

No. S10C1909

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**In the Supreme Court of Georgia**

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THE RECTOR, WARDENS AND VESTRYMEN OF CHRIST CHURCH IN SAVANNAH,  
ET AL., DEFENDANTS-PETITIONERS

v.

BISHOP OF THE EPISCOPAL DIOCESE OF GEORGIA, INC., THE EPISCOPAL CHURCH,  
CHRIST CHURCH EPISCOPAL, AND THE RECTOR, WARDENS AND VESTRY OF CHRIST  
CHURCH EPISCOPAL, PLAINTIFFS-RESPONDENTS

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE COURT OF APPEALS OF GEORGIA, CASE NO. A10A1375*

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**AMICUS CURIAE BRIEF OF  
THE PRESBYTERIAN LAY COMMITTEE**

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## **INTRODUCTION AND THE IDENTITY AND INTERESTS OF THE AMICUS CURIAE**

### **A. THIS CASE IS OF GREAT CONCERN, GRAVITY, AND IMPORTANCE TO THE PEOPLE OF GEORGIA**

The ruling in this case potentially effects not only the litigants in this action, but also the thousands of churches in Georgia that are members of scores of denominations, each with its own unique polity, practices, traditions, and concepts of connectionalism. Virtually every one of those churches gathers its members for worship in a building owned and titled in the name of that local church body with ownership and succession contingencies individually set up to reflect the intentions and devices of the owner. There has been certainty for the owners in this arrangement. The certainty of that ownership has now been cast into doubt. The doubt is not due to any lack of specificity in title, but rather has been created because of inconsistent and illogical interpretations of statutory and case law by the Georgia Court of Appeals in the present case, elevating a non-owner's claim to a trust interest above that of the titled owner's legal interests.

Speaking on behalf of Presbyterians who (among others) stand to be adversely impacted by the over arching interpretation of trust law and O.C.G.A. §14-5-46, we urge the Supreme Court of Georgia to accept this case for review, examine the underlying principles, and to make a proper pronouncement of law.

## B. THE AMICUS CURIAE

The Presbyterian Lay Committee (PLC) was established in 1965 to inform and equip Presbyterians regarding issues facing the denomination, and actively assists local congregations and members in their dealings with the regional and national entities within the Presbyterian Church (USA) ("PCUSA"). In doing so, the PLC supports the traditional balance between clergy and laity in Presbyterianism. 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."

The PLC has been asked by local churches to advocate on their behalf, representing their interests in church property litigation where misrepresentations or misunderstandings may adversely affect local church property rights. Here, the property rights of numerous PCUSA churches in Georgia will be adversely

impacted if the lower court's misapplication of law and misinterpretation of polity is affirmed.

The PLC is concerned that an oversimplification of church polity by courts, in general, will affect the rights of churches far beyond the denomination involved in this property dispute. Consequently, the PLC advocates here on behalf of neutral principles of law fairly and equitably applied to all, regardless of denominational affiliation, and free from improper entanglement in accord with the Constitutions of the United States and Georgia.

The PLC is vitally interested in the balance that has traditionally existed in Presbyterian denominations between local congregations and the structures by which Presbyterianism has historically been organized. 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. The imposition of a trust, by operation of law, against the intentions and desires of the titled church property owners, fundamentally effects a substantial right of the Presbyterian citizens of this state.

C. THE ERROR OF THE COURT OF APPEALS NEEDS TO BE CORRECTED IN THIS CASE FOR THE BENEFIT OF ALL LOCAL CHURCHES POTENTIALLY IMPACTED BY THE UNCERTAINTY CREATED BY THIS DECISION

The invitation to future error and harm will be extended if not corrected now. The danger which concerns this *amicus* is that the overly generalized two-fold classification of church polity will be misapplied to Presbyterianism, and will be misapplied to improperly reinsert a form of “hierarchical deference” into Georgia law, which deference does not reflect the intent of the parties, cuts against Georgia’s traditional neutral principles approach, to church property disputes, and does not reflect Georgia trust law.

The relationship of church-going Georgia citizens to their churches and their property ownership rights as congregation members stand to be altered by judicial fiat if not corrected here. This, most certainly, is a case of great concern, gravity, and importance to the peoples of Georgia and not solely the Episcopal and/or Anglican litigants.

The Presbyterian Lay Committee therefore respectfully submits this brief as *Amicus Curiae* in support of the petitioner’s position, and urges this honorable court to consider the additional legal arguments to be raised by the *Amicus*, particularly in deciding to accept this case for further review.

