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.

RESPONDENTS' ANSWER TO PETITIONERS' EMERGENCY MOTION FOR STAY

A. INTRODUCTION

As the trial court recognized, Seattle Presbytery has ecclesiastical authority to ensure that First Presbyterian Church of Seattle ("FPCS") is properly governed. The trial court denied petitioners' motion for preliminary injunction and their subsequent motion for a stay. In a third bite at the apple, petitioners ask this Court to become embroiled in the polity and governance of the Presbyterian Church (U.S.A.). This is constitutionally impermissible. The trial court's rulings were required by governing law, and petitioners cannot meet the requirements for a stay set forth in the Rules of Appellate Procedure.

Petitioners' motion for a stay is also based on false assumptions. Petitioners assert that permitting respondents to inform third parties about the trial court's orders and to accept monies owed to FPCS will force the church to shut its doors, leaving a dark building with staff, employees, and parishioners pushed onto the street. Not so. Indeed, so far from rendering meaningless the appellate victory petitioners still hope for, allowing the true church to re-assume control of the historic downtown property of FPCS will promote the viability of that church. Respondents are committed to FPCS's vitality, and they will continue to provide a place of employment and worship for those who currently work and worship at FPCS. Petitioners' emergency motion for a stay must be denied.

B. ARGUMENT

Under the Rules of Appellate Procedure, "[a] trial court decision may be enforced pending appeal . . . unless stayed." RAP 8.1(b). Thus, "[***a***]***ny person may take action premised on the validity of a trial court . . . decision*** until enforcement of the . . . decision is stayed as provided in [RAP] 8.1 or 8.3." RAP 7.2(c) (emphasis added).[1] An appellate court may, but need not, use its discretion to stay enforcement of a trial court decision. *See* RAP 8.1(b)(3); RAP 8.3. In deciding whether to do so, the court will (1) consider whether the movant can demonstrate that "debatable issues are presented on appeal" and (2) compare the injury the movant would suffer in the absence of a stay with the injury the nonmovant would suffer if a stay is issued. RAP 8.1(b)(3). If the motion for a stay is granted, such relief will be "ordinarily . . . condition[ed] . . . on the furnishing of a supersedeas bond." RAP 8.1(b)(3).[2]

---

[1] Thus, rather than being impermissible "self-help" as petitioners claim, respondents' efforts to take rightful control of their property and protect third parties from inconsistent payment obligations are not premature but rather are specifically permitted by RAP 7.2(c).

[2] "When the Rules of Appellate Procedure were first adopted, RAP 8.3 was designed to grant the appellate court the authority to stay enforcement of a judgment other than a money judgment or a judgment affecting property. That authority is now expressly found in RAP 8.1(b)(3), leaving RAP 8.3 to cover other, miscellaneous situations in which an appellate court might be called upon to enter orders needed to insure effective and equitable review." 2A Karl B. Tegland, Washington Practice: Rules Practice 616 (8th ed. 2014). Because this case does not involve a "judgment" but rather an interlocutory decision, this Court employs the test set out in RAP 8.1(b)(3). *See* RAP 8.1(b)(3) (permitting appellate court to stay enforcement of a trial court "decision").

1. Even if direct discretionary review is granted, the issues presented are not debatable.

a. *Rohrbaugh* is settled law in Washington.

Petitioners misunderstand how the "debatable issues" test applies. They argue that "if the neutral-principles approach applies here, . . . it is more than 'debatable' that [petitioners] will prevail." Mot. for Stay at 11. But the first question as to which they must demonstrate debatability is whether the neutral-principles approach actually applies here. *See* RAP 8.1(b)(3) (directing the Court to consider "whether the moving party can demonstrate that debatable issues are ***presented on appeal***." (emphasis added)).

