no permissible application of “neutral” principles may in practical effect favor some forms of religion against others, and some factions of a denomination against others.

Assuming title is otherwise clear, then, the Court should presume that the title-holder (here, St. James Parish) is the owner. The purported trust beneficiary (here, the Diocese) could overcome that presumption only if the title-holder had unambiguously expressed, in writing, its intent to hold its property in trust. As the trial court’s decision suggests, a neutral application of civil law principles favors the Parish.

The Diocese, however, asks the Court to do something quite different. To affirm the decision below, this Court would have to retreat from the neutral principles of equal justice under the law that were embraced, until recently, in the modern church property decisions of the Court of Appeal—and by a growing number of the most sophisticated courts in other States. Instead, the Court would have to use a specially tailored analysis that allows certain religious organizations to decide who

owns property held by other religious organizations. For local congregations that are in some way affiliated with a broader denomination, that analysis would replace access to even-handed civil justice with consignment to an ecclesiastical decision-maker—and one with a strong economic interest in the matter. That is not right, and it is not constitutional.

This property dispute does not involve questions of religious doctrine, such as which of two groups is a denomination's "true" church, or whether the governing body of a denomination has remained faithful to the views and practices of the denomination's founders. Departing from the traditional practice in the United Kingdom (where courts delved into doctrinal fidelity), courts in the United States defer to the resolution of such doctrinal matters by the ecclesiastical bodies that govern a denomination.

But there is no basis for similar deference here. This case involves only whether the Parish that holds title to the disputed property does so subject to a trust for a different organization, the Diocese.

The Diocese does not explain how this supposed trust could be recognized under general principles of trust law. It points to no documented act by the title-holder subjecting the property to a trust. Rather, to affirm here in line with the Diocese's contentions, the Court would have to allow the resolution of this purely civil property dispute to

turn on judicial deference to a religious organization's assertion of hierarchical power in one of two ways.

Under the first deferential analysis, the Court would begin by determining whether the principles of governance within the denomination (here, Episcopal) were hierarchical or congregational—notwithstanding the practical difficulties of fitting most denominations into one of these two categories. If the Court decided that the denomination fit within the hierarchical slot in the taxonomy, the Court would delegate the power to decide property ownership to the assertedly higher entity within the denomination, whether or not the deeds and any other valid trust or contract documents supported that result.

Under the second mode of deference to an assertion of religious hierarchy, the Court would purport to apply neutral principles of civil law. In a striking departure from those principles, however, the Court would permit the assertedly higher religious entity to unilaterally impose a trust in its own favor over property that was held by another, local entity.

The effect of this Court's choice between neutral principles and these two special rules not only will determine the fate of the Episcopal parish in this case that wishes to change its affiliation within the Anglican Communion. That choice also will affect the freedom of affiliation of many other local congregations in denominations that are far less hierarchical than the Episcopal Church. In the history of American religion

in general, and of American Presbyterianism in particular, local congregations have enjoyed a strong tradition of economic independence and denominational mobility—the freedom to choose an affiliation, if any, according to the collective conscience of the congregation.

Little of that freedom would survive a legal rule that resolves property disputes by effectively deferring to assertions of hierarchy by any Convocation, Convention, or General Assembly that seeks to impose a trust on local congregations' property. Many denominations with a polity that falls somewhere between traditional hierarchy and pure congregationalism, such as where a collective body has authority for some purposes but not for others, and where the boundary is subject to dispute. Under a rule compelling deference to (and preference for) purported hierarchies, however, a church in one of the many intermediate denominations would be treated for purposes of property ownership as if it were subject to complete hierarchical control. An exercise of conscience by a local church would come at the price of its property, even if that was not the intent of the church founders.

The United States and California Constitutions preclude this Court or any other from shaping religious polity and choosing sides in religious disputes. The Establishment Clause and other Religion Clauses require civil courts to hold all religious organizations to the same property-ownership rules that apply to all other property owners and claimants.

The contrary course—deference to an assertion of hierarchy by one religious entity claiming to be superior to another—is unconstitutional for many different reasons. First, resolving the civil matter of property ownership based on a religious body’s unreviewable determination unconstitutionally delegates civil judicial power to a religious organization to decide a matter of secular law—one that affects creditors and others outside the religious sphere. That Establishment Clause violation also delivers the decision to a self-interested panel controlled by (if not identical to) one side of the dispute.

Second, the threshold classification of denominations as hierarchical or congregational inevitably entangles a court in doctrinal questions. At a minimum, a court would have to endorse one rival view about the church’s internal structure—a structure that often falls between the hierarchical and congregational poles. One of the most fundamental doctrinal questions is whether and to what extent a denomination’s centralized body may assert authority over a local congregation. Many Protestant denominations arose in part because of principled dissatisfaction with the suppression of individual conscience that accompanied the type of central control exercised by the Roman Catholic Church and the established Church of England. Similar disputes between and within Protestant denominations continue to this day.

A court certainly cannot escape the constitutional problems by merely deferring to every religious body that *says* it has hierarchical power over a local church. That type of favoritism confined to the religious sphere is equally impermissible under the Constitution. Moreover, it would improperly provide incentives for denominational governing bodies to declare that their denominations are hierarchical, and for denominations to adopt a hierarchical governing structure in fact.

The other type of deference—to trusts imposed by the purported beneficiary—is just as constitutionally infirm. It is not constitutionally neutral to permit purportedly “higher” religious bodies to declare trusts in their own benefit over the property of other legal persons. That special power would give an unconstitutional preference to religious entities over other persons, and to some religious entities over others. Neither the Establishment Clause nor the No-Preference Clause of the California Constitution permits that result. Nor do the Religion Clauses permit the courts to shape religious polities by providing an incentive for religious organizations to declare that member congregations hold their property in trust for a denominational authority. As a consequence, the Corporations Code also should be construed to avoid providing the same preferential method of imposing a trust on others’ property.

Instead, as the courts of many other States have recognized, property disputes between religious entities should be resolved using the same tools

used to decide other property disputes, in accord with settled and strictly neutral principles governing public notice of real property ownership and the existence of trusts. The legal owner of any given property should own that property in the eyes of the civil courts unless a trust would be imposed under neutral, civil law. Our system of civil justice neither favors nor restricts religion, and does not play favorites within or between denominations, or between forms of religious organization. Determinations of property ownership therefore must proceed according to rules that apply equally to all.

It is entirely fair to govern hierarchical denominations by same law that governs everyone else. A truly hierarchical religious organization can always instruct its inferior components to modify their deeds or record actual trusts—just as any other property owner would with any legally enforceable trust. Religious organizations have been on notice for nearly 40 years that it would be prudent to organize their property in a way that withstood purely civil scrutiny. If the Court makes clear that religious organizations cannot benefit from tailor-made rules of decision for their civil disputes, then local congregations will rightly retain their autonomy unless they have expressly agreed to subordinate their property interests to other entities.

Religious freedom flourishes where there is a multiplicity of viewpoints about the relation between humans and the Divine, and

congregants can alter their affiliation as needed to find the best fit between doctrine and local conscience. A religious corporation should not lose its rights as a separate, recognizable legal entity merely because its name may reference a denomination, or its members affiliate for spiritual purposes with a broader religious organization or movement. The decision below therefore should be reversed.

ARGUMENT

The question in this case is only whether church property disputes will be resolved according to the rules that apply to everyone else, or by special legal rules that apply only when certain religious bodies are involved. There is no need to decide whether a congregation or larger church has adhered to the true doctrine of any faith, or who has the right to select and retain clergy.

Because this is a straightforward property dispute where one party claims to be the beneficiary of a trust, the normal rules of decision provide the most sensible starting point. First, in line with the public notice function of the recording system for ownership of real property (see generally *Dyer v. Martinez* (2007) 147 Cal.App.4th 1240, 1243-1246; Civil Code §§ 1213-1215), California law presumes that property belongs to the person holding title. (Evid. Code § 662.) That is, the holder of legal title presumptively is the full beneficial owner as well, and only clear and convincing evidence can overcome that presumption. (*Id.*) Second,

California law recognizes only those trusts that (1) are embodied in a written document that (2) reflects the clear and unambiguous intent of the *owner or settlor*—not merely the desires of the beneficiary. (See Civil Code §§ 1624, 1627; Probate Code §§ 15200-15201, 15206; *Protestant Episcopal Church v. Barker* (1981) 115 Cal.App.3d 599; 13 WITKIN, SUMMARY OF CAL. LAW (2005) *Trusts* § 33.)

