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No. 78399-8-I

DIVISION I, COURT OF APPEAL
OF THE STATE OF WASHINGTON

THE PRESBYTERY OF SEATTLE, *et al.*,

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

APPELLANTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS AND INTRODUCTION

The First Presbyterian Church of Seattle ("FPCS") is a nonprofit corporation that, for nearly 150 years, governed its own affairs and owned its own property. Jeff and Ellen Schulz are FPCS's former pastors, and Liz Cedergreen, David Martin, Lindsey McDowell, George Norris, Nathan Orona, and Kathryn Ostrom are FPCS's last elected trustees (the "Board"). After FPCS's congregation voted to disaffiliate from the Presbyterian Church (U.S.A.) ("PCUSA"), a commission created by Presbytery of Seattle—PCUSA's regional branch—unilaterally ruled that it had authority to replace FPCS's trustees without a member vote; that FPCS's validly amended articles and bylaws were without force and effect; that FPCS's downtown Seattle property was held in trust for PCUSA; and that the Schulzes' pre-existing employment agreements were unenforceable.

This appeal raises the issue of whether Washington courts should decide church-related disputes over property ownership, corporate control and employment rights using "neutral-principles of law," or whether they must absolutely defer to the tribunals of hierarchical churches—even where, as here, the dispute does not involve religious doctrine and can be decided on secular grounds. Although the U.S. Supreme Court and the vast majority of states follow the neutral-principles approach, the trial court and Court of Appeals felt constrained to apply the antiquated "hierarchical deference" approach recognized by this Court in *Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wn.2d 367, 485 P.2d 615 (1971).

Under the deference approach, the outcome was preordained. Even though the commission's self-interested "findings" on wholly secular issues were contrary to settled Washington law, the lower courts concluded that *Rohrbaugh* compelled them to affirm the commission's report without scrutiny. No principle of *stare decisis* requires continued adherence to *Rohrbaugh*. On the contrary, fairness, predictability, and the First Amendment compel rejection of hierarchical deference. When neutral-principles are applied here, Presbytery of Seattle has no legal right to govern FPCS's corporate affairs or disregard lawful employment agreements with its pastors, and PCUSA has no trust interest in FPCS's property. This Court should accept review, overturn *Rohrbaugh*, and hold that Washington courts must apply neutral-principles to resolve secular church disputes.

II. COURT OF APPEALS DECISION

The Court of Appeals issued its Published Opinion on October 7, 2019 and its Order Denying Motion for Reconsideration on November 27, 2019. A copy of the Opinion and Order are attached at **Appendix A**.

III. ISSUE PRESENTED FOR REVIEW

In *Rohrbaugh* this Court held that Washington courts must defer to the decisions of church tribunals when resolving disputes involving hierarchical churches—even when the dispute raises purely secular issues. *Rohrbaugh* is both incorrect and harmful, and its legal underpinnings have collapsed in the wake of the U.S. Supreme Court's later approval of the neutral-principles approach in *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979). The overwhelming majority of state courts apply

neutral-principles to resolve disputes involving church property, corporate affairs and contracts. Should this Court overturn *Rohrbaugh* and adopt the neutral-principles approach to resolving secular church disputes? **Yes.**

IV. STATEMENT OF THE CASE[1]

This case arises from a local church's disaffiliation from a national church. The First Presbyterian Church of Seattle is Washington nonprofit corporation founded in 1874. Over the years, FPCS's members voted to affiliate with various Presbyterian denominations, most recently PCUSA. Several years ago, differences arose between FPCS and PCUSA's regional council, Presbytery of Seattle ("Seattle Presbytery"). Those differences had nothing to do with religious doctrine or church polity; they arose out of Seattle Presbytery's ongoing interference with FPCS's operations and ministry. In November 2015, in strict conformity with Washington law, over 90% of FPCS's congregation voted to amend the church's articles of incorporation and ratify new bylaws to effectuate a disaffiliation from PCUSA so that the church could join a different Presbyterian organization.

Seattle Presbytery viewed FPCS's disaffiliation as an opportunity to seize FPCS's valuable downtown property, and it unilaterally appointed an administrative commission to "investigate." Months later, after FPCS had severed all legal and ecclesiastical ties with PCUSA, the commission issued a report finding that it had retained "original jurisdiction" over

[1] If this Court accepts review, overturns *Rohrbaugh*, and holds that the parties' claims must be decided under neutral-principles, the Court may either remand the case to the lower courts for such a determination or reach the merits itself. A discussion of the undisputed facts demonstrating why Petitioners will prevail under a neutral-principles analysis is fully set forth in their respective briefs to the Court of Appeals.

