ORAL ARGUMENT REQUESTED

NO. ____________

In The Court Of Appeals
For The Second District Of Texas
Fort Worth, Texas

In re

FRANKLIN SALAZAR; JO ANN PATTON; WALTER VIRDEN, III; ROD BARBER; CHAD BATES; JACK LEO IKER; CORPORATION FOR THE EPISCOPAL DIOCESE OF FORT WORTH; AND THE EPISCOPAL DIOCESE OF FORT WORTH,

Relators

The Honorable John P. Chupp,
141st Judicial District Court of Tarrant County, Texas, Respondent
Arising out of Cause No. 141-237105-09

PETITION FOR WRIT OF MANDAMUS

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LIST OF PARTIES AND COUNSEL

Relators *(Defendants below)* "The Diocesan Majority"

Franklin Salazar; Jo Ann Patton; Walter Virden, III; Rod Barber; Chad Bates; Jack Leo Iker (the "Individual Relators"), Corporation for the Episcopal Diocese of Fort Worth (the "Corporation") and The Episcopal Diocese of Fort Worth (the "Diocese")

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1 Mr. Nelson and Ms. Wells are, procedurally, the real parties in interest. Rule 12 stipulates that the respondents to a motion to show authority are the counsel whose authority is challenged. Tex. R. Civ. P. 12. Mr. Nelson and Ms. Wells contend that they represent the Diocese and the Corporation who bring this original proceeding in which the Diocese and the Corporation argue that they have no such authority.

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RECORD AND APPENDIX REFERENCES

The Mandamus Record ("R"), bound and filed separately from this petition, consists of the following:

A. Affidavit of Scott A. Brister

1. Amended Motion To Dismiss For Lack Of Subject-Matter Jurisdiction And First Amended Original Answer of Defendants Franklin Salazar, Jo Ann Patton, Walter Virden, III, Rod Barber, Chad Bates, Jack Leo Iker And The Anglican Province Of The Southern Cone's Diocese Of Fort Worth Subject To Amended Motion To Dismiss (filed June 1, 2009)

2. Defendants' Motion Challenging The Authority Of Attorneys To Prosecute This Suit On Behalf Of The Episcopal Diocese of Fort Worth And The Corporation Of The Episcopal Diocese Of Fort Worth (filed August 19, 2009)

3. Third-Party Petition Of Defendant The Episcopal Diocese Of Fort Worth (filed August 19, 2009)

4. Plea In Intervention And Third-Party Petition Of The Episcopal Diocese Of Fort Worth (filed August 19, 2009)

5. Plaintiffs' First Amended Original Petition (filed September 3, 2009)

6. Plaintiffs' Response To Defendants' Motion Challenging Attorneys' Authority (filed September 8, 2009)

7. Plaintiffs' Brief Supporting The Use Of Affidavit Testimony In Connection With Defendants' Motion Challenging The Authority Of The Attorneys Pursuant To Rule 12 Tex. R. Civ. P. (filed September 9, 2009)

8. September 9, 2009, Hearing Transcript

9. Plaintiffs' Supplemental Response To Defendants' Motion Challenging Authority Of Attorneys (filed September 15, 2009)

10. September 16, 2009, Hearing Transcript

11. Order Granting Rule 12 Motion (entered September 16, 2009)

12. Defendants' Motion For Reconsideration Of Rule 12 Order (filed September 22, 2009)

13. Defendants' Memorandum Brief In Support Of Motion For Reconsideration Of Rule 12 Order (filed October 1, 2009)

14. Plaintiffs' Opposition to Defendants' Motion For Reconsideration Of Rule 12 Order (filed October 2, 2009)

15. Brief In Support Of Plaintiffs' Opposition to Defendants' Motion For Reconsideration Of Rule 12 Order (filed October 2, 2009)

16. October 2, 2009 Hearing Transcript

17. Order Denying Defendants' Motion For Reconsideration Of Rule 12 Order (entered October 5, 2009)

18. Third-Party Defendants' Original Answer To Plea In Intervention And Third-Party Petition (filed October 5, 2009)

19. Third-Party Defendants' Original Answer (filed October 15, 2009)

The attached Appendix ("App.") consists of the following:

A. Order Granting Rule 12 Motion (entered September 16, 2009) (certified copy)

B. Articles of Incorporation of Corporation of the Episcopal Diocese of Fort Worth, attached as Ex. 28 to Plaintiffs' Summary Judgment Evidence, Affidavit of Reverend Canon Courtland Manning Moore

