

**IN THE SUPREME COURT OF THE STATE OF OREGON**

HOPE PRESBYTERIAN  
CHURCH OF ROGUE RIVER, a  
domestic nonprofit corporation,

Petitioner on Review-  
Plaintiff-Respondent,

vs.

PRESBYTERIAN CHURCH  
(U.S.A.) and PRESBYTERY OF  
THE CASCADES, a domestic  
nonprofit corporation,

Respondent on Review-  
Defendants-Appellants.

Supreme Court No. S059584

Court of Appeals No. A139430

Jackson County Circuit  
Court No. 07-2707-E2

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*BRIEF OF AMICUS CURIAE*  
PRESBYTERIAN LAY COMMITTEE  
IN SUPPORT OF PETITION OF REVIEW

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Petition for Review of the Decision of the Court of Appeals  
in an Appeal from a Judgment of the Circuit Court for Jackson County,  
Honorable G. Philip Arnold, Circuit Court Judge

Court of Appeals Opinion Filed: April 27, 2011  
Author of Opinion: Laudau, J. Pro Tempore  
Concurring Judges: Ortega, P.J. and Armstrong, J.

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**BRIEF OF *AMICUS CURIAE* PRESBYTERIAN LAY  
COMMITTEE IN SUPPORT OF PETITION FOR REVIEW**

*Amicus Curiae* Presbyterian Lay Committee respectfully submits this brief in support of petitioner on review/plaintiff-respondent Hope Presbyterian Church of Rogue River’s petition for review of the decision of the Court of Appeals in this case. *Amicus* emphasizes that the following points, among others, show why review is appropriate.

**I. The Issue is Ripe for Review**

The question for consideration on review is what rule of law Oregon will follow in resolving church property disputes, and how that rule is to be properly applied. Right now, Oregon lacks a definitive pronouncement as to whether courts should apply neutral principles of law or follow the methodology commonly referred to as “denominational deference.” The last time that the Oregon Supreme Court visited this topic was before the U.S. Supreme Court’s clarification of church property law in *Jones v. Wolf*, 443 US 595 (1979), where the high court espoused a preference for neutral principles over deference. In doing so, however, the U.S. Supreme Court clearly indicated that the selection of methodology and the manner in which it was to be applied was a matter of state law, guided only by the

constitutional constraints respecting both separation of church and state, and the guarantee of the free exercise of religion.

Since *Jones v. Wolf*, there has been a plethora of state court decisions, methodologies, and differing applications of the principles pronounced by the U.S. Supreme Court. There also has been a significant amount of misunderstanding by courts across the country as to what constitutes “neutral principles of law” and how those neutral principles should be applied. Some of that confusion has resulted in jurisprudence that can best be called “neutral in name only,” *i.e.*, it claims to apply neutral principles, but it in fact applies a form of denominational deference that is neither neutral nor fair.

The last time that the Oregon Supreme Court had an opportunity to address church property disputes was in *Berean Fundamental Church Council v. Braun*, 281 Or 661, 576 P2d 361 (1978). There, the case was resolved by applying standard legal principles of property and trust law, without giving undue weight to one party’s evidentiary submissions merely because it was a “national church” body. This would have seemed to foreshadow “neutral principles” as the methodology to use in Oregon but the Court of Appeals did not see it that way in its opinion in this case.

Instead, the Court of Appeals concluded that Oregon would more likely revert to the older concept of “denominational deference.”

The Court of Appeals made a diligent effort to discern the state of Oregon law and even looked directly at *Berean*. Honing in on the fact that the *Berean* court decided the case without reference to denominational classifications, the Court of Appeals assumed that the Oregon Supreme Court in *Berean* mistakenly had failed to consider constitutional law and opined that it would have deferred to the denomination had it considered and classified the denomination in a particular typology. However, that approach missed the forest for the trees. The *Berean* court did apply neutral principles of law - the same principles of law which would apply between any two property disputants without deferential reference to one party’s status as some form of religious organization. The court simply did not refer to its methodology as “neutral principles.” Thus, the Court of Appeals’ decision in this case now stands as the only Oregon precedent decided post-*Jones*, and appears to be in direct conflict with the direction that Oregon’s church property jurisprudence had been heading.

Properly applied, neutral principles of law do not depend upon the antiquated and often inadequate two-fold classification of all religious

institutions as either “hierarchical” or “congregational.” It avoids the constitutional entanglement issues inherent in courts classifying religious systems and then according one party additional deference, or “evidentiary preference,” because of that classification. The classification system has been an important predicate step in the denominational deference approach, but also has been inadequate to account for the myriad of distinguishing features between differing denominational structures. In plain English: Do we really want a system which is dependent upon a judge’s interpretation of polity distinctions between, for example, Lutherans, as distinguished from evangelical Lutherans, Baptists, Southern Baptists, Episcopalians, Presbyterians, and so on.<sup>1</sup> Relying upon denominational deference invites error and entanglement by either deferring to one party’s self-designation without scrutiny, or engaging in scrutiny of religious polity in order for the court itself to classify the religious body. Both approaches boil down to the same thing: The court permitting itself to be drawn into a process of characterizing a church.