FPCS. Contrary to FPCS's articles and bylaws, as well as Washington's nonprofit corporations law, the commission purported to remove the Board and appoint replacement trustees without congregational vote. Going further, the commission found, based on a provision PCUSA had written into its own constitution, that FPCS held all of its property in "trust" for the benefit of PCUSA—even though neither PCUSA nor Presbytery ever paid a cent toward the purchase of the property, FPCS held title to that property in its name alone, and FPCS never granted PCUSA an interest in the property.

The next day, Seattle Presbytery sued the Board in the name of FPCS to obtain judicial approval for its corporate takeover and property grab. It worked. On May 27, 2016, relying on *Rohrbaugh* and without regard to Washington corporate, property, or trust law, the trial court ruled that Seattle Presbytery's self-serving findings were "conclusive and binding," that the duly promulgated amendments to the church's articles and bylaws were void, that Seattle Presbytery's unelected appointees were entitled to govern FPCS, and that FPCS held its property in trust for the benefit of PCUSA. Seattle Presbytery ousted the Board from their leadership positions, seized control of FPCS's property, assets and corporate affairs, and forced the church's congregation to worship in exile.

Seattle Presbytery then capitalized on the trial court's ruling to renege FPCS's employment agreements with FPCS's former co-pastors, Jeff and Ellen Schulz. In response to threats from Seattle Presbytery, prior to disaffiliating from PCUSA in November 2015, the Board had entered into severance agreements with the Schulzes designed to retain their

services and compensate them in the event Seattle Presbytery seized control of FPCS and terminated their pastorships. After the May 2016 ruling, Seattle Presbytery's administrative commission issued a supplemental report finding, among other things, that the Schulzes' employment agreements were invalid and, even if they were valid, that Seattle Presbytery and FPCS had "good cause" to terminate the Schulzes' employment.

In September 2016, Seattle Presbytery (again purporting to act on behalf of FPCS) filed a separate lawsuit against the Schulzes, which was consolidated with its still ongoing action against the Board. In March 2017, the trial court granted Seattle Presbytery's motion for summary judgment. Again relying on *Rohrbaugh*, the court concluded that it was required to defer to the administrative commission's findings regarding the validity and enforceability of the Schulzes' severance agreements—even though it rejected Presbytery's claim that "good cause" existed to terminate the Schulzes' employment. Following entry of final judgment in both cases, the Board's and Schulzes' appeals were consolidated and transferred to the Court of Appeals after this Court denied direct review.

In its Published Opinion, a unanimous Court of Appeals held that the doctrine of vertical *stare decisis* required it to follow *Rohrbaugh*, and that only this Court could reconsider its own precedent. Opinion at 3, 14-15. The Court further held that *Rohrbaugh* and its progeny require Washington courts to defer to the decision of the highest tribunal of a hierarchical church regarding "any civil dispute." *Id.* at 3, 24. The Court of Appeals did not address the Board's argument that Washington courts

must abandon hierarchical deference and apply neutral-principles to avoid violating the First Amendment's Establishment and Free Exercise Clauses.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review because this case involves issues of substantial public interest and questions of constitutional law, as well as a conflict among the decisions of this state's courts. RAP 13.4(b)(1) - (4).

A. This Court Should Accept Review Because Resolution Of *Secular* Church Disputes Is An Issue Of Substantial Public Importance; This Court Should Overturn *Rohrbaugh* And Adopt The Neutral-Principles Approach.

The Court of Appeals was handcuffed by *Rohrbaugh's* antiquated rule of hierarchical deference. This Court is not. In the 50 years since *Rohrbaugh*, the legal landscape has changed; the U.S. Supreme Court, and the vast majority of states and scholars have recognized the superiority and constitutional necessity of the neutral-principles approach.[2] This Court should as well. "[S]tare decisis is neither a straightjacket nor an immutable rule; it leaves room for courts to balance their respect for precedent against insights gleaned from new developments, and to make informed judgments as to whether earlier decisions retain preclusive force." *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014) (citation and quotation marks omitted).

[2] Following *Jones*, thirty-six states have adopted neutral-principles as the exclusive means to decide church disputes, while only six have chosen to retain hierarchical deference. (One state, Iowa, permits its courts to use either method.) Notably, almost all of the states that retained the deference approach did so shortly after *Jones* was decided in 1979 (Florida (1980); Iowa (1983); Michigan (1982); Nevada (1980); New Jersey (1980); West Virginia (1984))—before the doctrine was subjected to near uniform condemnation in the caselaw and scholarship. *See* **Appendix B**.

