No. 20-____

In the Supreme Court of the United States

JEFF SCHULZ, ELLEN SCHULZ, LIZ CEDERGREEN, DAVID MARTIN, LINDSEY MCDOWELL GEORGE NORRIS, NATHAN ORONA, AND KATHRYRN OSTROM, AS TRUSTEES OF THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, A WASHINGTON NONPROFIT CORPORATION, PETITIONERS

v.

THE PRESBYTERY OF SEATTLE, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a dispute between a local congregation and its former denomination over ownership of property to which the local congregation holds legal title, does the First Amendment permit courts to apply a rule of absolute deference to assertions of ownership by the denomination?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners, Jeff Schulz, Ellen Schulz, Liz Cedergreen, David Martin, Lindsey McDowell, George Norris, Nathan Orona, and Kathryn Ostrom, were defendants in the trial court, appellants in the court of appeals, and petitioners in the Washington Supreme Court.

Respondents, The Presbytery of Seattle, The First Presbyterian Church of Seattle, Robert Wallace, and William Longbrake, were plaintiffs in the trial court, appellees in the court of appeals, and respondents in the Washington Supreme Court.

Petitioners, as trustees of First Presbyterian Church of Seattle, state that it is a Washington non-profit corporation that has no parent corporation and issues no stock.

RELATED PROCEEDINGS

Superior Court of Washington (King County):

The Presbytery of Seattle, et al. v. *Jeff Schulz, et al.*, No. 16-2-03515-9 SEA (Sep. 17, 2017)

The Presbytery of Seattle, et al. v. *Jeff Schulz, et al.*, No. 16-2-23026-1 SEA (April 3, 2017)

Court of Appeals of Washington (Division I):

The Presbytery of Seattle, et al. v. *Jeff Schulz, et al.*, No. 78399-8-I (Oct. 7, 2019)

Supreme Court of Washington:

The Presbytery of Seattle, et al. v. *Jeff and Ellen Schulz, et al.*, No. 97996-1 (April 1, 2020)

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INTRODUCTION

For the past forty years, many of this nation's largest Protestant denominations have been thrown into upheaval by doctrinal and other disagreements, leading to church splits, the creation of new denominations, and—relevant here—lawsuits over the ownership of church property. These disputes involve more than just the monetary value of the properties involved, which runs into the billions of dollars; they involve places of immense importance for worship, having been the locus of veneration and emotional attachment for generations.

The proper resolution of property conflicts in some denominations—those that are clearly hierarchical or clearly congregational—is straightforward under current doctrine. Truly hierarchical churches such as the Roman Catholic Church or LDS Church generally vest title in bishops or other high church authorities, and churches adopting decentralized polities, such as Baptists and Quakers, generally vest title in the local corporate entity or trustees.

Many religious traditions arising out of the Reformation, however, deliberately rejected both the hierarchical and the congregational forms of governance. These groups established unique systems of ecclesiastical "federalism" that divide authority among church bodies at the various levels, with differing degrees of democratic control and interconnection. Treating such denominations as purely "hierarchical" or "congregational"—or even as a monolithic class of hybrid denominations—ignores vital theological differences that inform their polities.

Unfortunately, in a politically charged case after the Civil War, this Court did just that, ruling that for

purposes of resolving church property disputes, there are just two forms of church organization: the "strictly congregational or independent" church, "governed solely within itself," and hierarchical denominations having "general and ultimate power of control" that is "more or less complete" and "supreme" (lumping Presbyterianism in with the latter). *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 724, 722 (1871). In so holding, the Court declared that local churches affiliate with denominations "with an implied consent to th[eir] government, and are bound to submit to it" in matters involving property. *Id*. at 729.

These assumptions were not only bad theology, but also bad constitutional law, as they effectively convert federal or mixed forms of church governance into top-down hierarchies. Indeed, the assumptions conflicted with the thrust of the *Watson* opinion, which affirmed "the full and free right" of all people "to organize voluntary religious associations" in accordance with their "religious doctrine." *Id*. at 728. As the Court has since noted, *Watson* was this Court's first decision to affirm the "freedom for religious organizations" to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 186 (2012) (citation omitted). Those foundational principles, for which *Watson* has so often been quoted, cannot be squared with the idea that religions come in just two organizational shapes, or that joining a denomination forfeits all rights in possible future conflicts with the denomination.

In *Jones* v. *Wolf*, 443 U.S. 595 (1979), this Court took the first step toward correcting *Watson*'s incorrect assumptions. It held that civil courts deciding

church property disputes need not follow *Watson*'s rule of absolute deference to denominations, explaining that First Amendment values are better served if courts apply "neutral principles of law": "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 603. A genuinely neutral approach, whereby courts "scrutinize the document[s] in purely secular terms," "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 604, 603. Moreover, because neutral principles facilitate "ordering private rights and obligations to reflect the intentions of the parties," they are "flexible enough to accommodate all forms of religious organization and polity." *Id.* at 604, 603. In short, neutral principles better protect the liberty of religious communities—be they hierarchical, congregational, or something else—to fashion systems of ecclesiastical governance that "accord with the desires of the[ir] members" and the dictates of their faiths. *Id.* at 604.

Perhaps because of a lingering loyalty of four Justices to *Watson*'s rule of denominational deference, and perhaps because doing so was unnecessary to resolving the question presented, the Court in *Jones* v. *Wolf* did not declare the denominational deference approach unconstitutional. Instead, it left the choice between deference and neutral principles to the state courts. A large majority of States have since adopted neutral principles, but Washington and eight other States have clung to *Watson*'s rule of absolute deference, and several others have purported to adopt neutral principles while effectively adhering to *Watson*. Some courts rejecting the deference approach have held that it violates the Free Exercise and/or Estab-

lishment Clauses, while others cite the First Amendment concerns of the Court in *Jones* without conclusively stating that deference is unconstitutional.

This case is a stark example of the consequences of *Watson*'s denominational deference rule. Washington's state courts awarded valuable church property in downtown Seattle to petitioners' former denomination, despite the undisputed facts that "[t]itle to [the] property" has always been in the local church's "name as a nonprofit corporation" and that the church never consented to give the denomination any trust or other interest in the property, which the church purchased entirely "with funds from its members." App. 3a. The sole reason for favoring the denomination was the Washington courts' continued adherence to *Watson*.

It is time for this Court to take the next step and hold that neutral principles are not only constitutionally permissible, but constitutionally required. Compare *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (holding that neutrality in aid to otherwise eligible religious and secular schools is permissible), with *Trinity Lutheran Church* v. *Comer*, 137 S. Ct. 2012 (2017), and *Espinoza* v. *Mont. Dep't of Rev.*, 140 S. Ct. 2246 (2020) (both holding that neutrality in aid to otherwise eligible religious institutions is constitutionally required). Only that approach ensures that all religious societies—not just "hierarchical" and "congregational" churches—enjoy "the full and free right" to "organize voluntary religious associations" and adopt forms of property ownership consistent with their religious polities. *Watson*, 80 U.S. at 728.

OPINIONS BELOW

The Washington Supreme Court's order denying review (App. 53a–54a) is reported at 460 P.3d 177. The Washington Court of Appeals' opinion (App. 1a–26a) is reported at 449 P.3d 1077. The trial court's orders granting partial summary judgment (App. 27a–35a) and denying a preliminary injunction (App. 36a–50a) are unreported.

JURISDICTION

The Washington Supreme Court issued its final judgment, denying the petition for review, on April 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV, § 1.

STATEMENT

A. The First Presbyterian Church of Seattle and its property

First Presbyterian Church of Seattle (FPCS) was incorporated in 1874. CP1798.[1] Its articles of incorporation stated that the church's "objects and purposes" were to "promote the worship of Almighty God and the belief in and extension of the Christian Religion, under the forms of government and discipline of The Presbyterian Church in the United States of America." CP1805. The articles expressly granted "charge and control of the property and temporal affairs" of the Corporation to First Presbyterian's Board of Trustees, a body elected by the congregation. CP1807. The articles did not give the denomination any right to its property. As amended in other respects, those articles remain in effect today.

FPCS owns real property in the heart of downtown Seattle, estimated to be worth more than $20 million, plus roughly $10 million in personal property. CP1032, CP1312–1314. It is undisputed that all of FPCS's property was purchased with "funds from its members," and that "[n]either [the] Presbytery nor [the denomination] has financially contributed to its property." App. 3a. Title has always "remained in [FPCS's] name as a nonprofit corporation." *Ibid.*

In addition, no trust interest in favor of the Presbytery or PCUSA or any predecessor denomination has ever been recorded in the deeds or other corporate documents. CP1814–1824 (deeds). In 1929, one of

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[1] "CP____" refers to the relevant page of the "Clerk's Papers," the record in the Washington courts.

PCUSA's predecessor denominations proposed amending its constitution to require local congregations to amend their charters or articles to "declare that [the congregation's] property is held in trust * * * for the [denomination]." CP1988. The proposal was rejected. *Ibid.*

B. The Presbyterian Church (U.S.A.) and the Seattle Presbytery

Contrary to this Court's characterization in *Watson*, 80 U.S. at 722–723 (discussed in detail below), Presbyterian churches are neither congregational nor hierarchical. See generally II James Bannerman, *The Church of Christ: A Treatise on the Nature, Powers, Ordinances, Discipline, and Government of the Christian Church* 245–341 (1868) (contrasting Presbyterian governance with Roman Catholic, Episcopalian, Independent, and Congregational governance). Much like the U.S. Constitution, which many Presbyterians believe was modeled on Presbyterian church polity, the church is "partly federal and partly national." THE FEDERALIST, No. 39 (Madison) (1788). Unlike a hierarchical church, authority is bottom-up: congregations elect their own governing boards made up of lay "elders" (collectively called the "Session"), which send "commissioners" to local and regional boards (called Presbyteries and Synods) and ultimately to a national General Assembly. CP1974–1976; Sidney Ahlstrom, *A Religious History of the American People* 265 (1972) (every level has "certain fixed responsibilities"); Joan Gray & Joyce Tucker, *Presbyterian Polity For Church Leaders* 10 (4th ed. 2012) ("Each council has certain expressed powers, and only those power, to exercise."). Control over property and other material aspects of corporate affairs are typically entrusted to a Board of

Trustees, which is likewise elected by the congregation. For a period, members of FPCS's Session also served as trustees.

Over the centuries, Presbyterian churches have experienced frequent splits and mergers,[2] with individual congregations deciding where to affiliate after the split. Until *Watson*, congregations that chose to disaffiliate kept their property. Eric Osborne & Michael Bush, *Rethinking Deference: How the History of Church Property Disputes Calls Into Question Long-Standing First Amendment Doctrine*, 69 S.M.U. L. Rev. 811, 839 (2016). There had been "no trust language, express or implied, automatically in favor of a national denomination or general body in any Presbyterian constitution from the inception of Presbyterianism in the 16th Century until the addition of express trust language to some Presbyterian constitutions in the early 1980s." CP1980.

In 1983, the United Presbyterian Church in the United States of America (UPCUSA) adopted such a clause—but even then, consistent with Presbyterianism's non-hierarchical polity, the denomination recognized and represented to member churches that the clause did "not give Presbytery, Synod, or Assembly any jurisdiction over property" unless the local church consented under state law. CP1980–1990; CP2064–2125. That representation reflected black-letter trust law in Washington and elsewhere: because the UPCUSA did not hold title to local church property, it

[2] See CP1945; *Family Tree of Presbyterian Denominations*, Presbyterian Historical Society (last visited Aug. 27, 2020) https://www.history.pcusa.org/history-online/presbyterian-history/family-tree-presbyterian-denominations.

could not grant itself a legally cognizable trust interest in that property. Restatement (Third) of Trusts §§ 10, 13 (2003).

It is undisputed that FPCS refused to transfer its property to the denomination. App. 3a. FPCS's lawyers concluded that UPCUSA's trust clause would not "change the title or legal effect of ownership without [FPCS] itself correcting—amending all of its deeds to show title is held in trust for UPC USA." CP1838; accord CP1833–1843. FPCS informed the Presbytery of its "unalterable opposition" to any denominational trust. CP1848.

FPCS's "unalterable opposition" did not change. *Ibid.* When UPCUSA merged with the Presbyterian Church in the United States (PCUS) to form the Presbyterian Church in the United States of America (PCUSA) in 1983, PCUSA put a trust clause in its Book of Order. CP1799; CP1863 (Book of Order, G-4.0203). PCUSA recognized, however, that the clause had no legal effect absent express consent from affiliated churches. CP1990–1991. To encourage such consent, PCUSA circulated model articles of incorporation that expressly granted PCUSA an interest in local church property. CP2128 (Model Article VI–"All Property Held in Trust for the Presbyterian Church (U.S.A.)"). When FPCS restated its articles and amended its bylaws to affiliate with PCUSA, it included no such language. CP1804–1812 (1985 articles); CP1870–1874 (2005 bylaws).

C. The dispute between First Presbyterian Church of Seattle and the Seattle Presbytery

Over the past decade, relations between FPCS and the Presbytery of Seattle deteriorated. The congregation had dwindled precipitously. In 2006, under new pastoral leadership, the church initiated plans to reinvest the value of its property in urban ministry and to partner with a younger congregation to create a "church in an urban village." At first, FPCS tried to work with the Presbytery, but it soon became clear that the Presbytery had other plans for FPCS's property. CP1907–1908; CP1913–1918. Things came to a head in 2015: the Presbytery's leaders threatened that if FPCS sought ecclesiastical permission to leave PCUSA—under a so-called "Gracious Separation" policy—the process would "not be gracious." CP1784.