The law of trusts could not be clearer that a trust must arise from an action by the *settlor* expressing clear and unambiguous intent to create a trust for another. (Probate Code § 15201.) As the Court of Appeal observed in another church property case, “no principle of trust law stat[es] that a trust can be created by the declaration of a nonowner that the owner holds the property as trustee for the nonowner.” (*California-Nevada Annual Conf. of United Methodist Church v. St. Luke’s United Methodist Church* (2004) 121 Cal.App.4th 754, 769 [*St. Luke’s*] [citing Probate Code §15200(a) and Restatement 2d (Trusts) § 17].) Rather, “a voluntary trust is created” only by “words *of the trustor*, indicating with reasonable certainty * * * [a]n intention *on the part of the trustor* to create a trust; and * * * the subject, purpose, and beneficiary of the trust.” (*Reagh v. Kelly* (1970) 10 Cal.App.3d 1082, 1089 (emphasis added and internal quotation marks omitted).) Thus, the California courts focus on “the intention of the trustor as expressed in the trust instrument.” (*Mummert v. Security-First Nat’l*

Bank of Los Angeles (1960) 183 Cal. App. 2d 195, 199; *First Trust Sav. Bank of Pasadena v. Costa* (1948) 83 Cal. App. 2d 368, 372.)

And a trust cannot be validly imposed across a range of local properties, each with a separate title-holder, by a general declaration by the beneficiary that all the properties are held in trust. Rather, trust agreements affecting real property generally are recorded just like any other written document affecting title. (See, e.g., *Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119 [noting “recorded trust agreement”]; Civil Code §§ 1213-1215.)

Moreover, because the trustor’s express intention is controlling, a validly created express trust is revocable at will unless the trust instrument explicitly precludes revocation. (Probate Code § 15400; see *St. Luke’s*, 121 Cal.App.4th at 767.) Thus, the trustor can change its mind, and undo mistakes or misunderstandings.

The question here is whether these rules should apply when the title-holder is a local religious congregation, and a larger religious group claims to benefit from a trust in its favor. Under modern constitutional principles, the same rules should apply here as in any similar dispute.

**I. MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE
REQUIRES THE USE OF STRICTLY NEUTRAL
PRINCIPLES TO DETERMINE PROPERTY DISPUTES.**

More important than the resolution of the property dispute in this case is the analysis this Court chooses to undertake. There are three

choices. Two approaches allow assertions of power by religious hierarchies (or purported hierarchies) to determine the outcome of property disputes. The third approach treats a property dispute between religious organizations the same as a dispute between any other parties.

First, the Court could hold that it will determine the form of polity, or principles of governance, of any religious denomination involved in a property dispute. Upon concluding that a denomination is hierarchical, the Court would defer to the resolution of the property dispute by whichever entity asserts that it has hierarchical control over the other. Second, the Court could hold that neutral principles of property law govern some issues, yet nonetheless defer to the declaration, in the governing documents of an entity claiming hierarchical control, that the property of affiliated local congregations is held in trust for the asserted hierarchy's benefit—even though an assertion by a self-described trust beneficiary would not be enforced in any other context. Third, the Court could simply apply the same legal principles that apply to all other property claimants.

As explained below, only the third option, which uses strictly neutral principles, accords with the Religion Clauses of the United States and California Constitutions.

A. Developments In The Law And Practical Experience Require Civil Courts To Use Neutral Principles To Decide Property Disputes Between Religious Organizations.

Nearly forty years ago, the Supreme Court of the United States made clear that the Establishment Clause permitted state courts to apply “neutral principles” to resolve property disputes between religious organizations. (See *Presbyterian Church in the United States v. Hull Memorial Presbyterian Church* (1969) 393 U.S. 440, 449; see also *Jones v. Wolf* (1979) 443 U.S. 595, 602-604.) The Court held that, when religious organizations invoke the power of a civil court to decide the secular question of property title, the court may subject religious organizations to the same legal rules that apply to everyone else, even if doctrinal authorities might decide the matter differently. The *Jones* opinion illustrated the distinction: a court could constitutionally uphold the local organization’s title even though another religious organization purporting to be the titleholder’s superior had identified a different entity as the “true congregation” within the broader denomination. (*Jones*, 443 U.S. at 598.)

By contrast, in cases that were not straightforward title contests but included matters of doctrine and spiritual leadership, the Court had deferred to the authority of a religious hierarchy. Those cases arose when, for example, different organizations each claimed to be the “true” representative of a particular faith, or when individuals or organizations disputed the appointment of a priest, minister, or bishop—disputes that

cannot practically be resolved through neutral principles of civil law. (See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696 [deferring to determination of “Mother Church” as to identity of bishop and organization of diocese].) As the Court explained, “the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive * * * .” (*Gonzalez v. Archbishop* (1929) 280 U.S. 1, 16.) But that deference properly applies only to “matters purely ecclesiastical” (*id.*), such as an appointment to a specific religious office, or “a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.” (*Watson v. Jones* (1871) 80 U.S. (13 Wall.) 679, 733.)

In deciding *Jones v. Wolf*, the Court did not then consider whether the Establishment Clause permitted state courts to retain their common-law option of according special treatment to certain religious organizations when they disputed property ownership with other, supposedly subordinate groups. But more recent Religion Clause decisions make clear that the Constitution does not permit such judicial deference to an assertion of religious hierarchy. In particular, the Court has continued to disapprove both judicial entanglement in religious affairs and judicial (or legislative) principles that provide an advantage to some but not other forms of religion or religious organization.

In particular, the Supreme Court has held that the government may not delegate decision-making authority to religious institutions. For example, in *Larkin v. Grendel's Den* (1982) 459 U.S. 116, the Court rejected a state law that gave churches a veto over neighboring applications for liquor licenses, because the law “vest[ed] discretionary governmental powers in religious bodies.” (*Id.* at 123.) But that is exactly what the Diocese seeks when it urges a “principle of government” approach that would delegate to purportedly hierarchical churches—and no other religious organizations—the inherently governmental power to decide property ownership. In particular, the Court in *Larkin* was concerned that “the churches’ power under the statute * * * could be employed for explicitly religious goals.” (*Id.* at 125.) Giving assertedly hierarchical religious bodies final dispute resolution authority over other churches that are separate legal persons—even when the latter, local churches have not expressly yielded authority over their property—poses precisely this risk. The power to decide who owns property, a core power of civil government, would be vested in religious bodies, which can and will use it for their own religious purposes—such as to enforce orthodoxy and to stifle dissent.

The result in *Larkin* would have been different if the churches’ veto power had been included in voluntarily adopted covenants, conditions, and restrictions. Then, the churches would have had a veto power under neutral principles of contract law, just as a condominium or other property owners’

association may have. Similarly, a local congregation is unquestionably free to grant a religious denomination the contractual right to resolve property disputes. And it appears that some of them have. (See, *e.g.*, *In re Church of St. James the Less* (Pa. 2005) 888 A.2d 795 [finding that parish agreed not to alienate property without diocese approval].) But such powers may be conveyed only by proper legal instruments executed by the grantor of those rights, such as contract, deed, or trust documents, or articles of incorporation. (See pp. 9-11, *supra* [discussing California trust law].)

Allowing religious organizations to declare trusts in their own favor would effectively delegate government authority to religious institutions, which would then become free to dictate legal rules and results in a way other parties cannot. That would amount to a religion-specific principle of state law that binds even entities that have not contractually accepted it.

As the Court of Appeal has repeatedly recognized, “the hierarchical theory [*i.e.*, allowing asserted religious hierarchies unique means to dictate property ownership] subordinates civil control of church property to ecclesiastical control of church property,” because, in practical effect, “the canons and rules of a general church override general principles of legal title in the resolution of church controversies over property.” (*St. Luke’s*, 121 Cal.App.4th at 771-772 [quoting *Barker*, 115 Cal.App.3d at 612].) The same considerations apply to a rule of law that permits religious bodies, but

only religious bodies, to use their governing documents to assert trusts for their own benefit. The Establishment Clause does not permit courts to supplant civil rules of decision in property cases with a delegation of authority to an ecclesiastical decision-maker, whether the delegation is manifest or more subtle. (See *Catholic Charities*, 32 Cal.4th at 552.)

B. Because The Threshold Classification Of A Religious Polity As Hierarchical or Congregational Is Closely Intertwined With Doctrinal Questions, The Establishment Clause Precludes Civil Courts From Basing Their Decisions On That Fundamentally Ecclesiastical Determination.