It is beyond debate that Washington courts require deference to the ecclesiastical decisions of a higher council in a hierarchical denomination. *See Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wn.2d 367, 485 P.2d 615 (1971), *cert. denied*, 405 U.S. 996 (1972). Petitioners portray the U.S. Supreme Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979), as implicitly overruling *Rohrbaugh*, but it did no such thing. On the contrary, *Jones* approved the neutral-principles approach but specifically held that the compulsory-deference approach was equally permissible for use in church-property disputes. *See id.* at 609 ("[I]f Georgia law provides that the identity of the [local] church is to be determined according to the

'laws and regulations' of the [Presbyterian denomination], ***then the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination of that church's identity***." (emphasis added)).

Petitioners try to manufacture a point of debate by suggesting that Washington precedent is unclear about whether the compulsory-deference approach still applies. But case law is very clear. Washington courts continue to endorse unequivocally *Rohrbaugh*'s deference approach in cases involving hierarchical churches. In *Erdman v. Chapel Hill Presbyterian Church*, 175 Wn.2d 659, 666, 286 P.3d 357 (2012), for example, this Court recognized that, although some ***non***-Washington courts apply the neutral-principles approach, the hierarchical church in that case (the same one as here) had a "First Amendment right . . . to deference to decisions made by its ecclesiastical tribunals." *See also id.* at 676 ("[T]he neutral principles . . . approach is not a proper approach for the claims before us.").[3]

[3] Petitioners' reliance on *Church of Christ at Centerville v. Carder*, 105 Wn.2d 204, 713 P.2d 101 (1986), is misplaced. There, the court recognized that "We are dealing with a congregational church," and not with a hierarchical church that would trigger compulsory deference. *Id.* at 208. Also inapposite is *In re Marriage of Obaidi and Qayoum*, 154 Wn. App. 609, 226 P.3d 787 (2010), where the court applied neutral principles to invalidate an unconscionable prenuptial agreement. There, neither party to the marriage was part of a hierarchical denomination, and no ecclesiastical tribunal had made any decision that could be subject to deference.

No Washington court has ever applied the neutral-principles approach to a church-property dispute involving a hierarchical church. *See Choi v. Sung*, 154 Wn. App. 303, 315 n.16, 225 P.3d 425, *review denied*, 169 Wn.2d 1009 (2010), *cert. denied*, 562 U.S. 1137 (2011) ("Courts in other jurisdictions have approved of other approaches to property disputes in a hierarchical setting . . . . [But] [t]he Washington Supreme Court has disavowed the approach taken in *Jones v. Wolf*, and exclusively adopted the deference approach."); *Org. for Preserving Constitution of Zion Lutheran Church of Auburn v. Mason*, 49 Wn. App. 441, 449, 743 P.2d 848 (1987) ("[T]he neutral principles approach has not been embraced by any court in this jurisdiction.").

Petitioners cannot generate a "debatable issue" merely by citing decisions from other jurisdictions that employ the approach Washington has specifically rejected. *See Choi*, 154 Wn. App. at 315 n.16. If this Court grants discretionary review, it is conceivable that the Court might disregard *stare decisis*, overturn its unanimous decision in *Rohrbaugh*, and adopt the neutral-principles approach, but this possibility does not render the current state of Washington law subject to any debate. It is firmly settled that Washington is a "polity" state and that, when it comes to deciding property disputes involving matters of doctrine, ecclesiastical

law, rule, or custom in a hierarchical church, the courts defer to the decision of a higher council. About this there is no debate.

Petitioners argue that the neutral-principles approach is superior to the deference approach. They are mistaken. This argument is addressed in Respondents' Answer to Statement of Grounds for Direct Review at pp. 8-13, and respondents incorporate those arguments by reference here. Petitioners also argue that, if the neutral-principles approach were to apply, they would prevail under corporate and property law. Not so; Judge Roberts has already rejected their argument. *See* Respondents' Answer to Motion for Discretionary Review at pp. 11-17, which respondents incorporate here by reference. *See also* Exhibit 3 to the Declaration of Robert B. Mitchell in Opposition to Emergency Motion for Stay ("Mitchell Decl."), Exhibit C (Secretary of State has stamped petitioners' Nov. 16, 2015, filing of amended articles of incorporation "Void and without effect").

b. <u>The trial court correctly granted summary judgment and denied petitioners' motion for reconsideration</u>.