FPCS's elected elders and trustees then took the steps necessary under Washington law to disaffiliate FPCS from PCUSA. On November 5, 2015, the Session provided written notice to the congregation of a November 15 meeting to vote on disaffiliation. CP1800; CP1905–1919. The Session also sent notice to the congregation—as members of FPCS's nonprofit corporation—of a November 15 meeting to vote on amending FPCS's corporate articles to remove reference to PCUSA if the congregation approved disaffiliation. CP1921–1936. Although not legally required, these notices also informed FPCS's congregation and corporate members that they would be asked to ratify revised bylaws. *Ibid.*

FPCS held the two congregational meetings after services on November 15, 2015. A few members angrily disagreed with the motion to disaffiliate, but all

the measures passed by margins exceeding 85%. CP1800–1801.[3]

The Presbytery viewed FPCS's disaffiliation as an opportunity to seize its valuable downtown property, and it unilaterally appointed an administrative commission to investigate. Months later, after FPCS had severed ties with the Presbytery and begun the process of reaffiliating with another Presbyterian denomination, the administrative commission issued a report. Without notice or a congregational vote, and contrary to FPCS's articles, bylaws, and Washington law, the commission purported to remove the elected elders and trustees and to appoint the commission, who are not even members of FPCS, to serve as the church's Session and Board of Trustees. CP612. The commission also declared that FPCS's amended bylaws and disaffiliation vote "ha[d] no effect." CP608–609. Finally, the commission seized control of FPCS's property, declaring: "All property held by or for FPCS —including real property, personal property, and intangible property—is subject to the direction and control of the Administrative Commission exercising original jurisdiction as the session." CP613.

D. The civil court proceedings below

1. One day later, the Presbytery sued, seeking a declaratory judgment that the commission's report was "conclusive and binding" and that any "interest FPCS has in church property is held in trust for" PCUSA. CP494; CP479–520. Before FPCS had even answered, the Presbytery sought partial summary

[3] The meeting's Moderator did not allow proxy voting, but even counting proxies, the vote to disaffiliate greatly exceeded two-thirds. CP1801.

judgment. FPCS opposed the motion and sought a preliminary injunction to stop the Presbytery from asserting control over FPCS's corporate affairs and property.

The trial court denied the preliminary injunction and granted summary judgment to the Presbytery. App. 27a–50a. In denying the injunction, the court held that, under *Presbytery of Seattle, Inc.* v. *Rohrbaugh*, 485 P.2d 615 (Wash. 1971), Washington Supreme Court precedent that pre-dates *Jones* v. *Wolf*, 443 U.S. 595 (1979), the administrative commission's "determinations" were "entitled to conclusive deference." App. 48a–49a. (As explained below, *Jones* criticized without overruling the nineteenth-century precedent on which *Rohrbaugh* relied.) The trial court also concluded, without explanation, that FPCS's attempt to disaffiliate was "ineffective" under "corporate law," and that the Presbytery controlled FPCS's property by virtue of the trust clause added to PCUSA's Book of Order in 1983 over FPCS's objection. *Ibid.*

In granting summary judgment to the Presbytery, the court declared that PCUSA "is a hierarchical church"; the "findings and rulings of the Administrative Commission" are "conclusive and binding"; the "amendments to the bylaws" and "articles of incorporation that the FPCS congregation purported to adopt" are "void"; "[a]ny interest that FPCS has in church property is held in trust for the benefit of [PCUSA]"; and the "current governing body of FPCS is the Administrative Commission." App. 34a.

2. FPCS appealed, arguing that the First Amendment bars civil courts from automatically favoring one side over another in ecclesiastical conflicts, without

regard to ownership under neutral law. The court of appeals affirmed in a published opinion. App. 3a.

Citing *Rohrbaugh*, the court held that Washington courts must defer to the decisions of the highest tribunals of hierarchical churches in "any civil dispute." App. 3a. *Rohrbaugh* was not affected by *Jones* v. *Wolf*, the court reasoned, because *Jones* held that "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." App. 12a. Viewing the Presbyterian Church as "hierarchical"—a disputed legal issue—the court deemed itself bound to accept the Administrative Commission's findings. App. 17a.

3. FPCS sought Washington Supreme Court review, arguing that *Rohrbaugh*'s rule of absolute denominational deference was unconstitutional. Pet. for Rev. 15–19. The court denied review. App. 54a.

REASONS FOR GRANTING THE WRIT

Church property cases arise with frequency in almost every State, and they have wrenching emotional, spiritual, and economic consequences. Unfortunately, a minority of nine States continue to follow the path set by *Watson* v. *Jones*, granting "compulsory deference" to denominations' assertions of property ownership (*Rohrbaugh*, 485 P.2d at 619), without regard to the actual property arrangements reflected in the deeds, corporate charters, and any trust instruments. Under that approach, applied below, churches are deemed either "strictly congregational" or hierarchical, and congregations that affiliate with denominations are treated as having irrevocably given their "implied consent" to the denominations' "general and ultimate power of control" over all church property. *Watson*, 80 U.S. at 722–724, 729.

By effectively establishing a top-down hierarchical governance structure for any and all faith groups that are not wholly "independent" (*ibid.*), *Watson*'s denominational deference approach denies religious groups their constitutional freedom to determine their own form of governance. State courts that still adhere to *Watson* dismiss this Court's later guidance, in *Jones* v. *Wolf*, that constitutional principles of free exercise and nonestablishment are better served by applying "neutral principles of law." The resulting split implicates all but four States and appears to be intractable.

This case offers a clean opportunity to resolve the split and correct the constitutional error. Certiorari should be granted.

I. Washington's denominational deference approach violates the First Amendment.

Review is warranted because Washington's rule of compulsory deference flouts the core principles of the First Amendment, with severe consequences for the self-determination of churches across America.

A. *Watson*'s understanding of the principles that ought to govern church property disputes was largely undermined by *Jones* v. *Wolf*.

In manifest tension with its ringing affirmation of the right of religious groups to organize themselves as they see fit, *Watson* adopted a rule of compulsory deference to the tribunals of hierarchical churches. 80 U.S. at 727; *Rohrbaugh*, 485 P.2d at 619. Under that approach to property disputes between congregations and denominations, the position of one side—the denomination—is treated as "binding," no matter what the legal documents governing property ownership

may say. *Watson*, 80 U.S. at 729.[4] And although *Watson* arose under the federal common law, this Court later stated that its reasoning had "a clear constitutional ring" (*Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church* ("*Hull Church*"), 393 U.S. 440, 446 (1969)), leading the state courts to treat it as authoritative.

Over time, *Watson*'s broad compulsory deference rule "encountered vivid and strong criticism," and this Court moved away from it. *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 115 (1952). As Justice Brennan explained for the Court in *Hull Church*:

> [T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such

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[4] *Watson* qualified the deference rule with the statement that it is the "obvious duty" of civil courts to enforce the "express terms" of deeds, wills, or other instruments. *Id.* at 722–723. But as the decision below illustrates, that qualification has fallen by the wayside. The deeds here expressly vest ownership in FPCS, whose charter vests control of property in the congregation's elected trustees. CP1814–1824 (deeds); CP1810 ("The Board of Trustees * * * shall have charge and control of the property and temporal affairs of the church"). Following *Watson*, the courts below disregarded these "express terms," instead relying on the self-serving claims of the Presbytery's administrative commission and PCUSA's internal rules. App. 3a.

> controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."

393 U.S. at 449. Ultimately, in *Jones* v. *Wolf*, this Court squarely held that "neutral principles" not only are a permissible means of deciding church property disputes, but in many key respects are preferable. 443 U.S. at 603; see also *ibid.* (the neutral-principles approach "received approving reference in [*Hull Church*], 393 U.S., at 449, in Mr. Justice Brennan's concurrence in *Md. & Va.* [*Eldership of*] *Churches* [*of God*] v. *Sharpsburg Church*, 396 U.S.[] [367, 370 (1970)]; and in [*Serbian Orthodox Diocese* v. *Milivojevich*], 426 U.S.[] [696,] 723 n. 15 (1976)]").

"Neutral principles of law" are those "objective, well-established concepts of trust and property law" that are "familiar to lawyers and judges" and have been "developed for use in all property disputes." *Id.* at 599, 603. Courts examine "the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property," so long as these documents do not "incorporat[e] religious concepts in the provisions relating to the ownership of property." *Id.* at 603–604.

As the Court in *Jones* recognized, the neutral principles approach to church property disputes yields numerous "advantages" over denominational deference. *Id.* at 603. It is "completely secular in operation" and thus "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and

practice." *Ibid.* Critically, moreover, it "shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties"—and thus "accommodate[s] all forms of religious organization and polity." *Ibid.* Naturally, courts must take care not "to rely on religious precepts in determining whether the document[s] indicate[] that the parties have intended to create a trust." *Id.* at 604. But "the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for" these "occasional problems in application." *Ibid.*

The time has come for this Court to take the logical next step: to hold that applying neutral principles is not only constitutionally permissible, but constitutionally required. Much as the Court's doctrine in the context of state aid to religiously-affiliated institutions has evolved—from holding that States generally must refrain from funding such institutions, even on a neutral basis,[5] to holding that neutral funding is constitutionally permissible,[6] to holding that it is unconstitutional for States to discriminate against otherwise eligible institutions based on their religious status[7]—the Court should take this opportunity to hold that the neutral principles approach endorsed in *Jones* v. *Wolf* is the only constitutional method for resolving church property disputes.

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[5] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Meek* v. *Pittinger*, 421 U.S. 349 (1975).

[6] *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Zelman*, 536 U.S. at 653.

[7] *Comer*, 137 S. Ct. at 2022; *Espinoza*, 140 S. Ct. at 2256.

B. Compulsory deference to the denomination cannot be reconciled with the free exercise and nonestablishment principles of the First Amendment.

Watson's holding rests on two assumptions—that religious societies are either congregational or hierarchical, and that all noncongregational entities that affiliate with denominations "impliedly consent" to the denominations' assertions of ownership of their property. Both assumptions are unfounded.

1. First, the Court in *Watson* wrongly assumed that all religious groups fall into one of two categories: "strictly congregational" or hierarchical. *Id.* at 722–723. That was not true in 1871, and it is not true today. See *Jones*, 443 U.S. at 605–606 (church government is often "ambiguous"). According to one study, "Approximately 17% of the religious organizations report that their organizational structure is either along a continuum of types or of some structural form other than hierarchical, congregational, presbyterial, or connectional." H. Reese Hansen, *Religious Organizations and the Law of Trusts*, *in* Religious Organizations in the United States 279, 285 n.49 (James A. Serritella ed., 2006) (citing DePaul University, *1994 Survey of American Religions at the National Level*, Public Release Document 3).

The "hierarchical" label best fits the Roman Catholic Church, whose worldwide church is governed by strict, descending levels of authority—from the Pope, to diocesan bishops, to local priests. Congregational elections have no formal role in governance. Roman Catholic parishes vest property in diocesan bishops—thus ensuring that the hierarchy has "a general and ultimate power of control." *Watson*, 80 U.S. at 722.

At the other end of the polity spectrum, Quakers and Independent Baptists exemplify the classic "congregational" model. These groups are "strictly independent of other ecclesiastical associations," and thus are "governed solely [from] within." *Id.* at 722, 724.

Many religious polities, however, fall between the two extremes, or change over time. Familiar examples include "mainline" Protestant denominations such as Presbyterians, Episcopalians, Methodists, and Lutherans. For example, the Evangelical Lutheran Church in America, the largest Lutheran denomination, emphasizes that it is organized neither as a hierarchical church in the Roman Catholic tradition nor as a congregational church in the Baptist tradition, but as a church in which all levels are "interdependent partners sharing responsibility in God's mission."[8] Similarly, Methodists and Episcopalians each reject elements of both congregational and hierarchical governance.[9]

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[8] Evangelical Lutheran Church in Am., Constitutions, Bylaws, and Continuing Resolutions § 5.01 (2008), https://newlifelutheran.com/wp-content/uploads/sites/56/2016/07/ELCA-Constitution.pdf.

[9] Judicial Council of the United Methodist Church, Decision No. 1312 (May 9, 2016) ("The system of government, with which The United Methodist Church constitutes itself, is based on an interconnected set of authorities. The system balances and constrains the power exercised by each of the authorities individually and by all connectionally. There are other ecclesial bodies that choose to vest all authority in one entity. That entity might be a single congregation, a regional synod, an episcopacy, or even an individual pastor. In The United Methodist Church, no single entity has authority for all ecclesial matters. Each authority

Other religious organizations cannot be located on a hierarchical–congregational spectrum at all. This is especially true of non-Christian groups, which often do not share the Christian notions of "assembly" and "membership" that underlie the hierarchical–congregational dichotomy. Examples include Hindu temples, Islamic mosques, Sikh temples, and some Jewish groups. *E.g.*, *Singh* v. *Singh*, 9 Cal. Rptr. 3d 4, 19 n.20 (Ct. App. 2004) (Sikh temples or "gurdwaras" are neither "congregational" nor "hierarchical"); *Congregation Yetev Lev D'Satmar, Inc.* v. *Kahana*, 879 N.E.2d 1282, 1289 (N.Y. 2007) (Smith, J., dissenting) (Hasidic Jewish groups defy "congregational" or "hierarchical" classification).[10] For these groups, hierarchical–congregational categorization makes no sense.

The Presbyterian denomination implicated here falls in the intermediate category. See Gray & Tucker, *supra*, at 1–5; Bannerman, *supra*, at 245–332 (contrasting Presbyterian and Roman Catholic, Episcopalian, "Independent," and "Congregational" govern-

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center is balanced or constrained by other authorities."); Ecclesiology Committee of the House of Bishops of The Episcopal Church, *A Primer on the government of The Episcopal Church and its underlying theology* (Jan. 2016), https://episcopalchurch.org/files/documents/primer.on_.tec_.pdf (describing the church's government as "at once democratic and hierarchical").