An equally deep constitutional infirmity taints any legal analysis that applies different rules of decision to determine property disputes involving denominations that include hierarchies. The effort to determine whether a denomination is sufficiently hierarchical to warrant judicial deference would entangle the courts in questions of religious doctrine.

As this Court has recognized when asked to apply different rules of decision according to a taxonomy of religious governance, “classification based on a formula is not of much assistance, especially” in the case of “an anomalous arrangement.” (*Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church* (1952) 39 Cal.2d 121, 134.) Yet if courts must place every religious group into one of two categories, all but the most extreme cases will be “anomalous.” As one commentator observed, “[m]ainline Protestant denominations generally fall somewhere in between

these two categories [*i.e.*, hierarchical or congregational], defying easy classification and giving rise to thorny issues for members and non-members alike.” (Jeffrey B. Hassler, Note, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intrad denominational Strife* (2008) 35 Pepp. L. Rev. 399, 406.) Many denominations have assemblies, conventions, or convocations that offer guidance on spiritual issues yet fall far short of the economic and doctrinal control exercised by the Roman Catholic Church.

For example, the Presbyterian polity has several tiers of organization beyond the local congregation. “Presbyteries” are gatherings of delegates from individual churches that conduct business matters as defined by the denomination’s constitution, or “Book of Order.” See PRESBYTERIAN CHURCH (USA), BOOK OF ORDER 2004/2005 (2004). While each presbytery has a standing staff and office, they do not have their own authority or control, but answer to the deliberative body of the presbytery acting as a whole.

Presbyteries, in turn, send delegates both to a Synod-level body and to the General Assembly, thereby dispelling any notions that there are strictly ascending bodies of governance. Delegates are entitled to vote their individual consciences, and are not required to disclose their vote to the body that sent them, so that the system is more connectional than representational. That is in keeping with the design of the Presbyterian

polity, which oversees the spiritual development of member congregations rather than imposing orthodoxy through top-down, economic coercion. (See, e.g., *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church* (Pa. 1985) 489 A.2d 1317, 1325 [noting that “overall intent of” the Presbyterian Book of Order is “a means of overseeing the *spiritual* development of member churches”] [emphasis in original].)

Thus, the Presbyterian Church is no mirror-image of Catholic or Episcopal polity. There is nothing like a diocese vested with plenary power over its parishes, or a bishop with authority to direct the affairs of the diocese. Rather, local congregations have had broad freedom of action that traces back to the denomination’s earliest days as a reaction to the centralized control of other churches. The influence and power to be exercised by the General Assembly and other collective bodies, while undeniably significant as a matter of spiritual guidance for churches that remain within the denomination (see *Presbytery of Beaver-Butler*, 489 A.2d at 1325), has been a topic of continual change and debate.

As the Ninth Circuit has explained, when there is any dispute over whether a church is hierarchical, or over the extent of hierarchical power, “the resolution of these questions may require a court to intrude impermissibly into religious doctrinal issues.” (*Maktab Tarighe Oveysi Shat Maghsoudi, Inc. v. Kianfar* (9th Cir. 1999) 179 F.3d 1244, 1248 [addressing Sufi denominations].) When civil courts attempt to resolve the

validity of an assertion of hierarchy for one of the many relatively “anomalous” denominations, “[t]he prospect of inconsistent treatment and government embroilment in controversies over religious doctrine” is pronounced. (*Texas Monthly, Inc. v. Bullock* (1989) 489 U.S. 1, 20 (plurality op. of Brennan, J.) [citing *Jones v. Wolf*].)

When courts choose to defer to ecclesiastical assessment of property ownership, the inadequacy of the hierarchic-congregational dichotomy necessarily produces judicial entanglement in intertwined questions of doctrine and polity. Few aspects of a denomination are more central to its character than how it is structured and by whom it is led.

If religious organizations consisted only of obvious and complete hierarchies like the Roman Catholic Church on one hand, and atomistic local congregations unaffiliated with any larger religious organization on the other, perhaps a rule of deference might be more nearly permissible under the Religion Clauses. But religious organizations are far more varied. The *Watson* Court hinted at the judicial dilemma when it described the organizations to which it would apply a deferential approach—at least as to “questions of discipline, or of faith, or ecclesiastical rule, custom, or law [that] have been decided by the highest ... church adjudicator[y].” (80 U.S. at 727.) These supposedly hierarchical organizations could embrace any “religious congregation which is itself part of a large and general organization of some religious denomination, with which it is *more or less*

intimately connected by religious views and ecclesiastical government.”
(*Id.* at 726 (emphasis added).)

But “more or less” covers a wide spectrum. “More or less” either means that *any* connection with a denomination amounts to a congregation’s complete surrender of property rights, because courts will routinely consider the more general body to have both spiritual and economic primacy over the local one. Or else “more or less” presents courts with a nearly impossible task when they seek to determine whether to defer to the larger organization’s pronouncements, while steering clear of ecclesiastical issues.

The U.S. Supreme Court recognized this problem in *Jones*. The Court observed that “a rule of compulsory deference to religious authority” would “always” require “civil courts * * * to determine which unit of government has ultimate control over church property.” (443 U.S. at 605.) That determination would be necessary simply to resolve whether a particular pronouncement by a religious body warrants deference with respect to property ownership. Whenever the answer was open to dispute, as it is to some degree in all the Protestant denominations and almost all the non-Christian ones—the court would have to engage in a “careful examination of the constitutions of the general and local church,” which ultimately requires “an analysis or examination of ecclesiastical polity or

doctrine.” (*Id.*) The Court’s phrasing reflects its recognition that polity and doctrine are necessarily intertwined in that examination.

Since it decided *Jones*, however, the Court has placed that threshold inquiry off limits to civil courts. The Court has explicitly forbidden judicial resolution of intra-denominational differences in belief. For example, in commenting on a disagreement among Jehovah’s Witnesses as to how much forbearance from war-making their religion required, the Court explained, “[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses.” (*Thomas v. Review Bd.* (1981) 450 U.S. 707, 715.) Courts must choose some approach that does not require judges to rely on their own assessment of which group within the religion is right.

The Court later reaffirmed this principle, tying *Thomas* and *Jones* together and thus clarifying that the principle governs analyses under both the Free Exercise and Establishment Clauses. As the Court put it (*Employment Division v. Smith* (1990) 494 U.S. 872, 887):

Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. See, e. g., *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S., at 716; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S., at 450; *Jones v. Wolf*, 443 U.S. 595, 602-

606 (1979); *United States v. Ballard*, 322 U.S.
78, 85 -87 (1944).

Any court that uses its own judgment to determine whether a denomination's governance is sufficiently hierarchical to warrant deference to an assertedly superior body impermissibly "determine[s] the place of a particular belief in a religion." (*Id.*)

The solution is to confine the judicial inquiry to the secular terms of the deeds, contracts, and trusts related to the property, by applying the same neutral principles of construction that would apply to documents pertaining to any other person. That obviates any need for factual determinations about the scope and extent of hierarchical authority within a denomination.

**C. Judicial Deference To Assertions Of Religious Hierarchy
Would Unconstitutionally Favor Certain Forms Of
Religious Belief And Organizational Structure.**

There is another reason that strictly neutral property law principles should govern church property disputes. Any form of judicial deference to an assertion of hierarchical power by a religious organization in a property dispute would unconstitutionally favor religious organizations with multiple tiers. Within those groups, a rule of deference would favor the most central or national bodies which assert hierarchical control. The alternative to a deeply entangling resolution of intertwined questions of doctrine and polity would be to accept assertions of hierarchical religious control of church property at face value. But that would be equally

unconstitutional. Because “the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice” (*Jones*, 443 U.S. at 602), civil courts cannot validly accept doctrine-based declarations of hierarchy as dispositive of underlying civil-law disputes.

Judicial deference to an assertion of hierarchy by one religious body over another has one certain result: “in every case, regardless of the facts, compulsory deference would result in the triumph of the hierarchical organization.” (*Bjorkman v. Protestant Episcopal Church in U.S. of Diocese of Lexington* (Ky. 1988) 759 S.W.2d 583, 586.) That, in large part, is why the Kentucky Supreme Court in *Bjorkman* embraced a neutral-principles analysis rather than a rule of deference.