C. Constitution of the Episcopal Diocese of Fort Worth, adopted in Conventions 1982-1999, attached as Ex. 4 to Amended Motion To Dismiss For Lack Of Subject-Matter Jurisdiction And First Amended Original Answer of Defendants Franklin Salazar, Jo Ann Patton, Walter Virden, III, Rod Barber, Chad Bates, Jack Leo Iker And The Anglican Province Of The Southern Cone's Diocese Of Fort Worth Subject To Amended Motion To Dismiss

D. Constitution and Canons of the Episcopal Diocese of Fort Worth, revised through Convention of October 4, 1991, attached as Certified Copies, District Clerk, Tarrant County, Texas, to Plaintiffs' Summary Judgment Evidence

E. By-Laws of the Corporation of the Episcopal Diocese of Fort Worth, attached as an exhibit to Plaintiffs' Summary Judgment Evidence, Affidavit of Elinor Normand

STATEMENT OF THE CASE

Nature of the Case

Rather than bring suit in their own names, the appointees of a national church body have filed suit in the names of a Texas unincorporated association and a Texas non-profit corporation in which they have never previously held office. Plaintiffs and Defendants (Relators) both claim to represent the Texas Diocese and the Texas Corporation.

Relators filed a Rule 12 motion challenging the authority of the Plaintiffs' attorneys to prosecute this suit on behalf of the Texas Diocese or the Texas Corporation as they admit they were not hired by either, but by representatives of the national organization.[2]

Respondent

The Honorable John P. Chupp, 141st District Court, Tarrant County, Texas.

Relief Requested

Relators seek a writ of mandamus compelling the Respondent to grant their motion to show authority and to dismiss the underlying case insofar as it is purportedly brought on behalf of the Corporation or the Diocese.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Tex. Gov't Code Ann. § 22.221(b) (Vernon 2004).

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2 *See* R2.

STATEMENT REGARDING ORAL ARGUMENT

The Relators request oral argument in this case. The underlying dispute involves significant issues involving the control of local institutions, organized under Texas law, and constitutional issues involving the religious liberty and the limits of civil courts to interfere in religious controversies or enforce religious doctrine. Relators, therefore believe that oral argument would greatly aid the Court's determination of this case.

ISSUES PRESENTED

Do the Plaintiffs' counsel have authority to bring suit on behalf of the Episcopal Diocese of Fort Worth?

A. Who can authorize suit for a non-profit corporation?

B. Who can authorize suit for an unincorporated association?

C. May attorneys be hired over the objections of the Diocese and the corporate Trustees whom they claim to represent?

I. INTRODUCTION AND SUMMARY

A party may not sue itself.[3] If Exxon Corporation were to appear as both plaintiff and defendant in a case, the Court would have a duty to sort it out, if for no other reason than to assure that a bona fide case or controversy existed. There is only one Exxon Corporation and it has only one board of directors. If opposing attorneys both claimed to represent Exxon, Rule 12 of the Texas Rules of Civil Procedure would require the trial court to find out who had the actual authority to appear on its behalf. Any such court would no doubt conclude that an out-voted minority of the board or the shareholders could not hold their own meeting, elect a new board and claim to be the true Exxon Corporation.

This case presents the very same question and the Trial Court had an obligation to sort it out. There is only one Episcopal Diocese of Fort Worth, and only one Corporation for the Episcopal Diocese of Fort Worth. And yet, the Episcopal Diocese of Fort Worth has purportedly been sued in this case ***by the Episcopal Diocese of Fort Worth***, and the Trial Court has refused to do anything about it. When the University of Houston showed up on both sides of a case, the attorneys

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[3] *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949); *accord City of Galveston v. State*, 217 S.W.3d 466, 474 (Tex. 2007).

who were not hired by the Board of Regents were shown the door. *See Gulf Reg'l Educ. Television Affiliates v. Univ. of Houston*, 746 S.W.2d 803, 809-10 (Tex. App.—Houston [14th Dist] 1988, writ denied). The same should happen here. The rule states that the trial court "shall" bar unauthorized attorneys from proceeding and "shall" strike their pleadings. Tex. R. Civ. P. 12.

