

No. _____

In the Supreme Court of the United States

THE PURE PRESBYTERIAN CHURCH OF
WASHINGTON AND SAMYEOL KIM,
Petitioners,
v.

THE GRACE OF GOD PRESBYTERIAN CHURCH,
Respondent.

*On Petition for a Writ of Certiorari to the
Supreme Court of Virginia*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The trial court entered its Final Order disposing, inter alia, of Church Property, predicated upon a judicial determination that Grace Presbyterian was the successor church to Pure Presbyterian, which was held to have been extinguished by merger. The question presented is whether this determination is beyond the constitutional competence of a secular court to resolve, even employing neutral standards, and thus was entered without subject matter jurisdiction.

PARTIES TO THE PROCEEDINGS

Petitioners, The Pure Presbyterian Church of Washington and Samyeol Kim, were the appellants in the court below. Respondent, The Grace of God Presbyterian Church, was the appellee in the court below. No party is required by Rule 29.6 to file a disclosure statement.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, The Pure Presbyterian Church of Washington and Samyeol Kim, respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 296 Va. 42; 817 S.E.2d 547, and reproduced in the appendix hereto at App. 1. The order of the Circuit Court of Fairfax County is reproduced in the appendix at App. 20.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on August 16, 2018, App. 1, and this Petition is therefore timely. Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I, cl. 1. The Fourteenth Amendment to the Constitution applies those provisions against the States through this language in Section 1: “nor shall any State deprive any person of life, liberty or property without due process of law.” *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

INTRODUCTION

The Grace of God Presbyterian Church (“Grace Presbyterian”), a Korean congregation, formerly known as Great Grace Presbyterian Church, consisting of approximately 100 members at the time of trial, obtained a judgment below declaring that it was the product of a valid merger between Grace Presbyterian and The Pure Presbyterian Church of Washington (“Pure Presbyterian”).¹ Pure Presbyterian is another Korean congregation, numbering thirty-some people at the time of trial, which prior to the judgment gathered at its 12851 Knight Arch Road, Fairfax, Virginia facility (the “Church Property”). The judgment below granted injunctive relief requiring Pure Presbyterian to transfer title to the Church Property to Grace Presbyterian, extinguished Pure Presbyterian as an ecclesiastical polity, and bound all members of Pure Presbyterian to the leadership and bylaws of Grace Presbyterian and its denomination.

The judgment below is a nullity because the relief sought and obtained by Grace Presbyterian was premised on a declaration regarding the governance and succession of a religious society, which the Circuit Court of Fairfax County lacked jurisdictional competence to decide.

¹ As there is no disagreement that The Grace of God Presbyterian was the name adopted by Great Grace Presbyterian Church about the time of the events in question, that entity is referred to as simply Grace Presbyterian for clarity.

STATEMENT OF THE CASE

As alleged in the Complaint filed by Grace Presbyterian on December 9, 2016: “On November 2, 2015, Pure Presbyterian filed for Bankruptcy under Chapter 11 of the Title 11 of the United States Bankruptcy Code. Their only substantial asset was their church property and their only substantial liability was the Note securing that property which was held, along with a deed of trust, by ACM United, LLC” As also alleged in the Complaint: “On September 21, 2016, a Plan of Reorganization (the ‘Plan’) was confirmed by the bankruptcy court.” Under the Plan, Pure Presbyterian had two options for satisfying the debt on its building. “The first source would be from funds provided by another church that chooses to merge with the debtor.” Pure Presbyterian was allowed six months in which to merge. The Plan further allowed: “If the debtor is unable to effect a merger and liquidation of the debt within the time allowed, the debtor shall sell the Church Property. The debtor has had a number of offers and inquiries for the Church Property that are sufficient to liquidate the debt.”

The First Amended Complaint was filed on February 1, 2017. Following an unsuccessful demurrer, Pure Presbyterian filed a timely answer repeatedly denying that a merger had occurred, demanding strict proof, and pleading the statute of frauds.

On February 20, 2017, Pure Presbyterian filed its Final Report and Motion for Final Decree in the bankruptcy court. In it, Pure Presbyterian reported that it continued to have the options of merger or sale.