[10] See also, *e.g.*, Willard G. Oxtoby, *The Nature of Religion, in* World Religions: Eastern Traditions 486, 489 (Willard G. Oxtoby ed., 2001) (Hindu temples have neither "members" nor "congregations"); Helen R. Ebaugh & Janet S. Chafetz, *Religion and the New Immigrants* 49 (2000) (same for Islamic mosques).

ance); Ahlstrom, *supra*, at 265; CP1974–1976. Recognizing its bottom-up structure, with specific responsibilities at every level, the PCUSA's highest adjudicative body has explained that the church's structure "must not be understood in hierarchical terms, but in light of the shared responsibility and power at the heart of Presbyterian order." *Johnston* v. *Heartland Presbytery*, Remedial Case 217–2 (Permanent Judicial Comm'n of Gen. Assembly of PCUSA 2004).[11]

Enforcing *Watson*'s dichotomy in church property cases violates free exercise and establishment principles. Forcing every faith community into one of these two boxes prevents them from adopting forms of property ownership that accord with their doctrine. Arlin M. Adams & William R. Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291, 1337 (1980). Stated simply, hierarchical deference "effectively limits the ability of local church congregations to establish the terms of their association with more general church organizations." *Ibid.*

By contrast, when property ownership is governed by neutral state law, general and local church entities may "orde[r] [their] rights and obligations to reflect the intentions of the parties." *Jones*, 443 U.S. at 603. Before a dispute arises, "religious societies can specify what is to happen to church property in the event of a particular contingency" by drafting "appropriate reversionary clauses and trust provisions." *Ibid.* If they intend that the denomination have ownership, "[t]hey

[11] http://oga.pcusa.org/media/uploads/oga/pdf/pjc21702.pdf.

can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church" or "the constitution of the general church can be made to recite an express trust" in its favor, provided that trust interest "is embodied in some legally cognizable form." *Id.* at 606. "The burden involved in taking such steps will be minimal." *Ibid.*

Watson's dichotomy invariably favors one ecclesiastical form, the hierarchical, over others, including federal, presbyterial, connectional, and mixed forms, in violation of the Establishment Clause requirement of denominational and doctrinal neutrality. As this Court has held, "[t]he clearest command" of the First Amendment "is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Churches must therefore be free to establish and follow their own doctrines regarding ecclesiastical structure. For courts to treat religious societies other than the "strictly congregational" as if they were hierarchical—forbidding application of the "ordinary principles which govern voluntary associations" to such societies (*Watson*, 80 U.S. at 724, 725)—is a bald-faced "denominational preference" for the hierarchical form. The deference approach effectively converts intermediate forms of church polity into top-down hierarchies.

Moreover, civil courts are ill-equipped to make difficult judgments about intra-church governance, which can be subtle or ambiguous. To understand how a church is governed, a court must be understand not only documents such as church constitutions, canons, and bylaws, but also their history in operation. As one church governance scholar put it, "the constitutions of church groups vary widely in how, and the extent to which, they provide the definitive clue to the

governance patterns of those groups." Edward Leroy Long, Jr., *Patterns of Polity: Varieties of Church Governance* 3 (2001). For courts to make these determinations—or even to determine what evidence to consider—is as clear an example of forbidden "entanglement" as one can imagine.

Neutral principles, by contrast, "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603. Unlike the deference approach, which requires courts to classify churches as congregational or hierarchical, neutral principles may be applied to "all forms of religious organization and polity." *Ibid.* This eliminates the need for courts to "review ecclesiastical doctrine and polity to determine where the church has 'placed ultimate authority over the use of church property'"—which often "require[s] 'a searching and therefore impermissible inquiry into church polity.'" *Id.* at 605 (quoting *Milivojevich*, 426 U.S. at 723).

2. Second, for churches that are not "strictly congregational or independent" (80 U.S. at 724), *Watson* mistakenly assumes that they consent to something they may not have consented to—giving the denomination "general and ultimate power of control" over their property (*id.* at 722). Here is the Court's logic:

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Id. at 729. Respectfully, however, this "implied consent" was the Court's own concoction.

A congregation consents only to what it consents to; the choice to join a larger organization does not necessarily translate into a choice to submit to that organization in every respect and for always—on pain of losing property purchased with the congregation's own donations. As the New York Court of Appeals has explained, deference wrongly assumes that "the local church has relinquished control to the hierarchical body in all cases, thereby frustrating the actual intent." *First Presbyterian Church of Schenectady* v. *United Presbyterian Church in U.S.*, 464 N.E.2d 454, 460 (N.Y. 1984). Certainly, there was no moment in FPCS's history when it consented to give the Presbytery property rights. Whenever this was proposed, FPCS unequivocally objected. *Supra* at 9. And States may not grant "unilateral and absolute power" to "a church" on "issues with significant economic and political implications" for others' property rights—let alone by allowing them to strip others of title. *Larkin* v. *Grendel's Den*, 459 U.S. 116, 117, 127 (1982).[12]

Some congregations in federal or connectional denominations might consent to be bound by denominational policy as long they remain part of the denomination, but reserve the right to leave (with their property) if irremediable differences arise. Other congregations might consent to be bound on some issues but

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[12] Allowing denominations to secure ownership of congregational property without complying with civil law cannot be defended as a religious "accommodation," as accommodations must alleviate "a significant burden" on religious exercise (*Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987)) and any "burden" of placing ownership in "legally cognizable form" is "minimal" (*Jones*, 443 U.S. at 606).

not others, or only if certain procedures are followed, or with other conditions. Contrary to *Watson*'s assumption, consent to join a denomination is not necessarily an all-or-nothing proposition.

Watson's implied consent rationale also misunderstands the nature of consent within voluntary associations. To be sure, members of voluntary associations —church or otherwise—agree to be bound by associations' rules, in the sense that they can be expelled for violating them. But that does not elevate all such rules to the level of an enforceable contract, let alone make the remedy for breach loss of one's property.

Suppose, for example, that a fraternal lodge adopts a bylaw requiring members to bequeath to the lodge some portion of their real property. The lodge will not automatically obtain that property when the member dies. Rather, to be enforced in court, the property interest must be put in legally cognizable form, such as a will. If a member refuses to make the bequest, he can be kicked out of the lodge. But the mere existence of the bylaw, and the member's continued participation in the organization, do not, without more, give the lodge a judicially-enforceable property right.

So too with churches. If a church adopts a rule requiring members to tithe ten percent of their income, it can enforce the rule by excommunication. But the mere existence of the rule, and the members' decisions to continue attending until expelled, does not empower the church to sue them for unpaid tithes. A church rule cannot be enforced as such in court. Similarly, if a hierarchical church adopts a rule declaring a trust interest in local property, it can direct local church officials to execute a trust agreement or be expelled from the denomination. But the mere existence

of the internal rule, and the congregations' decision to remain in the denomination unless and until excommunicated, does not create a legally cognizable trust.

The experience of the Roman Catholic hierarchy in the 1800s, when it sought to obtain control over local church buildings during the trusteeism controversy, is instructive. In 1823, the Council of Baltimore declared that church property should be held in the name of the bishop. But that did not mean that bishops across the country immediately gained title to local parishes. Over time, this decision was effectuated by changing deeds or executing trust instruments. Joseph Chisholm, *Civil Incorporation of Church Property*, in 7 Catholic Encyclopedia (1910). Courts enforce those civil instruments, not church canons.

The same is true today. Churches can adopt internal rules and enforce them through ecclesiastical discipline—for example, by expelling congregations, declining to ordain pastors or elders, or refusing to seat representatives at convocations—but those rules do not convey property interests unless they are embodied in "legally cognizable form." *Jones*, 443 U.S. at 606. This Court should make clear that the Constitution does not permit, let alone require, civil courts to become the enforcers of intra-church rules or the decisions of their judicatories.

3. Stare decisis is no obstacle. Since *Watson*, this Court has moved away from denominational deference. *Watson*'s deference rule was "poorly reasoned," has "led to practical problems and abuse," and has been "undermined by more recent decisions" (*Janus* v. *Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2460 (2018)), most notably *Jones*. Even as

Jones implied in dicta that deference remained permissible, it expressed a preference for neutral principles so clear that a large majority of state courts have abandoned the deference approach. See 443 U.S. at 603–606; *infra* at 27–30 (discussing state court precedent). And insofar as denominations may assert reliance interests in denominational deference, congregations have equally substantial reliance interests in enforcement of their deeds and charters. As the Oregon Supreme Court put it, *Jones* put denominations "on notice that state courts no longer are required to defer to the denominational church's decision in a property dispute." *Hope Presbyterian Church* v. *Presbyterian Church (U.S.A.)*, 291 P.3d 711, 721 (Or. 2012).

Moreover, *Watson*'s error was not its interpretation of the First Amendment; indeed, its affirmation of religious groups' self-determination rights was right on the mark. Its error arose from misunderstanding the diverse character of church organization and the nature of consent in voluntary associations. There is no reason to give stare decisis effect to that sort of error. *Cf. S. Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (correcting historical errors).

II. Review is needed to resolve a longstanding split over the proper approach to resolving church property disputes.

As explained above, the Court in *Jones* explained why a neutral principles approach better accords with free exercise and nonestablishment values, but stopped short of overruling *Watson*. That encouraged conflict among state courts, which "have divided over the rules they apply and the mandates of the Constitution." Osborne & Bush, 69 S.M.U. L. Rev. at 813.

Three-fourths of the States, following this Court's lead in *Jones*, apply neutral principles. Others adhere to *Watson*, deferring to denominations' property claims in all cases not involving congregational churches. All but four States have weighed in on this issue, and the split appears to be entrenched.

1. Currently, the great majority of jurisdictions—thirty-six States and the District of Columbia—have rejected *Watson*'s rule and instead resolve church property disputes under neutral principles of law. See App. 55a–58a. Some have held that *Watson*'s compulsory deference rule is unconstitutional, and that "the First Amendment * * * necessitate[s] [the] adoption of the 'neutral principles approach." *Fluker Cmty. Church* v. *Hitchens*, 419 So. 2d 445, 447 (La. 1982). Others, following *Jones*'s "sharp[] criticism" of *Watson*, have expressed grave doubts about denominational deference without declaring it unconstitutional. *St. Paul Church, Inc.* v. *Bd. of Trustees of Alaska Missionary Conference of United Methodist Church, Inc.*, 145 P.3d 541, 552 (Alaska 2006).

Still other state courts purport to follow neutral principles, but use a "hybrid" approach that in effect is more like deference. *E.g.*, *Church of God in Christ, Inc.* v. *L. M. Haley Ministries, Inc.*, 531 S.W.3d 146 (Tenn. 2017); *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 453 (Ga. 2011); *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009). Those cases are subject to the same constitutional critique as those that openly embrace hierarchical deference, with the added vice of unpredictability. See Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 327–344 (2016); accord *Peters Creek United Presbyterian Church* v. *Washington Presbytery*,

90 A.3d 95, 109 (Pa. Commw. Ct. 2014) (hybrid approach "violates the Establishment Clause and would effectively divest legal property owners of their land against their will"); *Hope Presbyterian*, 291 P.3d at 722 (hybrid approach is "a *de facto* application of hierarchical deference"); *Presbytery of Ohio Valley* v. *OPC, Inc.*, 973 N.E.2d 1099, 1106 n.7 (Ind. 2012) (hybrid approach is "*de facto* compulsory deference").

The state courts applying neutral principles have given ample reasons to doubt the constitutionality of "compulsory deference" (*Rohrbaugh*, 485 P.2d at 619) to the claims of one side in litigation between denominations and congregations.

First, as the New York Court of Appeals has held, deference "prefer[s] one group of disputants to another" based solely on the court's assumptions of their hierarchical character, without regard to actual legal documents. *Schenectady*, 464 N.E.2d at 460. The Supreme Court of Connecticut has explained that deference is "unfair because it results in the disparate treatment of local churches, depending on whether the general church is hierarchical." *Episcopal Church in Diocese of Connecticut* v. *Gauss*, 28 A.3d 302, 315–316 (Conn. 2011). Deference deprives local churches of a fair hearing, as it "allow[s] the higher adjudicatory authorities within the denomination, which invariably support the position of the general church, to decide the dispute." *Ibid.* Similarly, the Louisiana Supreme Court has noted that hierarchical deference "den[ies] a local church recourse to an impartial body to resolve a just claim." *Hitchens*, 419 So. 2d at 447. And the Montana Supreme Court has explained that it raise "serious problems under the Free Exercise Clause" to "deprive religious organizations of all recourse to the protections of civil law that are available

to all others." *Second Int'l Baha'i Council* v. *Chase*, 106 P.3d 1168, 1172 (Mont. 2005) (citation omitted).

Second, several courts have recognized the "free exercise" problems with *Watson*'s false "assum[ption] that the local church has relinquished control to the hierarchical body in all cases, thereby frustrating the actual intent of the local church in some cases." *E.g.*, *Schenectady*, 464 N.E.2d at 460. "Whatever authority a hierarchical organization may have over associated local churches is derived solely from the local church's consent." *Hitchens*, 419 So. 2d at 447. In assessing intent, however, deference "ignor[es] other possibly relevant facts" beyond denominations' assertions of ownership. *Gauss*, 28 A.3d at 316. Indeed, it disregards the most relevant and reliable evidence of the actual terms of consent—deeds, charters, trust documents, and other "civil legal documents" whereby religious entities "organize their affairs." *All Saints Par. Waccamaw* v. *Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163, 171 (S.C. 2009).

Third, some courts have observed that, "by supporting the hierarchical polity over other forms," deference "may indeed constitute a judicial establishment of religion." *Schenectady*, 464 N.E.2d at 460; accord *York* v. *First Presbyterian Church of Anna*, 474 N.E.2d 716, 721 (Ill. App. Ct. 1984) (following *Schenectady*). As the Louisiana Supreme Court has held, deference "constitut[es] a judicial establishment of the hierarchy's religion" by granting it "authority" over "property" not obtained "from the local church's consent." *Hitchens*, 419 S. 2d at 447. A systemic tilt toward denominations in disputes with congregations distorts American ecclesiological doctrine toward hierarchy over mixed polities.

2. Nine States' courts nonetheless apply deference. Most, like the court below, simply adhere to pre-1979 precedent without grappling with the constitutional concerns raised in *Jones* v. *Wolf*. See App. 55a–58a. Because *Jones* did not hold that deference was "impermissible" (*Tea* v. *Protestant Episcopal Church in Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980)), these States see no need to overrule longstanding precedent. See *ibid.*; *Mills* v. *Baldwin*, 377 So. 2d 971, 971 (Fla. 1979) ("We have carefully reviewed *Jones* v. *Wolf* and find our decision [applying deference] to be not inconsistent with [it]."); *Heartland Presbytery* v. *Presbyterian Church of Stanley, Inc.*, 390 P.3d 581, 596 (Kan. App. Ct. 2017) (*Jones* did not "repudiate the principle of hierarchical deference").

