No. 20-261

In the Supreme Court of the United States

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, PETITIONERS

v.

THE PRESBYTERY OF SEATTLE, ET AL., RESPONDENTS

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents do not dispute that the state courts are intractably divided over the requirements of the First Amendment in church property cases, with 46 States weighing in. In fact, they agree the law is in "chaos." Opp. 34. That powerfully confirms the need for certiorari.

To be sure, respondents blame the chaos on *Jones* v. *Wolf*, 443 U.S. 595 (1979), not *Watson* v. *Jones*, 80 U.S. 679 (1871). But those are two sides of the same coin. *Watson* required courts to decide church property disputes involving congregations not "governed solely within" themselves by deferring to the denomination. *Id.* at 724. *Jones* allowed courts to apply neutral principles, but stopped short of requiring them. Denominations like respondents cling to their privileged status under *Watson*; congregations like petitioners, who can prove ownership under neutral law, plead with the Court to extend *Jones* to its logical conclusion and end *Watson*'s denominational favoritism.

Indeed, since this petition was filed, parties on the other side have filed petitions citing the same lower-court split, decrying the same chaos, and joining petitioners in asking this Court to intervene—while urging the opposite resolution. *All Saints' Episcopal Church (Fort Worth)* v. *Episcopal Diocese of Fort Worth* (No. 20–534); *The Episcopal Church* v. *Episcopal Diocese of Fort Worth* (No. 20–536). All sides seek clarity; all agree that the costs, uncertainty, and disruption of having opposite constitutional rules apply in different States is intolerable.

Stare decisis should be no obstacle. Both sides ask that one of this Court's decisions be overruled. The

status quo is no resolution; it just perpetuates the conflict. Strikingly, respondents never invoke stare decisis. As the *Fort Worth* petitions confirm, neither side in this long-running controversy is happy.

Respondents' reasons for denying review are paper thin. They trumpet *Watson* as a "pillar" of constitutional law (Opp. 17), but the aspect of *Watson* they celebrate is the principle that "religious organizations" may "decide for themselves, free from state interference, matters of church government." Opp. 14 (citation omitted). We do not challenge that principle; we *invoke* it.

Respondents say almost nothing about the aspects of *Watson* under challenge—its specific holdings that religious associations are either congregational or hierarchical, and that congregations that join a denomination necessarily give "implied consent" to forfeit their property if the parties fall out. Remarkably, respondents never *mention* the implied consent problem, and they happily join in the project of redefining their polity as hierarchical for litigation purposes—while stoutly denying hierarchical status outside court. Respondents thus fail to engage the question presented.

Unable to deny the split or defend *Watson*'s specific holdings, respondents raise "vehicle" issues. But these are not real vehicle issues; they are alternative state-law theories deemed irrelevant by the court of appeals. Respondents can raise those theories on remand (though Washington law and the record foreclose them, *infra* at 7–12). They pose no obstacle to this Court's resolving the merits. The decision below unambiguously rests solely on a federal constitutional rule: that in all cases involving congregations not "independent of any other ecclesiastical body," courts

must defer to denominational "tribunals." App. 15a; see App. 9a (citing *Watson* and decisions adopting *it*). Under "compulsory deference," other considerations—whether the congregation's proof of ownership or the denomination's alternative theories—are "not relevant." App. 9a, 16a.

That unequivocal holding makes this case a superb vehicle to finish what *Jones* started, by requiring that courts decide church property cases under neutral law.

ARGUMENT

I. It is time to resolve the undisputed split over what the First Amendment requires in church property disputes.

There is a deep and undisputed split over what the Constitution requires of courts deciding church property cases. Pet. 27–35; Becket Br. 4–6. Since the petition was filed, others have asked the Court to "restore the deference approach of *Watson*." Pet. 3 (No. 20–534); Pet. i (No. 20–536) (questioning "[w]hether the neutral-principles approach may constitutionally be applied"). All, including respondents, agree on the point most relevant to certiorari: the law is in "chaos." Opp. 34. That chaos imposes enormous human and financial costs. It is time for this Court to intervene.

II. Respondents' merits arguments confirm the need to revisit *Watson*'s specific holding.

Rather than contest our Rule 10 showing, respondents say *Watson* is a "pillar" of constitutional law. Opp. 17. But although this Court has reaffirmed *Watson*'s teaching on churches' self-governance rights, no decision supports its holding that churches are either congregational or hierarchical, or that congregations

joining denominations necessarily consent to relinquish their property. Those holdings are not constitutional "pillars"; respondents do not dispute that stare decisis cannot sustain them; and respondents' other arguments only underscore the need for review.