Petitioners' argument on this point is addressed in Respondents' Answer to Motion for Discretionary Review at pp. 5-11, and respondents incorporate those arguments by reference.

2. The injury petitioners will suffer if no stay is granted is small compared to the injury respondents will suffer if a stay is granted.

Denying petitioners' motion for a stay will neither foreclose them from pursuing discretionary review nor deny them the fruits of potential success, however faint the prospects for such success now appear. To the contrary, denying a stay will allow the true church to safeguard FPCS's continued existence while changing the "facts on the ground" very little. This will preserve the fruits of petitioners' motion for discretionary review in the unlikely event that it succeeds. On the other hand, entering a stay would thwart the Presbyterian Church's right to ecclesiastical self-governance and would force it to remain a bystander while the witness and the ministry of the Presbyterian Church in Seattle wither away.

a. Petitioners exaggerate the injury, if any, that they will suffer without a stay.

Petitioners claim that, absent a stay, FPCS will be forced to close its doors, dismiss pastors and staff, and stop the worship services, missions, and programs that it offers. Because of this, they argue, any appellate victory they might achieve will be hollow. Not so.

No stay is needed to preserve the fruits of appellate review if such review is both granted and successful. The Administrative Commission, which constitutes FPCS's current leadership, fully intends and is prepared to continue the ministries, programs, and services of FPCS. Declaration of

Scott Lumsden in Opposition to Motion for Stay ("Lumsden Decl."), ¶ 18. If petitioners cooperate, the transition will be seamless and can be easily undone should petitioners ultimately prevail. *See id.*

Once the true church's leadership is restored, funds will be disbursed to ensure that FPCS's ministries and programs are continued, that staff is compensated, and that financial obligations are met with respect to tenants, maintenance, and utilities. *Id.* ¶ 20. Specifically, the programs generally described at ¶¶ 8-19 of the Declaration of David Martin in Support of Petitioners' Emergency Motion for Stay will be continued under the true church's leadership. Lumsden Decl., ¶ 21.

If the emergency motion for stay is denied and petitioners either volunteer or are required to relinquish the premises, the true church's leadership can and will assume control of and manage the church's property without interruption. *Id.* ¶ 22. The true church's leadership will pay all proper maintenance, payroll, program-related, lease-related, and other administrative costs that are essential to conducting the ministries and programs of the true church. *Id.* It also will be able to address allegations of financial impropriety and mismanagement, based on the findings and credible reports that are documented in the Administrative Commission's report. *See* PA 31-32, 39-40.

The Presbytery and the Administrative Commission, comprising the Session of the true church, are in a far better position to manage church finances than petitioners. The Presbytery and Administrative Commission have the leadership, resources, and backing of the Church. Lumsden Decl., ¶ 23. Far from being harmed, FPCS would benefit from the denial of a stay because the true church's leadership has (1) full ministry support of the Presbytery and its member churches; (2) full financial support of the Presbytery through proceeds of its mission asset fund account in addition to the funds from FPCS congregational donations and lease revenue; (3) full support of ecumenical partners, who have long been separated from the petitioners; and (4) full support of the Presbytery staff. *Id.*

The true church's leadership is also committed to retaining the current employees at FPCS until at least thirty days after the petitioners' motion for discretionary review is denied, or, if the motion is granted, until the appeals process is resolved. Lumsden Decl., ¶ 24. Although the Schulzes, having renounced the jurisdiction of the Church, are not employees and can have no role in leading worship services or otherwise ministering at FPCS, the Session as an accommodation will pay the Schulzes at their current rate of pay until at least 30 days after the motion for discretionary review is denied or, if granted, until the propriety of their

purported "severance" agreements is addressed and, if need be, adjudicated. *Id.* ¶ 25.