## **LAW AND ARGUMENT**

### **A. THE COURT OF APPEALS MISCONSTRUES O.C.G.A. §14-5-46 AS VALIDATING, IPSO FACTO, A NON-OWNER'S ASSERTION OF TRUST**

O.C.G.A. §14-5-46 is a deed validation statute, not a trust creation statute.

There is no doubt that when enacted in 1805 the statute was created to permit local houses of worship to hold title to their property, thereby giving certainty to the deeds and titles reflecting such local ownership. While it is now standard practice for a church to incorporate under Georgia's non-profit corporation laws, historically this was not always the case. Many churches and religious institutions had a reticence to governmental structures which kept them from incorporating. In order to address the diversity of ecclesiastical forms, and to clear up questions of the legal right of those churches and religious institutions to hold property, O.C.G.A. §14-5-46 was enacted. Its drafting was broad enough to account for the many different forms of churches, yet careful not to endorse one form over another. Churches, by whatever form, are legally recognized juridical entities with the right to own property, transact business, to sue and be sued, and to do all other things which a legal person may do. The statute on property ownership was enacted to ensure this right was recognized in land ownership.

O.C.G.A. §14-5-46 now states:

All deeds of conveyance executed before April 1, 1969, or thereafter for any lots of land within this state to any person or persons, or any church or religious society, or to trustees for the use of any church or religious society for the purpose of erecting churches or meeting houses shall be deemed to be valid and available in law for the intents, uses, and purposes contained in the deeds of conveyance. *All lots of land so conveyed shall be fully and absolutely vested in such church or religious society or in their respective trustees for the uses and purposes expressed in the deed to be held by them or their trustees for their use by succession, according to the mode of church government or rules of discipline exercised by such churches or religious societies.*

From a grammatical perspective, the subordinate clause “according to the mode of church government” modifies the phrase “by succession,” meaning the succession of title-holding trustees. No other grammatical construct makes logical sense. A simple analysis of the sentence bears this out:

Lots of land . . . shall be fully and absolutely vested in:

[a church]; or

[a religious society]; or

[in the respective trustees of that church or religious society]

for the uses and purposes *expressed in the deed*

to be held by them [the church, religious society, or the trustees designated to hold the land for that church or religious society]

for their [the trustees] use by succession

“according to the mode of church government or rules of discipline exercised by such churches or religious societies.”

The “mode of church government” clause can only modify one of two phrases: “by succession” or the “uses and purposes.” First, the phrase “mode of church government” follows immediately the “by succession” clause, making it the most logical antecedent from a grammatical perspective. Additionally, the “uses and purposes” clause already has a modifier, that being the clause “expressed in the deed.” There would be no need to add an additional modifier which could potentially conflict with the first modifier; yet seeing the “mode of church government” modifier as clarifying the succession adds meaning to the statutory scheme. Recognizing that - where legal title is held in a church trustees’ name - and that such trustees change over time, the statute obviates the need for the deed holder to transfer the deed to new trustees every time that occurs. Thus, the modifier is used.

While the construct described above is grammatically logical, the court below did not see it that way, and interpreted the statute to modify the manner *for which* the property is to be held, and *by whom* it could be held. In so doing the court below saw a trust creation mechanism which simply is not written into the statute.

The rules of statutory construction require this Court to give legislative enactments their plain and logical meaning. Modifiers should be applied to the closest antecedent and not to a distant antecedent, and to give clarity and effect to the statutory purpose, rather than to confer upon a non-title holder the ability to impose a trust upon the land at issue. One reading is simple and straightforward; the other invites uncertainty and ambiguity.

Therefore, the “mode of church government,” or “rules of discipline” referenced in O.C.G.A. §14-5-46 only reference the mode of succession, and do not, and cannot be said to codify the phrase “uses and purposes” or otherwise permit a new form of trust creation.

From a constitutional perspective, if O.C.G.A. §14-5-46 is read to codify religious uses and purposes, the government would have effectively established a religion which, of course, it is prohibited from doing.

As a deed recognition statute, 14-5-46 makes sense, simply validating ownership in the deed holder.

**B. THE COURT OF APPEALS INCORRECTLY UTILIZED AN IMPLIED TRUST TO DIVEST THE TITLE HOLDER OF OWNERSHIP**

Having found that a trust existed over the property the Court of Appeals held that:

When Christ Church disaffiliated from the National Episcopal Church, the local church property reverted to the control of the Bishop of the Diocese of Georgia for the uses and purposes of the National Episcopal Church.