A. Respondents agree that churches may adopt "whatever polity" they "choose" (Opp. 23–24), but cannot explain how *Watson* respects "the intentions of the parties." *Jones*, 443 U.S. at 603. Under denominational deference, the parties' mutual understanding of property ownership when they affiliated is never *binding*. Becket Br. 10–11. One side—the denomination—can always reverse course unilaterally, and courts must enforce its will. Why? Because *Watson* irrebuttably presumes that congregations "implied[ly] consent" to denominational ownership claims. 80 U.S. at 729. *Watson* never even *examines* both parties' "intentions" (*Jones*, 443 U.S. at 603); it is ownership by "ambush" and "a one-way ratchet toward ever more hierarchical" governance. Law Profs. Br. 18, 13.

Neutral principles, by contrast, "accommodate all forms" of "polity" and all balances of local and denominational power. *Jones*, 443 U.S. at 603. At the outset of their relationship, denominations may require that congregations execute "reversionary clauses or trust provisions" that "specify what is to happen" upon disaffiliation. *Ibid*. A congregation might agree or disagree. But either way, *both sides'* "intentions" are respected. *Ibid*.

Denominations can also adopt trust rules *during* affiliation, expelling churches that refuse to "modify the deeds" or corporate articles accordingly. *Id*. at 606. To be enforceable, however, property arrangements must be "embodied in some legally cognizable form."

Ibid. For congregations unwilling to toe the line, denominations have remedies, but they are ecclesiastical, not civil. Pet. 24–27.

Contrary to respondents' assertion, neutral principles are not synonymous with "deference to a congregational majority." Opp. 23. Through such familiar means as corporations sole (commonly used by Roman Catholics) or trusts (commonly used by Protestants), ownership can be placed in congregations *or* denominations. Majority control "is not foreordained"; numerous arrangements "can ensure, if [the parties] so desire, that the faction loyal to the hierarchical church will retain the church property." *Jones*, 443 U.S. at 606. The alternative is imposing top-down hierarchical governance on all churches that are not "independent." *Watson*, 80 U.S. at 724. It is far more consistent with church autonomy doctrine—and *Watson*'s broader teaching—to allow churches to organize their affairs via "private-law systems" that have a "peculiar genius" for honoring "the intentions of the parties." *Jones*, 443 U.S. at 603.

Watson's "implied consent" rule should not prevail over express declarations of contrary intent. Here, FPCS declared "unalterable opposition" to denominational ownership (CP1848); the denomination assured members that its rules "do not in any way change the fact that the congregation, in the [PCUS] owns its property" or "give Presbytery, Synod, or Assembly any jurisdiction over property" (CP1983); and FPCS's articles give local trustees "control of the property" (CP1807). Applying denominational deference, however, the courts below wrongly deemed such evidence "not relevant." App. 16a. Review is urgently needed.

B. Respondents also suggest the constitutional framework is academic since PCUSA is indeed hierarchical and courts must defer to their "authoritative assessment" of their "own polity." Opp. 18. But outside property litigation, PCUSA's highest tribunal says PCUSA "must not be understood in hierarchical terms." Pet. 21 (citation omitted). Indeed, for centuries Presbyterian polity has rejected both pure congregationalism and pure hierarchy, adopting an intermediate, bottom-up, federalist structure. Pet. 18–21. Note how respondents' expert couches her opinion: "*secular courts* have historically identified the polity of [PCUSA] as being hierarchical." App. 16a (emphasis added). *Watson* incentivizes denominations to take one position in church and another in court. Anglican Church Br. 18–24.

Watson's irrebuttable presumption that churches are either "independent" or "hierarchical" renders the facts immaterial. App. 14a–15a, 16a. "[W]hether the Book of Order, internal tribunals, seminary treatises, or Presbyterian history characterize the Presbyterian Church as being hierarchical only for ecclesiastical matters," the court below reasoned, "is not relevant." App. 16a. The court thus brushed off both PCUSA's own self-definition and FPCS's legal title.

Our point is *not* that this Court should rebalance the evidence. Our point is that courts should not be deciphering church polity. Instead, the Court should embrace the "completely secular" alternative of neutral principles—which can "accommodate all forms" of "polity," uses "objective, well-established concepts of trust and property law," is "familiar to lawyers and judges," and "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones*, 443 U.S. at 603.