No stay is needed to allow those worshiping at FPCS to continue attending the church for worship services and other activities. Lumsden Decl., ¶ 27. From the perspective of a parishioner or attendee of a church service or program, nothing will change other than that Pastor Heidi Husted Armstrong will be the pastor in charge. *Id.* The only other difference will be administrative, with the leadership of the true church restored. *Id.* That leadership will oversee the disbursement and expenditure of funds in a responsible way, thereby preserving the church's assets, and will allow FPCS to deepen its ecumenical presence and relationships with the broader Seattle church community. *Id.*[4] Only in this fashion will FPCS be truly Presbyterian.

Respondents will, of course, also comply with the law. *Id.* ¶ 29. Should petitioners prevail in this matter and receive a final judgment on the merits from which no appeal can be taken, the Administrative Commission will return control of the property to petitioners and account for any funds earned or expended in the interim. *Id.*

---

[4] Although the Presbytery and the Session will not use funds that FPCS is entitled to receive to finance litigation against them, they also will not unreasonably withhold funds from programs that the former ruling elders may wish to maintain or pursue, should they return to the true church. Lumsden Decl., ¶ 28.

Rather than being on the brink of closing its doors, as petitioners argue, FPCS stands at the threshold of a long-awaited new beginning. Lumsden Decl., ¶ 30. The only thing obstructing this is petitioners' intransigence and continued use of the church's name even if not carrying out its mission or abiding by its governing principles. *Id.* The Presbytery is dedicated to FPCS's vitality, and it is prepared to support that mission spiritually, financially, and administratively. *Id.* ¶ 31. Accordingly, even with the true church managing and administering the church property, ministries, and programs, the "facts on the ground" will remain largely as they are, and the harms petitioners threaten will not materialize.

b. An emergency stay would harm respondents' religious practice, hamper their ability to litigate this case, and impose difficult obligations on third parties.

i. *A stay would directly harm the mission, ministry, and self-governance of FPCS.*

A stay would directly harm respondents' religious practice by (1) interfering with their ecclesiastical self-governance; (2) hampering the Presbytery's ability to maintain a local Presbyterian congregation and presence in downtown Seattle; (3) forcing the true church to hold religious services in inferior venues; and (4) frustrating the true church's lawful efforts to regain its rightful property.

First, an emergency stay would interfere with ecclesiastical governance. The Constitution of the Presbyterian Church (U.S.A.), which

sets forth the ecclesiastical law of the Church, provides that the particular congregations of the denomination constitute one church, which is governed by a hierarchical series of councils. Lumsden Decl., ¶¶ 9-10. Because this structure is required under ecclesiastical law, an emergency stay would impair the self-governance of the Church and of FPCS. Preventing Seattle Presbytery from exercising its ecclesiastical decision-making authority over a local congregation in its purview would also interfere with the relationship between the presbytery and the local congregation. *Id.* ¶ 11.

Second, the presence of a non-denominational ministry, led by petitioners Jeff and Ellen Schulz, in the FPCS building and using the name "First Presbyterian Church of Seattle" has created confusion in the Seattle community.[5] Lumsden Decl., ¶ 12. While claiming the name "Presbyterian," petitioners have renounced the jurisdiction of the Church and are not affiliated with any Presbyterian denomination. Their actions have also undermined Seattle Presbytery's ability, through a local congregation, to maintain a presence in downtown Seattle, to deepen

[5] That FPCS's website and membership list are currently under petitioners' control further compounds this problem. Declaration of Heidi Husted Armstrong in Opposition to Motion for Stay ("Husted Armstrong Decl."), ¶ 11. Petitioners' control over the website and membership list hinders the true church's ability to communicate with current and prospective congregants, resulting in much confusion and ill will among parishioners. *Id.* By preventing the true church from communicating with congregants or accessing its rightful property, petitioners continue to sow seeds of confusion and resentment and continue to jeopardize the long-term health of the congregation. *Id.* ¶ 14.

relationships with other religious leaders and ministries in the area, and to extend its mission by supporting community and religious programs. *Id.*

Petitioners' ministry, which now falsely purports to be that of FPCS, has retreated from FPCS's traditionally high level of community involvement and urban ministry. *Id.* ¶ 15. Historically, the church was involved in many efforts throughout the city, including ministering to groups in underprivileged communities and working on ecumenical relationships and projects with other churches in the area. *Id.* ¶ 16. But petitioners have withdrawn the public face of FPCS from most of these projects, which means that the presence of Presbyterianism in downtown Seattle has shrunk to a sliver of its former prominence. *Id.*; *see also* Husted Armstrong Decl., ¶ 12. A stay would force the true church to watch as a church unrelated to it, yet bearing its name, fails to carry out FPCS's mission in Seattle. Lumsden Decl., ¶ 17.