This is fundamentally erroneous because a trust is not a reverter. At page 2 of its decision, the Court recognized that “the parish owns its real estate.”<sup>1</sup> Yet even the Dennis Canon itself does not purport to divest the owner of ownership. Quoted at page 17 of the Court of Appeals Opinion, the Dennis Canon clearly states that

All real and personal property held by . . . any parish . . . is held in trust for this Church. . . . The existence of this trust, however, shall in no way limit the power and authority of the Parish . . . so long as the particular Parish . . . remains a part of and subject to this Church and its constitution and canons.

Therefore, even the Dennis Canon itself does not purport to change ownership, or establish a reverter, as improperly held by the Court of Appeals.

Should the decision below stand, a precedent will have been established which would allow a court to imply a trust and divest title holder owner of property. This effects not only the obvious ownership interests of the landholder, but all who may have financial dealings with the landowner secured by that title. Any mortgage holder for church property is placed at risk by uncertainty of title. Obtaining loans will be complicated, all to the detriment of the various church

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<sup>1</sup> Court Op. at p. 2.

entities, because of a potential cloud on title by virtue of their possible association with a denomination. Given that courts struggle with interpretation of denominational structures, passing that burden on to banking and commercial loan institutions will only aggravate the problems - all to the detriment of the local church. (Generally speaking - almost universally - it is the local churches which obtain loans, raise funds, and pay for their property; thus the burden of a more complicated loan process will be born by the local churches in the financing of property development, but the non-owner stands to gain).

Accepting review of this case presents an opportunity to avoid the adverse consequences created by the new trust theory adopted by the Court of Appeals.

### C. THE COURT OF APPEALS OPINION ENTANGLES ITSELF IN RELIGIOUS PRACTICES

A troubling aspect of the Court of Appeals opinion is its entanglement of the court with church relations, interpreting the effect of canons on parishes and determining that the local parish “acceded to the National Episcopal Church’s implied trust, which had become part of the fabric of governance of the National Episcopal Church, through its actions of ... becoming a parish in the Diocese of Georgia ...[and] affirm[ing] adherence to the National Episcopal Church doctrine.” (Ct. Ap. Op at p.14).

If the court is to make sweeping interpretations of Episcopal doctrine, what is to prevent it from overstepping with other denominations, such as the Presbyterians? Elevating the Presbyterian Book of Order to the level of establishing a legal trust over property would run contrary to the Book of Order's own self limitations from having civil law effect. "Governing bodies of the church are distinct from the government of the state and have no civil jurisdiction or power to impose civil penalties. They have only ecclesiastical jurisdiction for the purpose of serving Jesus Christ..." (PCUSA Book of Order G-9.0102a). This would seem to prevent an ecclesiastical entity from divesting a church from its property as a civil penalty. Yet the court below does precisely that.

This precedent raises the specter of giving effect to ecclesiastical declarations of trust based upon interpretation of church laws (constitutionally questionable) and without ever examining the sufficiency of the legal elements ordinarily required to establish a trust. For this reason, a review of the case by this court is of the utmost importance.

#### D. THE COURT OF APPEALS ALTERED AND AVOIDED GEORGIA'S TRUST CREATION ELEMENTS

The purported trust at issue fails to satisfy the elements necessary to create a trust under Georgia trust law. According to the Court of Appeals, "the National

Episcopal Church's implied trust was formalized and converted into an express trust with the adoption of the Trust Canon of 1979. The court sought to justify this deviation by citing to Jones v Wolfe, which, in dicta, postulated that national church charters could be amended to establish trusts. But the Court of Appeals overlooked the courts critical caveat that to be enforced the trust would need to be "embodied in some legally cognizable form." 443 U.S. 595, 606 (1979) The U. S. Supreme Court did not set out to modify Georgia law for trust creation, but did the opposite by recognizing the primacy of the existing state laws on "legally cognizable forms."

Nowhere in the opinion below did the court assess whether the purported trust was in a legally cognizable form which would be recognized by Georgia attorneys. To the contrary, its reasoning was somewhat circular. While stating it was applying neutral principles, the court bowed to a denominational self declaration of a trust over property it clearly did not hold title to, and deferred to the conclusion that it was a valid trust because the Jones v Wolfe case said it would have to pass legal muster. But the court missed a step in the analysis. This court should accept review to rectify the misstep. In doing so, it would be wise to ask if this method of trust creation would be legitimate if applied to non-ecclesiastical entities.