Moreover, the Constitution forbids both a rule that favors one side of a dispute and a rule that favors one form of religious organization. Thus, the U.S. Supreme Court has held that preferences for particular forms of religious observance are impermissible when they impose too great a burden on third parties. (See *Estate of Thornton v. Caldor* (1985) 472 U.S. 703.) In *Caldor*, the statute at issue produced an “unyielding weighting in favor of Sabbath observers”—who were given an absolute right not to work on their particular Sabbath—“over all other interests,” including those of employers and non-sabbatarian employees. *Id.* at 710; see also *Cutter v. Wilkinson* (2005) 544 U.S. 709, 722.

Here, an “unyielding weighting” in favor of the interests of an asserted religious hierarchy would trump local congregations’ property rights. That “weighting” also would unduly favor those denominational factions that assert a hierarchical form and claim hierarchical power over local congregations. As the New York Court of Appeals has observed, “[b]y supporting the hierarchical polity over other forms and permitting local churches to lose control over their property, the deference rule may indeed constitute a judicial establishment of religion.” (*First Presbyterian Church of Schenectady v. United Presbyterian Church in the U.S.* (N.Y. 1984) 464 N.E.2d 454, 460 [citation omitted].)

A rule of deference would be particularly troubling because courts would defer, not only to well-established hierarchical organizations like a Catholic diocese, but also to any *assertion* of hierarchy by one loosely affiliated group over another. A group claiming hierarchical control over the property of another legal person might succeed in its assertion simply by amending its own governing documents, whether or not the local organization whose property was at issue made an express statement subordinating its property rights, by creating a trust in favor of the larger group or otherwise. The very fact of asserting hierarchical control over property would become the determinative evidence that such control exists.

No other area of the law operates that way. That use of nonsecular decisionmaking to determine secular rights would provide an advantage

available to no other entity, and thus would prefer religion—and a particular structural choice among religions—in a way that falls afoul of the Establishment Clause.¹

D. The Establishment Clause Requires The Use Of Strictly Neutral Principles That Provide No Procedural Or Evidentiary Preferences To Religious Organizations Or Asserted Hierarchies Within Them.

The Establishment Clause forbids “subtle departures from neutrality” as well as obvious ones. (*Catholic Charities*, 32 Cal.4th at 552.) Accordingly, the Court should apply strictly neutral principles—the very same rules that apply to everyone else—to resolve property disputes between religious bodies.

Justice Brennan’s concurring opinion in *Maryland & Virginia Eldership of the Churches of God v. Sharpsburg Church of God, Inc.* ((1970) 396 U.S. 367) explained how courts can resolve church property disputes without any involvement in matters of doctrine: “Under the ‘formal title’ doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws.” (*Id.* at 370 (Brennan, J., concurring).) That strictly neutral reliance on formal title, corporate structure, and explicit agreement by the title-holder of the type

¹ Reinforcing the unconstitutionality of this approach is the No-Preference Clause in Article I, Section 4 of the California Constitution. See pp. 36-37, *infra*. That Clause can mean very little if it does not forbid the determination of civil property rights by deference to some—but only some—religious authorities, in derogation of the title and other documents that would determine the rights of all other legal persons and their property.

chargeable to any other property holder is in fact the only method of determining property disputes that is consistent with contemporary Establishment Clause jurisprudence.

The Court in *Jones* used several different formulations in suggesting how religious organizations might ensure that the civil courts resolved property disputes in accord with the organizations' desires. Consistent with the concurring opinion in *Sharpsburg Church of God*, the Court explained, "[t]hrough appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency." (*Jones*, 443 U.S. at 603.) That is exactly what should happen, and what courts should require: the use of "*appropriate reversionary clauses and trust provisions*" that pass muster as a matter of formal title without the application of special doctrines that apply only to certain types of religious organizations in certain circumstances.

Misreading other passages in *Jones*, the Diocese contends that a denomination may unilaterally assert a trust for its own benefit over property titled in the name of a local church organization, simply by declaring the trust in the general church canons or constitution. (See Ans. Br. 47-48 [citing *Jones*, 443 U.S. at 603-604, 607-608].) That contention snatches a twig from the *Jones* opinion without regard for the surrounding forest. The whole point of the neutral-principles analysis, as the Court explained it, is that "the outcome of a church property dispute is not

foreordained.” (*Jones*, 443 U.S. at 606.) Rather than depending on the preference of a purported religious hierarchy, a property dispute would turn on the express intentions of the property owner as well as the body claiming spiritual supremacy.

In the relevant passages, the Court extolled a secular, neutral-principles approach for its “flexibility in ordering private rights and obligations to reflect the *intentions of the parties*”—not just the preferences of an assertive hierarchy. (*Id.* at 603 [emphasis added].) And the Court suggested that any enforceable use of “appropriate reversionary clauses and trust provisions” to “order[] private rights” would be mean that “a dispute over the ownership of church property will be resolved in accord with the desires of the *members*.” (*Id.* at 604 [emphasis added].)

In answering the dissenting opinion’s concern that application of neutral legal rules could violate the Free Exercise Clause—a contention since squarely rejected in *Employment Division v. Smith*, *supra*, 494 U.S. at 878-882—the Court further explored ways in which “the *parties* can ensure, if *they* so desire, that the faction loyal to the hierarchical church will retain the church property.” (*Jones*, 443 U.S. at 606 [emphasis added].) Repeating its earlier suggestion, the Court explained that the parties “can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church.” (*Id.*) The Court suggested, as a possible alternative, that “the constitution of the general church can be

made to recite an express trust in favor of the denominational church.” (*Id.*) But the Court’s use of the passive voice—“can be made”—suggests that the recitation of trust would have to be “made” by the “parties” referenced in the preceding sentence of the opinion, not just by one side of the dispute.

Most important, in keeping with its emphasis on a rule of decision that relies on “objective, well-established concepts of trust and property law familiar to lawyers and judges” (*id.* at 603), the Court made clear that any “recitation of trust” would have to be “embodied in some legally cognizable form.” (*Id.* at 606.) The Court did not suggest that such a recitation, made unilaterally by the purported beneficiary, could have legal effect irrespective of the operation of neutral principles of state law.²

And because a statement by a purported beneficiary unilaterally asserting a trust in its own favor over the property of another legal owner is not “legally cognizable” under the principles applicable to other parties—certainly not in California—the Court’s passing reference to “an express trust” in “the constitution of the general church” (*id.* at 606) cannot be construed to provide a different and decidedly *non*-neutral means of creating a trust available only to religious organizations. Any suggestion of such a religion-specific means could not survive the development of Establishment Clause jurisprudence since then. The Court’s intervening

² The analysis is not altered by the Court’s recapitulating reference to the ways in which a local congregation might agree to transfer some measure of its property rights to a general church. (443 U.S. at 607-608.)

decisions reinforce the need for strictly neutral legal rules that do not include exceptions available only to certain types of religious organizations that assert hierarchical powers. As this Court recently observed, the Establishment Clause prohibits “subtle” as well as blatant “departures from neutrality.” (*Catholic Charities, supra*, 32 Cal.4th at 552.)

As explained above (at pp. 9-11), under the principles applicable to every other type of trust, the expressions of intent to impose a trust on real property would have to come from the settlor (*i.e.*, the local congregation), not the beneficiary (or entity claiming hierarchical superiority). Application of those principles in a strictly neutral manner—just as they apply to everyone else—would restrict judicial consideration in most instances to the deed, the articles of incorporation and by-laws of the deed owner, and any trust declarations or other written contractual commitments undertaken by the deed owner.

As the U.S. Supreme Court observed, “the outcome of a church property dispute” using this analysis “is not foreordained.” (*Jones*, 443 U.S. at 606.) In some cases, no doubt, the title-holder will have explicitly conveyed its interest to another organization, either through the trust device, in the articles of incorporation, or through some other contractual mechanism. (See *In re Church of St. James the Less* (Pa. 2005) 888 A.2d 795 [finding that parish’s corporate charter subjected its property to a trust

to benefit diocese].) But a religious body could not take unilateral action to convey property to itself.

There is nothing unfair about enforcing strictly neutral rules of decision, as many other States have. (See Reply Br. 6-8; see also pp. 33-34, *infra*.) Indeed, in deciding *Jones* nearly thirty years ago, the Court expected that the “occasional problems in application” that arise from ambiguous history and documents “should be gradually eliminated” once “States, religious organizations, and individuals” recognize their obligation to “structure relationships so as not to require the civil courts to resolve ecclesiastical questions.” (443 U.S. at 604 [quoting *Hull Church*, 393 U.S. at 449].) Religious organizations have been on notice ever since.

