23393-9

No. 23393-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DONALD L. BARNETT,

Appellant,

vs.

JACK A. HICKS, JACK H. DuBOIS, and
E. SCOTT HARTLEY, individually and as the
Board of Directors of COMMUNITY CHAPEL AND
BIBLE TRAINING CENTER and COMMUNITY CHAPEL
AND BIBLE TRAINING CENTER

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE NORMAN QUINN

BRIEF OF RESPONDENTS

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I. COUNTER-STATEMENT OF ISSUES

Appellant's Statement of Issues generally alerts the Court to the nature of this appeal, but we are uncomfortable with its argumentative tone. We believe the following more accurately describes the issues:

1. Does the Nonprofit Corporation Act invalidate the requirement that Donald Barnett concur in any amendment to Community Chapel's articles of incorporation or bylaws when (a) the statute forbids directors from delegating the power to amend articles and bylaws; and (b) it only allows corporations to require a greater, but not a lesser, proportion for statutory voting requirements?

2. If the requirement of Barnett's concurrence in article or bylaw amendments is invalid under the Nonprofit Corporation Act, and if Barnett may raise this issue for the first time on appeal, is the concurrence requirement nonetheless preserved by the savings clause in the Nonprofit Corporation Act?

3. Was the requirement of Barnett's concurrence in article or bylaw amendments based on religion when (a) this requirement only related to him personally; (b) did not apply to others who might later hold his position; (c) he has never offered any religious basis or explanation for this personal

privilege; and (d) has never suggested that such a basis existed?

4. Even if this personal concurrence requirement has a religious basis, did the trial court unconstitutionally invalidate that requirement under the Nonprofit Corporation Act?

5. May Barnett claim for the first time on appeal that the trial court's ruling (a) is an unconstitutional establishment of religion; or (b) that it violates the state Constitution?

6. Was Barnett entitled to notice of the continuation of a valid corporate directors' meeting at which he was present when he interrupted that meeting by ordering the other directors to leave?

II. COUNTER-STATEMENT OF FACTS

A. Community Chapel Accepted the Benefits of State Law.

Community Chapel and Bible Training Center ("Community Chapel") was incorporated on November 1, 1967 by Donald Barnett, appellant; Scott Hartley, respondent; and others. (CP 495-99) They incorporated Community Chapel under RCW chapter 24.08 (CP 496), which then related to religious and other charitable societies. At that time, the Legislature had already adopted the Nonprofit Corporation Act, now codified

as RCW chapter 24.03, but it did not become effective until two years later.

When this new act took effect, it eliminated the requirement that a nonprofit corporation have members, (RCW 24.03.065), specifically repealed the chapter under which Community Chapel had incorporated (RCW 24.03.920(18)), and provided that corporations organized under repealed acts would henceforth be governed by this new act (RCW 24.03.010(2)).

Community Chapel took advantage of this new legislation. The first amendment of its articles eliminated the requirement for members. The revised articles provided that

> This corporation shall have no members. All decision-making authority for this corporation shall be hereafter vested in the Board of Directors, except as specifically limited by the corporation bylaws.

(CP 493-94)

In 1981 Community Chapel undertook a wholesale revision of its articles of incorporation, deleting a number of sections in their entirety and adding completely new sections. (CP 488-93) These amendments specifically acknowledged that the new Nonprofit Corporation Act, RCW chapter 24.03, placed restrictions on Community Chapel. (CP 490, subsection i)

No other amendments to the articles were made until March 1988 -- the amendments which are the subject of this action. (See generally CP 480) The bylaws were amended six times before March 1988, but in no ways material to this appeal.

B. Community Chapel's Articles and Bylaws Favored Barnett Individually. At all times, Community Chapel's articles and bylaws drew a distinction between the powers and status afforded Donald Barnett as the original pastor, and any successor to him.

Article VI, sections 1 and 3, authorized amendment of the articles and bylaws by a three-fourths affirmative vote of the board, "and the original Pastor's concurrence, if he is still presiding." (CP 491, 498) (emphasis added).

This same distinction was recognized in the bylaws. The Senior Elders were allowed to remove all division heads, "except when the original Pastor is that Division head." (CP 684, Article Two) (emphasis added) The Elders could exercise jurisdiction in additional matters "(subject to the concurrence of the original chairman of the Board of Senior Elders if he is still presiding)." (CP 687, sec. I) (emphasis added)

The Elders was authorized to overturn decisions by the corporation president "except the original president of the corporation . . ." (CP 688) (emphasis added) Finally, the bylaws repeated the same restriction in the articles, that the bylaws could be amended by three-fourths of the board "and the original Pastor's concurrence if still presiding . . ." (CP 694) (emphasis added)

The bylaws specifically invested Barnett, by name, as Chairman of the Board (CP 685, Article Two(B)), President of the Corporation (CP 688, Article Two), and President and chief administrator of the Bible College (CP 700, Article Eight). Other provisions specifically named him as Pastor of the Church, and Chief Executive Officer of the Christian School and Community Chapel Communications (CP 684-85, Article Four).

Most of these sections purportedly gave him life tenure. Section IV, Article Two (CP 685) was typical:

> B. The original Chairman of the Board of Senior Elders is Donald Lee Barnett who cannot be removed from office while living.

No comparable provision restricted removal of future chairmen.

As Chairman of the Board of Senior Elders, the "original Pastor" was not subject to removal, although nothing precluded removal of successor pastors from that position. (CP 686, Article Five (F))

Section V, Article Two (CP 688) prohibited removing Donald Barnett as the original President of the Corporation, while Article Five (CP 688) specifically authorized removal of the President "Except for the original President of the Corporation . . ." In like manner, Chapter Four, Article Eight (B) (CP 700) provided that, "Donald Lee Barnett is not subject to being removed from the presidency of Community

Chapel Bible College by any action of the Corporation." The next article provided that "In the event that the original Pastor terminates his ministry at the Corporation Church . . ." the Board could "appoint and remove any subsequent president." (Emphasis added.)

This difference in treatment also extended to the pastor himself. The original pastor, Donald Barnett, could not be removed, but future pastors could be removed by a two-thirds vote of the board and a simple majority of the congregation. (CP 698, Article One (B)(3))

Neither the articles nor bylaws referred to any scriptural basis for affording special status to Donald Barnett as an individual. Nor did they refer to any scriptural basis for distinguishing between his elevated status and the reduced status of successive pastors, presidents, or other corporate officers who would follow him. At no time during the trial court proceedings did Barnett offer any scriptural or doctrinal basis for this distinction or suggest that such a basis existed.

C. A Leadership Crisis Led to the Actions At Issue Here. In December 1987 a former director for counseling at Community Chapel wrote to the elders to request an investigation into allegations of sexual misconduct by Barnett. (CP 25, 31-34) The senior elders conducted a series

of confidential hearings (CP 26), which resulted in their February 15, 1988 letter to Barnett placing him on "special status" and asking that he refrain from being alone with women. (CP 36-37)

Two days after the congregation was told that he had been placed on special status, Barnett announced during a church service that he would not accept that status, that he was not under the authority of the elders or even the state, and that he intended to continue in his role as before. (CP 27-28)

This forced the elders to evaluate their legal obligations. (CP 28) They knew that three women, former parishioners, had sued Community Chapel alleging sexual misconduct by Barnett. (Id.) In light of their investigation and these lawsuits, his defiance of their attempted restraints on him provoked a leadership crisis. That crisis led to the March 4, 1988 meeting in Barnett's home five days later.