But a word about what is ***not*** in issue. Although this original proceeding arises from a religious controversy, the question presented is not religious: who has authority to file suit for a Texas organization? Relators did not file this suit and do not ask this Court to decide which side represents "The True Church." Indeed, no Texas court has jurisdiction to decide such a question and cannot accept an invitation to wade into doctrinal controversies. *See infra* § III.A. The only question presented is which set of human beings are the duly elected representatives of a Texas non-profit corporation and a Texas unincorporated association. The question admits of only one answer, and the Trial Court had no discretion to proceed without deciding it.

II. STATEMENT OF FACTS

A. The Relators Are The Trustees And Treasurer Of A Texas Non-Profit Corporation And Unincorporated Association

Individual Relators are the trustees of a Texas non-profit corporation, the Corporation for the Episcopal Diocese of Fort Worth

("the Corporation"), and the Bishop and Treasurer of a Texas unincorporated association, the Episcopal Diocese of Fort Worth ("the Diocese").[4] Relators have been sued by The Episcopal Church ("TEC"), and two other Plaintiffs who claim to be the very Corporation and Diocese that the Individual Relators serve.[5]

B. The Individual Relators Have Not Been Replaced And Continue To Serve

The Diocesan Minority contends that the Individual Relators abandoned their offices in obeying the majority vote of the Diocese rather than TEC, the national body.[6] TEC then claimed the right to replace all the officers of the Diocese and Corporation with appointees of its own. As shown in detail below, while TEC may sever relations or create new organizations however it wishes, it cannot take over organizations it has never owned or replace officers it has never had the right to appoint.

1. The Diocese, a Texas unincorporated association, voted to realign with a different segment of the Anglican Communion

As with any other organization, the Diocese could have been organized in any number of forms when it was separated from the

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4 R2 at 2, 5.

5 *See* R5 at 1-2.

6 *See* R5 at ¶¶ 46-51.

Diocese of Dallas on January 1, 1983. The form chosen was an unincorporated association that is governed by its own Constitution and Canons,[7] which were adopted by "the Clergy and Laity of The Episcopal Church, resident in that portion of the State of Texas."[8] The Diocese has the authority to adopt its own Canons,[9] and amend its own Constitution.[10] Nothing in either requires permission or ratification by TEC.[11]

That is all that occurred here. Briefly, the underlying suit stems from the Diocese's amendment of its own Constitution to remove references to TEC based on actions that many in the Diocese believed violated some of the traditional and foundational purposes of the church. As required by the Diocese's Constitution, both clergy and lay delegates at two of the Diocese's Annual Conventions (November 2007 and November 2008) voted to amend the Diocese's Constitution.[12] The votes were not close; although only a majority vote was required, about

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[7] App. C, Enabling Clause.

[8] App. C, Preamble.

[9] App. C, art. 18.

[10] App. C, art. 19.

[11] *See generally* App. C, D.

[12] App. C, art. 19.

80 percent of both the clergy delegates and the lay delegates independently voted for the amendments at each convention.

2. *TEC then purported to take over the Diocese and the Corporation*

The Real Parties in Interest admit that Bishop Iker and the other Individual Relators received their offices by the election of a Diocesan Convention.[13] It is undisputed that such office holders are elected by the Diocesan Convention, not appointed or installed by TEC.[14]

As to Bishop Iker in particular, the Bishop of the Diocese is not chosen by TEC or any other national body. To the contrary, the Diocesan Constitution specifically provides:

> The election of a Bishop, a Bishop Coadjutor, or a Suffragan Bishop for this Diocese ***shall*** take place at the regular meeting of the Convention or at a special meeting of the Convention called for that purpose.[15]

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[13] R9, Ex. 2 at 47-48.

[14] App. C, arts. 6, 17.

[15] App. C, art. 17. Before such an election, a Nominating Committee consisting of clergy and laity from the Fort Worth area accepts names for consideration, and makes a recommendation to the Diocese Convention. *See* App. D, Canon 40, pp. 68-69. Additional names may be placed in nomination from the floor of the Convention. App. D, Canon 40 § 40.7, p. 68. At the close of nominations, the Convention must recess for a celebration of the Holy Eucharist, after which the Convention elects the Bishop for the Diocese. App. D, Canon 40, § 40.8, p. 69. Similarly, the Diocese's Treasurer is elected by the Diocese Convention. App. D, Canon 5, p. 28.

