No. 93374-0

SUPREME COURT 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; WILLIAM LONGBRAKE, on behalf of himself and similarly situated members of First Presbyterian Church of Seattle,

Respondents,

v.

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

Petitioners.

ANSWER TO
STATEMENT OF GROUNDS
FOR DIRECT REVIEW

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A. INTRODUCTION

The former trustees of First Presbyterian Church of Seattle ("FPCS") (collectively, "defendants") seek direct review by the Supreme Court of five trial-court orders, but they fail to establish any of the limited grounds for such review. There is no conflict among decisions of the Court of Appeals or inconsistency in decisions of the Supreme Court that could justify direct review. The trial court simply applied this Court's unanimous holding in *Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wn.2d 367, 485 P.2d 615 (1971), to a nearly identical fact pattern.

The real reason that defendants want to bypass the Court of Appeals is that it, like the trial court, would be required to follow the polity approach to resolving church-property disputes set forth in *Rohrbaugh*. Defendants seek to overturn *Rohrbaugh*, and only the Supreme Court may do so. But defendants' diatribe against *Rohrbaugh* is baseless. Were the Supreme Court inclined to revisit that decision and consider whether to jettison its rule in favor of "neutral principles,"[1] the Court would have many reasons to re-affirm its holding. This case, however, is a singularly inappropriate vehicle for such revisiting. As

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[1] The neutral-principles approach supposedly "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges" to resolve disputes involving church property. *Jones v. Wolf*, 443 U.S. 595, 603, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979). But these "objective, well-established concepts" have proven to be highly unpredictable in real-life applications.

Judge Roberts determined, defendants cannot prevail under neutral principles any more than under the polity approach that *Rohrbaugh* soundly endorses. There is no basis to consider changing the law where doing so would not affect the case at bar.

B. ARGUMENT

1. There is no uncertainty in this Court's decisions or conflict among Washington courts over *Rohrbaugh*.

This Court will accept direct review of a superior court decision only in the types of cases identified in RAP 4.2(a), none of which apply here. Defendants fail to cite RAP 4.2, much less justify their motion under its standards. To be sure, defendants suggest that there are inconsistent appellate decisions, which—if true—could warrant review under RAP 4.2(a)(3). But they are wrong. Washington courts have uniformly applied *Rohrbaugh*'s polity approach: If "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 matter has been decided by the highest tribunal to which it has been carried in the denomination, "the civil court will accept that decision as conclusive." 79 Wn.2d at 373.

Rohrbaugh's validity has never been called into question, and its holding has been applied consistently. For example, in *Erdman v. Chapel Hill Presbyterian Church*, 175 Wn.2d 659, 682, 286 P.3d 357 (2012), this

Court reaffirmed that "in [*Rohrbaugh*], this court . . . recognized the principle that deference is to be afforded . . . decisions of an ecclesiastical tribunal of a hierarchical church." The Court held that an employment claim that had previously been ruled upon by a committee of the Presbytery of Olympia was not cognizable in civil court. *Id.* While rejecting the neutral-principles approach in the context of that case, the Court mentioned the U.S. Supreme Court has applied neutral principles "in limited circumstances," including "certain property disputes involving church property," but only where church property disputes did not touch in any respect on religious beliefs. *Id.* at 676 n.9. The plurality in *Erdman* thus reaffirmed *Rohrbaugh*, and its decision offers no reason to question Washington's approach to resolving church property disputes involving religious doctrine as set forth in *Rohrbaugh*.