This Court will reject its precedent if it is "incorrect and harmful." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). "An opinion can be incorrect when it was announced or … because the passage of time and the development of legal doctrines undermine its bases." *State v. Abdulle*, 174 Wn.2d 411, 415-16, 275 P.3d 1113 (2012). The meaning of "'incorrect' is not limited to any particular type of error," and may be found if a rule is contrary to public policy or constitutional protections. *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). "A decision may be 'harmful' for a variety of reasons as well," but "the common thread [is] the decision's detrimental impact on the public interest." *Id.* at 865. Finally, even without a showing of error or harm, this Court can reconsider a decision where "the legal underpinnings of [the] precedent have changed or disappeared altogether." *W.G. Clark Constr.*, 180 Wn.2d at 66. *Rohrbaugh* satisfies all these criteria.

1. *Rohrbaugh*'s Legal Underpinnings Have Changed And Its Premise That The First Amendment Required Hierarchical Deference Was Incorrect.

Rohrbaugh derives from *Watson v. Jones*, 80 U.S. 679, 20 L. Ed. 666 (1872). In *Watson*, the U.S. Supreme Court held that when "questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest … church … judicatories …, the legal tribunals must accept such decisions as final, and as binding on them[.]" *Id.* at 727. This "deference" approach applies only if the church is "hierarchical"; if the church is "congregational," courts apply "the ordinary principles which govern voluntary associations." *Id.* at 725-26. Thus, the deference approach

results "in two rules, one for 'hierarchical' churches … and another for all other churches (… i.e., neutral principles of law)." *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1106 (Ind. 2012).

For hierarchical churches, the result of "compulsory deference" is "foreordained." *Jones*, 443 U.S. at 605-06; *Bjorkman v. Protestant Church in the USA of the Diocese of Lexington*, 759 S.W.2d 583, 586 (Ky. 1988) ("in every case …. compulsory deference would result in the triumph of the hierarchical organization"). The national church always wins—even if the dispute is secular. *Fonken v. Cmty. Church of Kamrar*, 339 N.W.2d 810, 817 (Iowa 1983). "[U]nder the hierarchical deference approach, the decision of the hierarchy will invariably be deferred to, and thus no secular areas of the law have any direct application whatsoever." J. 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, 418 (2008) (citation and quotation marks omitted).

For over one hundred years, *Watson*'s deference approach was the *only* approach recognized by the U.S. Supreme Court. Although it was decided under federal common law, later opinions referred to *Watson*'s deference rule in constitutional terms. *Presbyterian Church of the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N.A.*, 344 U.S. 94, 116, 73 S. Ct. 143, 97 L. Ed. 120 (1957). Not surprisingly, Washington courts concluded that *Watson* required them to defer to hierarchical church tribunals in church

disputes as well. *See Wilkeson v. Rector, etc., of St. Luke's Parish of Tacoma*, 176 Wash. 377, 384, 29 P.2d 748 (1934); *Hoffman v. Tieton View Cmty. M.E. Church*, 33 Wn.2d 716, 729, 207 P.2d 699 (1949).

This culminated in *Rohrbaugh*, decided in 1971. In *Rohrbaugh*, minority members of a local church asked presbytery to strike them from the rolls and let them take the church property. 79 Wn.2d at 368. Presbytery refused. This Court noted that Washington had long followed *Watson* and, thus, presbytery's decision was binding. Notably, *Rohrbaugh* considered the case to be like *Blue Hull*, in which the U.S. Supreme Court reversed a Georgia decision on First Amendment grounds—finding *Watson* to have a "clear constitutional ring." Put simply, *Rohrbaugh* understood hierarchical deference to be constitutionally required. It certainly did not believe there was an alternative approach. Indeed, *Rohrbaugh* criticized the Georgia courts' use of civil law concepts following remand in *Blue Hull*.

Rohrbaugh's understanding of the constitutional limits on resolution of church disputes turned out to be wrong. In *Jones*, decided in 1979, the U.S. Supreme Court held that the First Amendment did not require deference. 393 U.S. at 604. The Court approved the "neutral-principles" approach Justice Brennan referenced in *Blue Hull* and espoused in *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368, 90 S. Ct. 499, 24 L. Ed. 2d 582 (1970) (Brennan, J., concurring). Although states could adopt different approaches, the Court recognized the clear advantages of neutral-principles:

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

Jones, 443 U.S. at 603. Thus, and particularly relevant here, courts need not defer to a provision in a national church constitution purporting to create a trust over local church property unless the local church had agreed "in some legally cognizable form," such as a deed or express trust. *Id.* at 606.

2. *Rohrbaugh*'s Hierarchical Deference Approach Is Harmful And Against Public Policy; The Neutral-Principles Approach Promotes Fairness, Consistency, And Equality Of Application.