California law has provided even stronger notice, particularly to the Presbyterian Church. The Court of Appeal applied neutral principles to resolve a property dispute involving the PC(USA)’s predecessor even before *Jones* was decided. (See *Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910 (Kaufman, J).) Other decisions of the Court of Appeal made clear that a prudent denomination wishing to assert rights over the property of affiliated congregations should ensure that the congregations’ title or other documents provided for those rights. (See, e.g., *Protestant Episcopal Church v. Barker* (1981) 115 Cal.App.3d 599; *California-Nevada Annual Conf. of United Methodist Church v. St. Luke’s United Methodist Church* (2004) 121 Cal.App.4th

754.) Thus, it has long been clear that the imposition of an express trust was the only course to preclude any questions that might arise.

By now, any religious organization that actually intends to hold its property in trust for some governing body has had nearly three decades to impress that property with an express trust. A denomination that actually had the power to control its affiliated congregations' property would have no difficulty instructing them to take that step. That a particular local congregation has not done so indicates that an asserted hierarchy does not have the power that it claims in litigation. It is entirely appropriate for such eloquent silence to resolve most disputes, including (in all likelihood) the one now before the Court.

E. The Mainstream View, and Clear Trend, in Other States Applies Neutral Principles to Property Disputes Between Affiliated Religious Organizations.

Justice Kaufman explained for the Court of Appeal that this Court's earliest church-property decision ultimately relied on "general principles of trust law" principles as a matter of sound policy, if not constitutional command. (See *Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910, 923 (discussing *Wheelock v. First Presbyterian Church* (1897) 119 Cal. 477, 483-484.) As St. James Parish has pointed out (Opening Br. 21, Reply Br. 6-8), state courts increasingly have responded to modern Establishment Clause jurisprudence by using

neutral property-law principles to resolve church property disputes. (See generally Hassler, *A Multitude of Sins?*, *supra*, 35 Pepp. L. Rev. 399.)

Without duplicating the discussion in St. James Parish’s briefs, we note that the highest courts in some of the largest and most influential States apply neutral principles when property rights are at stake. More important, several state courts have acknowledged that the use of neutral principles has become a matter of constitutional necessity rather than accommodative choice when purely secular interests—such as property ownership—are concerned.

Thus, the New York Court of Appeals held that “even though members of a local group belong to a hierarchical church, they may withdraw from the church and claim title to real and personal property, provided that they have not previously ceded the property to the denominational church.” (*First Presbyterian Church of Schenectady v. United Presbyterian Church in the U.S.* (N.Y. 1984) 464 N.E.2d 454, 459 [citing NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW [2d ed.], ch. 19, § IV, p. 1075].) Indeed, in the New York court’s view, “[t]he fact that the Presbytery is part of a hierarchical body which may have determined the property dispute adversely to plaintiffs does not bind this court if it proves possible to decide the controversy through application of ‘neutral principles of law.’” (*Id.*)

Likewise, faced with parallel property and religious doctrine disputes, the Ohio Supreme Court sidestepped the doctrine issues and resolved the property dispute before it using strictly neutral principles of law. Based on U.S. Supreme Court authority, the Ohio court held that “[t]he control of the name and property, of the [congregation] must be determined only by reference to the provisions of the Code of Regulations and By-Laws of the corporation not for profit, the corporate laws of this state, and any other secular instruments not requiring the resolution of religious tenets or doctrine.” (*Serbian Orthodox Church Congregation of St. Demetrius of Akron, Ohio v. Kelemen* (Ohio 1970) 256 N.E.2d 212, 217.)

The Pennsylvania Supreme Court also has held that “in cases where the resolution of a property dispute involves no inquiry into ecclesiastical questions, courts of this Commonwealth are to apply the same principles of law as would be applied to non-religious associations.” (*Presbytery of Beaver-Butler v. Middlesex Presbyterian Church* (Pa. 1985) 489 A.2d 1317, 1323.) Noting that “the primary focus must be on the intent of the settlor at the time of the creation of the alleged trust” (*id.* at 1324), the court rejected the notion that a Presbyterian congregation held its property in trust for the denomination in the absence of evidence that the congregation intended to convey its property interests to any other entity. (*Id.* at 1325.)

Other state courts also have recognized that the First Amendment requires application of neutral principles to property disputes. Thus, the Louisiana Supreme Court has explained that the First Amendment “necessitate[s] our adoption of the ‘neutral principles’ approach.” (*Fluker Community Church v. Hitchens* (La. 1982) 419 So. 2d 445, 447.) If the courts refused to treat a local church like any other civil litigant, that refusal might “deny a local church recourse to an impartial body to resolve a just claim, thereby violating its members’ rights under the free exercise provision, and also constituting a judicial establishment of the hierarchy’s religion.” (*Id.*) The Maryland Court of Appeals likewise continues to hold that “ownership of * * * church property * * * must be resolved without determining ecclesiastical questions and by applying neutral principles of law, developed for use in all property disputes, which can be applied without establishing churches to which property is awarded.” (*From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church* (Md. 2002) 803 A.2d 548, 565.) The Missouri courts recognize that “the neutral principles approach is the exclusive method for the resolution of church property disputes.” (*Reorganized Church of Jesus Christ of Latter Day Saints v. Thomas* (Mo. Ct. App. 1988) 758 S.W. 2d 726, 731 [emphasis added] [internal quotation marks omitted].) And the Colorado courts have held that “such disputes *must* be resolved by application of secular or neutral principles of law, thereby avoiding any impermissible

inquiry into ecclesiastical questions.” (*Wolf v. Rose Hill Cemetery Ass’n* (Colo. Ct. App. 1995) 914 P.2d 468, 471 [emphasis added].)³

This Court should ensure that California remains in the mainstream on this issue by requiring that strictly neutral principles govern disputes over the ownership of church property.

F. The No-Preference Clause Reinforces The Need To Apply Strictly Neutral Principles.

The California Constitution contains an additional constraint on the relation between government and religion that is directly relevant here, and provides an independent ground for this Court to require the use of strictly neutral principles in the resolution of church property disputes. Although the California Constitution’s protection against establishment of religion is co-extensive with the federal provision (see *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 718), the Constitution also prohibits the use of state power to create a “preference” for certain religions. (See Cal. Const. Art. I, § 4.) The “no preference”

³ Echoing the same concerns, the Illinois courts will not even exercise civil jurisdiction unless “the analysis can be done in secular terms.” (*Jenkins v. Trinity Evangelical Lutheran Church* (Ill Ct. App. 2005) 825 N.E. 2d 1206, 1211 (Ill. Ct. App.), app. denied (Ill. 2005) 839 N.E. 2d 1025.) See also, e.g. *Wisconsin Conference Bd. of Trs. of United Methodist Church, Inc. v. Culver* (Wis. 2001) 627 N.W. 2d 469, 475-76 [“We address church property disputes under the neutral principles of law approach * * * . Adherence to neutral principles will avoid an entanglement with religion that would run afoul of the Establishment Clause.”] [footnote omitted]; *Meshel v. Ohev Sholom Talmud Torah* (D.C. 2005) 869 A.2d 343; *Medlock v. Medlock* (Neb. 2002) 642 N.W. 2d 113, 129.

clause, which has “no counterpart[] in the federal charter, provide[s an] additional guarantee[] that religion and government shall remain separate.” (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 883.)

This Court has not yet “definitively construe[d] the no preference clause.” (*East Bay*, 24 Cal.4th at 719.) The text and logic of that provision, however, indicate that it prohibits a statute or judicial doctrine that favors one structure of religious organization over another, one tier of the same organization over another, or one faction over another. This Court observed that “the plain language of the clause suggests * * * that the intent is to ensure * * * that the state neither favors nor discriminates against religion.” (*Id.*) And the Court also has suggested that the No Preference Clause is “more protective of the principle of separation than the federal guarantee.” (*Sands*, 53 Cal.3d at 883 [citing *Fox v. City of Los Angeles* (1978) 22 Cal.2d 792, 795].)

As Justice Mosk observed separately, “[t]he preference clause seeks to prevent government from giving *any* advantage to religion in California.” (*Sands*, 53 Cal.3d at 911 (Mosk, J., concurring) (emphasis in original).) If the “government has granted a benefit to a religion or religion in general that is not granted to society at large * * * , it has acted unconstitutionally in this state.” (*Id.* at 911-912 (Mosk, J., concurring).) This constitutional command to avoid granting any preference to any type of religion, or to religion in general, precludes the use of special property rules to benefit

asserted religious hierarchies, and thus requires the use of strictly neutral principles to decide the present dispute. At a minimum, the No-Preference Clause should guide this Court’s interpretation of the Establishment Clause here.