TEC's own Constitution acknowledges that "[i]n every Diocese the Bishop . . . shall be chosen agreeably to rules prescribed by the Convention of that Diocese."[16] No matter how The Episcopal Church was organized in the 18th century, these provisions make clear that, in Fort Worth, Texas, the Diocese governs its own affairs and chooses its own Bishop.

After the vote removing the Diocese from TEC, the Presiding Bishop of TEC purported to remove Bishop Iker and appoint a replacement (Bishop Gulick, already Bishop of the Diocese of Kentucky) as bishop of a Diocese that was no longer part of TEC.[17] Specifically, TEC's Presiding Bishop purported to call a "special" meeting of the Diocesan Convention (again, for a Diocese that was no longer part of TEC) consisting of delegates representing those who lost at the previous Annual Convention.[18] This convention then voted to reverse the Constitutional amendments of the two previous Annual Conventions and appointed its own replacements to fill all the offices it "declared" to be vacant.[19]

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16 R1, Attachment 1, art. II, § 1.

17 R9, Ex. 2 at 32-33.

18 R9, Ex. 2 at 33-34.

19 R9, Ex. 2 at 33-34.

Presumably, it is these replacements—persons all appointed by a national organization rather than the rules of the Texas Diocese and Corporation—who hired the attorneys for the Real Parties in Interest.[20] The Individual Relators did not.

C. The Trial Court Declined To Decide The Rule 12 Motion

Relators filed a Rule 12 motion in the Trial Court challenging the authority of the Plaintiffs' attorneys to prosecute this suit on behalf of the Diocese and the Corporation.[21] The Plaintiffs filed a response and referred to several volumes of evidence on file.[22] The Plaintiffs' attorneys admitted they were not hired by the Diocese or Corporation representatives elected at any of the Annual Conventions, but instead by Bishop Gulick and six trustees he enabled through a "special" convention held on February 7, 2009.[23]

The Trial Court held hearings on the Rule 12 motion on September 9th and 16th, 2009,[24] and signed an order granting and denying the Rule 12 motion in part—barring the Plaintiffs' attorneys

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20 R5 at 18.

21 R2.

22 R6.

23 R9, Ex. 2 at 33-34.

24 *See* R8; R10.

from appearing for the Diocese and the Corporation "that is associated with Bishop Iker," but refusing to bar them from appearing as attorneys for the Diocese and Corporation generally.[25] Relators filed a motion for reconsideration,[26] which was heard on October 2, 2009,[27] and denied by order signed October 5, 2009.[28]

III. Argument And Authorities

A. Jurisdiction And Standard Of Review

This court has jurisdiction to issue all writs of mandamus, agreeable to the principles of law regulating those writs. Tex. Gov't Code Ann. 22.221(b) (Vernon 2004). Mandamus relief is available when (1) a trial court clearly abuses its discretion by failing to correctly apply the law, and (2) the benefits and detriments of mandamus render appeal inadequate. *In re Schmitz,* 285 S.W.3d 451, 458 (Tex. 2009) (orig. proceeding).

As to the first requirement, a trial court has no discretion in determining what the law is or in applying the law to the facts. *Perry v. Del Rio,* 66 S.W.3d 239, 257 (Tex. 2001) (orig. proceeding). As to the

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25 R11; App. A.

26 R12.

27 R13.

28 R17.

second requirement, an appellate remedy is inadequate when—considering "the purpose[] the Legislature was trying to accomplish"—the benefits of delaying or interrupting a particular proceeding outweigh the detriments. *In re Schmitz*, 285 S.W.3d at 458-59 (recognizing that the Court has most frequently used mandamus relief in cases "in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved," and granting writ of mandamus).

The jurisdiction of the courts, however, is limited by the state and federal constitutional guarantees of religious liberty. There is a general constitutional command that civil courts "decide church . . . disputes without resolving underlying controversies over religious doctrine." *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710, 96 S. Ct. 2372, 2381 (1976); *see also All Saints Parish Waccamaw v. Protestant Episcopal Church,* ___ S.E.2d ___, No. 26724, 2009 WL 2998941, at *5 (S.C. Sept. 18, 2009). To avoid deciding ecclesiastical matters, a State may adopt either of two approaches expressly approved by the United States Supreme Court: "neutral principles of law" or "deference." *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

In their response to the Rule 12 motion below, the Plaintiffs relied heavily on the "deference" approach, insisting that TEC is

hierarchical and thus has the right to say what the Corporation and Diocese can do regardless of what the rules of those organizations say. But, Texas courts, including this Court, have adopted the "neutral principles of law" approach. *See Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007); *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.).[29] "Church disputes that are resolved under the neutral principles of law approach do not turn on the single question of whether a church is congregational or hierarchical. Rather, the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes." *All Saints Parish Waccamaw*, 2009 WL 2998941, at *7; *see Jones*, 443 U.S. at 603.