This Court has not reconsidered *Rohrbaugh* in light of *Jones*.[3] "Because the neutral-principles-of-law approach permits greater fairness, consistency, and equality of application," *Presbytery of Ohio Valley*, 973 N.E.2d at 1107, the vast majority of states have adopted neutral-principles. *Masterson v. Diocese of Nw. Texas*, 422 S.W.3d 594, 606-07 & n.6 (Tex. 2014). Indeed, as discussed in the next section, many state courts have done so because the deference approach is itself unconstitutional. *All Saints*

[3] In its most recent decision touching on the issue, a majority of the justices questioned *Rohrbaugh*'s application in cases like this one. In *Erdman v. Chapel Hill Presbyterian Church*, 175 Wn.2d 659, 286 P.3d 357 (2012), which involved a church's right to select and supervise employees, four justices noted that neutral-principles might be appropriate in secular church property cases, *see* 175 Wn.2d at 675-76 & n. 9, and three justices concluded more broadly that the "neutral principles of law approach is the best way to protect churches from judicial interference and individuals from the categorical deprivation of their rights." *Id.* at 694. Indeed, the only thing the justices wholly agreed upon was that *Rohrbaugh* required deference only when one *willingly* submits a dispute to a church tribunal for decision, *id.* at 682 & 684—something that did not occur here.

Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C., 685 S.E.2d 163, 172 (S.C. 2009). This Court should likewise reject the deference approach as harmful, and hold that Washington courts must apply neutral principles to secular church disputes—deferring to church authority only where the dispute turns on interpretation of religious doctrine.

Under the neutral-principles approach, courts resolve property right disputes, for example, by examining the "language of the deeds, the terms of the local church charters, the state statutes …, and the provisions in the constitution of the general church concerning the ownership and control of church property." *Jones*, 443 U.S. at 603-04. At the same time, the neutral-principles approach does not circumvent First Amendment protections:

> In undertaking such an examination [of a church constitution], a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.

Id. Thus, if the nature of the "dispute require[s] the civil court to resolve a religious controversy," the court must abstain to church authority. *Id.* In short, the neutral-principles approach "simply allocates decisions to the proper forum: ecclesiastical decisions are made by the church and secular decisions are made by the courts." *Masterson*, 422 S.W.3d at 599.

"The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones*, 443 U.S. at 602. Under the deference approach, however, many local churches have no meaningful access to a civil forum. "Because congregational

churches and their members are dealt with by civil courts on the same terms as secular voluntary associations, aggrieved members may seek civil court protection of certain common-law rights in their relation with the church. Under the hierarchical-deference standard, members of a hierarchical or semi-hierarchical congregations, on the other hand, may be deprived of all such rights as long as the denomination determines they should be." Hassler, *supra*, at 428-29. That is what happened here.

The deference approach is particularly unfair because it invariably favors the hierarchical church by permitting it to rely on the self-interested findings of its own tribunals and the provisions of its own constitution to resolve a dispute. If the constitution forbids disaffiliation, or permits it to assert control over the local church and its property, nothing else matters. Not surprisingly, as here, when a church tribunal decides an issue, the national church always wins. *Jones*, 443 U.S. at 602-03; *Bjorkman*, 759 S.W.2d at 586; *All Saints Parish*, 685 S.E.2d at 171. Neutral principles, by contrast, furthers the state's interest in deciding secular disputes, and does so equally for all types of churches based on settled civil law.

The deference approach also relies on a flawed theory of implied consent, not facts, to find that the local church intended to submit its affairs to the national church's hierarchical authority. *Rohrbaugh*, 79 Wn.2d at 371 ("All who unite themselves to such a body (the general church) do so with an implied consent to (its) government, and are bound to submit to it." (quoting *Watson*, 80 U.S. at 729)). "*Watson* assumes that the 'essence' of membership in a hierarchical church is submission to the higher church

authority, so it awards the property based on deference to the hierarchy." M. McConnell & L. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 315 (2016). In short, once a local church affiliates with a national church, courts must blithely assume that the local church consented to forfeit its corporate independence on all matters—and for all time.

That assumption is often factually wrong, and ignores the local church's intent. *First Presbyterian Church of Schenectady v. United Presbyterian Church in the U.S.*, 464 N.E.2d 454, 460 (N.Y. 1984) (deference assumes "the local church has relinquished control to the hierarchical body in all cases, thereby frustrating the actual intent"). As was the case here, a local church can affiliate for theological purposes without intending to submit to denominational authority over its corporate affairs and property rights. *See Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 586 (Mo. App. 2012). Under the neutral principles approach, courts must determine intent by examining actual evidence—including that most relevant to corporate governance and property disputes, *i.e.*, articles of incorporation, bylaws, deeds, etc.