E. THE LAW AND PRACTICAL EXPERIENCE REQUIRE CIVIL COURTS TO USE NEUTRAL PRINCIPLES TO DECIDE PROPERTY DISPUTES BETWEEN RELIGIOUS ORGANIZATIONS.

Forty years ago, the United States Supreme Court held 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 Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969); see also Jones, 443 U.S. at 606. The Supreme Court has 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. See Jones, 443 U.S. at 604 ("State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.").

Moreover, the U.S. Supreme Court has disapproved of 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. Jones, 443 U.S. at 603 (finding that the neutral-principles approach is "flexible enough to accommodate all forms of religious organizations..." and it "promises to free civil courts completely from entanglement in questions of religious doctrine.")

For example, the U.S. Supreme Court has held that the government may not delegate decision-making authority on temporal, civil matters to religious institutions. In Larkin v. Grendel's Den, 459 U.S. 116 (1982), 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. However, that is exactly what will happen here if the lower court's decision is affirmed, elevating the lower court's construction of the "mode of government" language in O.C.G.A. § 14-5-46, to the law of the state. Such action delegates to a purportedly hierarchical church -- and no other religious organizations -- the inherently governmental power to decide property ownership. Federal and state religious guarantees do not permit courts to supplant civil rules of decision in property cases by delegating authority to an ecclesiastical decision-maker, whether by direct delegation or, as in this case, by indirect delegation that results from misconstruing O.C.G.A. § 14-5-46.

F. THE TRIAL COURT'S THRESHOLD JUDICIAL CLASSIFICATION OF A "MODE OF CHURCH GOVERNMENT" AS HIERARCHICAL OR CONGREGATIONAL IMPERMISSIBLY ENTANGLED THAT COURT IN RELIGION.

Allowing courts to determine whether a denomination's "mode of church government" is sufficiently hierarchical to warrant judicial deference would

entangle those courts in questions of religious doctrine. Perhaps a rule of deference might be more nearly permissible under state and federal religious guarantees if religious organizations consisted only of obvious and complete hierarchies on the one hand and local congregations unaffiliated with any larger religious organization on the other. However, realistically there are far more than the two types of structures for religious organizations, "hierarchical" or "congregational," than originally noted in the U.S. Supreme Court's decision in Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). Indeed, the diversity among religious denominations in American only continues to grow.

Civil court determination of the actual form of ecclesiastical polity is fraught with problems. When there is any dispute over whether a church is hierarchical or the extent of hierarchical power, "the resolution of these questions may require a court to intrude impermissibly into religious doctrinal issues." Maktab Tarighe Oveyssi Shat Maghsoudi, Inc. v. Kianfar 179 F.3d 1244, 1248 (9th Cir. 1999) (addressing Sufi denominations.) When civil courts attempt to resolve the validity of an assertion of hierarchical polity or to interpret the general church's "mode of church government" by deferring to its claim of a trust in its own favor, government embroilment in controversies over religious doctrine is pronounced.

See Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989) Brennan, J. plurality op., citing Jones, 443 U.S. 595 (1979).

The U.S. Supreme Court recognized this problem of entanglement 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." Jones, 443 U.S. at 605. This necessarily entangles civil courts in religion.

That the civil law of property could be distorted by civil courts' confusion over church polity demonstrates the danger of trial courts voicing assent to neutral principles of law on the one hand, yet deciding church property cases by deference on the much-disputed theological point of whether a church government is hierarchical or congregational. Indeed, that is the very question of ecclesiastical polity, which the U.S. Supreme Court, in Jones, said, is "obviated" by the neutral principles of law method. Jones, 443 U.S. at 603-605.

G. JUDICIAL DEFERENCE TO A DENOMINATION'S PURPORTED  
"MODE OF CHURCH GOVERNMENT"  
UNCONSTITUTIONALLY FAVORS CERTAIN FORMS OF  
RELIGIOUS BELIEF AND STRUCTURE.

There is another reason that neutral property law principles should be strictly applied to church property disputes instead of according determinative weight to a

church's perceived "mode of church government." Any form of judicial deference to a religious organization's assertion of hierarchical power 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 asserting hierarchical control. 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 759 S.W.2d 583, 586 (Ky. 1988). That in large part is why the Kentucky Supreme Court in Bjorkman embraced a neutral- principles analysis rather than a rule of deference.<sup>2</sup>

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, 472 U.S. 703 (1985). In Caldor, the

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<sup>2</sup> 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. 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.