Under the "neutral principles" standard:

- Courts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration;
- Courts cannot avoid adjudicating rights growing out of civil law; and
- Courts must accept as final and binding the decision of the highest religious judicatories only as to religious law, principle, doctrine, discipline, custom, or administration.

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[29] *See also All Saints Parish Waccamaw*, 2009 WL 2998941, at *6 ("South Carolina courts are to apply the neutral principles of law approach as approved by the Supreme Court of the United States in *Jones v. Wolf,* 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979), and expressed by this Court in *Pearson v. Church of God,* 325 S.C. 45, 478 S.E.2d 849 (1996).").

All Saints Parish Waccamaw, 2009 WL 2998941, at *7; *see Jones*, 443 U.S. at 602-04.

When that standard is applied, the required vote of a non-profit or religious organization is effective to amend that body's constitution and bylaws, and to sever its ties with The Episcopal Church with local elected leadership intact. *All Saints Parish Waccamaw*, 2009 WL 2998941, at *10-11 (concluding that "through the application of neutral principles of law, it is clear to us that the true officers of All Saints Parish, Waccamaw, Inc. are the members of the majority vestry."). Here, that question arises in the context of a Motion to Show Authority under Tex. R. Civ. P. 12.

B. Rule 12 Is A Proper Vehicle To Decide Whether Those Hiring An Attorney Had Authority To Do So

1. Rule 12 is intended to protect against suits brought without authority

Rule 12 requires an attorney to "show his authority to act." Tex. R. Civ. P. 12. Moreover, "[a]t the hearing on the motion, the burden of proof [is] ***upon the challenged attorney*** to show sufficient authority to prosecute or defend the suit . . . ." *Id.* (emphasis added). As it applies here, the attorneys were required to establish that they were

hired by the Corporation's Trustees and the Diocesan Convention,[30] absent which the Trial Court was required to ban them from appearing and to strike their pleadings. *Id.*

There are several purposes behind Rule 12, all of which are implicated here. First, litigants are entitled to know who in fact authorized suit against them.[31] Thus, for example, in *Sloan v. Rivers* this Court granted a Rule 12 challenge against an attorney who admitted he had not been hired by the judgment creditors he listed as his clients, but instead by an undisclosed assignee of their judgment.[32] Of course, an assignee can often sue in an assignor's name,[33] but if a Rule 12 motion is filed the attorneys must show their authority to do so. As the Plaintiffs' attorneys here were actually retained by Bishop Gulick, they must either file suit in ***his*** name or show his authority to file suit in the names of the Diocese and the Corporation.

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30 See *infra* § III.C.1. & 2.

31 *Angelina County v. McFarland*, 374 S.W.2d 417, 423 (Tex. 1964) ("It was thought that a person who was sued was entitled to known [sic] that the named plaintiff had in fact authorized the suit."); *Boudreau v. Fed. Trust Bank*, 115 S.W.3d 740, 742 (Tex. App.—Dallas 2003, pet. denied) ("The main purpose behind the rule is that a person is entitled to know which person or party in fact authorized the suit.").

32 693 S.W.2d 782, 783-84 (Tex. App.—Fort Worth 1985, no writ).

33 *See, e.g.*, *Camden Fire Ins. Ass'n v. Eckel*, 14 S.W.2d 1020, 1022 (Tex. Comm'n App. 1929, judgm't adopted) (action instituted against insurance company by attorney of assignee in the name of assignor).