Some state courts explain their adherence to *Watson* as "[d]ue to First Amendment entanglement considerations." *Original Glorious Church of God In Christ, Inc.* v. *Myers*, 367 S.E.2d 30, 33 (W.Va. 1988); *Tea*, 610 P.2d at 184 (Nevada's "rule of deference[] [was] adopted to avoid entanglement with questions of religious doctrine"). This rationale defies logic. As *Jones* explained, courts applying deference are "always * * * required to examine the [church's] polity and administration," which risks "'a searching and therefore impermissible inquiry into church polity.'" *Id.* at 605 (quoting *Milivojevich*, 426 U.S. at 723). By contrast, enforcing deeds, corporate articles, and trust documents under secular law is routine and avoids religious entanglement. *Jones,* 403 U.S. at 603.

3. The lower courts' approaches can be divided into three categories:

Neutral principles	Hybrid neutral principles	Hierarchical deference
Alabama	California	Florida
Alaska	Connecticut	Kansas
Arizona	Georgia	Michigan
Arkansas	Kentucky	Nevada
Colorado	New York	New Jersey
Delaware	South Carolina	New Mexico
District of Columbia	Tennessee	Oklahoma
Hawaii	Virginia	Washington
Illinois		West Virginia
Indiana		
Iowa		
Louisiana		
Maine		
Maryland		
Massachusetts		
Minnesota		
Mississippi		
Missouri		
Montana		
Nebraska		
New Hampshire		
North Carolina		
Ohio		
Oregon		
Pennsylvania		
South Dakota		
Texas		
Utah		
Wisconsin		

(For citations, see App. 55a–58a.) This split stems directly from *Jones*'s ambiguous instructions—which this Court alone can clarify.

III. The question presented is important and recurring, and this case is an ideal vehicle to clarify the law governing church property disputes.

This Court has received many petitions asking it to resolve church property questions left open by *Jones*. This case presents an ideal vehicle for the Court to clarify the law and reject *Watson*'s rule of compulsory deference.

A. Disputes over church property and the constitutionally required rule of decision are important and recurring.

For centuries, church property disputes have had "intrinsic importance and far-reaching influence." *Watson*, 80 U.S. at 734. Throughout this nation's history, there have been a "surprising number of litigated church [property] disputes." Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 Calif. L. Rev. 1378, 1380 (1981). On average, there have been around 120 cases each decade since 1948. See Kent Greenawalt, *Hands Off: Civil Court Involvement in Conflicts over Religious Property*, 98 Colum. L. Rev. 1843, 1844 n.1 (1998); Jeffrey B. Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 Pepp. L. Rev. 399, 455 (2008) (finding "91 church property cases" between 1998 and 2007). All but four States have weighed in. The issue is not going away.

Moreover, the issue affects property collectively worth billions of dollars—roughly $30 million here alone. *E.g.*, *Episcopal Diocese of Fort Worth* v. *Epis-*

copal Church, 602 S.W.3d 417, 434 (Tex. 2020) (dispute over "$100 million worth of real estate"). But the properties' dollar value is far eclipsed by their religious and emotional significance. Indeed, to parishioners exiled from their houses of worship, little could matter more. Families often worship (and tithe) at churches for generations, marking life-changing events like baptisms, weddings, and funerals there as well. Their constitutional right to freely exercise their religion—and to freely structure the terms of their affiliation with other believers—has been fundamentally infringed. Few issues brought to this Court have more human impact than this one.

B. This case squarely presents the question whether compulsory deference is constitutional.

This case presents an excellent vehicle to resolve the conflict. The petition cleanly presents a single question—whether, in disputes between local congregations and their former denominations, civil courts may apply a rule of absolute deference to denominations' ownership assertions. The court below squarely addressed that question. App. 3a (in Washington, "a civil court must defer to the decision of the highest tribunal of a hierarchical church" in "any civil dispute"; "the trial court properly deferred"). It did not articulate any other ground of decision (see *ibid.*), and nothing about its decision is fact-bound. Thus, there is no doubt that resolving the question presented in petitioners' favor will entitle them to a remand for application of neutral principles.

Few church property cases offer such a straightforward vehicle for review. Prior petitions have arisen from States following a "hybrid" variant of neutral

principles,[13] which obscures the rationale of the decision in a welter of factors and considerations. This wolf comes as a wolf.

C. Reversal would likely alter the outcome.

Having applied a rule of "compulsory deference" to the Presbytery's ownership assertions, the court below did not need to address who owns FPCS's property under neutral law. And because this Court "does not declare what the law of [a State] is," it need not decide who will ultimately prevail. *Jones*, 443 U.S. at 609. But a ruling in petitioners' favor would likely alter the outcome on remand, making this case an excellent vehicle for review.

1. Under ordinary rules of property and trust law, the legal documents contain no hint of a trust in favor of respondents. Even the court below acknowledged that, decades before PCUSA existed, FPCS bought its property "with funds from its members." App. 3a. "Title to [FPCS's] property has remained in its name as a nonprofit corporation," and "[n]either Presbytery nor PCUSA has financially contributed." *Ibid.* Moreover, it is undisputed that no trust is recorded in the deeds, and that FPCS's articles and bylaws contain no trust language. Under neutral principles, a Washington court would likely rule for FPCS.

The Presbytery asserts that a "trust clause" added to the denomination's constitution in 1983 grants it a

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[13] *E.g.*, Pet. i, *The Protestant Episcopal Church in the Diocese of South Carolina*, v. *The Episcopal Church*, No. 17-1136 (Feb. 9, 2018) (asking whether "courts [must] recognize a trust on church property even if the alleged trust does not comply with the State's ordinary trust and property law").

beneficial interest in FPCS's property. Under Washington law, however, no one can unilaterally grant themselves a beneficial interest in property of legally distinct entities; trusts are created by the "[d]eclaration by the owner." RCW 11.98.008(2). Here, FPCS never created or assented to such a trust. Indeed, FPCS *objected*. *Supra* at 9; Wash. COA Respondents Br. 13 (FPCS "voiced opposition to the express trust provision"). And since no denominational trust over the contested property has ever been placed in "legally cognizable form" (*Jones*, 443 U.S. at 606), deferring to the Presbytery's unilateral "trust clause" would flout the principles of *Jones*.

The Presbytery contends that references in FPCS's articles and bylaws to PCUSA's "Form of Government" incorporated the trust clause. Not so. That language antedates FPCS's membership in any Presbytery. It refers to the presbyterial "form" of church organization, not to hierarchical control by a denominational body. Indeed, the articles then immediately state that the "charge and control of the property and temporal affairs of the church" is vested in FPCS's corporate trustees, whom the congregation elects. CP1810 (1985 articles). Many state courts considering similar language have rejected PCUSA's claims. *E.g.*, *OPC*, 973 N.E.2d at 1112 (a congregation's corporate documents recognizing PCUSA's Constitution are insufficient "to create an express trust on its property in favor of the PC(USA)"); *Heartland Presbytery* v. *Gashland Presbyterian Church*, 364 S.W.3d 575, 588 (Mo. Ct. App. 2012) (bylaws' "general statements concerning subordination to the PCUSA's Constitution" do not "establish a trust").

Lacking evidence that FPCS expressly consented to create a trust, the Presbytery says FPCS's conduct

is enough. Not by a long shot. Scattered statements by FPCS's pastors or accountants (not its elected trustees or Session) over the years cannot establish a trust under neutral law.

2. Similarly, under ordinary corporate law, FPCS disaffiliated from PCUSA. Under Washington law, the articles could be amended on ten days' notice and a two-thirds vote of the members. RCW 24.03.080(1); RCW 24.03.165. It is undisputed both that FPCS's members received ten days' notice (CP1800; CP1905–1936 (notice)), and that far more than two-thirds of them approved disaffiliation and the amended articles. CP1800–1801; CP1943 (vote count). Petitioners also had authority to amend FPCS's bylaws to remove references to the PCUSA. RCW 24.03.070 ("power to * * * adopt new bylaws shall be vested in the board of directors unless otherwise provided" in articles or bylaws); CP1874 ("These bylaws may be amended * * * by a two-thirds vote of the voters present[.]") (2005 bylaws). Petitioners did so unanimously and, although not legally required, FPCS's members overwhelmingly ratified the amendments.

Faced with these undisputed facts, the Presbytery lobbed a mishmash of far-fetched arguments below—contending, for example, that the trustees abolished the office of trustee in 2005, and that only a member vote could amend the bylaws. But the court below did not reach these strained arguments, which the Washington courts should address in the first instance.

When the smoke clears, all that matters under ordinary property law is that FPCS, a non-profit corporation, holds title to the disputed property and did not convey any trust interest to the Presbytery. That the

denomination asserts a contrary claim cannot, consistently with the First Amendment, be conclusive.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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AUGUST 2020

APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation; ROBERT WALLACE, President of the First Presbyterian Church of Seattle, a Washington nonprofit corporation; and WILLIAM LONGBRAKE, on behalf of himself and similarly situated members of First Presbyterian Church of Seattle,

Respondents,

v.

JEFF SCHULZ, ELLEN SCHULZ, LIZ CEDERGREEN, DAVID MARTIN, LINDSEY McDOWELL, GEORGE NORRIS, NATHAN ORONA, and KATHRYN OSTROM, as trustees of The First Presbyterian Church of Seattle, a Washington nonprofit corporation,

Appellants.

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; and THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation,

Respondents,

v.

JEFF SCHULZ and ELLEN SCHULZ, as individuals and as the marital community thereof,

Appellants.

No. 78399-8-1

DIVISION ONE

PUBLISHED OPINION

Filed: October 7, 2019

LEACH, J., — This consolidated appeal involves a church property dispute and a severance agreement dispute. In *Presbytery I*, Jeff and Ellen Schulz, former copastors of the First Presbyterian Church of Seattle (FPCS), and six former trustees of FPCS's board of trustees (Board) (together appellants) appeal the trial court's declaratory judgment in favor of FPCS, the Presbytery of Seattle (Presbytery), which is authorized to act on behalf of the Presbyterian Church U.S.A. (PCUSA), and two members of the Presbytery's administrative commission (AC) (together respondents). Appellants contend that the trial court erred in deferring to the AC's determination assuming original jurisdiction over FPCS, rejecting FPCS's disaffiliation from PCUSA, and finding that any interest FPCS had in church property was held in trust for the benefit of PCUSA. In *Presbytery II*, the Schulzes appeal the trial court's declaratory judgment in favor of Presbytery and FPCS, claiming that the trial court erred in deferring to the AC's determination that their severance agreements with FPCS were invalid and unenforceable.

In *Presbytery of Seattle, Inc. v. Rohrbaugh*,[1] the Washington Supreme Court established that a civil

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[1] 79 Wn.2d 367, 48 P.2d 615 (1971).

court must defer to the decision of the highest tribunal of a hierarchical church in a matter involving a church property dispute. To ensure the First Amendment guarantee to the free exercise of religion, Washington courts have extended *Rohrbaugh* to any civil dispute in a hierarchical church with an internal dispute resolution process. Because no genuine issue of material fact exists about whether the Presbyterian Church is hierarchical or whether it has a binding dispute resolution process, the trial court properly deferred to the AC's determinations about the property and severance agreement disputes. We affirm.

FACTS

From 1983 until November 15, 2015, FPCS's congregation was ecclesiastically affiliated with PCUSA. FPCS filed its first articles of incorporation in 1874 and its restated articles of incorporation in 1985. These articles recognized FPCS's governing bodies as its "Session" and Board. Its Session, comprised of ministers, elders, and deacons, governed the congregation's ecclesiastical matters. Its Board, comprised of church members, governed the FPCS's business operations, real and personal property, and "all other temporal affairs."

FPCS purchased its first parcel of real estate in 1905 and added additional parcels over the years until it had accumulated all of its current real estate located on 7th Avenue in downtown Seattle. It purchased the property with funds from its members. Title to its property has remained in its name as a nonprofit corporation. Neither Presbytery nor PCUSA has financially contributed to its property.

In November 2015, FPCS told Presbytery that its Session was going to vote on whether to disaffiliate

from PCUSA and seek affiliation with another Presbyterian denomination. And its Board was going to vote on whether to amend the articles to remove all references to PCUSA. On November 15, the Session approved FPCS's disaffiliation from PCUSA, and the Board approved an amendment to the articles removing any reference to PCUSA.

On November 17, Presbytery formed the AC to investigate FPCS's disaffiliation. On February 16, 2016, the AC issued a report assuming "original jurisdiction" over FPCS based on its finding that "the governing board of FPCS (the FPCS session) is unable or unwilling to manage wisely its affairs." This report found that the 2015 amendments to FPCS's articles and bylaws were improper and ineffective, leaving the prior articles and bylaws in force. And it rejected FPCS's disaffiliation, stating that FPCS remained a part of PCUSA because PCUSA had not dismissed FPCS, which the church constitution authorized only PCUSA to do. It also ousted certain FPCS members from FPCS's Session and Board. And it elected church officers, appointed an individual to handle administrative matters, and called for an audit of FPCS's finances. It stated, "All property held by or for FPCS—including real property, personal property, and intangible property—is subject to the direction and control of the [AC] exercising original jurisdiction as the session of the church."

A day after the AC issued its report, respondents filed a lawsuit against appellants (*Presbytery I*). Among other things, respondents sought a declaratory judgment stating that the AC's report was "conclusive and binding" and that any "interest FPCS has in church property is held in trust for the benefit of [PCUSA]." On March 10, 2016, respondents asked the

trial court to grant partial summary judgment on its declaratory judgment claim. Appellants opposed the request and asked for a CR 56(f) continuance. They claimed respondents had not yet responded to their discovery request about whether PCUSA was hierarchical for purposes of civil disputes. Appellants also asked for a preliminary injunction to stop Presbytery from asserting control over FPCS's corporate affairs and property.