C. Respondents' remaining defense of *Watson* is that courts may not decide ecclesiastical questions. Opp. 10–21. We agree. "[T]he 'neutral principles of law' approach is consistent with" that view; compulsory deference is not. *Jones*, 443 U.S. at 602.

Respondents imply (at 16) that resolving property disputes by neutral principles conflicts with church autonomy over "internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). But neutral principles respect that principle by resolving ownership based on "the parties' own agreements determining property rights by instruments customarily considered by civil courts." *Congregation Jeshuat Israel* v. *Congregation Shearith Israel*, 866 F.3d 53, 54 (1st Cir. 2017) (Souter, J.). Using "neutral principles" simply means using "private-law systems" with the "flexibility" to achieve any result. *Jones*, 443 U.S. at 603. It is compulsory deference that imposes a straitjacket. Becket Br. 7–19.[1]

III. Respondents' supposed "vehicle" problems are really alternative state law theories that lack support but can be raised on remand.

Respondents cannot dispute that the court below resolved the question presented solely on deference grounds. Nevertheless, citing unfounded state law

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[1] Under neutral principles, courts enforce churches' governance arrangements without favoring either side in the case; that is distinct from the idea of "neutral[ity]" and "general applicability" (*Employment Division* v. *Smith*, 494 U.S. 872, 879 (1990)), which allows government to *regulate* religious practices, provided it does not single them out.

theories ignored by the court of appeals, they say they would win even if this Court reversed. Opp. 26–36.

This Court need not address these theories. They were not part of the holding below, and their presence poses no obstacle to resolving the only federal question presented. The Court should grant review and, if it reverses on the "federal question," do what it did in *Jones* (443 U.S. at 609–610) and does "customarily"—"remand to the state court" for consideration of respondents' arguments. S. Shapiro et al., Supreme Court Practice § 3.26 (11th ed. 2019).

Regardless, respondents' theories run headlong into Washington law, rely on a repealed bylaw, and depend on the very deference theory being challenged.

A. Respondents' trust theories

According to respondents, their trust interest is in "strict compliance with state law." Opp. 31. Not so.

1. In Washington, "[e]very conveyance of real estate, or any interest therein"—including a "trust"—"shall be by deed." RCW 64.04.010. Moreover, trusts may be created only by "[d]eclaration by the owner." RCW 11.98.008(2). Respondents' trust claim rests on PCUSA's "Form of Government," its "Book of Order," and scattered statements of a pastor and accountants made decades after respondents' alleged trust was created. Opp. 32–34. Respondents never mention RCW 64.04.010, the deeds contain no trust (App. 3a), and the alleged trust was not created by the owners. These points alone are dispositive.

Respondents say *Jones* compels courts to enforce trust language in PCUSA's constitution. Opp. 28. Yet they omit the Court's qualification: "civil courts will be bound to give effect to the result indicated by the

parties, *provided it is embodied in some legally cognizable form*." 443 U.S. at 606 (emphasis added). Books of Church Order are not a legally cognizable form.

2. Beyond RCW 64.04.010 and 11.98.008(2), respondents cannot prove a trust "by clear, cogent, and convincing evidence." *Engel* v. *Breske*, 681 P.2d 263, 265 (Wash. Ct. App. 1984).

FPCS's 1985 corporate articles provide that it exists "to promote the worship of Almighty God and the belief in the extension of the Christian Religion, under [PCUSA's] Form of Government and discipline." CP1810. That language nowhere mentions property, and the articles vest "control of the property and temporal affairs" solely in FPCS's trustees. *Ibid*. Indeed, when the denomination circulated model articles asserting a trust in "[a]ll" local property (CP2128), FPCS's restated 1985 articles omitted that language. CP1804–1812.

Respondents also cite a bylaw stating that "[a]ny matter of church governance not addressed by these bylaws shall be governed by [PCUSA's] Constitution." CP1870. Again, the bylaw mentions no trust, and the subject *is* "addressed" (CP1870): the articles grant the trustees control of "property." CP1810.

Finally, when the denomination proposed adding a trust clause to the Book of Order in 1981, FPCS declared its "unalterable opposition." CP1848; Opp. 8. FPCS remained affiliated only after receiving assurances that this clause was unenforceable unless "embodied in some legally cognizable form." CP1989; see CP1981–1990 (denominational assurances), CP1838 (legal opinion). That clear record makes this an especially *good* vehicle to address the question presented.

B. Respondents' corporate theories

Contrary to respondents' convoluted suggestions, petitioners observed all corporate formalities in disaffiliating. App. 21a. The court below never mentioned respondents' contrary views (Opp. 27–28, 30), and for good reason.