On March 16, 2017, counsel for Grace Presbyterian filed a notice of the transfer of the claim from the holder of the note to Grace Presbyterian. Grace Presbyterian filed a Response to Motion to Close the Case in the bankruptcy court stating that it “has no objection to entry of the Final Decree.” Although it claimed to be the merged entity potentially envisioned in the Plan, asserting that the “merger process began ... when the two congregations ... voted to join together” and that “[t]he merger was completed in February 2017, when Grace [Presbyterian] purchased the note,” Grace Presbyterian sought no determination from the bankruptcy court. Instead, when the bankruptcy court granted the motion on March 31, 2017, it recited: “Nothing in the motion to close case and final account, and this order shall be dispositive of any issue pending between the debtor and the Great Grace Presbyterian Church, currently pending in the Circuit Court of Fairfax County, Virginia (Case No. CL2016-16945).”

Trial commenced in the Circuit Court of Fairfax County on May 1, 2017 and ran through May 3, 2017. Pure Presbyterian moved to strike the evidence at the conclusion of Grace Presbyterian’s evidence on the grounds that the draft Merger Agreement required a signed writing and payment of the debt in full, neither of which had occurred.

The jury was instructed on May 2, 2017, and found for Grace Presbyterian on two special interrogatories the next day. Judgment was entered on May 19, 2017 over the objection of Pure Presbyterian, and a timely notice of appeal was filed on June 16, 2017. The trial transcript was not filed within either 60 or 70 days, but

on motion the Supreme Court of Virginia granted leave to file out of time. A timely petition for appeal followed. The objections to the judgment raised by Pure Presbyterian in the trial court did not include the jurisdictional grounds relied upon herein, but subject matter jurisdiction may be raised at any time. *See U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988). Subject matter jurisdiction based on secular courts' incompetence to decide matters of church governance was raised in the Petition for Appeal's first assignment of error and repeated in the first assignment of error in the Opening Brief of Appellant. The Supreme Court of Virginia ruled on the question, albeit incorrectly. App. 1.

The facts testified to at trial demonstrated that the Pastor of Grace Presbyterian approached Pure Presbyterian when the latter was in financial difficulties and under the control of the bankruptcy court, suggesting either a merger or a purchase.

The Pastor of Grace Presbyterian maintained that an agreement to merge the two churches was reached through a process in which Pure Presbyterian supposedly voted to merge on February 14, 2016, with Grace Presbyterian then voting to merge on February 22, 2016. He thought the merger was finalized with the selection of a new church name on March 7, 2016. However, Deacon Daniel Kim also of Grace Presbyterian disagreed, saying: "The first formal merger was Easter Sunday 3-27-16."

Grace Presbyterian had entered into a listing agreement to sell its building at 3331 Holloman Road on March 2, 2016. Subsequently, on or about April 4, 2016, Deacon Kim of Grace Presbyterian drafted the

Merger Agreement, which was the subject of the suit. It was undisputed that neither church signed the Merger Agreement, which recited that mutual signatures was a condition of its effectiveness.

Pure Presbyterian had a different understanding of what was going on between the two churches. Its leadership believed that Pure Presbyterian's vote had merely signaled an agreement to have joint services and other meetings and to enter a period of discernment to determine whether a merger would be a good fit for the two congregations, with Pure Presbyterian reserving its options to merge or sell the Church Property. By April 2016, the experience had proved rocky.

Grace Presbyterian sold its church building on October 21, 2016, with Grace Presbyterian receiving \$816,000 in equity. Using those proceeds, cash on hand, and a \$200,000 loan from a sister church, Grace Presbyterian then bought the note on Pure Presbyterian's building, the Church Property, in January of 2017 for a discount.

Well prior to that, in early November, 2016, Pure Presbyterian withdrew from merger efforts through an email notice, advancing as the reasons, inter alia, "denominational issues, spiritual differences, and other problems," as well as stating an intent to sell its building to satisfy the debt. On December 5, 2016, Pure Presbyterian asserted sole ownership of the Church Property by locking out non-congregants. Ten days later, Grace Presbyterian's right of entry was restored under an agreed temporary injunction.