In May 2016, the trial court ruled in respondents' favor on all three requests. It concluded that (1) PCUSA is a hierarchical church and the AC's determinations are conclusive and binding on the Session, trustees, and congregation of FPCS, (2) the AC's February 16, 2016, findings and rulings are conclusive and binding, (3) the 2015 purported amendments to the bylaws and articles of incorporation "are void and without effect," (4) FPCS holds all church property in trust for the benefit of the PCUSA, and (5) the AC is the current governing body of FPCS. Appellants asked the court to reconsider its orders granting partial summary judgment, denying a CR 56(f) continuance, and denying a preliminary injunction. In a June 20, 2016, order, the trial court denied appellants' request to reconsider its denial of the CR 56(f) motion, asked for briefing "on whether it is factually at issue that [PCUSA] is a hierarchical church," and reserved ruling on reconsideration of its denial of the request for a preliminary injunction.

On June 30, after considering appellants' additional briefing, the trial court denied the remainder of their reconsideration requests. The trial court struck their third party complaint and dismissed their

Consumer Protection Act[2] claim. Appellants voluntarily dismissed claims for defamation, intentional interference with contractual relations, slander of title, trademark infringement, and ultra vires actions. The parties settled their remaining claims and agreed to a stipulated final order and judgment entered on August 16, 2017. Following these orders, respondents assumed control of FPCS and its property.

In September 2016, Presbytery and FPCS sued the Schulzes and asked the trial court to declare the severance agreements between the Schulzes and FPCS unenforceable (*Presbytery II*). The Schulzes became the copastors of FPCS in January 2006. On November 10, 2015, the Schulzes and the Board executed the Schulzes' severance agreements. These agreements had the stated purpose of encouraging the Schulzes to remain as pastors of FPCS, "including in the event of any conflict between FPCS, its Session, and its Congregation, on the one hand, and Presbyterian Church (U.S.A.), or any Presbytery, Synod, Administrative Commission, or affiliate (other than FPCS) of Presbyterian Church (U.S.A.) (collectively "PCUSA"), on the other hand." They stated that if FPCS, while under the control of PCUSA and Seattle Presbytery, terminated the Schulzes' employment other than for "Good Cause," as defined by the agreements, FPCS would (1) pay the Schulzes their "Regular Compensation" for two years or until they obtained comparable employment and (2) forebear for three years from the remedies FPCS had available under its 2006 home equity sharing agreement with the Schulzes. The severance agreements limited "good cause" to the Schulzes' commission of certain identified misconduct like

[2] Ch. 19.86 RCW.

dishonesty, the use of illegal drugs, and moral turpitude that harmed FPCS's reputation.

On August 25, 2016, the AC issued a supplemental report stating, (1) the FPCS Board that entered into the severance agreements was not "validly constituted," (2) the severance agreements constituted a "change in the terms of call" that required the congregation's and the presbytery's approval, neither of which the Schulzes sought, so the severance agreements were invalid, (3) the Schulzes "ended their pastoral relationship with FPCS when they voluntarily renounced the jurisdiction of the [PCUSA]" effective December 16, 2015, at which time they ceased to serve FPCS in good faith and good standing, (4) the severance agreements' good cause standard "cannot replace the requirements placed upon teaching elders by the *Book of Order*," (5) even if the good cause standard applied, FPCS had good cause to terminate the Schulzes' employment due to alleged dishonesty and misconduct, and (6) the Schulzes did not sign a release of possible claims against FPCS, so payment under the agreements was not due.

In November 2016, after PCUSA and FPCS sued the Schulzes, FPCS stopped paying the Schulzes their regular pastoral compensation. On November 18, the Schulzes filed counterclaims against FPCS for breach of contract and willful withholding of wages. PCUSA and FPCS asked the trial court to grant them summary judgment, claiming that the AC "determined that [FPCS] has no obligations under the Severance Agreements. A civil court must defer to the [AC's] judgment." The trial court granted this request. It decided that the AC's determinations were "conclusive and binding." It concluded the severance agreements were "invalid, inapplicable, and unenforceable"

because (1) they constituted "a change in the terms of call" for the Schulzes, which required FPCS's and Presbytery's congregations' approval, (2) the Schulzes terminated their pastoral relationships when they renounced the jurisdiction of PCUSA, (3) the Schulzes ceased to serve in good faith and standing as pastors of FPCS because they renounced jurisdiction, and (4) the severance agreements' attempt to replace the standards of pastoral conduct in the "Book of Order" with a "good cause" standard was improper.

The trial court entered final judgment in *Presbytery II* on April 3, 2017. The Schulzes appealed to the Washington Supreme Court on April 21, 2017. The trial court entered final judgment in *Presbytery I* in August 2017. Appellants again appealed to our Supreme Court. The Supreme Court consolidated *Presbytery I* and *Presbytery II*. It then transferred the consolidated case to this court.

STANDARD OF REVIEW

This court reviews an order granting summary judgment de novo and performs the same inquiry as the trial court.[3] It considers all facts and reasonable inferences in the light most favorable to the nonmoving party.[4] And it affirms summary judgment only when the evidence presented demonstrates no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[5]

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[3] *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005).

[4] *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

[5] *Steinbach*, 98 Wn.2d at 437.

ANALYSIS

Stare Decisis Requires That This Court Follow *Presbytery of Seattle, Inc. v. Rohrbaugh*

Both appellants and the Schulzes maintain that stare decisis does not bar this court from reexamining the compulsory deference approach our Supreme Court adopted in *Rohrbaugh* because the United States Supreme Court's decision in *Jones v. Wolf*[6] changed *Rohrbaugh's* legal underpinnings. We disagree.

In *Rohrbaugh*, the pastor and a third of the members of Laurelhurst United Presbyterian Church of Seattle voted to withdraw as a body from the United Presbyterian Church.[7] These members asked the Presbytery of Seattle to strike Laurelhurst from its rolls and authorize them to use the church property for their own purposes.[8] Presbytery refused and advised that the church constitution did not authorize members of an affiliated church to withdraw as a body.[9] The members maintained the fact that they were the record titleholders of the property entitled them to use and control it.[10] In examining this issue, the Washington Supreme Court adopted the rule that the United States Supreme Court articulated in *Watson v. Jones*:[11]

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[6] 433 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

[7] *Rohrbaugh*, 79 Wn.2d at 367-68.

[8] *Rohrbaugh*, 79 Wn.2d at 368.

[9] *Rohrbaugh*, 79 Wn.2d at 368.

[10] *Rohrbaugh*, 79 Wn.2d at 369.

[11] 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871).

> [T]he decision of the highest tribunal of a hierarchical church to which an appeal has been taken should be given effect by the courts in a controversy over the right to use church property. [And] in the absence of fraud, where a right of property in an action before a civil court depends upon a question of doctrine, ecclesiastical law, rule or custom, or church government, and the question has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive.[[12]]

Our Supreme Court concluded that the record titleholder of the property was The First United Presbyterian Church of Seattle, the former name of Laurelhurst, and "a corporation which by its bylaws is subject to the discipline of the United Presbyterian Church, and is governed by a Session which must act in accord with that discipline."[13] The court further stated that according to the decision of "the highest tribunal," the members "had no right to withdraw from the church as a body and take with them the name of the church and its property," and they "forfeited their right to govern the affairs of the church when they did so."[14] The court held that because the United Presbyterian Church is hierarchical, its highest tribunal's decision about ownership and control was conclusive.[15]

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[12] *Rohrbaugh*, 79 Wn.2d at 373.

[13] *Rohrbaugh*, 79 Wn.2d at 373.

[14] *Rohrbaugh*, 79 Wn.2d at 371-72, 373.

[15] *Rohrbaugh*, 79 Wn.2d at 367-73.

Eight years after *Rohrbaugh*, the United States Supreme Court decided *Jones*. This case involved a dispute over the ownership of church property after the rupture of a local church affiliated with the Presbyterian Church.[16] The Court characterized the Presbyterian Church as a hierarchical organization.[17] It framed the issue as "whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church."[18] The Court defined "neutral principles of law" as relying on "well-established concepts of trust and property law familiar to lawyers and judges" and involving, for example, "the language of the deeds, the terms of the local church charters, and state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property."[19]

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely

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[16] *Jones*, 443 U.S. at 597.

[17] *Jones*, 443 U.S. at 597-98.

[18] *Jones*, 443 U.S. at 597.

[19] *Jones*, 443 U.S. at 603.

> from entanglement in questions of religious doctrine, polity, and practice.[[20]]

The Court noted that the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[21] The Court held that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute."[22] But if "the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[23]

Appellants contend that this court should reconsider *Rohrbaugh* because *Jones* changed its legal underpinnings. First, *Jones* states only that unless ecclesiastical doctrine is involved, a State may constitutionally adopt neutral principles of law as a means of adjudicating a church property dispute; *Jones* does not require that states adopt this approach. Second, stare decisis requires this court to follow *Rohrbaugh*. "Stare decisis," a Latin phrase meaning "to stand by things decided," has two manifestations: horizontal stare

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[20] *Jones*, 443 U.S. at 603.

[21] *Jones*, 443 U.S. at 602 (Brennan, J., concurring) (quoting *Maryland & Va. Churches v. Sharpsburgh*, 396 U.S. 367, 368, 90 S. Ct. 499, 24 L. Ed. 2d 582 (1970)).

[22] *Jones*, 443 U.S. at 604.

[23] *Jones*, 443 U.S. at 604.

decisis and vertical stare decisis.[24] Under horizontal stare decisis, a court is not required to follow its own prior decisions.[25] The Washington Supreme Court has stated that generally, under stare decisis, it will not overturn its precedent unless there has been "a clear showing that an established rule is incorrect and harmful"[26] or "when the legal underpinnings of [its] precedent have changed or disappeared altogether."[27] But "vertical stare decisis" requires that courts "follow decisions handed down by higher courts in the same jurisdiction. For example, trial and appellate courts in Washington must follow decisions handed down by our Supreme Court and the United States Supreme Court. Adherence is mandatory, regardless of the merits of the higher court's decision."[28]

Because our Supreme Court decided *Rohrbaugh*, it is binding on this court and the doctrine of vertical stare decisis does not allow this court to reconsider it.

Church Property Dispute in *Presbytery I*

Appellants alternatively contend that even if this court applies *Rohrbaugh's* compulsory deference

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[24] *In re Pers. Restraints of Arnold*, 198 Wn. App. 842, 846, 396 P.3d 375 (2017), *rev'd on other grounds*, 190 Wn.2d 136, 410 P.3d 1133 (2018) (quoting BLACK'S LAW DICTIONARY 1626 (10th ed. 2014)).

[25] *Arnold*, 198 Wn. App. at 846.

[26] *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 65, 322 P.3d 1207 (2014) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

[27] *W.G. Clark Constr. Co.*, 180 Wn.2d at 65.

[28] *Arnold*, 198 Wn. App. at 846.

approach, the trial court erred in granting respondents summary judgment because (1) a genuine issue of material fact exists about whether the Presbyterian Church is hierarchical, (2) FPCS disaffiliated from PCUSA before the AC issued its report, and (3) the trial court erred in denying appellants' motion for a continuance. We disagree.

A. The Presbyterian Church Is Hierarchical

First, FPCS claims that the trial court erred in deferring to the AC's report because a genuine issue of material fact exists about whether the Presbyterian Church is hierarchical. We disagree.

The parties agree that under *Rohrbaugh's* deference approach, courts defer to an ecclesiastical tribunal only if the denomination is hierarchical.[29] Appellants rely on *Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc.*[30] to show that whether a church is hierarchical involves question of fact to be decided by the trial court. But *Southside Tabernacle* also states, "Although the hierarchical or congregational structure is a question of fact, summary judgment is available . . . if the trial court can say as a matter of law that [a church] is hierarchical."[31] A church is hierarchical when it is "a subordinate member of some general church organization in which

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[29] *Rohrbaugh*, 79 Wn.2d at 371-72.

[30] 32 Wn. App. 814, 821-22, 650 P.2d 231 (1982).

[31] *Southside Tabernacle*, 32 Wn. App. at 822.

there are superior ecclesiastical tribunals."[32] A church is congregational when it is "governed independent of any other ecclesiastical body."[33]

The constitution of PCUSA governs the church; Part II of this constitution, called the Book of Order, provides the ecclesiastical law of PCUSA. Ordained Presbyterian minister and teaching elder Scott Lumsden and the Book of Order state that congregations within the Presbyterian Church are governed by a hierarchy of councils that include, in ascending order, (1) Sessions comprised of pastors and elders of the local congregation, (2) presbyteries comprised of all pastors and at least one elder from each of the congregations within a district, (3) synods comprised of representative pastors and elders from the presbyteries within a region, and (4) the general assembly comprised of delegations of pastors and elders from the presbyteries. The Book of Order also states, "The particular congregations of the Presbyterian Church (U.S.A.) wherever they are, taken collectively, constitute one church, called the church. . . . The relationship to the Presbyterian Church (U.S.A.) of a congregation can be severed only by constitutional action on the part of the presbytery."

FPCS relies on the declaration of Reverend Parker Williamson, an ordained Presbyterian minister. He stated that the Book of Order acknowledges that PCUSA is hierarchical for ecclesiastical matters only, not civil matters. To support his assertion, Williamson

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[32] *Org. for Preserving the Constitution of Zion Lutheran Church v. Mason*, 49 Wn. App. 441, 447, 743 P.2d 848 (1987).

[33] *Mason*, 49 Wn. App. at 447.

refers to provisions from the Book of Order stating that religious constitutions should not be aided by civil power and governing bodies of the church do not have civil jurisdiction. He also notes that PCUSA's General Assembly Permanent Judicial Commission has stated that although one provision in the Book of Order refers to a higher governing body's "right of review and control over a lower one," these concepts must be understood within the context of the "shared responsibility and power at the heart of Presbyterian order," not in hierarchical terms. But whether the Book of Order, internal tribunals, seminary treatises, or Presbyterian history characterize the Presbyterian Church as being hierarchical only for ecclesiastical matters is not relevant when our Supreme Court has adopted the *Rohrbaugh* analysis to ensure religious entities receive their First Amendment protections.