Similarly, the deference approach compels courts to wrongly assume that the local church intended to submit to the church authority in perpetuity. As in this case, local churches often reserve the right to amend their articles and bylaws so they can disaffiliate if continued association interferes with their mission and ministry. *Masterson*, 422 S.W.2d at 609 (local church may disaffiliate absent contrary provisions in articles or bylaws); *Presbytery of the Twin Cities Area v. Eden Prairie Presbyterian*

Church, Inc., 2017 WL 1436050, at *8 (Minn. App. Apr. 24, 2017) (same). Under neutral principles, courts must properly determine whether the local church has retained that right by looking to the same corporate documents by which the local church manifested its affiliation in the first instance.

* * *

The hierarchical deference approach to secular church disputes offends traditional concepts of fairness, equal application of the law and, as shown below, First Amendment protections. It is incorrect and harmful, and has been rightly undermined by *Jones*, the states and recent scholarship. This Court should accept review under RAP 13.4(b)(4) because the public has a substantial interest in ascertaining whether *stare decisis* commands adherence to this antiquated and unjust rule.

B. This Court Should Accept Review Because Resolution Of *Secular* Church Disputes Involves A Significant Question Of Constitutional Law; Hierarchical Deference Violates The First Amendment's Establishment And Free Exercise Clauses.

Stare decisis does not compel this Court's continued adherence to *Rohrbaugh*. And even if it did, that doctrine does not resolve the grave constitutional concerns posed by hierarchical deference. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459, 48 P.3d 274 (2002) (citation and quotation marks omitted). *Rohrbaugh* did not consider, much less decide, whether hierarchical deference infringes the First Amendment rights of a

lawfully disaffiliating congregation where, as here, the parties' dispute can be resolved on purely secular grounds. No Washington decision has.

The U.S. Supreme Court has never considered the issue either. In *Jones*, the Court held that the First Amendment permitted state courts to use "neutral-principles of law" to resolve secular church disputes. While the Court did not foreclose *Watson*'s deference approach, it was not asked to decide whether the hierarchical deference approach itself violated the First Amendment. And, in the 40 years since, the Supreme Court has declined every opportunity to address the issue—leaving the development of that constitutional law to the states. M. McConnell & L. Goodrich, *supra*, at 310 (noting that *Jones* was "last major pronouncement on this subject," and that the "Court has repeatedly denied certiorari").

The state courts have not been silent. Numerous high and intermediate courts have concluded that secular church disputes must be decided by the neutral-principles approach because hierarchical deference would violate the Establishment and Free Exercise Clauses. *See Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 451 (Tenn. 2012); *All Saints Parish*, 685 S.E.2d at 172; *From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church*, 803 A.2d 548, 570 (Md. 2002); *Schenectady*, 464 N.E.2d at 460; *Fluker Cmty. Church v. Hitchens*, 419 So.2d 445, 447 (La. 1982); *Colonial Presbyterian Church v. Heartland Presbytery*, 375 S.W.3d 190, 197 n. 10 (Mo. App. 2012); *Aglikin v. Kovacheff*, 516 N.E.2d 704, 708 (Ill. App. 1987); *Presbytery of the Twin Cities*, 2017 WL 1436050, at *4 n.2.

This Court should accept review and join those other state courts holding that the First Amendment "commands" application of neutral-principles and prohibits blind hierarchical deference. *All Saints Parish*, 685 S.E.2d 163 at 172. This is so because "[r]efusal to adjudicate a dispute …, even when no interpretation or evaluation of ecclesiastical doctrine or practice is called for … may deny a local church recourse to an impartial body to resolve a just claim, thereby violating its members' rights under the free exercise provision, and also constituting a judicial establishment of the hierarchy's religion." *Fluker*, 419 So.2d at 447. Specifically:

Establishment of Religion. The First Amendment forbids states from preferring "one religion to another, or religion to irreligion." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994). Courts and scholars agree that hierarchical deference improperly does both: it prefers one kind of church (hierarchical) over others (congregational), and religious associations over secular ones. *See Fluker*, 419 So.2d at 447; *Schenectady*, 464 N.E.2d at 460; *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. Civ. App. 1999); *see also* M. Galligan, *Judicial Resolution of Intrachurch Disputes*, 83 Colum. L. Rev. 2007, 2021-22 (1983) (deference "effects an unconstitutional preference for hierarchical churches not only in relation to congregational churches but also in relation to nonreligious voluntary associations").[4]

[4] *See also* J. Hassler, *A Multitude Of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes*, 35 Pepp. L. Rev. 399 (2008) ("The general effect of adopting an approach that always leads to the victory of the general church in any such dispute at least raises questions about whether that approach tends toward an impermissible establishment of religion.") N. Belzer, *Deference in the Judicial Resolution of Intrachurch*

Free Exercise. Because the deference approach specifically targets religious conduct (*i.e.*, it is not generally applied), under both the First Amendment and the Washington constitution, such an approach violates the free exercise clause if it has a coercive effect on the practice of religion and cannot be justified by a compelling state interest. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); *Munns v. Martin*, 131 Wn.2d 192, 199-200, 930 P.2d 318 (1997). The hierarchical deference approach substantially interferes with a local church's and its members' free exercise of religion in two ways.