In the Court of Appeals, too, the polity approach has been faithfully applied. In *Choi v. Sung*, 154 Wn. App. 303, 315 n.16, 225 P.3d 425 (2010), the Court of Appeals recognized that "courts in other jurisdictions have approved" the neutral-principles approach, but it concluded that this Court in *Rohrbaugh* adopted the polity approach as the exclusive means of resolving disputes within a hierarchical church. The court therefore affirmed the trial court's determination that another Reformed denomination was hierarchical, and it accorded conclusive

deference to a higher council's determination of the true congregation and pastor. *Id.* at 316. Similarly, in *Organization for Preserving Constitution of Zion Lutheran Church of Auburn v. Mason*, 49 Wn. App. 441, 447, 743 P.2d 848 (1987), the Court of Appeals viewed the polity approach as the sole permissible approach in Washington. *See id.* at 448-49 (noting that while dissenting church members had argued for application of neutral principles, "the neutral principles approach has not been embraced by any court in this jurisdiction").[2]

No reported case is to the contrary. Defendants rely upon one case rejecting the application of Islamic law to property being divided between individuals in a marriage dissolution—a case that did not cite *Rohrbaugh* and has nothing to do with church governance—and an unpublished disposition. *See* Statement of Grounds at 3, 9 (citing *In re Marriage of Obaidi and Qayoum*, 154 Wn. App. 609, 226 P.3d 787 (2010), and *Kidisti Sekkassue Orthodox Tewahado Eritrean Church v. Medin*, 2003 WL 22000635 (Wn. App. Aug. 25, 2003)).[3] Defendants also suggest that *Church of Christ at Centerville v. Carder* was a case where this Court

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[2] Because the trial court in *Mason* had wrongly held that it lacked jurisdiction, and no record existed as to whether the Lutheran Church of America-Missouri Synod was hierarchical with respect to the issue confronted by the court, the Court of Appeals remanded the case to the trial court to decide the issue. *Id.* at 449.

[3] Defendants' citation to this case violates GR 14.1. In any event, the case does not involve the polity of a hierarchical church.

"applied neutral principles to a property dispute," Statement of Grounds at 8, but this suggestion is highly misleading. The *Carder* Court applied the rule that has governed property disputes in ***congregational*** churches since at least 1872, *see* 105 Wn.2d 204, 209, 713 P.2d 101 (1986) (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 724, 20 L. Ed. 666 (1872)), and it did not speak to the standard to be applied to a hierarchical denomination.

The law is well settled in Washington, as the trial court recognized. There is no reason for this Court to intervene and take the extraordinary step of reviewing a non-final superior court decision. Defendants have failed to show that RAP 4.2(a) provides any basis for direct review.

2. *Rohrbaugh* specifically rejected "neutral principles."

Defendants suggest that *Rohrbaugh* should be reconsidered because it preceded *Jones*, where the Supreme Court recognized "neutral principles" as acceptable under the First Amendment. Defendants claim that "[t]hings changed after *Rohrbaugh* was decided in 1971" and that it is time to reconsider whether Washington should adopt the neutral-principles approach. *See* Statement of Grounds at 7. But defendants fail to point out that *Rohrbaugh* considered and expressly rejected a neutral-principles analysis. This Court should not now revisit that decision.

As pointed out in *Jones*, the neutral-principles approach had been "approved in" *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 90 S. Ct. 499, 24 L. Ed. 2d 582 (1970), which dismissed for want of a substantial federal question a case resolving a property dispute between a denomination and two secessionist churches on the basis of property deeds and the church's constitution. 443 U.S. at 603. *Jones* also cited three opinions from 1969, 1970, and 1976 in which "[n]eutral principles of law . . . received approving reference . . ." *Id.* (citing *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969); *Maryland & Virginia Churches*, 396 U.S. at 368-70 (Brennan, J., concurring); *Serbian E. Orthodox Diocese for the U.S.A. & Canada v. Milivojevich*, 426 U.S. 696, 723 n.15, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976)).