Second, Rule 12 is intended "to protect defendants from groundless suits."[34] An attorney cannot file suit without a client. While other means exist for challenging a party's standing or capacity to file suit for a named party, that does not prevent using Rule 12 to challenge an attorney's authority to file suit for a named party. Thus, for example, in *Vela v. Vela* the case was dismissed under Rule 12 because the plaintiff's son failed to show she was incompetent, and thus that he was authorized to hire an attorney for her.[35] Similarly, a complaint that a grandfather was not authorized to hire an attorney on his granddaughter's behalf was also properly raised by Rule 12 motion.[36] And Rule 12 required dismissal when an attorney was unable to show the "next friend" who hired him had any authority to do so in a child's name.[37]

Third, if an attorney has no authority to represent a litigant, a judgment against that litigant is likely unenforceable. For example, in

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34 *Angelina County*, 374 S.W.2d at 422-23 (recognizing that the purpose of Rule 12, a version of which has "been on the books since the early days of Texas," is "to protect defendants from groundless suits.").

35 763 S.W.2d 601, 603 (Tex. App.—San Antonio 1988, writ denied).

36 *See Dickerson v. State*, 169 S.W.2d 1005, 1008 (Tex. Civ. App.—Austin 1943), *rev'd on other grounds*, 141 Tex. 475, 174 S.W.2d 244 (1943).

37 *See In re B.E.A.R.*, No. 05-02-01493-CV, 2003 WL 21544507, at *2 (Tex. App.—Dallas July 10, 2003, no pet.) (mem. op.).

Parker v. Spencer the Supreme Court of Texas held that a consent decree was not binding on a defendant because it was signed by an attorney he had never authorized.[38] If the Diocesan Minority loses this case, the judgment would be binding on TEC, but it would vanish as to the other Plaintiffs these attorneys claim to represent because the judgment would say they do not represent them.

All of these concerns are implicated when, as in this case, attorneys for both sides claim to represent the same parties. As the Dallas court of appeals held in 2003, "a Rule 12 motion may be properly brought when a new and different attorney attempts to appear as attorney of record" for an existing party.[39]

It is true that courts hesitate to grant a Rule 12 motion when it rests upon technical defects in the process of retaining an attorney. In *Tri-Steel Structures, inc. v. Baptist Foundation of Texas*, this Court rejected a Rule 12 challenge to a bankrupt party's attorney when the representation was not approved by the bankruptcy court until after an appeal had been filed.[40] And in *Miami Independent School District v.*

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[38] 61 Tex. 155, No. 1734, 1884 WL 8737, at *3-4 (1884); *accord Angelina County*, 374 S.W.2d at 423.

[39] *Air Park-Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 906 (Tex. App.—Dallas 2003, no pet.).

[40] 166 S.W.3d 443, 453-54 (Tex. App.—Fort Worth 2005, pet. denied).

Moses, the courts granted an attorney additional time to obtain official authorization from the 127 school districts that had hired him.[41] But this is not a case in which a technical defect is asserted against an attorney awaiting the named party's official approval; the challenge here is asserted against attorneys that the official parties will never approve.

2. *An attorney hired by unauthorized persons has no authority*

When a person hires an attorney for an entity, an attorney cannot "show his authority" without showing the authority of the person who engaged him. For example, in *Gulf Regional Education Television Affiliates v. University of Houston*, the president and board members of an unincorporated association hired an attorney to sue the University of Houston.[42] But the court of appeals concluded that the association was part of the University, and only the board of regents could authorize suits on the university's behalf. So while the attorney had been hired by ***someone*** to file the suit, he could not show authority

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41 989 S.W.2d 871, 878 (Tex. App.—Austin 1999, pet. denied).

42 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist] 1988, writ denied).

to file the suit by someone ***authorized*** to do so on the association's behalf, so the Rule 12 motion was sustained.[43]

Similarly, in *Square 67 Development Corp. v. Red Oak State Bank,* a corporation's president hired an attorney to sue the bank, but the board of directors revoked authorization for both the suit and the attorney shortly thereafter.[44] As here, nothing in the corporation's by-laws authorized the hiring of an attorney over the board's objection. The court of appeals, therefore, affirmed dismissal of the suit based on Rule 12.[45] Because the person hiring the attorney had no authority to do so, the attorney had no authority to bring suit on the corporation's behalf.[46]

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[43] *Id.* at 808-09.

[44] 559 S.W.2d 136, 138 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).

[45] *Id.* at 138.