1. It is undisputed that petitioners gave 10 days' written notice (CP1800; CP1905–1936; Opp. 2), satisfying both FPCS's bylaws and state law. CP1910 (2015 bylaws); RCW 24.03.080(1). Respondents' assertion that "no announcement was made to the assembled congregation" is false. Opp. 3. Two Sundays before the congregational meeting, petitioners "announced [their] recommendation that the congregation disaffiliate" and "a congregational meeting for November 15, to vote." CP1905.

Respondents say the trial court "found that petitioners failed to give notice as the bylaws required." Opp. 36. Not so. The relevant finding, which respondents never quote, states: "no notice was read at the November 8, 2016 joint service and no notice was printed in the FPCS church bulletin for that service." App. 45a. But the 2015 bylaws required only mailing notice "at least ten (10) days prior to the meeting" and giving notice "in verbal form on at least one Sunday in advance." CP1910. Petitioners did just that.

Respondents suggest that the superseded 2005 bylaws, which required notice on *two* Sundays, could be amended "only [by] the congregation," and were not. Opp. 36. That is doubly wrong: Under Washington law, "the board of directors" could amend the bylaws (RCW 24.03.070), and 92.3% of the congregation ratified the amendment (CP 1800–1801).

2. Respondents' argument that "petitioners were never properly elected" trustees (Opp. 30) is a red herring. As respondents' complaint admits, "[u]nder the FPCS bylaws, the ruling elders also constitute the officers and directors/trustees of FPCS corporation." CP484. It is undisputed that petitioners were validly elected to a dual office as elders and corporate "officers and directors." CP1872 (2005 bylaws). What respondents misleadingly call the Session "install[ing] its members as trustees" (Opp. 30) was merely petitioners amending the bylaws to "reconstitute the Board [of Trustees]" as a distinct entity (CP1876).

It is respondents who flouted Washington law, by purporting to replace FPCS's elected officers without notice, a vote, or compliance with FPCS's governing documents. CP612.

C. Respondents' voluntary associations theories

Respondents suggest that Washington applies "the same rule" as *Watson* to "non-religious voluntary organizations." Opp. 12. Their cases, however, belie this claim. One holds that fraternal lodge property may be "held in [an express] trust." *Grand Court of Washington* v. *Hodel*, 133 P. 438, 438–439 (Wash. 1913). Another holds that, before chartering "a subordinate lodge," a fraternal order may require it to agree "to obey the [order's] constitution, laws, and regulations" and later enforce that agreement. *Grand Aerie, Fraternal Order of Eagles* v. *Nat'l Bank of Wash.*, 124 P.2d 203, 204 (Wash. 1942). Another holds that unions may expel members and decide the terms of their "readmi[ssion]." *Couie* v. *Local Union No. 1849*, 316 P.2d 473, 478 (Wash. 1957). These are clas-

sic examples of neutral principles. And authority respondents ignore holds that deference applies to "internal discipline, and not to disputes over money or tangible property." *Local Lodge No. 104* v. *Int'l Bhd. of Boiler Makers*, 291 P. 328, 330 (Wash. 1930).

These precedents bear little resemblance to *Watson*. First, they do not divide voluntary associations into two arbitrary categories, applying different rules to each. Instead, they enforce actual trusts, bylaws, and contracts. Second, they do not treat decisions of non-religious voluntary associations' "judicatories" as "binding," thus depriving litigants of a neutral forum. Opp. 12 (quoting *Watson*, 80 U.S. at 727). Third, they do not hold that, by joining a national association, local associations *necessarily* give "implied consent" to the national association's "ultimate power" over property (*Watson*, 80 U.S. at 729, 722), let alone over their express objection.

D. Respondents' "true church" and standing theories

Respondents' last-gasp theory is that petitioners are not the "true church" and lack standing to "represent" it. Opp. 28–31. But those arguments presuppose the validity of the deference rule under challenge.

Under neutral principles, the identity of the owner is the entity "named in the deeds" (*Jones*, 443 U.S. at 609): FPCS, "as a nonprofit corporation" (App. 3a). Where a particular corporation holds title, courts may not award that property to someone else on the theory that that someone is the "true church." And because this case can be resolved without "pass[ing] on questions of religious doctrine" (*Jones*, 443 U.S. at 609), the Constitution requires no less (*Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 449–450 (1969)).

CONCLUSION

Certiorari should be granted, either singly or together with Nos. 20–534 and 20–536.

Respectfully submitted,

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