G. Under The Doctrine Of Constitutional Avoidance, Corporations Code Section 9142 Should Be Construed In Accord With Generally Applicable Principles Of Trust Law.

The Diocese suggests (Br. 35-37) that Corporations Code section 9142(c) provides a way to resolve this and similar cases without reaching the difficult constitutional issues.⁴ That is not so. Construed as the Diocese would like—so that an assertedly “superior religious body” could impose a trust over others’ property for its own benefit—Section 9142(c) itself would violate the Establishment Clause.

In light of the constitutional considerations outlined above, Corporations Code section 9142 should not be construed to abrogate basic principles of trust law. St. James Parish explains (Opening Br. 43-49; Reply Br. 32-37) that Section 9142 was intended to limit the power of religious hierarchies, not expand them. As the Parish points out, there is no support in the language, legislative history, or elsewhere for the notion that

⁴ Corporations Code section 9142(c)(2) provides that “[n]o assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law * * * [u]nless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.”

Section 9142(c) authorizes a church hierarchy to create a trust interest for itself in property owned by a local church, simply by saying so. (See *St. Luke's*, *supra*, 121 Cal.App.4th at 757 [holding that section 9142(c)(2) does not grant that authority].) Even if labeled a church canon or constitution, a document created by the assertedly hierarchical body remains a creation of the beneficiary rather than a written expression of unambiguous intent by the trustor. That type of document would not suffice to create a trust under the law applied to other property holders and claimants.

But there is another reason to construe Section 9142 in accord with normal trust principles. This Court construes statutes to avoid “serious federal constitutional questions.” (*In re Marriage Cases*, No. S147999 (Cal. May 15, 2008) slip op. 35; *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 43.) The Establishment Clause explicitly limits legislative authority: “Congress shall make no law respecting an establishment of religion * * * .” (U.S. Const. Am. I.) Accordingly, the Legislature has no more power than a court to dictate an unconstitutional process for deciding property disputes between religious organizations. To recognize a religion-specific exception to general law, and allow a hierarchical denomination to determine property ownership by fiat, would have several impermissible effects.

First, if Section 9142(c) were construed to allow religious organizations that claim hierarchical control over affiliated congregations to

appropriate congregational property without any affirmative conveyance by the congregation, the statute would give special property rights to hierarchical churches because of both their religious nature and their choice of a hierarchical structure. Under that construction, Section 9142(c) also would unduly and improperly favor hierarchical organizations against other religious groups, and those within a denomination that assert hierarchical control over those that resist it. A preference of either type would violate both the Establishment Clause (*e.g.*, *Estate of Thornton*, 472 U.S. at 710; *Cutter*, 544 U.S. at 722), and (literally) the No-Preference Clause.

By enlisting the power of the state in favor of any *assertion* of hierarchical property rights, Section 9142(c), if interpreted the Diocese's way, would "impermissibl[y] advance[] a particular religious practice" and therefore would be invalid. (*Estate of Thornton*, 472 U.S. at 710.) Just as a "statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about" (*Texas Monthly v. Bullock* (1989) 489 U.S. 1, 28 (op. of Blackmun, J., concurring in judgment)), a "statutory preference" for centralized religious organizations—or organizations that aspire to central control—is "constitutionally intolerable." (*Id.*)

Second, any statute like Section 9142 would have to "be administered neutrally among different faiths." (*Cutter*, 544 U.S. at 720 [citing *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet* (1994) 512

U.S. 687].) But that would be impossible under the interpretation of the statute urged by the Diocese. The statute would discriminate within the category of religious institutions, treating those that are members of general churches or religious bodies worse than those that are not members of such churches. That would unlawfully “differentiate among bona fide faiths” (*Cutter*, 544 U.S. at 723), much as the statute invalidated in *Larson v. Valente* (1982) 456 U.S. 228, which discriminated between religious bodies that are funded mostly by nonmember donations and those mostly funded mostly by their members.

Third, Section 9142 appears to have replaced a statutory provision that treated secular and religious nonprofits evenhandedly. (See, e.g., *Barker*, 115 Cal.App.3d at 609 n.2 [quoting former Corporations Code § 9802].) Replacing a neutral statutory provision with one that provides special favors to particular religious organizations would reflect exactly the type of improper purpose and effect of “advanc[ing]” religion that the Establishment Clause forbids. (*Lemon v. Kurtzman* (1971) 403 U.S. 602, 613.)

Fourth, the U.S. Supreme Court has invalidated a “subsidy” that was “directed exclusively at religious organizations that is not required by the Free Exercise Clause and * * * cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion.” (*Texas Monthly v. Bzullock* (1989) 489 U.S. 1, 15 (plurality op. of Brennan, J.)) A

statute permitting asserted religious hierarchies to declare trusts for their own benefit is a substantial “subsidy” that is not required by, or even related to, the strictures of the Free Exercise Clause. Nor does that preference remove a “state-imposed deterrent to the free exercise of religion.” (*Id.*) It does not burden free exercise to require religious organizations to reflect property ownership in the usual title documents, rather than by ecclesiastical imposition.

The only genuine Free Exercise Clause problems here would arise from an interpretation of Section 9142(c) to allow asserted religious hierarchies to declare and enforce trusts in their own favor. That would effectively permit confiscation of the property of local, independently incorporated congregations—a power and a threat that could have powerful coercive effects on freedom of religious expression and affiliation. So interpreted, Section 9142(c) would substantially burden local churches’ right to affiliate with larger denominations by making any affiliation a possible source of involuntary loss of property. That would violate the Free Exercise Clause because association with other churches is itself the exercise of religion.⁵ (See *First Presbyterian Church of Schenectady*, 464 N.E.2d at 460 [similar legal rule “discourages local churches from associating with a hierarchical church for purposes of religious worship out

⁵ Restrictions on affiliation also violate the general right of expressive association. (See, e.g., *Boy Scouts of America v. Dale* (2000) 530 U.S. 640).

of fear of losing their property and the indirect result of discouraging such an association may constitute a violation of the free exercise clause”].)

That rule of law would enlist the civil courts to enforce private economic sanctions against perceived heresy. A local congregation has no realistic ability to express the religious conscience of its members if, by doing so, it stands to lose the sanctuary and other property it has acquired.⁶ Allowing some religious bodies to use civil law to give themselves this kind of power over other groups would violate the free exercise protections of the United States and California Constitutions. (See U.S. Const., am. I; Cal. Const., Art. I, § 4.)

Section 9142(c) should be interpreted to avoid all these constitutional problems by construing “the governing instruments of a superior religious body or general church of which the corporation is a member” to mean a body that the local corporation itself has expressly recognized as having a superior, secular title in a written document specifically addressing property rights—not merely an edict from a body that has asserted its superior title without the local corporation’s express agreement. An operative document would expressly grant the “superior

⁶ Under the general principle that a trust is revocable by the trustor unless the trust instrument explicitly precludes revocation (Probate Code § 15400), a local congregation that actually created a trust for the benefit of an entity at another tier of the denomination could preserve its right of revocation and thus its ability to disaffiliate without severe economic penalty. But the unique trust that the Diocese purports to discern in Section 9142(c)(2) apparently has no such limits.

religious body” control over the property, not just recognize spiritual affiliation by acknowledging that the “superior religious body” is primary in matters of religious faith. Mere affiliation with a denomination should not risk a forfeiture of property rights, and Corporations Code should not be construed to accomplish that result.

II. THE PRACTICAL CONSEQUENCES WEIGH HEAVILY AGAINST AN APPROACH DEFERENTIAL TO ASSERTIONS OF HIERARCHY.

Adopting a legal rule requiring judicial deference to assertions of ecclesiastical hierarchy would also cause severe practical problems. To begin with, the whole enterprise of categorizing religious groups is largely futile. Most denominations are not top-down hierarchies, but neither are their affiliated local churches atomistically independent. Many, like the Presbyterian Church, have several tiers of organization to resolve doctrinal issues but lack centralized economic control of the type seen in the Roman Catholic Church. Thus, affiliation, disaffiliation, and reaffiliation are constant features of those denominations’ existence. A legal rule that subjected local congregations to far more control by purported hierarchies would fundamentally change the nature of these denominations. And it could have unforeseen adverse repercussions for local congregations and broader denominations alike.

A. The History And Structure Of The Presbyterian Church Illustrate The Problems Encountered At Every Step Of An Analysis That Defers To Asserted Hierarchy.