Third, because the former co-pastors and former ruling elders have refused to leave the premises despite being ordered to do so, the true church has been forced to conduct worship services at other, less suitable locations. Husted Armstrong Decl., ¶¶ 8-9. The lack of access to worship space poses a hardship to the true church. *Id.* ¶ 10. But beyond interfering with Sunday worship, petitioners' continued occupation of the church's physical facilities also denies the true church access to office,

administrative, classroom and community space (including for counseling, pastoral care, fellowship opportunities, Bible study and faith-formation classes, and other activities to build community and nurture spiritual growth). *Id.*

Fourth, a stay in this case would frustrate the true church's efforts to regain its rightful property. That effort began on February 16, 2016, when the Administrative Commission sent petitioners a letter advising them that, pursuant to the Administrative Commission's binding report, they had to vacate the premises within 48 hours. *See* Mitchell Decl., ¶¶ 2-6; Husted Armstrong Decl., ¶ 8. When petitioners refused to comply with this valid direction, respondents promptly filed a civil action against them. Mitchell Decl., ¶ 7. Petitioners' assertion that respondents will not be injured by a stay because they seem to be fine without access to their property and have not sought it is simply false.

Without full access to the church property, the future ministry opportunities envisioned by the Administrative Commission and the members of the true church are stymied. Husted Armstrong Decl., ¶ 16. A stay would thus harm, perhaps irrevocably, the ministries of FPCS that have been part of Seattle Presbytery for more than a century. *Id.* Granting a stay would prolong and exacerbate the harm that respondents have suffered for months, whereas denying the stay would let respondents take

back property that is rightfully theirs and would preserve the church's ministries and resources while also preserving the fruits, if any, of petitioners' motion for discretionary review.

ii. *An emergency stay would unfairly hamper respondents in pursuing and defending against other claims.*

The emergency stay requested by the petitioners would halt discovery on claims that remain pending before Judge Roberts, even though those claims have little or nothing to do with the issues raised in the motion for discretionary review. Judge Roberts has already rejected this request when petitioners moved the trial court for a stay. Petitioners offer no reason for this Court to rule differently.

In urging a stay, petitioners identify alleged injuries associated solely with maintaining the status quo at FPCS's historic property. Yet they ask this Court also to "stay trial court proceedings pending a decision on" their motion for discretionary review. Mot. for Stay at 18. Impeding respondents' ability to pursue their remaining claims and to defend against the counterclaims and third-party claims asserted by petitioners cannot be justified.

In addition to pursuing discovery, respondents have moved for summary judgment on petitioners' Consumer Protection Act claim. Further motions practice is planned to address other claims (such as

defamation) in the near future. There are also deadlines governing the parties under the trial court's scheduling order. Petitioners offer no justification for this aspect of the relief they request. It is overreaching for them to try to hamstring respondents in trial-court litigation based on an assertion of harm that is wholly unrelated to those proceedings.

iii. *An emergency stay will impermissibly force inconsistent obligations on third parties.*

Not only would FPCS suffer harm if a stay were entered; in addition, the third parties with whom FPCS has contractual relationships would face confusing and inconsistent obligations. Any stay entered by this Court can bind only the parties over which the Court has jurisdiction. Yet petitioners take the position that a stay should require any third parties owing lease and interest payments to FPCS to pay those funds to petitioners rather than to the true church. That would leave bcIMC Realty and FPCS's tenants in the untenable position of making payments in direct contravention of court orders that deferred to the Administrative Commission's findings and decisions. They would be exposed to multiple liabilities. Petitioners have identified no precedent suggesting that an appellate court has authority to issue a stay that binds third parties, nor do they explain why such a burden should be regarded as an acceptable consequence of entering a stay.