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*, 544 U.S. 709, 722 (2005).

Here, an "unyielding weighting" in favor of the interests of an asserted religious hierarchy would trump local congregations' property rights regardless of the facts of any particular case or however inequitable the result might be. 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.*, 464 N.E.2d 454, 460 (N.Y. 1984).

H. 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.

Justice Brennan's concurring opinion in Maryland & Virginia Eldership of the Churches of God v. Sharpsburg Church of God, Inc., 396 U.S. 367 (1970) (adopted by the majority in Jones) 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 chargeable to any other property holder is in fact the only method of determining property disputes that is consistent with contemporary Establishment Clause jurisprudence.

Denominational governing documents are also to be examined, but are to be "scrutinized in purely secular terms". Jones, 443 U.S. at 604. As stated in that opinion, "the neutral principles of law method, properly understood and applied, looks to the mutual intention of the parties as ascertained by "well-established concepts of trust and property law", and "thereby promises to free civil courts completely from entanglement in questions of "religious ... polity". Id. at 603. The

neutral principles approach ... "obviates entirely the need for an analysis or examination of ecclesiastical polity ..." Id. at 605.

Misreading other passages in Jones, however, the lower court held 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. That contention snatches a twig from the Jones opinion without regard for the surrounding forest. The whole point of the neutral-principles analysis is that "the outcome of a church property dispute is not foreordained." Id. at 606. Rather than depending on the preference of a purported religious hierarchy, i.e. the "mode of church government", a property dispute would turn on the express intentions of the property owner as well as the body claiming spiritual supremacy. Indeed, in the relevant passages, Jones 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).

The Court in Jones 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). The Jones court did not foreordain an outcome, but postulated possibilities "if they [the parties - plural] so

desire.” Thus it was clearly the intent of Jones to give effect to the intended outcome of the parties, both of whom would be in assent, and not to give preference to one parties self declared intent as to the outcome. By any logical reading, the parties would necessarily include the property owner as one of the parties whose intentions are to be given effect. And, whatever the parties decided to do, it would have to be *"embodied in some legally cognizable form."* *Id.* at 606 (emphasis added). 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 in contravention of the intent of the property owner. 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 Georgia.<sup>3</sup>

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<sup>3</sup> 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. See also supra note 3.

I. O.C.G.A. § 14-5-46 SHOULD BE CONSTRUED IN ACCORD WITH GENERALLY APPLICABLE PRINCIPLES OF TRUST LAW.

O.C.G.A. § 14-5-46 should not be misconstrued to abrogate basic principles of property or trust law. There is no support for the notion that O.C.G.A. § 14-5-46 authorizes a church "hierarchy" to create a trust interest for itself in property owned by a local church, simply by saying so. Even if labeled a church canon or constitution, a document created by an allegedly 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.

Construing O.C.G.A. § 14-5-46 as in accord with normal property law and trust principles avoids serious federal constitutional questions. The Establishment Clause explicitly limits legislative authority: "Congress shall make no law respecting an establishment of religion . . . ." (U.S. Const. amend I.) Accordingly, a state legislature has no more power than a court to dictate an unconstitutional process for deciding property disputes between religious organizations.<sup>4</sup> To recognize a religion-specific exception to general law, and allow a purportedly

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<sup>4</sup> Cantwell v. Connecticut, 310 U.S. 396 (1940); Everson v. Bd. of Educ., 330 U.S. 1 (1947).

hierarchical denomination to determine property ownership by fiat, would have impermissible effects.

First, if the "mode of church government" language of O.C.G.A. § 14-5-46 was construed to allow national denominations to expropriate local congregational property without any affirmative conveyance by the congregation (by deferring to a claimed hierarchical status), the statute would give special property rights to so-called hierarchical churches because of both their religious nature and their choice of a hierarchical structure. Under that construction, O.C.G.A. § 14-5-46 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 federal religious guarantees and those set forth at Ga. Const. art. I, paras. III and IV.<sup>5</sup> As the U.S. Supreme Court said in a landmark decision:

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<sup>5</sup> By enlisting the power of the state in favor of any assertion of hierarchical property rights, O.C.G.A. § 14-5-46, if interpreted the lower court's way, would "impermissibly 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, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring), a "statutory preference" for centralized religious organizations, or organizations that aspire to central control, is "constitutionally intolerable." Id.