The elders (also known as the directors, see CP 676) convened at Barnett's home that morning. All were present. (CP 228) The bylaws did not require notice of regular or special directors meetings, but simply required that they be permitted by Barnett or held in his presence. Since he was present, the meeting was a valid directors' meeting, and the trial court so held. (CP 654) Appellant does not contend otherwise.

It is unclear whether Community Chapel's articles were amended that morning or later that day. In one affidavit, Barnett claims that the subject never came up while the other directors were in his home. (CP 372) In another, he admits that they handed him the proposed amendments and said they wanted to vote on them. (CP 55-56) Finally, his counsel conceded that Barnett was uncertain, and acknowledged that the articles may have been amended while everyone was in his home that morning. (CP 575)

In any event, at some point during the meeting that morning, Barnett grew angry with the other directors and asked them to leave immediately. (CP 229) They did, and then concluded their business as a board without any notice to him. (Id.) The trial court reasoned that such notice was not required:

> He [Barnett] made it clear by his conduct that he would not participate in that meeting at that time, or an extended version of that, or at a recess time on that day. I think it would be indulging in unreality to suggest that he still was intending, evinced an intent to participate in the meeting that day.

Transcript of Hearing, November 18, 1988, p. 6. (Record Excerpt 3)[1] See also CP 654-55.

Either before they left Barnett's home or afterwards, the three directors voted unanimously to amend Article VI of

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[1] See Record Excerpts Accompanying Respondents' Brief Opposing Stay Pending Appeal, filed herein.

Community Chapel's articles. (CP 655) That amendment eliminated the requirement for concurrence by the original pastor in any amendments of the articles or bylaws. (CP 657)

After leaving Barnett's home, the three directors then voted unanimously to amend the bylaws and remove Barnett as director. (CP 655, 660-68) Acting as the senior elders, they also disfellowshipped[2] him in accordance with church procedures, (CP 30) an action which Barnett did not challenge in the trial court. On March 10, 1988 the three elders met again and further unanimously amended the bylaws. (CP 655, 669-72)

The effect of these actions was to remove Barnett from all offices within Community Chapel and eliminate all provisions in its articles and bylaws that purported to allow control of the corporation by any one person.

III. ARGUMENT

A. Summary of Argument. The parties agree that factual issues raise no obstacle to deciding whether Barnett's veto power was valid under the Nonprofit Corporation Act, or whether that statute could apply despite his claims of religious freedom. Both issues turn on undisputed facts and substantive law.

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[2] Disfellowshipping is comparable to excommunication.

Community Chapel and its elders contend that the Nonprofit Act applies, and that its prohibition on delegating the authority to amend articles or bylaws was violated by the unique requirement that Barnett personally concur in any proposed amendments. That concurrence effectively delegated to him alone the power to amend Community Chapel's articles and bylaws.

Key to this appeal is Barnett's claim that the articles and bylaws embody a religious belief in authoritarian church government. As such authority applies to him personally, the record simply does not support that claim. Indeed, the personal power extended to him, instead of to the offices he held, contradicts such a claim and demonstrates that the articles and bylaws were not based on religious belief, but on his personal privileges.

Even if the record supported his claim, the trial court properly weighed the impact on his religious beliefs against the state's compelling interests in protecting nonprofit corporations from a single director's excesses, and properly concluded that the marginal burden was justified.

Barnett makes two constitutional arguments that were not raised below. Neither should be considered now, but in any event, the Nonprofit Corporation Act as applied does not establish religion or violate the Washington Constitution.

Finally, when Barnett ended his participation in the March 4, 1988 directors meeting by ordering the other directors out of his house, he was not entitled to notice of their intentions to continue that meeting in his absence.

B. Community Chapel is Subject to the Nonprofit Corporation Act. RCW Chapter 24.03 applies to Community Chapel for either of two reasons.

First, the statute says so. Community Chapel was originally incorporated under RCW chapter 24.08, but that chapter was specifically repealed when the Nonprofit Corporation Act became effective, RCW 24.03.920(18), and the new act expressly applied. RCW 24.03.010 states: "The provisions of this chapter . . . shall apply to: . . . (2) all not-for-profit corporations heretofore organized under any act hereby repealed. . . ." Thus, Community Chapel came squarely within the terms of the Nonprofit Corporation Act.

The Legislature's power to alter, amend, or repeal laws relating to existing corporations is expressly reserved under Washington Constitution, Article XII, § 1. That unlimited power has not been doubted since Seattle Trust v. McCarthy, 94 Wn.2d 605, 617 P.2d 1023 (1980), overruled earlier, more restrictive decisions.

Community Chapel is also subject to the Nonprofit Corporation Act because it took specific steps to bring itself under this act.

The most obvious step was that after the new act eliminate the requirement of members, Community Chapel amended its article to eliminate members. In Golconda Mining Corp. v. Hecla Mining Co., 80 Wn.2d 372, 494 P.2d 1365 (1972), our court, relying on Fletcher, Cyclopedia of Corporations, § 3577 (perm. ed. 1964), held that a corporation which accepts benefits from new laws adopted after its creation becomes subject to those laws. 80 Wn.2d at 381.

Moreover, in 1981 Community Chapel undertook a wholesale revision of its articles and bylaws after the Nonprofit Corporation Act was in effect. These revisions expressly acknowledged that the new act applied. As in Hanks v. Borelli, 411 P.2d 27 (Ariz. 1966), quoted with approval in Golconda Mining, at 80 Wn.2d 381: "[W]hen a corporation renews its existence it then breathes a new life which includes all laws then in effect."

The Indiana Court of Appeals pithly made this point in Lozanoski v. Sarafin, 485 N.E.2d 669, 671 (Ind. App. 1985);

> Turning to the question of the local church's existence as an Indiana not-for-profit corporation, we have no hesitation in expressing our conviction. If a church or religious group elects to incorporate under the laws of this state, then the courts have the power to consider and require that the corporation thus

> formed comply with state law concerning such corporations.

Accord: Clough v. Wilson, 368 A.2d 231, 234 (Conn. 1926) (as a nonstock corporation, church was subject to statutes controlling such entities).

These principles apply here.

C. The Concurrence Requirement Conflicts With the Act.

Barnett argues that the trial court erred in ruling that a requirement of his concurrence in any article or bylaw amendment was void. In other words, he claims that the Nonprofit Corporation Act does not prohibit his exclusive veto power over article or bylaw amendments. He is wrong for either of two reasons found by the trial court, when he must be right on both.

First, a nonprofit corporation must be managed by its board of directors. RCW 24.03.095. Directors must perform their duties in good faith and in the best interests of the corporation. RCW 24.03.127. The board cannot delegate control of the corporation to one individual. Fletcher, Cyclopedia Corporations § 392 (perm. ed.), cited with approval in Tretheway v. Green River Gorge, Inc., 17 Wn.2d 697, 727, 136 P.2d 999 (1943); Boston Athletic Association v. International Marathon, Inc., 467 N.E.2d 58, 62 (Mass. 1984).