3. If a stay is granted, petitioners must post a bond to ensure that respondents' victory is preserved should petitioners' request for discretionary review fail.

A party seeking a stay must generally post a supersedeas bond as security for the party subject to the stay. *See* RAP 8.1(b)(1)-(2) (requiring a bond); RAP 8.1(b)(3) (noting that the appellate court "ordinarily will condition such relief . . . on the furnishing of a supersedeas bond"); RAP 8.3 ("The appellate court will ordinarily condition the order on furnishing a bond or other security."). The purpose of a bond is to secure the interests of the parties pending an appeal. *See Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 769, 27 P.3d 1233 (2001) (recognizing that bond serves dual purpose of delaying the execution of judgment against the losing party while protecting the winning party from risk of the loser's intervening insolvency).

Here, where money damages have yet to be awarded, a superseadeas bond is needed to protect respondents from two primary risks if review is accepted and a stay granted. First, if a stay is entered, the money petitioners receive from bcIMC Realty and FPCS's tenants will continue to be diverted away from the ministry and mission of FPCS and funneled into petitioners' litigation effort—despite the fact that petitioners are not entitled to indemnification by FPCS. The difficulty of quantifying the value of the church's ministry and community efforts means that

unrecoverable damages will continue accruing during appellate review if Judge Roberts's decision cannot be given effect in the interim.

Second, if a stay is entered and this Court either denies review or grants it but rules against petitioners, respondents will have suffered a delay in their rightful use and enjoyment of their property. A bond will ensure that respondents are compensated for this delay by making available the reasonable value of the use of the property during review, regardless of petitioners' eventual financial condition or an unforeseen drop in the property's value. *See, e.g.*, RAP 8.1(c)(2) ("Ordinarily, the amount of loss [the appellee will incur] will be equal to the reasonable value of the use of the property during review."); *Muniz v. Vasquez*, 797 S.W.2d 147, 150 (Tex. Ct. App. 1990) ("The supersedeas bond . . . is only intended to indemnify the judgment creditor from losses caused by delay of appeal.").

Petitioners gloss over the bonding requirement and give no reason why they should be excused from it. They argue only as an afterthought that "[i]n addition, [the purported] First Presbyterian should not be required to post a bond" because they have "no means to pay a bond." Mot. for Stay at 18.

Petitioners' admission that they have no means to pay a bond and are litigating from paycheck to paycheck highlights precisely why a bond

must be required: to protect respondents' right to recover funds that are currently being diverted to litigation and to recover the loss of the value of using the property. Indeed, the requirement of a bond generally should not be waived unless the petitioner is solvent and its ability to pay is beyond question. *Cf., e.g.*, Fed. R. Civ. P. 62(e) (providing that the United States need not post a bond to obtain a stay); *Quinones v. Chase Bank USA, N.A.*, No. 09cv2748, 2012 WL 1530155, at *2 (S.D. Cal. May 1, 2012) (granting stay without bond where the judgment creditor had "the ability to pay the amount of the judgment"); *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986) (district court has discretion to waive $2 million appeal bond as judgment debtor has the ability to pay the judgment).

C. CONCLUSION

For the foregoing reasons, respondents respectfully ask that this Court deny petitioners' motion for a stay. If a stay is nevertheless granted, it should be conditioned on the furnishing of a bond or other security in an amount no less than $350,000.

Respectfully submitted this 22nd day of July, 2016.

K&L GATES LLP

By Robert B. Mitchell
Robert B. Mitchell, WSBA #10874
Peter A. Talevich, WSBA # 42644

MILLS MEYERS SWARTLING

By David D. Swartling by RBM per authorization
David D. Swartling, WSBA #6972
Attorneys for Respondents Presbytery of Seattle, First Presbyterian Church of Seattle, Robert Wallace, and William Longbrake