The "establishment of religion" clause ... means at least this: Neither a state nor the Federal Government ... can pass laws, which aid one religion, aid all religions, or prefer one religion over another.

Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (emphasis added).

Second, any statute like O.C.G.A. § 14-5-46 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, 512 U.S. 687 (1994). That would be impossible under the interpretation of the statute adopted by the court below. The statute would discriminate within the category of religious institutions, treating those that are members of general churches or religious bodies worse than those who 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, 456 U.S. 228 (1982).

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. Allowing some religious bodies to use civil law to give themselves this kind of power over other groups would violate the free exercise and establishment protections of the United States and Georgia Constitutions. (See U.S. Const., amend. I; Ga. Const., art. I, paras. III, IV). The lower court's

interpretation and application of O.C.G.A. § 14-5-46 not only departs from the prior decisions of this Court but also places at risk fundamental freedoms:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Board of Education v. Barnett, 319 U.S. 624, 642 (1943).

O.C.G.A. § 14-5-46 can alternatively and rightly be interpreted to avoid all these constitutional problems by construing its "mode of church government" language to simply require scrutiny of the denomination's governing documents as one factor among several in a neutral principles analysis, but "scrutinized in purely secular terms" and "obviating entirely the need for an analysis or examination of ecclesiastical polity". Jones, 443 U.S. at 603-605 (emphasis added). Mere affiliation with a denomination, without more, should not risk automatic forfeiture of property rights as a consequence of unilateral assertions of a trust by ecclesiastical hierarchies (or claimed hierarchies) and subsequent judicial deference to an asserted "mode of church government". Georgia statutes should not be ignored (O.C.G.A. § 53-12-20) or misconstrued (O.C.G.A. § 14-5-46) to accomplish that result.

J. THE NEUTRAL PRINCIPLES OF LAW CORRECTLY APPLIED.

Although this Court has previously adopted the neutral principles of law test for use by lower courts in Georgia, the court below did not apply that test when it essentially ignored the deeds (which contain no trust language), state trust law, and articles of incorporation. Instead, the trial court misinterpreted O.C.G.A. § 14-5-46 to give determining weight to the alleged "mode of church government," unbalanced against the contrary evidence. In doing so, the court entangled itself in this dispute concerning the effect and reach of religious polity and ignored the deed language and other indicators of mutual intent, including the text of the denominational constitutions "scrutinized in purely secular terms". Jones, 443 U.S. at 604.

The ECUSA's Canons contain a unilateral assertion of a trust over property not owned by the ECUSA (the purported settler). This is the same type of unilateral assertion found in the PCUSA, which is facing its own spate of litigation. (Other Presbyterian denominations, such as the PCA and EPC did not seek to insert some sort of property trust clause and have no problematical litigation over property rights). The unilateral trust clause was made after Jones held that a church being "connectional" is not sufficient grounds to establish a trust. If the relationship between the local church and the denomination alone is insufficient to

establish a property trust, then the document which the proponent of the trust claims establishes that trust must be scrutinized in the same manner as any other non-ecclesiastical entity's claim of trust. And in no instance would a non-ecclesiastical entity be permitted to claim that a self-declaration of a trust over property it did not own was sufficient to create a trust.

O.C.G.A. § 14-5-46 is a deed validation statute. It applies to the interpretation of deeds, and does not ipso facto validate claims of trust or place denominational claims of trust beyond the scrutiny of the courts or exempt such claims from the legal elements required for a trust. See O.C.G.A. § 14-5-46. Thus, to determine if a trust exists, it is logical to look to trust law.

Imposition of a trust where there is no written signed trust document and the property owner has not transferred property into a trust and has expressed a disagreement over the validity of the claim is certainly contrary to the intended constitutional effect of Jones v. Wolf, and hardly sufficient to justify a trust under Georgia law. Thus, by giving undue weight to the words "form of government" in O.C.G.A § 14-5-46, the trial court unwittingly reintroduced a form of denominational deference to Georgia jurisprudence that has otherwise long been abandoned, and directly contradicts the civil law requirements for trust creation applicable to all citizens, corporations, and organizations in Georgia.

## CONCLUSION

The trial court deviated from the neutral principles of law test and erroneously gave deference to the denomination's assertions. The PLC urges this Court to grant certiorari and, after doing so, reverse the trial court and reaffirm that the neutral principles of law test remains the law in Georgia.

Respectfully submitted this 17<sup>th</sup> day of September, 2010.

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