Community Chapel's articles could have required the affirmative vote of all directors for amendments. This would

give each director an equivalent "veto" power and preserve the collective nature of decision-making. Through such a process, no director would unlawfully delegate his duties as a director.

The Nonprofit Act allows directors to delegate some duties to a committee of two or more directors, but specifically prohibits delegating the power to amend articles and bylaws. RCW 24.03.115. Yet, giving a unilateral veto to one of several directors has precisely that effect. The final decision on amendments to the articles and bylaws is delegated to one director.

Barnett argues that the statute only prohibits delegations _by_ the directors and that the delegation at issue here is already provided in the articles themselves, so that the directors have not impermissibly delegated anything.

This exalts form over substance. The clear purpose of RCW 24.03.115 is to prevent the adoption of article or bylaw amendments by less than all the directors. Whether the committee or individual who purports to exercise such power gains it from a delegation by all the directors, or from the articles adopted by the original directors hardly matters. RCW 24.03.115 is directed at the exercise of power by fewer than all directors, rather than at how that power is gained.

Moreover, the statute applies "if the articles of incorporation or bylaws so provide . . . " Thus, it would seem to apply regardless of whether the improper delegation were contained _in_ the articles or bylaws themselves, or in a delegation _authorized_ by the articles of bylaws.

The underlying policy as explained in 2 Fletcher, Cyclopedia of Corporation § 498 (perm ed. 1982) is, with respect to "a particular duty to be performed by the directors" (_i.e._, amending the articles or bylaws) "the fair intent of the law is that they should act as a body in regard to the particular matter, and not delegate their discretion or duty to a subcommittee."

Barnett insists that the board is still required to make any bylaw or article amendments, and that his concurrence is simply required before they become effective. From this he argues that the power to amend is not delegated because concurrence is not the same as delegation.

That also exalts form over substance. The _power_ to amend articles and bylaws under this structure is effectively in the hands of one man. No mechanism exists to override his veto. His power is absolute. Under these circumstances, the board does not make amendments; it merely makes _proposals_. For this reason, the trial court correctly concluded that the power to amend had been illegally delegated.

The second obstacle Barnett cannot overcome is RCW 24.03.455, which allows a corporation to require a supermajority, i.e., "the vote or concurrence of a greater proportion of the members or directors . . . than required by this chapter. . . ." A one man veto contradicts this authority. Obviously, such a veto does not impose "a greater proportion," but allows the vote or concurrence of only one director. If concurrence from all directors were required, the veto power would then equate to "a greater proportion." Delegation to one specific director is not a "proportion." Concurrence of all directors evenly distributes the power, for any one director could defeat unanimity. Hence, the supermajority authorized under RCW 24.03.455 spreads power among more directors, while Barnett's veto concentrates that power in one man. That contradicts the supermajority allowed under RCW 24.03.455.

Barnett argues that RCW 24.03.455 simply evinces a legislative intent to allow nonprofit corporations to "vary" statutory voting requirements. Since that is all Community Chapel did in giving Barnett the concurrence power, his power is valid.

But the only way this argument makes sense is to read the language in RCW 24.03.455, which allows for the vote of a "greater proportion of the . . . directors," as if it said

"greater or lesser proportion." Such an interpretation, of course, stands the statute on its head. As it now reads, RCW 24.03.455 ensures that, even with a supermajority requirement, all directors still hold equal power. The statute refutes Barnett's argument that he can be authorized more power than the other directors.

Repeatedly, Barnett argues for a result based on hypotheticals. He proposes that a one-man veto is acceptable because a nonprofit corporation need only have one director, and that a corporation sole clearly has only one director. But these ignore Community Chapel's actual corporate structure. It is not a corporation sole under RCW Ch. 24.12, and it has more than one director. Indeed, during all material times it had four. These facts simply cannot be ignored.

Because Community Chapel could have been organized differently cannot mean that it should be treated as if it were. Community Chapel could even have operated without incorporation, but it chose the tax advantages and limited liability of a nonprofit corporation. As such "then the courts have the power to consider and require that the corporation thus formed comply with state law. . . ." Lozanoski v. Sarafin, 485 N.E.2d 669, 671 (Ind. App. 1985).

Barnett's final statutory argument is that even if the Nonprofit Corporation Act forbids the concurrence requirement, this requirement nonetheless survives under RCW 24.03.905, the savings clause in the Nonprofit Act.

This argument was not raised below and should not be considered here. Issues not raised at the summary judgment hearing cannot be considered for the first time on appeal. Save-Way Drug v. Standard Investment Co., 5 Wn. App. 726, 727, 490 P.2d 1342 (1971). This is simply part of the general policy, now embodied in RAP 2.5(a), against appellate review of claimed errors not raised in the trial court. As explained in State v. Reano, 67 Wn.2d 768, 771, 409 P.2d 853 (1966);

> The reason for the rule is that, if a party desires to rely upon some theory other than upon which the case was tried, he must present it to the trial court so that a ruling thereon may be made and, if such ruling be adverse, he may have the opportunity to elect to stand on his theory or apply to the court to amend his theory and present some other one.

Even if Barnett had raised this argument below, he would have lost. A careful reading of RCW 24.03.905 shows that it only saves "any right accrued or any liability or penalty incurred." A requirement of Barnett's concurrence in article or bylaw amendments is neither a "right" nor a "liability." This portion of the savings clause was simply designed to prevent impairment of preexisting obligations; it was not intended to enshrine corporate structures in stone. As it

explains, "the provisions of this chapter shall, however, apply prospectively to the fullest extent permitted by the Constitutions of the United States and the state of Washington to all existing corporations . . . ." RCW 24.03.095.

Barnett's argument is simply a backdoor attempt to revive the "vested rights" notion previously rejected by our courts, i.e., that corporate shareholders or officers have a vested right in certain provisions despite a change in the law. See State ex rel. Swanson v. Perham, 30 Wn.2d 368, 191 P.2d 689 (1948), limited by its facts in Golconda Mining Corp. v. Hecla Mining Co., 80 Wn.2d 372, 494 P.2d 1365 (1972), and then expressly overruled in Seattle Trust v. McCarthy, 94 Wn.2d 605, 617 P.2d 1023 (1980). The notion of vested corporate rights should continue to rest in peace.

D. The Concurrence Requirement Is Not Based on Religion. We do not doubt that Donald Barnett sincerely believes that the scriptures support authoritarian church government, and we do not ask this Court to examine the validity of that belief.

But his claim that Community Chapel's corporate structure embodies such a belief, particularly as it relates to his personal status, simply is not supported. His generalized assertions about a pastor's biblical authority do not, for several reasons, explain the unique features in these articles

and bylaws. We do not ask this Court to embark on doctrinal interpretation, but simply to see for itself whether the record supports Barnett's claim that Community Chapel's articles and bylaws incorporate a religious belief about the specific form of this church's government.

First, these documents make no reference to such a belief. The articles describe the religious objectives of Community Chapel but say nothing about any scriptural basis for the corporation's form of government. The bylaws repeat those objectives and describe in detail the corporation's management. They describe the scriptural basis and belief in "a specific structure of authority" (CP 282 at I), but make no reference to Barnett's special status at issue here.