At trial, the jury found the existence of an unwritten contract to merge the congregations and full performance by Grace Presbyterian under that contract. This was found despite the jury being instructed that there is a strong presumption that no contract exists without a signature where the parties intend to culminate their agreement with a signed contract; that this presumption can only be overcome with strong evidence; that partial performance satisfies the statute of frauds only where the acts alleged to constitute part performance are consistent with no other theory than a party acting in furtherance of the unsigned contract, and even then only so far as is necessary to prevent a fraud; as well as being instructed on the principle of *contra proferentem*. The jury's finding was the basis for the May 19, 2017 Final Order, granting declaratory and injunctive relief to Grace Presbyterian.

That order provided in relevant part:

- (i) That Grace of God be, and hereby is, declared the owner of that real property located at 12851 Knight Arch Road in Fairfax, Virginia ("the Church Property"), which is the subject of this litigation, with sole rights to place signage on the property, make use of all personal property thereon (including books, hymnals, instruments and other church materials), and otherwise utilize for any lawful purpose;
- (ii) That Grace of God be permitted to put the names of its active Elders on the Deed of the Church Property, according to the

procedures outlined in its Bylaws for holding real property;

- (iii) That [Pure Presbyterian] will henceforth be considered merged into Grace of God and the surviving church shall have unified offerings, bank accounts, services and clergy, according to the bylaws of Grace of God.
- (iv) That the former elders of [Pure Presbyterian] shall sign whatever documents are necessary to effectuate the terms of this Order, shall provide all keys to the building to Grace of God, and shall inform any interested third parties regarding the terms of this Order and the ownership of the church Property;
- (v) That all members of the Grace of God, the surviving church, shall be deemed to be subject to the bylaws of said church and its denomination.

App. 21–22.

REASONS FOR GRANTING THE PETITION

A writ should issue to maintain uniformity because the decision below conflicts with decisions of the Courts of Appeal, and decisions of state courts of final jurisdiction. The right of ecclesiastical self-government is of great historical and practical importance with roots in Chapter I of Magna Carta, Legal Classics Library (1982). (“That the English Church shall be free, and have her rights and liberties inviolable;” with “freedom of election.”). Indeed, those roots go even deeper in history. *See 2 Chronicles* 19:11 (King James) (“And, behold, Amariah the chief priest is over you in all matters of the Lord; and Zebadiah the son of Ishmael, the ruler of the house of Judah, for all the king’s matters . . .”).

This Court, applying the First Amendment, has held that generally civil courts are not a constitutionally permissible forum for a review of ecclesiastical disputes. That is because “religious freedom encompasses the power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721–22 (1976) (alterations in original) (quotation marks omitted); *see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.”).

Determining whether Grace Presbyterian is the successor church to Pure Presbyterian – the ecclesia – is at its core an ecclesiastical dispute, requiring the

courts to choose between competing ecclesiastical interpretations of their congregational votes and joint services, and to determine who the clergy and the membership are. See, e.g., *Huttenville Hutterian Brethren, Inc. v. Sveen*, 776 F.3d 547, 557 (8th Cir. 2015) (holding that a case that required determining “which excommunications were valid and which is the true church” as part of determining corporate control of a religious society presents “religious questions” outside the jurisdiction of the courts to determine); cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 181–90 (2012) (reviewing the constitutional history and case law prohibiting state interference with religious societies’ internal governance). Whether Grace Presbyterian has absorbed and extinguished Pure Presbyterian, placing Pure Presbyterian’s members under Grace Presbyterian’s clergy and bylaws, obviously raises questions of church polity and governance over which the trial court “lacked subject matter jurisdiction.” See, e.g., *Wipf v. Huttenville Hutterian Brethren, Inc.*, 808 N.W.2d 678, 686 (S.D. 2012) (holding that because the Supreme Court of South Dakota could not “uphold the circuit court’s order, findings, and conclusions without also endorsing its decision on the identity of corporate leaders and members,” there was no subject matter jurisdiction).