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<sup>1</sup> The Pew Forum on Religion and Public Life estimates there are hundreds of denominations and hundreds of smaller sects currently recognized in the United States. See <http://religions.pewforum.org/reports> (last visited Aug. 12, 2011).

That is not proper work for a secular court. The constitutional pitfalls can be readily avoided by the adaptation of purely neutral principles.

Because the State of Oregon lacks a pronouncement from its Supreme Court as to the proper methodology to be used in cases of this kind in Oregon, and because this case has a well developed record below, with all the legal elements necessary to permit an informed decision, *amicus* respectfully suggests that it presents an ideal opportunity to properly define Oregon's approach to religious property dispute jurisprudence.

## **II. The Criteria for Granting Discretionary Review are Present**

ORAP 9.07 sets forth a list of considerations or criteria that this Court treats as relevant to a decision whether to grant discretionary review. Many of those listed criteria apply here.

First, this case presents a significant issue of law. Church property disputes involve the constitutional principles of property ownership, freedom of religion, and the intersection of church and state principles. Property ownership is a matter of state law. Freedom of religion and freedom of religious opinion are concepts firmly embedded within the Oregon constitution. Does one's religious views, or a change in one's

religious views, affect that party's right to retain property titled in its name? Does changing denominational affiliations result in a forfeiture of property rights otherwise held?

Church property disputes seem to come in waves. The United States is seeing an upsurge in cases as churches transfer denominational affiliation. Such matters have been before the U.S. Supreme Court numerous times and have been litigated in every state in the Union. With splits and fracturing currently prevalent in the mainline denominations like the Presbyterian Church (USA), the Episcopal Church, and the Lutheran Church, to name a few, it is a virtual certainty that churches in Oregon will face these issues in the near future. There are thousands of churches in Oregon with hundreds of thousands of individual members in a multiplicity of denominations, faiths, and religious structures. The breadth of the impact of this case is clearly sufficient to warrant guidance from the Supreme Court.

ORAP 9.07(4) is satisfied because property ownership is an issue of state law. So is trust law. Express trusts in Oregon are a creature of state statute; if the elements are not present, the trust claim fails. The

revocability of trusts is governed by state law. Constructive and resulting trusts are established and defeated based on state law.

ORAP 9.07(5) is satisfied because this is an issue of first impression, or at least first post-*Jones v. Wolf* impression for the Oregon Supreme Court.

The legal issues have been properly preserved and are devoid of procedural obstacles which would prevent the Supreme Court from making a full pronouncement on them, thereby satisfying ORAP 9.07(7), and are present or on the record, per 9.07(8).

ORAP 9.07(9) seeks cases where inconsistent appellate case law invites clarification. As *amicus* has outlined, the very opinion for which review is being sought creates such an inconsistency.

While well written, the Court of Appeals' decision appears to be wrong in its selection of applicable principles of law. If uncorrected, irreparable harm will occur. It is conceded as a matter of record in this case that petitioner on review Hope Presbyterian Church of Rogue River holds title to its property. Causing a congregation to forfeit its property results in serious and irreversible injustice to the property-owning congregation. The potential loss of the property is a consequence of a

misapplication of the legal principles at issue. There is a great likelihood that these errors will be compounded if left unaddressed, because future courts will follow the appellate precedent that applies the deference method. It would seem to be in the best interests of judicial guidance to accept review now and set a clear path for others to follow.

All of the litigants are well represented and have shown that the issues are clearly addressed in the briefs.

*Amicus curiae* have appeared and are available to provide an independent assessment of the impact of the law, its constitutional implications, and practical considerations, beyond those directly affecting the litigants to this case, all mindful and respectful to both secular and ecclesiastical rights. If the underlying case is accepted for review, this *amicus* intends to provide further detailed briefing beyond what the parties submit, focusing on fundamental principles of law equal to all, capable of logical and fair application in future cases.

### **III. Conclusion**

For the foregoing reasons, and for the consideration of the ample constitutional and legal principles which may be addressed in the litigants' briefs and the *amicus* briefs, *amicus* Presbyterian Lay Committee

respectfully requests that this Court accept review of this significant matter.

DATED this 15th day of August, 2011.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH  
AND TYPE SIZE REQUIREMENTS UNDER ORAP 5.05(2)(d)**

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 1,588.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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**CERTIFICATE OF FILING AND SERVICE**

I certify that on August 15, 2011, I filed the AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER ON REVIEW-PLAINTIFF-RESPONDENT with the State Court Administrator by the Court of Appeals' eFiling System.

I further certify that on August 15, 2011, I served two copies of the AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER ON REVIEW-PLAINTIFF-RESPONDENT on the following parties by the United States Postal Service, first-class mail, at the following addresses:

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