Not only was the neutral-principles approach ***available*** to the *Rohrbaugh* Court; it also was ***rejected*** by the *Rohrbaugh* Court. The Court discussed at length *Presbyterian Church in the U.S. v. Eastern Heights Presbyterian Church*, 225 Ga. 259, 167 S.E.2d 658 (1969). *See* 79 Wn.2d at 369-72. In *Eastern Heights*, the Georgia court resolved a dispute between the Presbyterian Church in the United States and a congregation by determining "where the legal title lies, which

determination civil courts can make." 225 Ga. at 260. The court determined that the property deeds to the church property named the local churches themselves, and it held that "legal title to the property is in the respective local churches." *Id.* at 260-61. *Jones* itself cited this case (which it called "*Presbyterian Church II*") and stated that the Georgia court "adopted what is now known as the 'neutral principles of law' method for resolving church property disputes." 443 U.S. at 659-60.

This Court in *Rohrbaugh* found the *Presbyterian Church II* analysis unpersuasive. As *Rohrbaugh* noted, while the Georgia court had held that the church corporation held legal title, it ignored the fact that "under the constitution of the church, only the loyal members of the church could be regarded as members of the congregation." 79 Wn.2d at 372. The *Rohrbaugh* Court also noted that even if the property belonged to the departing trustees, "the trust was defined by the provisions of the church constitution," which set forth the trustees' duties with respect to the property. *Id.* And in any event, the *Rohrbaugh* Court saw "no reason to abandon" the polity approach. *Id.* at 372-73. In short, the *Rohrbaugh* Court wisely recognized that the neutral-principles approach does not account for the inherently religious question of who constitutes the true church in whom property is formally titled. *See generally Apostolic Faith*

Mission of Portland, Or. v. Christian Evangelical Church, 55 Wn.2d 364, 347 P.2d 1059 (1960).

The fact that *Rohrbaugh* rejected neutral principles in favor of the polity approach is recognized both in *Choi*, 154 Wn. App. at 315 n.16, which noted that this Court there "disavowed" the neutral-principles approach, and in *Mason*, 49 Wn. App. at 447, which noted that the Court in *Rohrbaugh* "expressly rejected the neutral principles method . . . ." Contrary to defendants' contention that this Court has not considered whether to adopt a neutral-principles approach, it has addressed the question and has rejected that approach.

3. This Court has had good reason to follow the polity approach, as it is far superior to "neutral principles."

Defendants assert that the so-called "neutral-principles" approach is better than the polity approach. On the contrary, the neutral-principles approach is confusing, is based upon false assumptions, and discriminates against religious denominations that have a hierarchical polity.

First, the neutral-principles approach has brought uncertainty to what was previously a clear area of the law. Even the law review articles cited by defendants as endorsing this approach recognize that its application has produced radically different outcomes throughout the country. For example, Professor McConnell's article points to great

uncertainty over the approach. The article states that "[t]he blame for the uncertainty falls squarely on the United States Supreme Court" because of its unclear decision in *Jones*. *See* M. McConnell & L. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 310 (2016).[4] Yet *Jones* is the case that defendants want this Court to embrace.

With this uncertainty has come a groundswell of litigation over church governance, in which dissenting members of churches governed by hierarchical polities have been encouraged to flout the rules they agreed to in joining the denomination. While this has surely benefited attorneys such as Lloyd Lunceford of Baton Rouge, LA, who specializes in helping churches secede from hierarchical denominations, *see* App. 597, it has diverted church funds that should be devoted to mission and ministry to lawyers and litigation instead.

Defendants here followed a cynical but common playbook in devising their secession plan: They attempted to shift church assets, rewrite governing documents, and insert "poison pills" such as indemnity clauses and rich severance agreements for the co-pastors. *See* PA 84, 99, 101, 547-48. They then embarked on a litigation strategy involving convoluted arguments about how these actions supersede the Church

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[4] Further reflecting the confusion caused by *Jones*, another article cited by defendants indicates that courts can take six separate approaches in applying a neutral-principles analysis. J. Hassler, *A Multitude of Sins?*, 35 Pepp. L. Rev. 399, 436-44 (2008).