[46] Of course, either of these complaints might have been raised by a procedural vehicle other than Rule 12. The University in *Gulf Regional* might have filed a plea in abatement challenging the association's capacity to file suit, *see, e.g., El T. Mexican Restaurants, Inc. v. Bacon,* 921 S.W.2d 247, 250 (Tex. App.—Houston [1st Dist] 1995, writ denied), or a summary judgment motion to the same effect. *See, e.g., Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991). And the Bank in *Square 67* might have waited until trial to complain that the president had neither standing nor capacity to file suit against the wishes of its board of directors. *See, e.g., T.O. Stanley Boot Co. v. Bank of El Paso,* 847 S.W.2d 218, 221 (Tex. 1992). But in neither case was the Rule 12 motion improper merely because there were alternative forms of relief.

The Plaintiffs argued in the Trial Court that Rule 12 deals only with challenges to an ***attorney's*** authority, not a ***party's*** authority.[47] Their complaint misunderstands this Rule 12 motion. Relators agree that both the Corporation and the Diocese have the capacity to sue or be sued in their own names; what they challenge is the authority of ***TEC and its agents*** to hire attorneys for those two entities. As already shown, most Rule 12 cases in Texas address precisely this question—whether the person hiring an attorney had the authority to do so on the entity's behalf. For the following reasons, the attorneys here did not.

C. Counsel For The Diocesan Minority Have No Authority To Proceed

1. *Plaintiffs' counsel were not engaged by agents having authority to act for the Corporation*

Plaintiffs admit (as they must) that title to the property and endowment funds they seek is held by the Corporation.[48] When the Corporation was formed in 1983, it was formed as a non-profit corporation organized under the Texas Non-Profit Corporation Act.[49]

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47 *See* R9 at 1.

48 R5 at 12.

49 Tex. Rev. Civ. Stat. Ann. art. 1396-1.01-11.01 (Vernon 2003 & Supp. 2009). Effective January 1, 2010, the Act moves to Chapter 22 of the Texas Business Organization Code. *See* Tex. Bus. Org. Code Ann. §§ 22.001-.409 (Vernon 2009); *see also* § 401.001(1)(C) (defining "mandatory application date" as January 1, 2010 for entities that do not opt in earlier). References in this brief are to the governing

From inception (and thus long before this dispute arose), the Corporation's articles of incorporation have provided that its affairs are to be governed by a board of trustees, whose manner of election and term of office "shall be fixed by the Bylaws of the corporation."[50] Both those by-laws and the Constitution of the Diocese provide for six trustees: the Bishop of the Diocese plus five trustees who are elected one-per-year at the Diocesan Convention.[51] It is undisputed that the Individual Relators were authorized by such elections.[52]

The Constitution of the Diocese contains no provision for replacing trustees except one trustee at a time through these annual elections. The by-laws provide for removal of a trustee only by majority vote of the remaining trustees.[53] Because the Texas Non-Profit Act limits removal of a board member "to any procedure therefor provided in the articles of incorporation or by-laws,"[54] they cannot be removed by

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provisions of Article 1396 of the Texas Revised Civil Statutes because the prior law "governs the acts, contracts, or transactions of the entity or its managerial officials, owners, or members that occur before the mandatory application date." *Id.* § 402.006.

50 *See* App. B, art. 6.

51 App. D, Canon 17, § 17.3, p. 41; App. E, art. II, § 3.

52 *See* R9, Ex. 2 at 19-20.

53 App. E, art. II, § 10.

54 Tex. Rev. Civ. Stat. Ann. art. 1396-2.15(D) (Vernon 2003). Although this statutory provision refers to removal of a "director," that term includes "the

TEC or its outside appointees in any other way. Texas law did not require the churches here to organize in any particular manner, but once they choose to obtain the benefits provided by the Texas Non-Profit Corporation Act they become bound by its terms.

The Plaintiffs argue that the Relators "vacated their offices," allowing Bishop Gulick and five new trustees he enabled to authorize this suit on the Corporation's behalf.[55] The Supreme Court of South Carolina rejected this same argument in *All Saints Parish Waccamaw v. Protestant Episcopal Church.*

In *All Saints Parish*, as here, the requisite majorities voted in favor of an amendment, after which a small group of dissenters with TEC's support purported to elect a new vestry because the elected officers had "abandoned their offices." 2009 WL 2998941, at *4, *10-11. But under the "neutral principles" standard, the court looked only to the statutory provision for amending the articles of a non-profit corporation, which in that state required approval by 1) the board, 2) a 2/3 vote of the members, and 3) anyone else required by the articles themselves. *Id.* at *10-11. The requisite votes having taken place, the

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group of persons vested with the management of the affairs of the corporation, irrespective of the name by which such group is designated." Tex. Rev. Civ. Stat. Ann. art. 1396-1.02(A)(7) (Vernon 2003).