To counter Williamson, PCUSA provided the declaration of Laurie Griffith, an elected "Assistant Stated Clerk of the General Assembly of the [PCUSA] [who is] empowered, along with other Associate and Assistant Stated Clerks, to give guidance on Authoritative Interpretations of the Constitution of the [PCUSA]." She disagreed with Williamson's conclusion that the church is not hierarchical for civil matters. She explained in her declaration that the Book of Order establishes the poli[t]y and form of the church. She detailed the levels of the hierarchy of councils governing the church discussed above, explaining that it is because of the structure of the church that "secular courts have historically identified the polity of the [PCUSA] as being hierarchical in nature." Griffith stated further, "Chapter 4 of the Book of Order unequivocally establishes that civil matters impacting church property proceed through the polity as set forth

within the other parts of the Book of Order." It states that "all property held by a congregation, a presbytery, a synod, the General Assembly, or the [PCUSA] "is held in trust . . . for the use and benefit of the [PCUSA]."

Additionally, the Washington Supreme Court in *Rohrbaugh* described the Presbyterian Church as having a hierarchical structure, and the Unites States Supreme Court in *Jones* stated that the Presbyterian Church "has a generally hierarchical or connectional form of government, as contrasted with a congregational form."[34] This, in addition to Griffith's interpretation of the Book of Order and the text itself, makes clear that the Presbyterian Church contains local churches that are subordinate to PCUSA. No genuine issue of material fact exists about whether the church is hierarchical. The trial court did not err in finding that it was hierarchical.

B. FPCS's Purported Disaffiliation from PCUSA before the AC Issued Its Report Does Not Preclude Application of the Deference Approach

Next, appellants claim that because they lawfully disaffiliated from PCUSA before the AC issued its report, *Rohrbaugh* does not require that this court defer to the AC's determination. Appellants contend that here, unlike in *Rohrbaugh*, the congregation of the entire local church voted to disaffiliate from the national church and amend its articles to remove PCUSA's authority. They assert that when FPCS voted to

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[34] *Rohrbaugh*, 79 Wn.2d at 373; *Jones*, 443 U.S. at 597-98.

disaffiliate on November 15, 2015, PCUSA's ecclesiastical authority over it ended.

Rohrbaugh, however, requires that a court give effect to the decision of the highest tribunal of a hierarchical church in a controversy over the right to use church property. This rule applies here. Appellants do not cite any authority to support that the factual distinction they identify has legal significance. Because FPCS purportedly disaffiliated from PCUSA before the AC issued its report does not mean that the trial court erred in deferring to the AC's decision.

C. *The Court Did Not Err in Denying Appellants' CR 56(f) Motion for a Continuance*

Last, appellants assert that the trial court erred in denying their CR 56(f) request to continue the summary judgment hearing because respondents had not yet produced all their requested discovery about whether the Presbyterian Church is hierarchical. We disagree.

CR 56(f) gives courts discretion to continue a motion for summary judgment to allow further discovery if the nonmoving party, for good reason, cannot present facts essential to oppose the motion.[35] A trial court may deny a CR 56(f) motion when, "(1) the requesting party fails to offer a good reason for the delay, (2) the requesting party does not state what evidence is desired, or (3) the desired evidence will not raise a genuine issue of material fact."[36] This court reviews a denial of a motion for a CR 56(f) continuance for abuse

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[35] *Kozol v. Dep't of Corr.*, 192 Wn. App. 1, 6, 366 P.3d 933 (2015).

[36] *Kozol*, 192 Wn. App. at 6.

of discretion.[37] A court abuses its discretion when it bases its decision on untenable grounds or reasons.[38]

Appellants asked respondents to produce all documents related to whether the Presbyterian Church is a hierarchical denomination, which appellants contend is a material issue that they were unable to develop. Appellants' trial counsel asked for a three-month continuance to look "for evidence relating to the intent and I think the legally cognizable evidence of a trust. The legally cognizable evidence of the importation of Book of Order provisions into the governance documents of the Church and of its corporation."

When the trial court stated that it would need more information about what appellants were looking for because it had not heard a reason to give them a continuance, appellants' counsel stated they wanted to discover evidence regarding whether PCUSA is hierarchical for civil purposes. We have requests of PCUSA that are outstanding and unresponded to. . . . I would imagine that there are e-mails, that there are internal documents within the offices in Kentucky where the denomination headquarters are that relate to these issues.

Respondents' counsel explained that appellants had the Book of Order, Griffith's declaration and its exhibits, and all the minutes for Seattle Presbytery from 1979 among other documents. Respondents' counsel stated further:

> We've also given them citations to numerous court decisions on this topic. Last, but not least,

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[37] *Kozol*, 192 Wn. App. at 6.

[38] *Kozol*, 192 Wn. App. at 6.

> we have produced [appellants'] own communications with the congregation last November, in which they say that the congregation should vote to disaffiliate because the PCUSA is hierarchical and has limited their freedom of action.

Counsel asserted that additional discovery would be only cumulative.

The trial court denied appellants' request for a continuance:

> The record shows that [appellants] have had sufficient time and notice to prepare their opposition to [respondents'] motion for partial summary judgment. [Appellants] have had ample opportunity to assemble declarations from experts, and they have done so. Upon inquiry from the court as to what specific evidence the [appellants] expected to discover, [appellants'] counsel made only vague references to internal correspondence he suspected existed. Even so, the anticipated evidence would not add anything to the [appellants'] already thorough response to the [respondents'] motion for summary judgment. Evidence of the sort alluded to by [appellants'] counsel would be cumulative at best.
>
> [Appellants] fail to show that additional discovery would support further their assertion that there exists a genuine issue of material fact as to whether the Presbyterian Church (U.S.A.) is hierarchical.

The record shows that appellants had already received extensive documentation related to whether the church is hierarchical, and appellants' counsel asked for a continuance to discover documents that he

merely expected existed. As discussed above, the trial court properly decided that the Presbyterian Church is hierarchical as a matter of law. The trial court acted within its discretion to deny appellants' continuance request.

The trial court did not err in following *Rohrbaugh* and deferring to the AC's determination that any interest FPCS had in church property was held in trust for the benefit of PCUSA.

Employment Contract Dispute in *Presbytery II*

The Schulzes claim that even if this court declines to reconsider *Rohrbaugh*, it should still decide that the trial court erred in applying compulsory deference rather than neutral principles to the AC's determinations about their severance agreements because courts in other jurisdictions and "[m]ost Washington court[] of appeals decisions" recognize that compulsory deference does not apply to a civil contract dispute involving religious institutions. We disagree.

In *Org. for Preserving the Constitution of Zion Lutheran Church v. Mason*,[39] the organization, comprised of members of the Zion Lutheran congregation, sought to enjoin the installation of Joseph Mason as pastor based on a voting provision in Zion Lutheran's constitution. The church asserted that because no property interest was involved, the civil courts could not interfere.[40] The trial court dismissed the organization's complaint, finding that it lacked authority to interpret the provision at issue in Zion Lutheran's

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[39] 49 Wn. App. 441, 442-44, 743 P.2d 848 (1987).

[40] *Mason*, 49 Wn. App. at 445-46.

constitution.[41] This court reversed and remanded for trial on two grounds: (1) there remained a question of fact about whether the church was hierarchical or congregational and (2) the church did not have a binding dispute resolution process.[42] We rejected the argument that the dispute involved ecclesiastical questions that the trial court could not decide.[43] We explained that based on *Rohrbaugh*,

> when a property dispute is involved, [the issue in this jurisdiction] is whether the church in question is hierarchically or congregationally organized. We see no logical reason why a different approach should be used to determine when the civil courts have jurisdiction over religious disputes not involving property.
>
> Therefore, the jurisdictional threshold question remains whether Zion Lutheran Church is an independent congregation or a member of a hierarchically organized church.[[44]]

And we stated that because the church did not have a binding dispute resolution process, "If the civil courts denied jurisdiction, the Organization would be without a remedy."[45] *Mason* thus extended *Rohrbaugh's* compulsory deference approach to civil disputes within a hierarchically organized church that has a binding dispute resolution process.

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[41] *Mason*, 49 Wn. App. at 442.

[42] *Mason*, 49 Wn. App. at 447-50.

[43] *Mason*, 49 Wn. App. at 449.

[44] *Mason*, 49 Wn. App. at 447.

[45] *Mason*, 49 Wn. App. at 449.

Consistent with this holding is our Supreme Court's plurality opinion in *Erdman v. Chapel Hill Presbyterian Church*.[46] There, an employee of a local denomination of the Presbyterian Church brought a number of claims against the church and its ministers, including negligent retention and negligent supervision.[47] She submitted her claims to the church's decision-making ecclesiastical tribunal, which concluded her "allegations could not be reasonably proved."[48] In affirming the trial court's dismissal of Erdman's claims, the plurality opinion held that because Erdman submitted her claims to the church's highest decision-making tribunal and the church is "undisputedly a hierarchically structured church," a civil court must defer to the church's ecclesiastical decision."[49] The court noted that in *Rohrbaugh*, it "recognized the principle that deference is to be afforded such decisions of an ecclesiastical tribunal of a hierarchical church."[50] And it relied on the rule from the United States Supreme Court's decision in *Watson*, stating:

> [T]he rule that should "govern the civil courts" is that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept

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[46] 175 Wn.2d 659, 286 P.3d 357 (2012).

[47] *Erdman*, 175 Wn.2d at 660.

[48] *Erdman*, 175 Wn.2d at 664.

[49] *Erdman*, 175 Wn.2d at 681-82, 684.

[50] *Erdman*, 175 Wn.2d at 682.

such decisions as final, and as binding on them, in their application to the case before them."[51]

Last, in *Elvig v. Ackles*,[52] this court reiterated the rule articulated in *Mason*. The Schulzes mistakenly claim that *Elvig* shows a court should apply neutral principles to a civil contract dispute. There, Monica Elvig, an associate minister at Calvin Presbyterian Church, told the church that Reverend Will Ackles had sexually harassed her.[53] Church authorities did not discipline Ackles because the church's investigating committee and judicial commission decided that insufficient evidence existed to file a charge.[54] They also precluded Elvig from seeking other work, claiming that the Book of Order prohibited a minister from transferring while charges were pending.[55] We affirmed the rule we articulated in *Mason*, stating, "[I]f the church accused of wrongdoing is a member of a hierarchically-organized church that has ecclesiastical judicial tribunals, civil courts must defer to the highest church tribunal's resolution of the matter, despite the fact that the dispute could be resolved by a civil court."[56] In affirming the trial court's dismissal of Elvig's claims against the church, the presbytery, and Ackles, this court reasoned,

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[51] *Erdman*, 175 Wn.2d at 679-80 (emphasis added) (quoting *Watson*, 80 U.S. at 727).

[52] 123 Wn. App. 491, 98 P.3d 524 (2004).

[53] *Elvig*, 123 Wn. App. at 493.

[54] *Elvig*, 123 Wn. App. at 498-99.

[55] *Elvig*, 123 Wn. App. at 498-99.

[56] *Elvig*, 123 Wn. App. at 496.

> Elvig's negligent supervision and aiding and abetting claims would require a secular court to examine decisions made by ecclesiastical judicial bodies, and her retaliation claims would require a court to question and interpret the transfer rule in the church's *Book of Order*. We can do neither without effectively undermining the church's inherent autonomy.
>
> ....
>
> Our ruling is a narrow one based on the court's inability to question or interpret the Presbyterian Church's self-governance.[57]

The Schulzes ask this court to distinguish *Erdman* and *Elvig* from this case because both Erdman and Elvig filed complaints with their respective churches. The Schulzes claim that by contrast, because they did not submit their severance claims to any ecclesiastical body for resolution but, rather, Presbytery unilaterally convened the AC to decide the validity of their severance agreements, a civil court need not defer to the AC's decision. We do not find this factual distinction persuasive. It has no bearing on the rule that a civil court must defer to the decision of the highest tribunal of a church that is hierarchically structured.

Consistent with *Mason*, *Erdman*, and *Elvig*, we conclude that because the Presbyterian Church is hierarchical and has an internal dispute resolution process, the trial court properly deferred to the AC's determination that the Schulzes' severance agreements were invalid.

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[57] *Elvig*, 123 Wn. App. at 496.

CONCLUSION

We affirm. The trial court properly deferred to the AC's determinations resolving the property and severance agreement disputes.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND OR FOR THE COUNTY OF KING

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation; ROBERT WALLACE, President of The First Presbyterian Church of Seattle, a Washington nonprofit corporation; and WILLIAM LONGBRAKE, on behalf of himself and similarly situated members of First Presbyterian Church of Seattle, Plaintiffs, v. JEFF SCHULZ and ELLEN SCHULZ, as individuals and as the marital community comprised thereof; and LIZ CEDERGREEN, DAVID	No. 16-2-03515-9 SEA

MARTIN, LINDSEY McDOWELL, GEORGE NORRIS, NATHAN ORONA, and KATHRYN OSTROM, as trustees of The First Presbyterian Church of Seattle, a Washington nonprofit corporation,

Defendants.

JEFF SCHULZ and ELLEN SCHULZ, as individuals and as the marital community comprised thereof; and LIZ CEDERGREEN, DAVID MARTIN, LINDSEY McDOWELL, GEORGE NORRIS, NATHAN ORONA, and KATHRYN OSTROM, as trustees of The First Presbyterian Church of Seattle, a Washington nonprofit corporation,

Third-Party Plaintiffs and Counterclaimants,

v.

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; SCOTT

LUMSDEN, Executive Presbyter of the Presbytery of Seattle, an individual; and THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation, as recognized by the State of Washington under Washington's Nonprofit Corporations Act, by and through the corporation's duly elected Board of Trustees,

Counterclaim Defendant and Third-Party Defendants,

THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation, as recognized by the State of Washington under Washington's Nonprofit Corporations Act, by and through the corporation's duly elected Board of Trustees,

Cross-Claimant and Third-Party Plaintiff,

v.