We do not suggest that this lack of reference necessarily belies the existence of a doctrinal underpinning, but that absence grows in significance when considered with other factors.

Chief among these is the special status afforded Barnett individually under the articles and bylaws. He is designated <u>by name</u> throughout the bylaws as the original pastor, president, chairman of the directors, division head, and so forth. Powers are granted to him <u>personally</u>, and not to the office he holds. Thus, concurrence on article and bylaw

amendments is required only from the "original Pastor" -- Donald Barnett -- and not from later or other pastors.

This pattern is repeated throughout. Barnett, alone, is immune to removal from office. He, alone, has the right to restrict the board of senior elders' jurisdiction. They can overturn decisions by later presidents of the corporation and they can remove later pastors, but Barnett is exempt from either of those checks on his personal power.

If Community Chapel were truly organized on an authoritarian basis, then that authority would be consistently applied. If the doctrine is what Barnett claims it to be -- "that the pastor ultimately controls the church" -- the corporate documents would give the pastor the power to do that regardless of who is pastor. Instead, we see one set of rules for Barnett and another for all his successors.

At no time has Barnett offered any scriptural basis for this personal preference. Indeed, at no time has he claimed that any scriptural basis even exists for this distinction. His silence on this critical point is deafening.

The record simply will not support a claim that the special privileges and power personally accorded him are based on any religious doctrine. Neither the articles and bylaws nor his generalized assertions about authoritarian church government support the novel distinctions made by the articles

and bylaws in his favor. To paraphrase George Orwell's observation in Animal Farm, all pastors are equal, but Barnett fails to tell us and the record does not show why some pastors are more equal than others.

If Barnett had presented evidence to support his claim that the personal privileges afforded him under Community Chapel's articles and bylaws were biblical, we might have a factual issue as to whether his belief is sincerely held. United States v. Seeger, 380 U.S. 163, 185 (1965) (whether beliefs are sincerely held raises a question of fact).

But this appeal only offers the routine question of whether summary judgment may be granted where the party opposing the motion presents nothing to support its position. Barnett has claimed throughout that the articles and bylaws embody his religious belief in an authoritarian church, but he has never offered anything to support a claim that his religious belief embraces special personal privileges in contrast to those privileges or power granted Community Chapel pastors who may follow him.

Even on this appeal, he skirts around and avoids openly claiming that these personal privileges are based on religious belief. Thus, in this crucial respect, his position remains both unarticulated and unsupported. Hence, this appeal merely presents another application of the oft-stated rule that:

> A party seeking to avoid summary judgment cannot simply rest upon the allegations of his pleadings, he must affirmatively present the factual evidence upon which relies.

Johnson v. Schafer, 110 Wn.2d 546, 548, 756 P.2d 134 (1988), quoting with approval, Mackay v. Graham, 99 Wn.2d 572, 576, 663 P.2d 490, cert. denied, 464 U.S. 894 (1983).

Having failed to do so, Barnett may not at this stage claim that his alleged constitutional rights were violated.

E. The State's Interests Outweigh Any Religious Claims. In light of Barnett's failure to support his constitutional claim with anything in the record, this Court should not consider it. "Constitutional issues should not be decided unnecessarily." State v. Boot, 40 Wn. App. 215, 219, 697 P.2d 1034 (1985). It is well established that a court "will not decide an issue on constitutional grounds when that issue can be resolved on other grounds." Tommy P. v. Board of Commissioners, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). See In re Meyers, 105 Wn.2d 257, 268, 714 P.2d 303 (1986) ("the court need not consider a constitutional issue if nonconstitutional grounds dispose of the case"); State v. Ng, 110 Wn.2d 32, 36-37, 750 P.2d 632 (1988) ("A reviewing court should not pass on constitutional matters unless absolutely necessary . . .")

Nonetheless, because the trial court reached and decided the merits of Barnett's constitutional claim, we address it

here. In doing so, however, we do not waive our position that it need not and ought not be decided.

First, we answer Barnett's allegation that application of the Nonprofit Corporation Act infringes on the exercise of his religion. We begin with an overview of basic principles.

Sincerely held religious beliefs are absolutely protected, but religiously motivated conduct "remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 304, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); Carrieri v. Bush, 69 Wn.2d 536, 419 P.2d 132 (1966) (allowing alienation of affectious action[3] against pastor who counselled woman to leave her husband who was "full of the devil"); State ex rel. Holcomb v. Armstrong, 39 Wn.2d 860, 239 P.2d 545 (1952) (upholding requirement of chest x-ray for university applicant despite religious objections); State v. Verbon, 167 Wash. 140, 8 P.2d 1083 (1932) (upholding conviction of pastor for prescribing and administering drugs to the sick without a physician's license).

The rationale for regulating religious conduct was explained in the earlier Supreme Court decision in Reynolds v. United States, 98 U.S. [8 Otto.] 145, 166-67, 25 L. Ed. 244 (1879):

[3] The subsequent abolition of this tort does not change the principle that religious conduct may be regulated.

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?
>
> * * *
>
> To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law until himself. Government could exist only in name under such circumstances.

Assuming arguendo that Barnett had shown a religious basis for a belief entitling him to protections and privileges not afforded to other pastors of Community Chapel, the question is whether this uniquely individual religious status is entitled to override the public policies embodied in the Nonprofit Corporation Act's prohibitions on delegating certain corporate powers, RCW 24.03.115, or on concentrating power in one of several directors, RCW 24.03.455. As explained in Bassett, Religion and Religious Institutions: The Rising Din of Litigation, 20 U. San Fran. L. Rev. 775, 819 (1986):

> It is where religious doctrine collides with legitimate secular goals that the courts must evaluate what is a religious act or belief and how important that act or belief is to the religion.

The test for resolving such claims can best be described as a balancing test, in which the importance of the state's interest is weighed against the severity of the burden imposed

on religion. The greater the burden imposed on religion, the more compelling must be the government interest. Compare Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed.2d 15 (1972) (government's interest in educating citizens insufficient to justify education requirement that threatened survival of Amish communities), and State ex rel. Bolling v. Superior Court, 16 Wn.2d 373, 133 P.2d 803 (1943) (government's weak interest in requiring flag salute outweighed by strong religious conviction of Jehovah's Witness pupils to refrain from worshipping idols), with Goldman v. Weinberger, 475 U.S. 503, 508, 106 S. Ct. 1310, 89 L. Ed.2d 478 (1986) (government's reasonable interest in uniform military attire sufficient to justify mild burden on religious expression created by ban against Jewish officer wearing a yarmulke) and O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S. Ct. 2400, ___ L. Ed.2d ___ (1987) (government's strong interest in prison security outweighed inmate's request for special religious services).

A government action that passes the balancing test must meet the further requirements that (1) no action imposing a lesser burden on religion would satisfy the government's interest; and (2) the action does not discriminate between religions, or between religion and nonreligion. Braunfeld v.

Brown, 366 U.S. 599, 607, 81 S. Ct. 1144, 6 L. Ed.2d 563 (1961).