These limitations are sufficiently coherent to have acquired a doctrinal label – the “church autonomy” doctrine. See *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002). The term was coined by Professor Laycock in an article in the *Columbia Law Review*, cited in *Bryce*. *Id.*; see Douglas Laycock, *Towards a General Theory of the Religion*

Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 COLUM. L. REV. 1373, 1373 (1981). It appears to be the judicially preferred term. See Marjorie A. Shields, Annotation, “Construction and Application of Church Autonomy Doctrine,” 123 A.L.R. 5th 385; see also, *Westbrook v. Penly*, 231 S.W.3d 389, 395 (Tex. 2007) (employing the term in the course of finding no subject matter jurisdiction). Nevertheless, the less precise terminology, “church abstention doctrine,” is also encountered. See, e.g., *Dobrota v. Free Serbian Orthodox Church “St. Nicholas”*, 952 P.2d 1190 (Ariz. App. 1998); *Abrams v. Watchtower Bible and Tract Soc’y of N.Y.*, 715 N.E.2d 798 (Ill. App. 1999); *Mallette v. Church of God Int’l*, 789 So. 2d 120 (Miss. App. 2001); *Archdiocese of Miami, Inc. v. Minagorri*, 954 So. 2d 640 (Fla. App. 2007); *Southeastern Conf. Ass’n of Seventh-Day Adventists, Inc. v. Dennis*, 862 So. 2d 842 (Fla. App. 2003). And sometimes the terms are used interchangeably. *Church of God in Christ, Inc. v. L.M. Haley Ministries, Inc.*, 531 S.W.2d 146 (Tenn. 2017).

The church autonomy doctrine terminology is the more apt because the doctrine is truly jurisdictional, see *Sveen*, 776 F.3d at 557; *Harris v. Matthews*, 643 S.E.2d 566, 570 (N.C. 2007); *Wipf*, 808 N.W.2d at 686; *Huttersville Hutterian Brethren, Inc. v. Waldner*, 791 N.W.2d 169, 174, 179 (S.D. 2010); *Westbrook*, 231 S.W.3d at 392, capable of being raised at any time just like any other defect in subject matter jurisdiction, contrary to the ruling below of the Supreme Court of Virginia. See, e.g., *Church of God in Christ*, 531 S.W.3d at 158–59 (holding that “ecclesiastical abstention may be raised at any time” and distinguishing the ruling in *Hosanna-Tabor Evangelical Church & Sch. v. E.E.O.C.*,

565 U.S. 171, 186–87, 195 n.4 (2012), regarding the ministerial exception being an affirmative defense).

Although all of the elements of the church autonomy doctrine were argued in the Supreme Court of Virginia, that term was not employed because Virginia appeared to have its own line of authority treating intrusion into ecclesiastical disputes as a jurisdictional defect. *See Singh v. Mooney*, 261 Va. 48, 51–52 (2001) (“An order is void *ab initio* if entered by a court in the absence of jurisdiction of the subject matter or over the parties, *if the character of the order is such that the court had no power to render it*, or if the mode of procedure used by the court was one that the court could not lawfully adopt.” (emphasis added) (citation omitted)); *Cha v. Korean Presbyterian Church of Wash.*, 262 Va. 604, 610 (2001) (“The United States Supreme Court, applying the First Amendment, has held that generally civil courts are not a constitutionally permissible forum for a review of ecclesiastical disputes.”); *Bowie v. Murphy*, 271 Va. 127, 133 (2006) (“While what is or is not an ‘ecclesiastical’ dispute is often debatable, issues of church governance . . . are unquestionably outside the jurisdiction of the civil courts.”). In the event, the Supreme Court of Virginia held that issues of church autonomy—a contested merger—do not raise matters of subject matter jurisdiction (App. 1–2), 296 Va. at __; 817 S.E.2d at 553–54, in direct conflict with at least the Eighth Circuit and the Supreme Courts of North Carolina, South Dakota, Tennessee and Texas. Not only is the conflict real, it is also mature. *See, e.g. Bryce*, 289 F.3d at 654 (“Here, St. Aidan’s Church raised the church autonomy defense on a motion to dismiss for lack of subject matter jurisdiction. The motion would more appropriately be considered as a

challenge to the sufficiency of plaintiff's claims under Rule 12(b)(6)."); *Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession of Worthington*, 877 N.W.2d 528, 534 (Minn. 2016) (ecclesiastical abstention doctrine not jurisdictional, citing *Hosanna-Tabor*).

In sum, certiorari should be granted because the opinion below conflicts with the ample authorities cited above and because this case presents a good vehicle for establishing that the church autonomy doctrine is the law of the land that may be raised at any time, like any other defect in subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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