First, it effectively conditions disaffiliation on the local church's forfeiture of its property and control of its corporate affairs to the national church—even though that church has no cognizable interest in either thing under civil law. *See Fluker*, 419 So.2d at 447. As one court observed:

> [I]t would arguably violate the First Amendment … for a state to impose a rule of deference so iron-clad as to force a local church to either (1) continue its association with a national church whose religious beliefs the local church no longer shared; or (2) disassociate and, in so doing, put itself at the financial mercy of the national church which could … appropriate to itself all of the local church's property, despite having no right to do so under neutral principles of law.

Colonial Presbyterian Church, 375 S.W.3d at 197 n.10; *Presbytery of the Twin Cities*, 2017 WL 1436050, at *4 n.2 (same); *also* Galligan, *supra*, at

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Disputes: The Lesser of Two Constitutional Evils, 11 St. Thomas L. Rev. 109 (1998) ("The deference paid to the national church's description of its own polity evidences a strong preference for the rights of hierarchical churches, and thereby violates the Establishment Clause of the First Amendment."); A. Adams & W. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Penn. L. Rev. 1291 (1980) ("by encouraging and supporting a hierarchical form of church polity over other alternative forms, … *Watson*'s fiction of implied consent would appear to constitute a judicial establishment of religion").

2026 ("requiring courts automatically to … defer to a selected church body … violates the free exercise rights of churches and church members"). Here, for example, FPCS owned its property when it began its association with PCUSA, and it never transferred any interest in it to PCUSA. Under the deference approach, however, once FPCS chose to end its association, it was forced to forever surrender that same property to PCUSA.

Second, deference chills local churches from associating with hierarchical national churches—again, because a local church might rightly fear that doing so would mean relinquishing church authority to a national church in perpetuity, with no means to regain its corporate identity or property if it later dissociates. *Schenectady*, 464 N.E.2d at 460 (deference "discourages local churches from associating with a hierarchical church for purposes of religious worship out of fear of losing their property and the indirect result of discouraging such an association may constitute a violation of the free exercise clause"); *Aglikin,* 516 N.E.2d at 708 ("such a rule may result in discouraging local churches from associating themselves with other churches, and thereby infringe upon the free exercise of religion").

There is no compelling interest to justify these significant burdens on the religious practices of the local church and its members. As *Jones* explains, hierarchical deference is not constitutionally required, and the neutral-principles approach itself requires courts to abstain from deciding truly religious questions. 393 U.S. at 603-04. Indeed, the only benefit of the deference approach is predictability: if the case involves a hierarchical national church, the national church always wins. But that is not a sufficient

reason—and, certainly, not a compelling one—to excuse wholly unnecessary interference with religious freedom and association. The Court should accept review under RAP 13.4(b)(3) for this reason as well.

C. This Court Should Accept Review Because Washington Decisions Conflict As To Whether *Rohrbaugh*'s Hierarchical Deference Approach Applies To All Civil Disputes.

For all the reasons discussed above, *Rohrbaugh*'s hierarchical deference rule has created inconsistent standards of review. If a local church is (or was) a part of a hierarchical national church, then courts defer to the national church to resolve property disputes. *See Rohrbaugh*, *supra*; *Choi v. Sung*, 154 Wn. App. 303, 225 P.3d 425 (2010); *Southside Tabernacle v. Pentecostal Church of God, Pacific Northwest Dist., Inc.*, 32 Wn. App. 814, 650 P.2d 231 (1982). If, on the other hand, the local church is congregational, courts apply neutral-principles. *See Church of Christ at Centerville v. Carder*, 105 Wn.2d 204, 713 P.2d 101 (1986); *Kidisti Sekkassue Orthodox Tewehado Eritrean Church v. Medin*, 2003 WL 22000635 (Wn. App. Aug. 25, 2003). The result, of course, is that the outcome of a church property case will almost always turn solely upon the structure of the church rather than the merits of the dispute.