Applying these criteria, the Supreme Court has allowed some religious conduct to be banned entirely (see, e.g., Reynolds v. United States, 98 U.S. 145, 166, 25 L. Ed. 244 (1878) [law against polygamy upheld]; Prince v. Massachusetts, 321 U.S. 158, 170-71, 64 S. Ct. 438, 88 L. Ed. 645 (1944) [permitting state to prohibit parents from allowing their children to distribute religious literature when necessary to protect children's health and safety]), and some conduct to be compelled in the face of religious objections (see, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905) [compulsory vaccinations for communicable diseases upheld]; United States v. Lee, 455 U.S. 252, 261, 102 S. Ct. 1051, 71 L. Ed.2d 127 (1982) [mandatory participation of Amish in Social Security system upheld].

Other religious conduct, though not banned, has been restricted. (See, e.g., Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 654, 101 S. Ct. 2559, 69 L. Ed.2d 298 (1981) [law confining sale and distribution of religious literature to booths at state fair upheld]; Cook v. New Hampshire, 312 U.S. 569, 575, 61 S. Ct. 762, 85 L. Ed. 1049 (1941) [license requirement for religious parades upheld].) Still other religious conduct, through not banned

or restricted, has been made more costly. (See, e.g., Braunfeld v. Brown, supra, 366 U.S. 599, 605 [Sunday closing law upheld despite financial burden on Orthodox Jew required to refrain from working Saturday as well]; Bob Jones University v. United States, 461 U.S. 574, 604, 103 S. Ct. 2017, 76 L. Ed.2d 157 (1983) [tax-exempt status denied to private school practicing religiously motivated racial discrimination]; Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305, 105 S. Ct. 1953, 85 L. Ed.2d 278 (1985) [minimum wage laws applied to religious groups].)

With these principles in mind, we turn to the question raised by Barnett: whether the state's interest in regulating the number of directors required to amend articles of incorporation and bylaws, and in ensuring that all corporate directors exercise equal power, is important enough to outweigh any burden such legislation imposes on religion. See Wisconsin v. Yoder, supra, 406 U.S. at 221.

1. Barnett's Interest is Slight. As we have already discussed, Barnett's general belief in authoritarian church government is not at issue here. The real interest Barnett seeks to protect is his personal leadership or permanence. As previously shown, the interest here is not that of Community Chapel pastors generally, but of Donald Barnett specifically. Other pastors would not have the

permanence or veto powers vested exclusively in Barnett, and their interests are not at stake on this appeal.

We hesitate to question whether Barnett's individualized rights have anything to do with the exercise of religion, because a court may only inquire into the sincerity of a belief, and may not judge its truth or falsity. United States v. Ballard, 322 U.S. 78, 86-88, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). We can say with certainty, however, that a statute has minimum impact on the free exercise of religion when it only affects the leadership or permanence of one pastor, and that religion places no premium on these qualities for future pastors. In short, the state's impact on free exercise is temporary and incidental, because Barnett's complaint could never be raised by another pastor of Community Chapel.

2. The State's Interest is Strong. Weighed against this minimal impact is the state's interest in enforcing its Nonprofit Corporation Act. Nonprofit corporations are publicly subsidized by their tax-exempt status. They frequently solicit contributions from their followers and the general public. They have no shareholders and are not required to have members. Hence, they lack most of the internal checks and balances extant in business corporations.

A state has an important interest in controlling excessive delegations of authority by the officers of nonprofit corporations. As articulated in Boston Athletic Association v. International Marathons, Inc., 467 N.E.2d 58, 64 (Mass. 1984):

> The rule on delegation of authority to officers of charitable or nonprofit organizations is the result of heightened public interest in the affairs of those organizations. Those entrusted with the management of funds dedicated to charitable purposes and donated out of a sense of social or moral responsibility owe an especially high degree of accountability to the individual donors as well as to the community.

Barnett nonetheless argues that the state's interest is minimal because nonprofit corporations are now allowed to have only one director, and a corporation sole has only one corporate officer. But the same 1986 legislation which allowed nonprofit corporations to have only one director, Wash. Laws 1986, ch. 240, § 15, also amended RCW 24.03.115 in other ways, but left the prohibition on delegating authority to amend articles and bylaws intact. See Wash. Laws 1986, ch. 240, § 20. This was obviously no oversight. At least for multiple-director corporations, our Legislature consciously chose to retain this prohibition on delegation. Cox v. Helenius, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985) (Court will give effect to every portion of statute. Absent obvious error, "no part should be deemed inoperative or superfluous.")

Barnett's corporations sole argument also does not fit the facts. The essence of a corporation sole is a legal entity which survives the death of the individual office holder and extends the same rights and obligations to his successor in office. RCW 24.12.010. See generally, O'Hara, The Modern Corporation Sole, 93 Dick. L. Rev. 23 (1988). Inherent in a corporation sole is the concept of organizational continuity. Yet, the structure defended by Barnett is anything but that. It is noncontinuous and individual, designed for his personal benefit. The state's recognition of corporations sole offers no support for Barnett's claim that the state is disinterested in minimizing potential abuses in nonprofit corporations.

Lord Acton's axiom that power tends to corrupt and absolute power corrupts absolutely even applies to churches. Imagine a pastor using his considerable influence to exploit vulnerable members of his congregation. See, e.g., Lund v. Caple, 100 Wn.2d 739, 675 P.2d 226 (1984) (pastor seduced parishioner who sought counseling); John Does v. CompCare, Inc., 52 Wn. App. 688, 763 P.2d 1237 (1988) (priest sexually molested altar boys).

Here, Community Chapel's directors were confronted with lawsuits and allegations of sexual misconduct by their pastor. When they tried to place him on special status and

restrict his involvement with women, he claimed that neither the elders nor the state could restrict him, and that he intended to continue in his role as before.

Clearly, the state has a compelling interest in regulating corporations that grant such a pastor dictatorial powers and prevent his control or removal. See Cleveland v. United States, 329 U.S. 14, 67 S. Ct. 13, 91 L. Ed. 12 (1946) (criminal convictions for polygamous religious practices upheld). Protection of marital and family relationship is one of our most fundamental constitutional values. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383-87, 98 S. Ct. 673, 54 L. Ed.2d 618 (1978); Moore v. City of East Cleveland, 431 U.S. 494, 499-506, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977), and cases cited therein.

Less fundamental state interests have been upheld despite religious freedom claims. Traffic control justified restrictions on the distribution of religious literature at state fairs in Heffron v. International Society of Krishna Consciousness, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed.2d 298 (1981). An efficient and fraud-resistant food stamp program justified requiring a welfare family to furnish their child's social security number despite religious objections in Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986). Health and safety concerns justified a hospital bylaw

requiring physicians to carry liability insurance despite religious objections in Backlund v. Board of Commissioners, 106 Wn.2d 632, 724 P.2d 981 (1986), appeal dismissed, 481 U.S. 1034 (1987). Requiring a nonprofit church corporation to show that earnings would not benefit individuals justified revoking its tax exempt status in Church of Scientology of California v. Commissioner, 823 F.2d 1310 (9th Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1752 (1988). Record keeping requirements of the Fair Labor Standards Act justified requiring a religious foundation to maintain wage and overtime records despite religious opposition to paying wages in Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S. Ct. 1953, 105 S. Ct. 1953, 85 L. Ed.2d 278 (1985). Uniform application of the social security system required an Amish employer to pay social security taxes despite religious objection in United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed.2d 127 (1982). And a state's minimum standards for instruction could be imposed on parents who taught their children at home because of religious objections to public schools. Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988), appeal dismissed, 866 F.2d 548 (2d Cir. 1989).