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; ROBERT WALLACE, an individual; WILLIAM LONGBRAKE, an individual; and PRESBYTERIAN CHURCH (U.S.A.), A Corporation, a Pennsylvania nonprofit corporation,

Cross-Claim Defendants and Third-Party Defendants.

[FILED May 27, 2016]

Before: The Honorable Mary E. Roberts

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; DECLARATORY JUDGMENT

This matter came before the Court on Plaintiffs' Motion for Partial Summary Judgment (the "motion"). Plaintiffs requested summary judgment on the first cause of action in the complaint that they filed on February 17, 2016, which seeks a declaratory judgment.

The Court has considered the motion and the following materials submitted with the motion:

Declaration of Heidi Husted Armstrong in Support of Plaintiffs' Motion for Partial Summary Judgment;

Declaration of Shelley M. Dahl in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Declaration of Doug Kelly in Support of Plaintiffs' Motion for Partial Summary Judgment, with its exhibit;

Declaration of William A. Longbrake in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Declaration of Scott Lumsden in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Second Declaration of Scott Lumsden in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Declaration of Robert B. Mitchell (filed with Plaintiffs' Motion for Partial Summary Judgment); and

Declaration of Peter A. Talevich in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits.

The Court has also considered defendants' opposition to the motion and the following materials submitted with defendants' opposition:

Declaration of Richard B. Head (filed with Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment), with exhibits;

Declaration of Daniel Kittle in Support of Opposition to Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Declaration of David Martin in Support of Opposition to Plaintiffs' Motion for Partial Summary Judgment, with exhibits; and

Declaration of Parker T. Williamson in Support of Opposition to Plaintiffs' Motion for Partial Summary Judgment, with exhibits.

The Court has considered as well plaintiffs' reply in support of the motion and the following materials submitted with plaintiffs' reply:

Second Declaration of William A. Longbrake in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Third Declaration of Scott Lumsden in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits; and

Second Declaration of Peter A. Talevich in Support of Plaintiffs' Motion for Partial Summary Judgment.

The Court has considered the following additional materials:

First Presbyterian Church of Seattle's Motion for Preliminary Injunction to Preserve the Status Quo;

Declaration of Richard Head in Support of Motion for Preliminary Injunction, with its exhibit;

Declaration of Bruce Leaverton in Support of Motion for Preliminary Injunction, with exhibits;

Declaration of Lloyd Lunceford in Support of Motion for Preliminary Injunction; Declaration of David

Martin in Support of Motion for Preliminary Injunction, with exhibits;

Declaration of Parker Williamson in Support of Motion for Preliminary Injunction, with its exhibit;

Plaintiffs' Opposition to Motion for Preliminary Injunction;

Declaration of Heidi Husted Armstrong in Opposition to Motion for Preliminary Injunction;

Declaration of Laurie Griffith, with exhibits;

Declaration of Neal Lampi in Opposition to Motion for Preliminary Injunction, with exhibits;

Declaration of Scott Lumsden in Opposition to Motion for Preliminary Injunction, with its exhibit;

Declaration of Robert B. Mitchell in Opposition to Motion for Preliminary Injunction, with exhibits;

Defendants' Reply in Support of Motion for Preliminary Injunction to Preserve the Status Quo;

Supplemental Declaration of Bruce Leaverton in Support of Motion for Preliminary Injunction, with its exhibit;

Defendants' CR 56(f) Motion, for Continuance;

Declaration of Daniel Kittle in Support of Defendants' CR 56(f) Motion for Continuance, with exhibits;

Plaintiffs' Opposition to Defendants' Motion for Continuance;

Declaration of Robert B. Mitchell in Opposition to Defendants' Motion for Continuance, with exhibits; and

The Court held oral argument in open court on May 27, 2016.

Based upon the foregoing, the Court GRANTS the motion. There exists no genuine issue of fact that is material to the first cause of action, which seeks a declaratory judgment, and plaintiffs are entitled to judgment as a matter of law. The Court therefore enters the following declaratory judgment:

1. The Presbyterian Church (U.S.A.) is a hierarchical church in which the determinations of Seattle Presbytery, through its Administrative Commission, are conclusive and binding on the session, trustees, and congregation of First Presbyterian Church of Seattle (FPCS).

2. The findings and rulings of the Administrative Commission adopted on February 16, 2016, are conclusive and binding in all determinations of church policy and governance related to FPCS.

3. The amendments to the bylaws that the defendants purported to adopt in October 2015 and to have the FPCS congregation ratify in November 2015, as well as the amendments to the articles of incorporation that the FPCS congregation purported to adopt in November 2015, are void and without effect. FPCS is governed by the Restated Articles of Incorporation of the First Presbyterian Church of Seattle dated June 18, 1985, and the Bylaws of the First Presbyterian Church of Seattle dated May 8, 2005.

4. Any interest that FPCS has in church property is held in trust for the benefit of the Presbyterian Church (U.S.A.).

5. The current governing body of FPCS is the Administrative Commission for First Presbyterian Church of Seattle. This Administrative Commission, appointed by Seattle Presbytery in November 2015, assumed original jurisdiction on February 16, 2016,

and it now acts as the session of FPCS. The ruling elders and directors/trustees of FPCS are Steve Aeschbacher, Heidi Husted Armstrong, Shelley Dahl, J.P. Kang, William Longbrake, Jonathan Siehl, Kathy Smith, and Robert Wallace. The duly elected officers of FPCS are Robert Wallace (President), Shelley Dahl (Vice President), and William Longbrake (Secretary/Treasurer).

SO ORDERED this 27th day of May, 2016.

/s/ Mary E. Roberts
Mary E. Roberts
KING COUNTY SUPERIOR COURT JUDGE

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND OR FOR THE COUNTY OF KING

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation; ROBERT WALLACE, President of The First Presbyterian Church of Seattle, a Washington nonprofit corporation; and WILLIAM LONGBRAKE, on behalf of himself and similarly situated members of First Presbyterian Church of Seattle, Plaintiffs, v. JEFF SCHULZ and ELLEN SCHULZ, as individuals and as the marital community comprised thereof; and LIZ CEDERGREEN, DAVID	No. 16-2-03515-9 SEA

MARTIN, LINDSEY McDOWELL, GEORGE NORRIS, NATHAN ORONA, and KATHRYN OSTROM, as trustees of The First Presbyterian Church of Seattle, a Washington nonprofit corporation,

Defendants.

JEFF SCHULZ and ELLEN SCHULZ, as individuals and as the marital community comprised thereof; and LIZ CEDERGREEN, DAVID MARTIN, LINDSEY McDOWELL, GEORGE NORRIS, NATHAN ORONA, and KATHRYN OSTROM, as trustees of The First Presbyterian Church of Seattle, a Washington nonprofit corporation,

Third-Party Plaintiffs and Counterclaimants,

v.

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; SCOTT

LUMSDEN, Executive Presbyter of the Presbytery of Seattle, an individual; and THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation, as recognized by the State of Washington under Washington's Nonprofit Corporations Act, by and through the corporation's duly elected Board of Trustees, Counterclaim Defendant and Third-Party Defendants.
THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation, as recognized by the State of Washington under Washington's Nonprofit Corporations Act, by and through the corporation's duly elected Board of Trustees, Cross-Claimant and Third-Party Plaintiff,

v.

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; ROBERT WALLACE, an individual; WILLIAM LONGBRAKE, an individual; and PRESBYTERIAN CHURCH (U.S.A.), A Corporation, a Pennsylvania nonprofit corporation,

Cross-Claim Defendants and Third-Party Defendants.

[FILED May 27, 2016]

Before: The Honorable Mary E. Roberts

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

This matter came before the Court on "First Presbyterian Church of Seattle's Motion for Preliminary Injunction to Preserve the Status Quo," Dkt. No. 50 (the "motion").[1] The Court has considered the motion

[1] Because the leadership of First Presbyterian Church of Seattle is disputed, the Court refers to the movant as "defendants."

and the following materials submitted with the motion:

Declaration of Richard Head in Support of Motion for Preliminary Injunction, with its exhibit;

Declaration of Bruce Leaverton in Support of Motion for Preliminary Injunction, with exhibits;

Declaration of Lloyd Lunceford in Support of Motion for Preliminary Injunction; Declaration of David Martin in Support of Motion for Preliminary Injunction, with exhibits;

Declaration of Parker Williamson in Support of Motion for Preliminary Injunction, with its exhibit.

The Court has also considered Plaintiffs' Opposition to Motion for Preliminary Injunction and the following materials submitted with the opposition:

Declaration of Heidi Husted Armstrong in Opposition to Motion for Preliminary Injunction;

Declaration of Laurie Griffith, with its exhibit;

Declaration of Neal Lampi in Opposition to Motion for Preliminary Injunction, with exhibits;

Declaration of Scott Lumsden in Opposition to Motion for Preliminary Injunction, with its exhibit;

Declaration of Robert B. Mitchell in Opposition to Motion for Preliminary Injunction, with exhibits.

The Court has considered as well Defendants' Reply in Support of Motion for Preliminary Injunction to Preserve the Status Quo and the following materials submitted with the reply:

Supplemental Declaration of Bruce Leaverton in Support of Motion for Preliminary Injunction, with its exhibit.

The Court has considered the following additional materials:

Plaintiffs' Motion for Partial Summary Judgment;

Declaration of Heidi Husted Armstrong in Support of Plaintiffs' Motion for Partial Summary Judgment;

Declaration of Shelley M. Dahl in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Declaration of Doug Kelly in Support of Plaintiffs' Motion for Partial Summary Judgment, with its exhibit;

Declaration of William A. Longbrake in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Declaration of Scott Lumsden in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Declaration of Robert B. Mitchell (filed with Plaintiffs' Motion for Partial Summary Judgment);

Declaration of Peter A. Talevich in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Second Declaration of Scott Lumsden in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Defendants' Opposition to Motion for Partial Summary Judgment;

Declaration of Richard B. Head (filed with Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment), with exhibits;

Declaration of Daniel Kittle in Support of Opposition to Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

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Declaration of Parker T. Williamson in Support of Opposition to Motion for Partial Summary Judgment, with exhibits;

Plaintiffs' Reply in Support of Motion for Summary Judgment;

Second Declaration of William A. Longbrake in Support of Plaintiffs' Motion for Partial Summary Judgment, with exhibits;

Third Declaration of Scott Lumsden in Support of Motion for Partial Summary Judgment, with exhibits;

[Second Declaration of Peter A. Talevich in Support of Motion for Partial Summary Judgment;

Defendants' CR 56(f) Motion for Continuance;

Declaration of Daniel Kittle in Support of Defendants' CR 56(f) Motion for Continuance, with exhibits;

Plaintiffs' Opposition to Defendants' Motion for Continuance;

Declaration of Robert B. Mitchell in Opposition to Defendants' Motion for Continuance, with exhibits; and

The Court heard argument on the motion in open court on May 27, 2016.

Having considered the foregoing, the Court hereby finds, concludes, and orders as follows:

FINDINGS OF FACT

1. The Presbyterian Church (U.S.A.) (the "Church") is a hierarchical religious denomination.

2. Under the Form of Government of the Church, congregations within the Church are governed by a hierarchy of councils including, in ascending order, the session (pastors and elders of the local congregation), the presbytery (composed of all pastors and at least one elder from each of the congregations within a district), the synod (composed of representative pastors and elders from the presbyteries within a geographical region), and the general assembly (composed of delegations of pastors and elders from the presbyteries). The presbytery with jurisdiction over First Presbyterian Church of Seattle ("FPCS") is plaintiff Presbytery of Seattle ("Seattle Presbytery").

3. The Church, its congregations, and its councils are all governed by the Constitution of the Presbyterian Church (U.S.A.) (the "Church Constitution"). Part II of the Church Constitution, known as the *Book of Order*, sets forth the Form of Government of the Church.

4. According to the Church Constitution, "[t]he provisions of this Constitution prescribing the manner in which decisions are made, reviewed, and corrected within this [C]hurch are applicable to all matters pertaining to property."

5. Under the Church Constitution, "all property held by a congregation, whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association . . . is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)." When property of a congregation of the Church "ceases to be used by that congregation as a

congregation of the Presbyterian Church (U.S.A.) in accordance with the Constitution, such property shall be held, used, applied, transferred, or sold as provided by the Presbytery."

6. If permitted by civil law, the Church Constitution requires congregations to "cause a corporation to be formed and maintained." The powers of the corporation and trustees are "subject to the authority of the session and under the provisions of the [Church Constitution]," and "[t]he powers and duties of the trustees shall not infringe upon the powers and duties of the session . . .".

7. FPCS incorporated under civil law in 1874. The original articles of incorporation state that FPCS was established "to promote the worship of Almighty God and the belief in and extension of the Christian Religion, under the form of government and discipline of the 'Presbyterian Church in the United States of America.'"

8. The restated articles of incorporation, adopted in 1985, provide that the "objects and purposes" of FPCS are "to promote the worship of Almighty God and the belief in the extension of the Christian Religion, under the Form of Government and discipline of 'The Presbyterian Church (U.S.A.).'"

9. On October 27, 2015, the session of FPCS purported to repeal the bylaws then in effect (the "2005 Bylaws") and establish separate corporate and congregational bylaws. The session then installed its members as trustees of the corporation. According to FPCS elder David Martin, "[t]he FPCS Board is governed by the Corporation's Articles of Incorporation and Corporate Bylaws, as well as the provisions of the Washington Nonprofit Corporation Act, and is not subject to the

authority of the Presbytery of Seattle ('Presbytery') or the PCUSA Book of Order."

10. Mr. Martin notified Seattle Presbytery that the assets of FPCS were "owned by and under the control of the Corporation, and are therefore not subject to Presbytery authority." He also stated that the "Corporation" had transferred approximately $420,000 into the trust account of Lane Powell P.C.