The law is similarly inconsistent in the context of tort, contract, and employment rights. This Court and the majority of appellate decisions recognize that *Rohrbaugh* plays no role in resolving such disputes; courts can use neutral-principles unless the dispute involves church doctrine or religious beliefs. *See C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 728, 985 P.2d 262 (1999); *In re Marriage of Obaidi and*

Qayoum, 154 Wn. App. 609, 615, 226 P.3d 787 (2012); *Rentz v. Werner*, 156 Wn. App. 423, 433-34, 435-36, 232 P.3d 1169 (2010); *Gates v. Seattle Archdiocese*, 103 Wn. App. 160, 166-67, 10 P.3d 435 (2000). These cases, however, conflict with the Published Opinion below and another decision that have extended *Rohrbaugh*'s deference approach from just property cases to every kind of civil dispute. Opinion at 23-27; *Org. for Preserving Constitution of Zion Lutheran Church of Auburn v. Mason*, 49 Wn. App. 441, 447, 743 P.2d 848 (1987).

This patchwork of conflicting caselaw should be unified in the only way that balances fundamental fairness with First Amendment rights. The structure of the church should not matter; nor should the nature of dispute. Washington courts should use neutral-principles of law to resolve all church-related disputes unless resolution of the dispute would require the court to delve into issues of religious doctrine, *i.e.*, the "ministerial exception" or "ecclesiastical abstention" doctrines apply. At the very minimum, this Court should clarify that *Rohrbaugh*'s deference approach has no application outside the church property context—and the Schulzes' employment case must be revived on this basis.

VI. CONCLUSION

This Court should accept review, overturn *Rohrbaugh*, adopt the neutral-principles approach to resolving secular church disputes, and bring Washington into line with contemporary First Amendment jurisprudence.

RESPECTFULLY SUBMITTED this 20th day of December 2019.

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CERTIFICATE OF SERVICE

I certify and declare that on December 20, 2019, I caused the foregoing Petition for Review to be served on the following person(s) as indicated:

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I hereby declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Executed at Seattle, Washington this 20th day of December, 2019.

s/Kathryn Savaria

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APPENDIX A

FILED
10/7/2019
Court of Appeals
Division I
State of Washington

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,

No. 78399-8-I

DIVISION ONE

PUBLISHED OPINION

FILED: October 7, 2019

Respondents,)
)
v.)
)
JEFF SCHULZ and ELLEN SCHULZ,)
as individuals and as the marital)
community comprised thereof,)
)
Appellants.)
)

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 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."

[1] 79 Wn.2d 367, 485 P.2d 615 (1971).

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.

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[2] Ch. 19.86 RCW.

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 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

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

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]

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

[4] Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).
[5] Steinbach, 98 Wn.2d at 437.
[6] 443 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.

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]

> [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

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

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]

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]

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[14] Rohrbaugh, 79 Wn.2d at 371-72, 373.
[15] Rohrbaugh, 79 Wn.2d at 367-73.
[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.

> 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 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

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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.

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 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]

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[24] In re Pers. Restraint 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.

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 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, Pacific Northwest District, 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,

[29] Rohrbaugh, 79 Wn.2d at 371-72.
[30] 32 Wn. App. 814, 821-22, 650 P.2d 231 (1982).

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 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

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

[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.

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 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 polity 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

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

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 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 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."

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

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, 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 Organization 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 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]

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[39] 49 Wn. App. 441, 442-44, 743 P.2d 848 (1987).
[40] Mason, 49 Wn. App. at 445-46.
[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.

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.

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

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

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 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

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

[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.

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,

> 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.

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[56] Elvig, 123 Wn. App. at 496.
[57] Elvig, 123 Wn. App. at 499.

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.

CONCLUSION

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

Leach, J.

WE CONCUR:

Mann, ACJ

Dwyer, J.

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	No. 78399-8-I ORDER DENYING MOTION FOR RECONSIDERATION

corporation,)
)
Respondents,)
)
v.)
)
JEFF SCHULZ and ELLEN SCHULZ,)
as individuals and as the marital)
community comprised thereof,)
)
Appellants.)
_____)

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:

Leach, J.
Judge

APPENDIX B

Adoption of Neutral-Principles (N-D) or Hierarchical Deference (H-D) After *Jones v. Wolf*