In the present case the public, and hence the state, has a strong interest in ensuring that nonprofit corporations are used for their intended purposes and do not become

vehicles for abuse or manipulation for private advantage. One important way to further this is to regulate the number of directors needed to change the corporation's governing rules, and to require that all directors hold equal powers. One can argue about whether other, more effective, means are available, but the short answer is that these were the means selected by our Legislature to accomplish these purposes.

Weighing these state interests against Barnett's individualized claim, Judge Quinn reasoned:

> But this Court is persuaded that clearly there is an overriding interest on the part of the State in regulating the affairs of an organization such as this, which again has sought the benefits of tax-exempt status and the other benefits available under the Nonprofit Corporation Act, and that those far outweigh any other claims . . .
>
> The State does have a strong public interest . . . in seeing that its Nonprofit Corporation Act is applied, as it has been in this action, and weighing this strong public interest against the temporary and incidental impact on the religious conduct, it is clear that the State's interest justifies that marginal burden, such as it is.

Oral Decision, December 15, 1988, pp. 5-6. (Record Excerpt 6)[4]

The only remaining questions are whether (1) no action imposing a lesser burden on religion would satisfy the government's interest; and (2) the action does not

[4] See Record Excerpts Accompanying Respondents' Brief Opposing Stay Pending Appeal, filed herein.

discriminate between religions, or between religion and nonreligion. Both of these are easy.

As to the first, we can imagine no way that the state could have a lighter touch and still achieve its goal of regulating the powers of corporate directors. Short of abandoning those goals, we can imagine no less restrictive means of achieving them, and Barnett has suggested none.

As to the second question, it is clear on its face that RCW ch. 24.03 does not discriminate between or against religions. The statutory requirements at issue here are neutral, applying to nonprofit corporations of every type.

3. *First Baptist* Does Not Compel A Different Result. Barnett argues that the trial court ignored City of Sumner v. First Baptist Church, 97 Wn.2d 1, 639 P.2d 1358 (1982), by failing to accommodate the Nonprofit Corporation Act with his beliefs. We disagree.

First, the lack of agreement among the justices undercuts the authority of First Baptist. The plurality decision only garnered three votes. One of the concurring justices (J. Utter) supported an accommodation requirement, but a second concurring justice (J. Williams) felt that the city's interest deserved more weight, and a third concurring justice (J. Dore) took an entirely different tack. Two dissents would have enforced the city's codes outright.

Hence, the accommodation requirement urged here by Barnett captured only four votes. This may explain why First Baptist has not been followed in any of our Supreme Court's more recent cases. See Grant v. Spellman, 99 Wn.2d 815, 664 P.2d 1227 (1983) (religious objection to unions required dues exemption); Backlund v. Board of Commissioners, 106 Wn.2d 632, 724 P.2d 981 (1986), appeal dismissed, 481 U.S. 1034 (1987) (hospital may compel physician to carry liability insurance despite religious objections); Witters v. Commission for the Blind, 112 Wn.2d 363, ___ P.2d ___ (1989) (blind ministerial student not entitled to vocational aid). Indeed, the tension between First Baptist and these decisions was noted in dissent in the first Witters decision, 102 Wn.2d 624, 642, 689 P.2d 53 (1984).

Second, First Baptist did not hold that an accommodation between neutral regulations and religion was required; but simply that the trial court must consider whether an accommodation is possible. This was emphasized by the court at 97 Wn.2d 8:

> Where, as here, two legitimate and substantial interests collide, one may ultimately have to give way to the other. In such a situation, the court's function is to balance the interests of the parties and, if an accommodation cannot be effected, determine which interest must yield.

(Emphasis added)

Here, no accommodation was possible. Either Barnett's concurrence requirement or the Nonprofit Corporation Act had to yield. The trial court compared "the temporary and incidental impact on the religious conduct" with "the strong public interest" in complying with the statute, and concluded that the statute justified "the marginal burden" imposed by the state. Oral Decision, supra. Nothing suggests that the trial court in First Baptist went through such an comparable analysis.

In sum, even if First Baptist is still good law, it does not compel a different result here.

F. Deference to Church Law is Not Required Here. Barnett confuses the doctrines of ecclesiastical immunity and free exercise of religion. At pages 27-39, he relies on cases which hold that courts will defer to church decisions or law in ecclesiastical disputes, from which he argues that deference to Community Chapel's articles and bylaws is required here.

Those cases are inapplicable for two reasons. First, this is not an ecclesiastical dispute. The issue here involves a conflict between a corporate structure and a state statute. Barnett's claim that the structure reflects a religious belief does not turn this into an ecclesiastical dispute, but merely into an alleged conflict between a

religious belief and a state regulation. Such disputes are routinely decided by courts.

If Barnett had claimed that the elders misapplied church doctrine in deciding to disfellowship him, that would present an ecclesiastical dispute, but he has challenged neither the procedure nor the substance of that decision.[5]

It is beyond cavil that disputes such as the present one, involving congregational churches not subject to hierarchial control, are resolved by "the ordinary principles which govern voluntary associations." Organization of Lutherans v. Mason, 49 Wn. App. 441, 447, 743 P.2d 848 (1987). As Commissioner Ellis explained here in his ruling denying a stay:

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[5] A court could decide whether church procedures were correctly followed in disfellowshipping Barnett. Church of Christ of Centerville v. Carder, 105 Wn.2d 204, 713 P.2d 101 (1986). But Barnett never questioned that action in the trial court (he claims now for the first time on appeal that the elders only "purported" to disfellowship him). Hence, his disfellowshipping stands. That, itself, disposes of this appeal, for a victory in his favor could not restore Barnett to his former positions.

Community Chapel's bylaws provide:

> The results of being "put out of the Church" and being "disfellowshipped" are . . . fellowship with Community Chapel and Bible Training Center is terminated; the individual is barred from entrance to Church property, functions, meetings, and facilities; and the active participants in the church are instructed to have no fellowship or non-business conversation with him.

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> Where, as here, the issue presented is who shall control a corporate entity, the corporation operates a congregational church with no higher governing organization, and the rights of the competing parties can only be resolved by resorting to the courts, the fact that the court's decision may somehow impact the practice of a party's religion does not prevent the court from acting. The cases holding otherwise are simply too numerous to support any other conclusion.

Commissioner's Decision, p. 6-7 (citations omitted).

Thus, in Church of Christ v. Carder, supra, 105 Wn.2d 204, the court could decide whether the pastor of a congregational church had been properly terminated. It is undisputed that Community Chapel is also a congregational church, and that Barnett is the party who brought this lawsuit to resolve these competing claims. Hence, as in Organization of Lutherans v. Mason, supra, 49 Wn. App. at 446, "this dispute is amenable to civil court resolution."