Constitution. This included offering the testimony of "experts" who portrayed mandatory Church doctrines as "aspirational" or otherwise unimportant and who misrepresented financial statements. *Cf. Lamont Cmty. Church v. Lamont Christian Reformed Church*, 285 Mich. App. 602, 617 & n.7, 777 N.W.2d 15 (2009) (criticizing testimony from defendants' counsel Lloyd Lunceford and holding that the hearing including his testimony "devolved into an impermissible 'searching' inquiry into the polity" of that denomination); *see* PA 320-326. The many cases cited by defendants involving property disputes within hierarchical denominations stem directly from *Jones*. This Court should not follow that path.

Second, the neutral-principles approach rests on a false premise: that "church property disputes" are invariably secular and do not involve church doctrine. As the four dissenters pointed out in *Jones*,[5] disputes that affect church property arise "almost invariably out of disagreements regarding doctrine and practice." 443 U.S. at 616 (Powell, J., dissenting). Disagreements affecting control of church property are usually over "which faction should have control of the local church," *id.* at 614, an inherently ecclesiastical determination. Such is the case here, where the

[5] The *Jones* dissenters believed that deference to the judgment of a higher church council should be mandatory, not just permissible.

Administrative Commission found a schism and determined that those who opposed defendants' actions constituted the true church.

Defendants seek license to ignore the Administrative Commission's decision under a neutral-principles analysis, but as the *Jones* dissent points out, what defendants really ask is that a court substitute its judgment for that of a higher church council:

> When civil courts step in to resolve intrachurch disputes over control of church property, they will either support or overturn the authoritative resolution of the dispute within the church itself. The new analysis, under the attractive banner of "neutral principles," actually invites the civil courts to do the latter. The proper rule of decision . . . requires a court to give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose.

Id. at 614. Ironically (and hypocritically), defendants also invite the court to delve deeply into matters of religious doctrine and practice in their effort to disprove that the Church Constitution forbids defendants' wrongful actions and that the Church has a valid trust interest in property. This is the very evil that "neutral principles" was supposed to avoid.

Third, a neutral-principles approach is inconsistent with the First Amendment. Advocates of neutral principles seek to turn the polity approach on its head by having courts declare, as a matter of First Amendment principle, that a church within a hierarchical denomination must be treated just like a congregational church. The Presbyterian

Church, however, is unitary, and its very name reflects representational leadership by presbyters in ascending councils: Session, Presbytery, Synod, and General Assembly.

Although defendants criticize the polity approach for failing to apply a rule "equally for all churches," Statement of Grounds at 10, it makes no sense for congregations within a hierarchical denomination to be governed by the same rules as congregations that are part of a congregational denomination. The entire point of a hierarchical polity is to provide predictability and accountability in matters of faith and practice, something defendants seek to flout. The polity approach is also consistent with how Washington courts have treated disputes within non-religious hierarchies. *See Anderson v. Enter. Lodge No. 2*, 80 Wn. App. 41, 47, 906 P.2d 962 (1995), *review denied*, 129 Wn.2d 1015 (1996) (deferring to statewide organization's interpretation of its governing documents in suit by dissident members); *Couie v. Local Union No. 1849 United Bhd. of Carpenters & Joiners of Am.*, 51 Wn.2d 108, 115, 316 P.2d 473 (1957) (courts will not interfere with union's own interpretation of its constitution unless interpretation is arbitrary and unreasonable).[6] The

[6] Defendants suggest that the First Amendment may ***require*** a court to adopt neutral principles, lest the polity approach favor the denomination. This is simply incorrect under *Jones* itself, which permits but does not require courts to use neutral principles. 443 U.S. at 602 (noting that a state may "adopt any one of various approaches for settling

approach is sound as a matter of policy, and it should not be reconsidered in this case.