11. The FPCS session and the FPCS board, purporting to be different entities, provided notice to the FPCS members of corporation and congregational meetings to occur on November 15, 2016. Notice of each meeting was mailed to the members of FPCS, but no notice was read at the November 8, 2016 joint service and no notice was printed in the FPCS church bulletin for that service.

12. On November 15, 2016, the members of the FPCS congregation voted to disaffiliate from the Church, and the members of the FPCS corporation voted to ratify the October 27 bylaw amendments and amend the restated articles of incorporation to remove any references to the Church. Voting occurred in person and by proxy. The *Book of Order* does not permit "disaffiliation" by congregational vote, nor does it permit voting by proxy. Seattle Presbytery's Communal Discernment and Gracious Separation Policy constitutes the only policy under which a congregation within Seattle Presbytery may be dismissed or otherwise separated from the Church.

13. On November 17, 2016, following the *Book of Order,* Seattle Presbytery appointed an Administrative Commission for First Presbyterian Church of Seattle (the "Administrative Commission") to work on the presbytery's behalf with purposes and authority as

described in the presbytery's resolution and as repeated on pages 2-3 of the Administrative Commission's report.

14. Effective December 16, 2015, Jeff and Ellen Schulz, the co-pastors at FPCS, renounced the jurisdiction of the Presbyterian Church (U.S.A.).

15. On February 16, 2016, the Administrative Commission adopted ten resolutions and issued its report, together with a 222-page appendix.

16. The Administrative Commission assumed original jurisdiction, thereby becoming the session of FPCS with responsibility for the governance, property, and spiritual well-being of the church.

17. As authorized by the *Book of Order,* the Administrative Commission determined that there is a schism in FPCS and that the members who opposed the actions of the former FPCS elders constitute the true church. The Administrative. Commission noted that Jeff and Ellen Schulz, having renounced the jurisdiction of the Presbyterian Church (U.S.A.), had ceased to function at that point as pastors of FPCS. The Administrative Commission appointed a temporary pastor for the FPCS congregation as well as a person having authority to oversee the property and financial affairs of FPCS. The Administrative Commission also determined that its members, as the current ruling elders on session, were now the trustees of the FPCS corporation.

18. The Administrative Commission determined that all property of FPCS—including real property, personal property, and intangible property—is subject to the direction and control of the Administrative Commission's original jurisdiction and must be held, used,

applied, transferred, or sold as the Administrative Commission may provide or direct.

19. The Administrative Commission directed that the funds transferred to the Lane Powell trust account be returned to the church immediately, and all funds held in the name of the FPCS corporation be turned over to the Administrative Commission. The Administrative Commission also directed an accounting of all financial transactions involving FPCS and the turning over of all books and records by February 21, 2016.

20. After being apprised of the Administrative Commission's actions, defendants' counsel stated that "the decisions of the Administrative Commission have no authority over [FPCS] nor do the AC, the Presbytery or PCUSA hold any valid claims to, or interests in, [its] records or property." This litigation followed.

21. Since the purported secession of FPCS from the Church, the defendants have continued to conduct worship service in the FPCS chapel. The FPCS congregants who opposed defendants' actions, on the other hand, have worshipped at various locations.

22. Seattle Presbytery and its agents have not interfered or attempted to interfere with any bank account held in the name of FPCS. Instead, to support its ministry to the FPCS congregants who opposed defendants' actions, Seattle Presbytery opened a new banking account at Banner Bank in the name of Seattle Presbytery AC for the First Presbyterian Church of Seattle.

23. Seattle Presbytery established a new website, rather than interfere with the website now controlled by defendants, to inform the FPCS congregants who - opposed defendants' actions of the congregation's activities and changing locations for worship.

24. Seattle Presbytery and its agents have not contacted Diamond Parking, Seattle Classical Christian School, Town Hall, or any other entities that have contractual obligations to FPCS. Instead, after defendants rejected a proposed joint communication, Seattle Presbytery decided to await a prompt resolution of this case rather than draw these entities into the parties' dispute. Seattle Presbytery has also not interfered with any of the redevelopment projects associated with FPCS premises.

25. Lane Powell P.C. has voluntarily agreed not to access any of the funds in its trust account that were placed there by defendants until the Court determines who is entitled to those funds.

26. Seattle Presbytery offered to make the client files of FPCS in the hands of Riddell Williams available to both the plaintiffs and defendants in this matter, while the right to those files remains disputed, but the defendants rejected this compromise.

CONCLUSIONS OF LAW

1. To obtain a preliminary injunction, the movant must establish (1) a clear legal, or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the act complained of will result in actual and substantial injury. *E.g., Huff v. Wyman,* 184 Wn.2d 643, 651, 361 P.3d 727 (2015).

2. Defendants have not met their burden of showing a clear legal or equitable right for the following reasons:

a. Under *Presbytery of Seattle, Inc. v. Rohrbaugh,* 79 Wn.2d 367, 485 P.2d 615 (1971), *cert. denied,* 405 U.S. 996, *reh. denied,* 406 U.S. 939 (1972), the determinations of the

Administrative Commission of Seattle Presbytery are entitled to conclusive deference. As a result, the Administrative Commission's assumption of original jurisdiction over the affairs of FPCS cannot be disturbed.

b. Washington courts have rejected a "neutral principles of law" approach to resolving ecclesiastical disputes related to church property, but even under this analysis, defendants would not be entitled to relief. Defendants' purported attempts to amend the FPCS 2005 Bylaws and the Restated Articles of Incorporation were ineffective as a matter of corporate law.

c. Moreover, even if a neutral principles of law approach applied, the *Book of Order* provides that all property held by or for congregations, including FPCS, is held in trust for the Church. FPCS's Restated Articles of Incorporation and 2005 Bylaws incorporate this provision; FPCS's financial statements expressly recognized it before 2015. Because defendants have ceased to use such property as property of the Church, Seattle Presbytery is entitled to the use and possession of that property.

d. With respect to defendants' claim of trademark infringement, defendants have not shown ownership, distinctiveness, or likely confusion. Their requested injunction would impermissibly limit the plaintiffs' Free Exercise rights.

3. Defendants have not met their burden of showing a well-grounded fear of immediate invasion of any right. Instead, the evidence shows that plaintiffs have not interfered with defendants' purported governance

of FPCS but have, instead, attempted to resolve the issue promptly in court before taking any actions related to church property.

4. Defendants have not met their burden of showing that the acts complained of will result in actual and substantial injury.

The Motion is DENIED.

IT IS SO ORDERED this 27th day of May, 2016.

/s/ Mary E. Roberts
Mary E. Roberts
KING COUNTY SUPERIOR COURT JUDGE

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation; ROBERT WALLACE, President of the First Presbyterian Church of Seattle, a Washington nonprofit corporation; and WILLIAM LONGBRAKE, on behalf of himself and similarly situated members of First Presbyterian Church of Seattle,

Respondents,

v.

JEFF SCHULZ, ELLEN SCHULZ, LIZ CEDERGREEN, DAVID MARTIN, LINDSEY McDOWELL, GEORGE NORRIS, NATHAN ORONA, and KATHRYN OSTROM, as trustees of The First Presbyterian Church of Seattle, a Washington nonprofit corporation,

Appellants.

THE PRESBYTERY OF SEATTLE, a Washington nonprofit corporation; and THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, a Washington nonprofit corporation,

Respondents,

v.

JEFF SCHULZ and ELLEN SCHULZ, as individuals and as the marital community thereof,

Appellants.

No. 78399-8-1

Decided and Filed: November 27, 2019

Before: Leach, J.
Justice.

ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby:

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

/s/ J. Leach
Judge

APPENDIX E

THE SUPREME COURT OF WASHINGTON

THE PRESBYTERY OF SEATTLE, et al., Respondents, v. JEFF and ELLEN SCHULZ, et al., Petitioners.	No. 97996-1 Court of Appeals No. 78399-8-1

[FILED April 1, 2020]

Before: STEPHENS, MADSEN, JOHNSON, GORDON McCLOUD, and MONTOYA-LEWIS Justices.

ORDER

Department II of the Court, composed of Chief Justice Stephens and Justices Madsen, Wiggins, Gordon McCloud, and Montoya-Lewis (Justice Wiggins did not participate, Justice Johnson sat for Justice Wiggins), considered at its March 31, 2020, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS SO ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 1st day of April, 2020.

For the Court

/s/ Debra L. Stephens
CHIEF JUSTICE

APPENDIX F

Table of state court decisions concerning church property

States adopting neutral principles

Alabama - *Haney's Chapel United Methodist Church* v. *United Methodist Church*, 716 So.2d 1156 (Ala. 1998)

Alaska - *St. Paul Church, Inc.* v. *Board of Trustees of the Alaska Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541 (Ak. 2006)

Arizona - *Ad Hoc Comm. of Parishioners of Our Lady of Sun Catholic Church, Inc.* v. *Reiss*, 224 P.3d 1002 (Ariz. App. 2010)

Arkansas - *Ark. Presbytery of Cumberland Presbyterian Church* v. *Hudson*, 40 S.W.3d 301 (Ark. 2001)

Colorado - *Bishop and Diocese of Colorado* v. *Mote*, 716 P.2d 85, 102 (Colo. 1986)

Delaware - *Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.* v. *East Lake Methodist Episcopal Church, Inc.*, 731 A.2d 798 (Del. 1999)

Hawaii - *Redemption Bible College* v. *Intern'l Pentecostal Holiness Church*, 309 P.3d 969 (Table), 2013 WL 3863104 (Haw. App. July 23, 2013)

Illinois - *Hines* v. *Turley*, 615 N.E.2d 1251 (Ill. App. 1993).

Indiana - *Presbytery of Ohio Valley, Inc.* v. *OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012)

Louisiana - *Fluker Community Church* v. *Hitchens*, 419 So.2d 445 (La. 1982)

Maine - *Graffam* v. *Wray*, 437 A.2d 627 (Me. 1981)

Maryland - *Mt. Olive African Methodist Episcopal Church of Fruitland, Inc.* v. *Board of Incorporators of African Methodist Episcopal Church Inc.*, 703 A.2d 194 (Md. 1997)

Massachusetts - *Fortin* v. *Roman Catholic Bishop of Worcester*, 625 N.E.2d 1352 (Mass. 1994)

Minnesota - *Piletich* v. *Deretich*, 328 N.W.2d 696 (Minn. 1982)

Mississippi - *Church of God Pentecostal* v. *Freewill Pentecostal Church of God*, 716 So.2d 200 (Miss. 1998)

Missouri - *Presbytery of Elijah Parish Lovejoy* v. *Jaeggi*, 682 S.W.2d 465 (Mo. 1984)

Montana - *New Hope Lutheran Ministry* v. *Faith Lutheran Church of Great Falls, Inc.*, 328 P.3d 586 (Mont. 2014)

Nebraska - *Aldrich on behalf of Bethel Lutheran Church* v. *Nelson on behalf of Bethel Lutheran Church*, 859 N.W.2d 537 (Neb. 2015)

New Hampshire - *Berthiaume* v. *McCormack*, 891 A.2d 539 (N.H. 2006)

North Carolina - *Davis* v. *Williams*, 774 S.E.2d 889, 892 (N.C. App. 2015)

Ohio - *Southern Ohio State Exec. Offices of Church of God* v. *Fairborn Church of God*, 573 N.E.2d 172 (Ohio. App. 1989)

Oklahoma - *Fowler* v. *Bailey*, 844 P.2d 141 (Okla. 1992)

Oregon - *Hope Presbyterian Church of Rogue River* v. *Presbyterian Church (U.S.A.)*, 291 P.3d 711 (Or. 2012)

Pennsylvania - *Presbytery of Beaver–Butler* v. *Middlesex Presbyterian Church*, 489 A.2d 1317 (Pa. 1985)

South Carolina - *All Saints Parish Waccamaw* v. *Protestant Episcopal Church in Diocese of South Carolina*, 685 S.E.2d 163 (S.C. 2009)

South Dakota - *Foss* v. *Dykstra*, 319 N.W.2d 499 (S.D. 1982)

Texas - *Masterson* v. *Diocese of Northwest Texas*, 422 S.W.3d 594 (Tex. 2013)

Utah - *Laumalie Ma'oni'oni Free Wesleyan Church of Tonga* v. *Ma'afu*, 440 P.3d 804 (Utah 2019)

Wisconsin - *Wisconsin Conference Bd. of Trustees of United Methodist Church, Inc.* v. *Culver*, 627 N.W.2d 469 (Wisc. 2001)

States adopting hybrid neutral principles

California - *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009)

Connecticut - *Episcopal Church in Diocese of Connecticut* v. *Gauss*, 28 A.3d 302 (Conn. 2011)

Georgia - *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446 (Ga. 2011); *Rector, Wardens & Vestrymen of Christ Church in Savannah* v. *Bishop of Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237 (Ga. 2011)

Kentucky - *Cumberland Presbytery of Synod of the Mid-West of Cumberland Presbyterian Church* v. *Branstetter*, 824 S.W.2d 417 (Ky. 1992)

New York - *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920 (N.Y. 2008)

Tennessee - *Church of God in Christ, Inc.* v. *L. M. Haley Ministries, Inc.*, 531 S.W.3d 146 (Tenn. 2017)

Virginia - *Falls Church* v. *Protestant Episcopal Church in U.S.*, 740 S.E.2d 530 (Va. 2013)

States adopting hierarchical deference

Florida - *Mills* v. *Baldwin*, 377 So.2d 971 (Fla. 1980).

Kansas - *Heartland Presbytery* v. *Presbyterian Church of Stanley, Inc.*, 390 P.3d 581 (Kan. App. 2017)

Michigan - *Bennison* v. *Sharp*, 329 N.W.2d 466 (Mich. App. 1982)

Nevada - *Tea* v. *Protestant Episcopal Church in Diocese of Nev.*, 610 P.2d 182 (Nev. 1980)

New Jersey - *Protestant Episcopal Church in Diocese of New Jersey* v. *Graves*, 417 A.2d 19 (N.J. 1980)

West Virginia - *Church of God of Madison* v. *Noel*, 318 S.E.2d 920 (W.Va. 1984)