The Presbyterian Church provides a clear example of the practical difficulties that result from any effort to defer to religious hierarchy. Property rights should not turn on a court's guess as to how much "more or less intimately connected" (*Watson*, 80 U.S. at 726) congregations may be within their affiliations. There are far more than the two types of structures for religious organizations—hierarchical and congregational—recognized in *Watson*. In particular, as the Presbyterian polity shows, a denomination may have one or more successive bodies with some responsibility for doctrinal consistency over geographic areas encompassing many local congregations, without having authority over economic matters such as property ownership. That an organization may have multiple tiers does not mean that its local congregations are subject to comprehensive hierarchical governance.

Watson itself reflects the ambiguities. The Court chose as its example of a congregational structure a state court's assessment of a local Presbyterian church. (See 80 U.S. at 725-726 [citing *Smith v. Nelson* (1846) 18 Vt. 511].) Yet the Court nonetheless held that the Presbyterian Church in fact was hierarchical. (See *id.* at 727.) While there is little to dispute in *Watson*'s holding that the General Assembly could determine which of two factions in a congregation was in fact Presbyterian, there is

far less support for the notion that the Presbyterian Church is (or ever was) a hierarchy whose adjudicatory bodies had plenary power over the property of every local congregation.

To the contrary, the Presbyterian Church has a history of valuing individual conscience rather than hierarchical control. “In the Presbyterian system, the authority of Christ is understood and dispensed to individual believers and delegated by them to the elders [*i.e.*, Presbyters] whom they select and who[] thereafter represent them.” (MILLARD J. ERICKSON, INTRODUCING CHRISTIAN DOCTRINE (1992) p. 343.) “[T]here is only one level of clergy.” (*Id.* at 344.) Thus, there are no bishops; rather, persons with “administrative posts within the ruling assemblies” have “no special ordination” and “no special authority.” (*Id.*) And there “is a deliberate coordinating of clergy and laity.” (*Id.*) Indeed, the Book of Order of the Presbyterian Church confirms that “[t]he nature of Presbyterian order is such that it shares power and responsibility.” (PRESBYTERIAN CHURCH (USA), BOOK OF ORDER, G-4.0302.)

As with many other denominations that arose during the Protestant Reformation, much of the Presbyterian dissatisfaction with earlier churches derived from the central control exercised by bishops, which deprived congregants of the ability to worship according to their conscience. A leading history of Presbyterianism describes successive revolts and secessions by Scottish Presbyterians in reaction to “prelacy” and assertions

of monarchic or episcopal control. (ROBERT ELLIS THOMPSON, A HISTORY OF THE PRESBYTERIAN CHURCHES IN THE UNITED STATES (1895; 2003 ed.) pp. 3-5.) The Scots Confession of 1560, one of the seminal documents of the denomination, addresses this issue in blunt terms, making clear that an asserted hierarchy has no more conclusive authority when it takes the form of a council or assembly: “But if men, under the name of a council, pretend to forge for us new articles of faith, or to make decisions contrary to the Word of God, then we must utterly deny them as doctrine of devils * * * .” (John Knox, *The Scots Confession* (1560) ch. 20, in THE PROPOSED BOOK OF CONFESSIONS OF THE UNITED PRESBYTERIAN CHURCH OF THE UNITED STATES OF AMERICA (1966) p. 30.) Those are not words of subservience to hierarchy.

The same disinclination toward central control has marked Presbyterianism in the United States. Indeed, the PC(USA) explained in a recent paper presented to the Pope that Presbyterians “generally rejected hierarchy and Episcopacy on the one hand, and pure democracy of Congregationalism on the other,” and that “an antipathy to Episcopacy remains in the Presbyterian ethos.” (PC(USA), *The Successor to Peter* (2000) p.7.) The conduct of congregations has reflected this sense of the relative place of local and larger organizations. Congregations have moved routinely from one larger Presbyterian organization to the next. (See Thompson, *supra*, at 308 (noting that there had been 28 more or less

national Presbyterian bodies up to 1895, with 10 “still in existence” at that time.)

There are several levels of doctrinal governance in the PC(USA). Each congregation is governed by the Session, consisting of the pastor and elders (or Presbyters) elected by the congregation. Sessions send delegates to a regional Presbytery, which in turn sends delegates to a Synod (often state-wide), with the General Assembly at the national level. But there is not hierarchical power in each successive adjudicatory body. Rather, the legal manual of the PC(USA) specifically states that the “polity is presbyterial—as distinguished from hierarchical.” (PC(USA), LEGAL RESOURCE MANUAL 2004-2007 (2d ed. 2005) *Basic Organization of the Presbyterian Church* [available at <http://www.pcusa.org/legal/basic.htm>].) The current moderator of the PC(USA) explained that “there is no hierarchy of Presbyters in the Presbyterian Church. * * * Rather, all Presbyters stand in the same footing.” (JOAN S. GRAY & JOYCE C. TUCKER, PRESBYTERIAN POLITY FOR CHURCH OFFICERS (3d ed. 1999) p. 4.) And, although passages in the Book of Order of the Church suggest greater or lesser measures of central control, the Permanent Judicial Commission of the General Assembly—the highest ecclesiastical adjudicative body in the PC(USA)—cautioned that “a higher governing body’s ‘right of review and control over a lower one’” (as set forth in Section G-4.0301F of the Book of Order) “must not be understood in hierarchical terms, but in light of the shared

responsibility and power at the heart of the Presbyterian Order.” (*Johnston v. Heartland Presbytery* (2004) Permanent Judicial Comm’n Remedial Case 217–2, p.7 (quoting Book of Order section G–4.0302).)

In other words, the courts in *Watson* and other cases that have viewed the existence of the General Assembly, Synods and Presbyteries as indications of hierarchical control were wrong as a matter of Presbyterian ecclesiastical law. That the civil law of property could be distorted by civil courts’ misapprehension of church polity demonstrates the folly of deferential, pro-hierarchical jurisprudence.

The error is understandable, however, as the national organization of the PC(USA) and its immediate predecessors have maintained that, for all its history of revolt against prelacy, the Presbyterian Church is thoroughly hierarchical. Governing bodies larger than the individual congregation do exist in the Presbyterian denominations. The question is how broadly the powers of the Presbytery, the Synod, and the General Assembly reach into local affairs. Those bodies may determine matters of doctrine, at least insofar as those matters may be represented as the doctrine of the PC(USA). But there is substantial dispute whether any higher body has the power to compel a congregation (or Presbytery) to disregard the conscience of its members or face the confiscation of its place of worship and other property.

The Supreme Court's most recent characterization of the Presbyterian Church is telling. In *Jones*, the Court described the Presbyterian Church in the United States (a predecessor of the PC(USA)) as having a "generally hierarchical or connectional form of government." (443 U.S. at 597-598.) The qualifier "generally," and the choice of "connectional" as well as "hierarchical," accurately suggest that the polity is more a matter of spiritual affiliation than temporal command. The ambiguity in the formulation aptly illustrates the difficulties in determining the nature of the polity even of one of the most widespread denominations. That counsels strongly against a legal rule that makes the result of a property dispute depend on an accurate classification of the polity involved.

B. The Definitional Questions Regarding Presbyterianism Are Not Even The Tip Of The Iceberg In A Religiously Diverse Society.

Because, to be consistent with the Establishment Clause, any legal doctrine would have to be applied to all religions or to none, any policy of deference to asserted hierarchy would have to apply to all worshippers whose valuable assets could become the subject of litigation, from the various Zen Centers to the Self-Realization Fellowship. (See, e.g., *Self-Realization Fellowship Church v. Ananda Church of Self-Realization* (9th Cir. 1995) 59 F.3d 902. See also, e.g., *Jodo Shu Betsuin v. Jodoshu North American Buddhist Missions*, 2d Dist. No. B192869; *Joyhl v. Guru Nanak Sikh Temple*, 3d Dist. No. C052412.)

One of the first matters to reach the U.S. Supreme Court after *Jones v. Wolf* involved Synanon, a novel, cultish church with little history of either doctrine or polity. (See *Synanon Foundation, Inc. v. California* (1979) 444 U.S. 1307 (Rehnquist, J., in chambers).) The Ninth Circuit, in an appeal from a California district court, has confronted somewhat similar questions with respect to an ancient Sufi order (though the dispute there involved intellectual property rather than real property). (See *Maktab Tarighe Oveyssi Shat Maghsoudi, supra*, 179 F.3d 1244.)