4. There is no reason to depart from *stare decisis*.

"A party asking this court to reject its precedent faces a challenging task. The party must show not merely that it would have been reasonable to reach a different conclusion in the first instance, but that the prior decision is so incorrect and harmful that it would be unreasonable to adhere to it." *State v. Otton*, __ Wn.2d __, No. 91669-1, 2016 WL 3249468, at *8 (June 9, 2016). *Rohrbaugh* is neither incorrect nor harmful, much less so obviously wrong that it should be overturned.

Defendants cannot seriously argue that *Rohrbaugh* was incorrectly decided. Instead, as the U.S. Supreme Court confirmed in *Jones*, this Court applied a correct rule of law in *Rohrbaugh*. States are free to adopt the polity approach in resolving church property disputes, and this Court has done so, rejecting the neutral-principles approach.[7] *See generally City*

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church property disputes so long as it involves no consideration of doctrinal matters . . ."). The two out-of-state cases relied upon by defendants are unpersuasive. *Fluker Community Church v. Hitchens*, 419 So.2d 445, 447 (La. 1982), mentioned that the polity approach "may" deny a local church recourse to an "impartial body to resolve a just claim." It has not been cited for this principle outside of Louisiana. *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina*, 385 S.C. 428, 444-45, 685 S.E.2d 163 (2009), described another case as holding that "where a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so," but that case contained no such holding. *See Pearson v. Church of God*, 325 S.C. 45, 52-53, 478 S.E.2d 849 (1996).

[7] Nor is this a case in which, on an issue of federal law, the "legal underpinnings of [the Court's] precedent have changed or disappeared altogether." *W.G. Clark Const. Co. v.*

of Fed. Way v. Koenig, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009) ("Making the same arguments that the original court thoroughly considered and decided does not constitute a showing of 'incorrect and harmful.'").

Defendants also cannot show that *Rohrbaugh* is harmful. In *Otton*, for example, this Court held that it would not overrule its interpretation of a hearsay exception for written statements submitted by domestic violence victims under penalty of perjury, even though some jurisdictions had disagreed with that interpretation. 2016 WL 3249468 at *6. The Court reasoned that its prior decision in *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982), even if incorrect, adequately ensured the reliability of the out-of-court statement and did not harm the rights of criminal defendants. *Id.* The same logic compels rejection of defendants' motion. Even if this Court were inclined to apply a neutral-principles analysis if it were to decide the issue anew, *Jones* has already confirmed that both methods are acceptable to resolve church governance disputes without entangling courts in ecclesiastical matters.

Pac. Nw. Reg'l Council of Carpenters, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014) (overruling prior ERISA preemption doctrine where interpretation conflicted with federal courts' interpretation of a federal statute). Instead, the Washington Supreme Court had before it the polity approach and the neutral-principles approach in *Rohrbaugh*, and it selected the polity approach. That other states have chosen to apply neutral principles is of no moment, because "a decision is not necessarily incorrect merely because it lacks universal acceptance." *Otton*, 2016 WL 3249468 at *4.

Instead, it is defendants' attempt to overturn a longstanding precedent that would be harmful. *Stare decisis* "protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). Religious denominations in Washington have relied upon the polity approach for over a century, and that reliance was justified again by the *Rohrbaugh* decision. To overrule *Rohrbaugh*, thereby sanctioning defendants' efforts to flout church polity and ignore the decision of a higher tribunal, would undermine the clarity of the law and adversely affect churches throughout Washington.

C. CONCLUSION

As plaintiffs' answer to the motion for discretionary review points out, the trial court addressed defendants' claims under both the polity approach and the neutral-principles approach. It ruled that defendants' attempt to secede from the Presbyterian Church (U.S.A.) failed under either test. If this Court should ever wish to re-examine its approach to resolving church-property disputes, it ought to do so in a case where the distinction matters.

In any event, no grounds for direct review are present here. The decisions of this Court and the Court of Appeals betray neither confusion nor inconsistency, and *Rohrbaugh* sets forth a sound rule of law.

Respectfully submitted this 20th day of July, 2016.

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