Indeed, courts have an obligation to resolve such disputes. As explained by the Kansas Supreme Court in Gospel Tabernacle Body of Christ Church v. Peace Publishers & Co., 506 P.2d 1135, 1138, adhered to in 508 P.2d 849 (Kan. 1973):

> The property and financial affairs of churches must be the concern of secular authority in order to assure regularity of business practices and assure the right of citizens to have their gifts used as they direct. Government owes this assurance to citizens and this in no way hinders any citizen's religious freedom.

See also Samoan Congregational Christian Church v. Samoan Congregation Christian Church of Oceanside, 135 Cal. Rptr.

793 (Cal. App. 1977) (court could resolve church dispute based on nonprofit corporation act rather than on church rules).

G. The Establishment Clause Has Not Been Violated. Barnett argues that the trial court's ruling prefers one type of church over another in violation of the first amendment's establishment clause.

This argument was not raised below. Thus, it should not be considered now. State v. Reano, 67 Wn.2d 768, 771, 409 P.2d 853 (1966). We acknowledge that RAP 2.5 recognizes an exception for "manifest error affecting a constitutional right," but that does not apply here. Constitutional issues may be raised for the first time on appeal only where they relate to the trial court's jurisdiction, Kueckelhan v. Federal Old Line Ins. Co., 69 Wn.2d 392, 418 P.2d 443 (1966), or to trial court proceedings which, themselves, invaded a constitutional right. State v. Lampshire, 74 Wn.2d 888, 447 P.2d 727 (1968) (impermissible remark by trial judge in presence of jury); Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (denial of procedural due process). As explained in State v. Valladares, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), aff'd in part, rev'd in part, 99 Wn.2d 663, 664 P.2d 508 (1983):

> The very verbiage of the rule contemplates a trial error involving a trial right -- due process right -- as opposed to a pretrial right. RAP 2.5(a)(3) may not be invoked merely because defendant can identify a

> constitutional issue not litigation below. (Emphasis original)

Quoted with approval in State v. Scott, 48 Wn. App. 561, 568, 739 P.2d 742 (1987).

Even if this issue were preserved, Barnett's contention is still wrong. Larson v. Valente, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed.2d 33 (1982), on which he heavily relies, involved a statute which distinguished on its face between different religious. It imposed registration and reporting requirements only on those churches that received less than half of their contributions from internal sources -- thereby granting a denominational preference on its face.

Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed.2d 745 (1971), announced a three-part test for analyzing statutes under the establishment clause. A statute is constitutional if (1) its purpose is secular, (2) it primary effect neither advances nor hinders religion, and (3) if does not create an excessive entanglement of government and religion. The statute in Larson failed at least the second test, because its primary effect was to favor some churches over others.

Contrast that with the present case. The Nonprofit Corporation Act is neutral on its face. Its purpose is clearly secular. Even accepting Barnett's argument that the statute as applied advances or hinders some religions, that

is clearly not its primary effect. Nor has Barnett contended otherwise. In short, he contends that because the statute arguably impacts his personal beliefs, it violates the establishment clause. But that is no more true than a statute which impacts all religions that practice polygamy, Reynolds v. United States, 98 U.S. [8 Otto.] 145, 25 L. Ed. 244 (1879), or which require men to wear a yarmulke, Goldman v. Weinberger, 475 U.S. 503 (1986). The primary effect of the Nonprofit Corporation Act is secular. Its incidental effect on religion does not make it otherwise.

Finally, there is no showing or suggestion that this statute excessively entangles government and religion.

Thus, the contention that the Nonprofit Corporations Act establishes religion is without merit.

H. Washington's Constitution Does Not Change the Result. Without raising the issue in the trial court, Barnett asserts that the Nonprofit Corporation Act, as applied, violates the Washington Constitution. For the same reasons discussed in the preceding section, this issue should not be considered. State v. Reano, 67 Wn.2d 768, 771, 409 P.2d 853 (1966) ("This court will not review a case on a theory different from that on which it was presented at the trial level.") In any event, Barnett is wrong.

His argument that the state constitution has been violated is long on assertions and short on authority. On that ground alone this Court should decline Barnett's invitation to reach this issue. "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

Washington's establishment clauses, Const. art. 1 § 11 and art. 9, § 4, have been characterized as stricter than their federal counterpart. Witters v. Wn. Dept. of Services for the Blind, 474 U.S. 481, 489, 106 S. Ct. 748, 88 L. Ed.2d 846 (1986). Whether they actually are or should be can be debated. Compare Utter & Larson, Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution, 15 Hastings Const. L.Q. 45 (1988) (tracing the history of our establishment clauses), with Conklin & Vache, The Establishment Clause and the Free Exercise Clause of the Washington Constitution -- A Proposal to the Supreme Court, 8 U. Puget Sound L. Rev. 411 (1985) (adding more history and arguing that our establishment clauses have been applied too strictly).

In any event, the strict interpretation of our establishment clauses has been in connection with state financial aid for religious purposes, see, e.g., Witters v.

Commission for the Blind, 112 Wn.2d 363, ___ P.2d ___ (1989) (vocational aid for blind ministerial student); State Higher Education Assistance Authority v. Graham, 84 Wn.2d 813, 529 P.2d 1051 (1974) (college loans), but not in any way that will help Barnett.

The "free exercise" portion of Const. art. 1, § 11, guarantees freedom of religious conscience, but adds:

> . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness of justify practices inconsistent with the peace and safety of the state. (Emphasis added)

Few cases construe this language, and none of them support Barnett's position. They are all listed below:

State v. Neitzel, 69 Wash. 567, 125 Pac. 939 (1912) (fortune telling by astrology minister could be prosecuted); State v. Verbon, 167 Wash. 140, 8 P.2d 1083 (1932) (minister prosecuted for prescribing drugs without a license); Seventh Elect Church in Israel v. First Seattle Dexter Horton National Bank, 167 Wash. 473, 10 P.2d 207 (1932) (members who withdrew from church could not recover freely given offerings); State ex rel. Holcomb v. Armstrong, 39 Wn.2d 860, 239 P.2d 545 (1952) (chest x-ray for entering college students required despite religious objections); State ex rel. Shoreline School District v. Superior Court, 55 Wn.2d 177, 346 P.2d 999 (1959), cert. denied, 363 U.S. 814 (1960) (compulsory school attendance required despite religious objections); Carrieri

v. Bush, 69 Wn.2d 536, 419 P.2d 132 (1966) (minister liable for alienation of affections in counseling wife to leave her husband because he was "full of the devil").

Our only Supreme Court case upholding religious convictions in the face of state regulation is State ex rel. Bolling v. Superior Court, 16 Wn.2d 373, 133 P.2d 803 (1943), which exempted Jehovah's Witness students because of their religious objections from saluting the flag at school ceremonies. But Bolling hardly supports the "heightened scrutiny" urged by Barnett under our state Constitution, because the decision relies on both the federal and state constitutions, and the U.S. Supreme Court reached the same conclusion under the federal Constitution. West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

In sum, the state cases reveal no support for Barnett's argument that the state Constitution compels a different result. Here, as in Backlund v. Board of Commissioners, 106 Wn.2d 632, n.3, 724 P.2d 981 (1986):

> The parties have not argued persuasively for a different application of the provisions of the First Amendment and Const. art. 1, § 11 (amend. 34) of the state Constitution as they pertain to the exercise of religion.