Valuable property attracts assertions of hierarchical control, even within such historically antihierarchical denominations as the Baptists. (See *Central Coast Baptist Ass'n v. First Baptist Church of Las Lomas*, No. S156770 (Cal.)) And virtually any religious organization that has persisted for a decade or two in urban and suburban California is likely to own valuable real estate.

A legal rule that required courts to determine whether a title-holding religious corporation or association was in fact subordinate to a religious hierarchy would require judicial resolution of knotty matters of doctrine that would be no easier among affiliates of the San Francisco Zen Center than among Presbyterians. As this Court observed long ago, "classification based on a formula is not of much assistance, especially when we have * * * an anomalous arrangement." (*Rosicrucian Fellowship*, 39 Cal.2d at

134. In California’s contemporary religious landscape, “anomalous arrangement[s]” are the rule rather than the exception.

C. Additional Practical Considerations Support Application of Strictly Neutral Principles.

Judicial deference to assertions of religious hierarchy also could cause more mundane harms both to religious organizations and to legal doctrine. To begin with, approving unrecorded trusts imposed by trust beneficiaries would undermine the public notice function that is the foundation of the system for recording real property ownership. Lenders and other creditors should be able to know who the owner is upon consulting the county recorder’s office and any articles of incorporation filed with the Secretary of State. But it would be practically impossible to determine the true ownership of a property when a local church held the deed. Local congregations would have difficulty establishing marketable title to real estate holdings of significant value. A church thus could not alienate its property or use it to secure a loan to finance facilities expansion and other church projects, because lenders would have no clear sense of which entity owns the property. Doctrines protecting *bona fide* purchasers without notice might provide some relief, but its extent necessarily would be unclear.

If another religious entity can assert a hierarchical relationship and declare a trust in its own favor at will, then title to real estate held by local

congregations and their corporations will be permanently and irreparably clouded. And it works both ways: if it became convenient for a higher church body to renounce the trust it created in its own favor, it could do so through ecclesiastical legislation, leaving private creditors to litigate their recourse. This state of affairs would simply add to the limitations on the economic (and thus the religious) freedom of local organizations that are in any way affiliated with a broader religious entity.

In addition, legal recognition of enforced deference would directly undermine the status of a local religious corporation as an autonomous legal person, especially in light of the ability of an organization to subject other corporations' property to a trust for its own benefit. Religious corporations alone would be a different breed, lacking actual control by their own boards of directors. Indeed, because the erosion of facial corporate autonomy would rest on peculiarly religious notions, the California courts effectively would be enforcing religious doctrine in addition to secular law.

A legal rule permitting top-down imposition of trusts by any assertedly central and hierarchical religious organization could have still more deleterious effects by expanding liability from one church to another. If the property of each local congregation is in fact held in trust for a higher body in the denomination whenever that higher body says so, it would be only a slight stretch for the civil courts to consider every local congregation

within a Presbytery or Diocese to be a single enterprise for liability purposes, notwithstanding the separate, nominally local title under which local church property is held.

Under California's single enterprise theory of liability, a plaintiff may recover from all parts of a common enterprise for the liability of one part. A plaintiff may expand the scope of recovery in this way by showing, first, that there is "such a unity of interest and ownership between the two corporations that their separate personalities are merged, so that one corporation is a mere adjunct of the other or the two companies form a single enterprise" (*Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1219) and, second, that "an inequitable result would follow if the parent were not held liable." (*Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 742.) Although this doctrine usually provides a way of piercing the corporate veil of profit-making organizations, there is no reason why it could not apply to religious corporations, particularly if a local church corporation held all its property in trust for a "parent" entity in the denomination. That trust status would simplify the analysis, as single enterprise theory is directed principally at subjecting assets to recovery by those injured by the assets' true owner.

Indeed, significant Establishment Clause and No-Preference Clause issues might arise if these expanded liability principles were applied differently to religious corporations. The result of permitting hierarchies to

impose trusts in their own favor could be to subject property of any local church that affiliates with a denomination to judgments against any other church, notwithstanding the separate corporate form and separate ownership. That outlandish consequence provides another reason to reject the religion-specific rule of deference and instead apply strictly neutral principles to determine the property rights of religious and non-religious organizations alike.

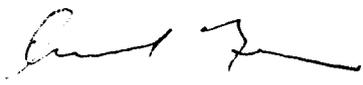
CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be reversed.

May 22, 2008

Respectfully submitted.

RANDALL M. PENNER (101201)
LAW OFFICE OF PENNER,
BRADLEY & BUETTNER
1171 West Shaw Avenue – Suite 102
Fresno, CA 93711
Telephone: (559) 221-2100



DONALD FALK (150256)
MAYER BROWN LLP
Two Palo Alto Square – Suite 300
Palo Alto, CA 94306
Telephone: (650) 331-2000

EUGENE VOLOKH (194464)
MAYER BROWN LLP
350 South Grand Avenue – 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500

CERTIFICATE OF WORD COUNT
(California Rule of Court 8.520(c)(1))

According to the word-count facility in Microsoft Word 2002, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 12,683 words, and therefore complies with the 14,000-word limit contained in Rule 8.520 (c)(1).



Donald M. Falk
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE
S155094

I, Kristine Neale, declare:

I am over the age of eighteen years and not a party to the within-entitled action. My business address is Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On May 22, 2008, I served a copy of the within document(s):

**APPLICATION OF THE PRESBYTERIAN LAY COMMITTEE
FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS AND BRIEF AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

- By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail at Palo Alto, California addressed as set forth below.
- By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an overnight service agent for delivery.
- I caused the above listed documents to be served by **PERSONAL DELIVERY** on the following individuals:

Eric C. Sohlgren
Benjamin A. Nix
Daniel F. Lula
Payne & Fears
4 Park Plaza, Suite 1100
Irvine, CA 92614
Tel.: (949) 851-1100

*Attorneys for Defendants and
Respondents Bunyan, Menees,
Adams, Dale, Hettinga, Stanley,
Trent, McLauhglin, Reveley,
Thompson, Austin, Evans,
Frank, Grantham, Houten and
Rector Wardens & Vestrymen
of St. James Parish in Newport*

Robert A. Olson
Greines, Martin, Stein & Richland LLP
5700 Wilshire Boulevard, Suite 375
Los Angeles, CA 90036
Tel.: (310) 859-7811

*Attorneys for Defendants and
Respondents Bunyan, Menees, Adams,
Dale, Hettinga, Stanley, Trent,
McLauhglin, Reveley, Thompson,
Austin, Evans, Frank, Grantham,
Houten and Rector Wardens &
Vestrymen of St. James Parish in
Newport*

John R. Shiner
Holme Roberts & Owen, LLP
777 S. Figueroa St., Suite 2800
Los Angeles, CA 90017-5826
Tel.: (213) 572-4300

*Attorney for Plaintiff and
Appellant Rasmussen,
Anderson, Bruno and
Protestant Episcopal Church in
the Diocese of Los Angeles*

Joseph E. Thomas
Thomas Whitelaw & Tyler LLP
18101 Von Karman Ave.
Suite 230
Irvine, CA 92612
Tel.: (949) 679-6400

*Attorney for Plaintiff Episcopal
Church in the United States of
America*

Tony J. Tanke
Attorney at Law
2050 Lyndell Terrace, Suite 240
Davis, CA 95616
Tel.: (530)758-4530

*Attorney for Amicus Curiae
Holy Apostolic Catholic
Assyrian Church of the East*

Clerk of Orange County
Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701
Attn: Hon. Sheila Fell

Frederic D. Cohen
Jeremy Brooks Rosen
Horvitz & Levy, LLP
15760 Ventura Blvd., 18th Floor
Encino, CA 91436-3000
Tel.: (818) 995-0800

*Attorney for Plaintiff and Appellant
Rasmussen, Anderson, Bruno and
Protestant Episcopal Church in the
Diocese of Los Angeles*

David Booth Beers
Heather Anderson
Goodwin Procter, LLP
901 New York Avenue
Washington, DC 20001
Tel.: (202) 346-4000

*Attorney for Intervener and Appellant
Episcopal Church*

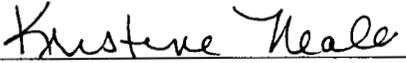
Court of Appeals
Fourth Appellate Dist., Div. Three
925 N. Spurgeon Street
Santa Ana, CA 92701-3724

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal

cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 22, 2008 at Palo Alto, California.


Kristine Neale
Kristine Neale