STATE	N-P	H-D	CASE
Alabama	X		*Haney's Chapel United Methodist Church v. United Methodist Church*, 716 So.2d 1156 (Ala. 1998)
Alaska	X		*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	X		*Ad Hoc Comm. of Parishioners of Our Lady of Sun Catholic Church, Inc. v. Reiss*, 224 P.3d 1002 (Ariz. App. 2010)
Arkansas	X		*Ark. Presbytery of Cumberland Presbyterian Church v. Hudson*, 40 S.W.3d 301 (Ark. 2001)
California	X		*Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009)
Colorado	X		*Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85, 102 (Colo. 1986)
Connecticut	X		*Episcopal Church in Diocese of Connecticut v. Gauss*, 28 A.3d 302 (Conn. 2011)
Delaware	X		*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)
Florida		X	*Townsend v. Teagle*, 467 So.2d 772 (Fla. App. 1985) (citing *Mills v. Baldwin*, 377 So.2d 971 (Fla. 1980)).
Georgia	X		*Jones v. Wolf*, 260 S.E.2d 84 (Ga. 1979)
Hawaii	X		*Redemption Bible College v. Intern'l Pentecostal Holiness Church*, 309 P.3d 969 (Table), 2013 WL 3863104 (Haw. App. July 23, 2013)
Idaho			(No Decisions)
Illinois	X		*Hines v. Turley*, 615 N.E.2d 1251 (Ill. App. 1993).
Indiana	X		*Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012)
Iowa	X	X	*Fonken v. Community Church of Kamrar*, 339 N.W.2d 810 (Iowa 1983) (approving use of either method)
Kansas		X	*Heartland Presbytery v. Presbyterian Church of Stanley, Inc.*, 390 P.3d 581 (Kan. App. 2017)
Kentucky	X		*Bjorkman v. Protestant Episcopal Church in the United States of America of the Diocese of Lexington*, 759 S.W.2d 583 (Ky. 1988)
Louisiana	X		*Fluker Community Church v. Hitchens*, 419 So.2d 445 (La. 1982)
Maine	X		*Graffam v. Wray*, 437 A.2d 627 (Me. 1981)

Maryland	X		*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	X		*Fortin v. Roman Catholic Bishop of Worcester*, 625 N.E.2d 1352 (Mass. 1994)
Michigan		X	*Bennison v. Sharp*, 329 N.W.2d 466 (Mich. App. 1982)
Minnesota	X		*Piletich v. Deretich*, 328 N.W.2d 696 (Minn. 1982)
Mississippi	X		*Church of God Pentecostal v. Freewill Pentecostal Church of God*, 716 So.2d 200 (Miss. 1998)
Missouri	X		*Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465 (Mo. 1984)
Montana	X		*New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 328 P.3d 586 (Mont. 2014)
Nebraska	X		*Aldrich on behalf of Bethel Lutheran Church v. Nelson on behalf of Bethel Lutheran Church*, 859 N.W.2d 537 (Neb. 2015)
Nevada		X	*Tea v. Protestant Episcopal Church in Diocese of Nevada*, 610 P.2d 182 (Nev. 1980)
New Hampshire	X		*Berthiaume v. McCormack*, 891 A.2d 539 (N.H. 2006)
New Jersey		X	*Protestant Episcopal Church in Diocese of New Jersey v. Graves*, 417 A.2d 19 (N.J. 1980)
New Mexico			(No Decisions)
New York	X		*First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.*, 464 N.E.2d 454 (N.Y. 1984)
North Carolina	X		*Davis v. Williams*, 774 S.E.2d 889, 892 (N.C. App. 2015)
North Dakota			(No Decisions)
Ohio	X		*Southern Ohio State Exec. Offices of Church of God v. Fairborn Church of God*, 573 N.E.2d 172 (Ohio. App. 1989)
Oklahoma	X		*Fowler v. Bailey*, 844 P.2d 141 (Okla. 1992)
Oregon	X		*Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 291 P.3d 711 (Or. 2012)
Pennsylvania	X		*Presbytery of Beaver–Butler v. Middlesex Presbyterian Church*, 489 A.2d 1317 (Pa. 1985)
Rhode Island			(No Decisions)
South Carolina	X		*All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina*, 685 S.E.2d 163 (S.C. 2009)
South Dakota	X		*Foss v. Dykstra*, 319 N.W.2d 499 (S.D. 1982)
Tennessee	X		*Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146 (Tenn. 2017)
Texas	X		*Masterson v. Diocese of Northwest Texas*, 422 S.W.3d 594 (Tex. 2013)
Utah	X		*Laumalie Ma'oni'oni Free Wesleyan Church of Tonga v. Ma'afu*, 440 P.3d 804 (Utah 2019)
Vermont			(No Decisions)

Virginia	X		*Falls Church v. Protestant Episcopal Church in U.S.*, 740 S.E.2d 530 (Va. 2013)
West Virginia		X	*Church of God of Madison v. Noel*, 318 S.E.2d 920 (W.Va. 1984)
Wisconsin	X		*Wisconsin Conference Bd. of Trustees of United Methodist Church, Inc. v. Culver*, 627 N.W.2d 469 (Wisc. 2001)
Wyoming			(No Decisions)

Neutral-Principles: 36 states

Hierarchical Deference: 6 states

Both: 1 state (Iowa)

No Decision: 6 states

LANE POWELL PC

December 20, 2019 - 10:48 AM

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