I. Barnett Was Not Entitled to Further Notice of the March 4 Meeting. Barnett's final argument is that the trial

court should not have entered summary judgment when a dispute existed as to whether the elders gave Barnett adequate notice of their intention to continue the meeting of March 4.

This does not raise a genuine issue of material fact. Indeed, the trial found that the directors did <u>not</u> give notice to Barnett because they were not required to. (CP 654)[6]

No notice of the meeting at Barnett's house that morning was required. The bylaws did not require notice of directors meetings so long as Barnett permitted the meeting or he was present. The meeting was in his presence, so no notice was required. A valid meeting was underway -- no one disputes that -- when Barnett grew angry with the other directors and ordered them out of his home.

The question presented is whether the other directors were required to notify Barnett of their intention to resume the meeting elsewhere after he kicked them out.

Judge Quinn explained:

> [H]e [Barnett] made it clear by his conduct that he would not participate in that meeting at that time, or an extended version of that, or at any recess time on that day. I think it would be indulging in unreality to suggest that he still was intending and evinced any intent to participate in the meeting that day.

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[6] Barnett claims that the trial court's findings on summary judgment are "inappropriate or superfluous." Judge Quinn made no findings on <u>disputed</u> issues and simply recited <u>undisputed</u> facts to clarify the basis for his decision. Such a procedure is specifically authorized by CR 56(d).

Transcript of Hearing, p. 6, lines 18-23. (Record Excerpt 3)[7]

If a corporate officer refuses to permit a meeting to continue in the company's offices, the rest of the attendees may adjourn to another site. 5 Fletcher, Cyclopedia of Corporations § 2015 at 110-11, citing State ex rel. Ryan v. Cronan, 49 Pac. 41, 46 (Nev. 1892) ("when the president refused to permit the meetings to be continued in the office of the company, the meetings had the right to adjourn . . ."). Barnett has previously argued that the adjournment in Ryan specified when and where the adjourned meeting would resume. On that point the opinion is not clear, but in any event that obscures the main point -- the president could not frustrate an otherwise proper meeting by unilaterally adjourning it. As the court said:

> To hold otherwise would be recognizing in the president . . . a right to prevent the annual election of the directors of the company, and a right to perpetuate in office indefinitely at his pleasure himself and the board of directors of which he was chosen a member. He has no such right under any rule of law, or under any decisions of the courts.

49 Pac. at 46 (emphasis added).

This point has been settled since at least the 17th century when Charles I was arrested for insisting on his

[7] See Record Excerpts Accompanying Respondents' Brief Opposing Stay Pending Appeal, filed herein.

perogative to dissolve Parliament to avoid enactment of unfavorable laws.

Even if Barnett had not kicked out the other directors, it is well settled that:

> [C]orporate meetings may be adjourned by the majority . . . and resumed and continued on the adjourned day without further notice for the transaction of whatever business was to come before the original meeting.

5 Fletcher, Cyclopedia of Corporations § 2015 at 109.

No new notice was required because "an adjourned meeting is but a continuation of the original meeting." Fletcher, _supra_ at 111; _Morris Alpert & Sons, Inc. v. Kahler_, 502 P.2d 98 (Colo. 1972). It is true that those who attended the original meeting in _Morris Alpert_ knew when the adjourned meeting would occur. Unlike Barnett, however, they had stayed throughout the original meeting, rather than walked out of it. When an officer effectively walks out, he waives any right to further notice. He is then simply an absent member and "No notice of the adjourned meeting need be given to absent stockholders or members, unless it is required by the charter or bylaws." Fletcher, _supra_ at 111.

Barnett could not end the March 4 meeting by kicking out the other directors, any more than he could by walking out himself. See _Robinson v. Davis_, 511 N.Y.S.2d 311 (N.Y. App. Div. 1987) (pastor's decision not to attend meeting where he was terminated did not render proceedings improper). Here,

since the meeting was at Barnett's home, kicking out the other directors was functionally equivalent to walking out himself. The other three directors constituted a quorum and majority and had a right to continue the meeting after he effectively stormed out of it. His argument that he was nonetheless entitled to notice of their further actions is baseless.

IV. CONCLUSION

This Court should affirm the trial court's orders granting Community Chapel's first and second motions for partial summary judgment (CP 651-701, 861-63) and the trial court's Order Dissolving Restraining Orders and Granting Permanent Injunction (CP 858-60).

Barnett has failed to show any error in the entry of these orders.

Respectfully submitted this 1st day of JUNE, 1989.

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APPENDIX

United States Constitution

Amendment I. Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

Washington State Constitution

Article 1, § 11. Religious Freedom

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Nonprofit Corporation Act

RCW 24.03.059. Board of Directors

The affairs of a corporation shall be managed by a board of directors. Directors need not be residents of this state or members of the corporation unless the articles of incorporation or the bylaws so require. The articles of incorporation or the bylaws may prescribe other qualifications for directors.

RCW 24.03.115. Committees

If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the directors in office, may designate and appoint one or more committees each of which shall consist of two or more directors, which committees, to the extent provided in such resolution, in the articles of incorporation or in the bylaws of the corporation, shall have and exercise the authority of the board of directors in the management of the corporation: Provided, That no such committee shall have the authority of the board of directors in reference to amending, altering or repealing the bylaws; electing, appointing or removing any member of any such committee or any director or officer of the corporation; amending the articles of incorporation; adopting a plan of merger or adopting a plan of consolidation with another corporation; authorizing the sale, lease, or exchange of all or substantially all of the property and assets of the corporation not in the ordinary course of business; authorizing the voluntary dissolution of the corporation or revoking proceedings therefor; adopting a plan for the distribution of the assets of the corporation; or amending, altering or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered or repealed by such committee. The designation and appointment of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any individual director of any responsibility imposed upon it or him by law.

RCW 24.03.165. Procedure to amend articles of incorporation

Amendments to the articles of incorporation shall be made in the following manner:

(1) Where there are members having voting rights, with regard to the question, the board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this chapter for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least two-thirds of the votes which members present at such meeting or represented by proxy are entitled to cast.

(2) Where there are no members, or no members having voting rights, with regard to the question, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

Any number of amendments may be submitted and voted upon at any one meeting.

RCW 24.03.455. Greater voting requirements

Whenever, with respect to any action to be taken by the members or directors of a corporation, the articles of incorporation require the vote or concurrence of a greater proportion of the members or directors, as the case may be, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control.

RCW 24.03.905. Savings

Any corporation existing on the date when this chapter takes effect shall continue to exist as a corporation despite any provision of this chapter changing the requirements for forming a corporation or repealing or amending the law under which it was formed. The provisions of this chapter shall, however, apply prospectively to the fullest extent permitted by the Constitutions of the United States and the state of Washington to all existing corporations organized under any general act of the territory or the state of Washington providing for the organization of corporations for a purpose or purposes for which a corporation might be organized under this chapter. The repeal of any prior act or part thereof by this chapter shall not affect any right accrued or any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof. The repeal of a prior act or acts by this chapter shall not affect any existing corporation organized for a purpose or purposes other than those for which a corporation might be organized under this chapter.