[55] R9 at Ex. 3 at 114-17.

Supreme Court held that nothing written in the articles required the consent of TEC—whether it was hierarchical or congregational. *Id.*

> The facts presented by this case demonstrate that the congregation, in compliance with relevant statutory provisions and applicable bylaws, passed the Articles of Amendment, thus removing any reference to the ECUSA and Diocese and explicitly severing any legal relationship with those organizations. Therefore, through the application of neutral principles of law, it is clear to us that the true officers of All Saints Parish, Waccamaw, Inc. are the members of the majority vestry.

Id. at 11.

As in *All Saints Parish*, no offices of trustee were vacant here, or could be declared so by any bishop whatsoever. Again, the Texas Non-Profit Act limits removal of a board member "to any procedure therefore provided in the articles of incorporation or by-laws."[56] The Corporation's by-laws provide for involuntary removal of a trustee only upon a majority vote of the remaining trustees.[57] The Plaintiffs never allege (let alone prove) that such a vote has taken place.

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[56] Tex. Rev. Civ. Stat. Ann. art. 1396-2.15(D).

[57] App. E, art. II, § 10. While directors may be removed from office by those who elected them "[i]n the absence of a provision providing for removal," *see* Tex. Rev. Civ. Stat. Ann. art. 1396-2.15(D) (Vernon 2003), the provision for removal in the by-laws renders that situation inapplicable.

Moreover, the Corporation's by-laws explicitly recognize the possibility of a dispute about ***who*** is actual bishop of the Diocese.[58] Those by-laws provide that the five trustees ***other than*** the bishop are empowered to decide the matter.[59] None of the existing trustees decided this dispute in favor of Bishop Gulick. Nor can his own appointees decide the matter without encountering a circularity problem: their selection depends on the validity of his, and his depends on the validity of theirs.

Finally, neither a bishop nor any special convention of the Diocese can replace all the trustees at once. The Diocesan Canons provide that "[o]ne member of the Board of Trustees shall be elected at each Annual Convention."[60] Accordingly, no special convention could elect all five trustees at once. Vacancies occurring in the interim between conventions are to be filled by the board of trustees until the next annual election, but in this case there were no vacancies and no

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58 *See* App. E, art. II, § 2.

59 App. E, art. II, § 2.

60 App. D, Canon 17, § 17.3, p. 41; App. E, art. II, § 3.

board of trustees' vote to replace anyone.[61] Bishop Gulick alone cannot make five interim appointments on his own authority.[62]

Texas courts have long been authorized to decide who validly represents a non-profit corporation. Exactly 100 years ago, Texas appellate courts decided who owned the Alamo by looking to the constitution and by-laws of the Daughters of the Texas Republic to decide which of two factions actually represented it.[63] In this case, the Corporation's officers were validly elected pursuant to its articles and by-laws, and they have not abandoned their offices. No persons other than the Individual Relators had authority to hire attorneys for the Corporation, and the Individual Relators did not hire or authorize the attorneys currently representing the Plaintiffs. The Trial Court, therefore, did not have discretion to deny the Rule 12 Motion with respect to the Corporation.

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[61] App. D, Canon 17, § 17.3, p. 41.

[62] App. E, art. II, § 7.

[63] *De Zavala v. Daughters of the Repub. of Tex.*, 124 S.W. 160, 162 (Tex. Civ. App.—Galveston 1909, writ ref'd).

2. *Plaintiffs' counsel were not engaged by persons having authority to act for the Diocese*

An unincorporated association may sue or be sued in its own name.[64] But an unincorporated association is a legal entity separate from its members.[65] Accordingly, individual members of an unincorporated association cannot hire attorneys for an organization unless they have proper authority from the organization to do so.[66] That question is governed by the association's own constitution and by-laws.[67]

Here, the Diocesan Constitution provides that the Diocesan Convention governs Diocese affairs,[68] and thus has final authority

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64 *See* Tex. Rev. Civ. Stat. Ann. art. 1396-70.01 § 8(a) (Vernon 2003 & Supp. 2009) (allowing unincorporated association to sue and be sued in its own name); Tex. R. Civ. P. 28 (allowing unincorporated association to sue and be sued in assumed name).

65 Tex. Rev. Civ. Stat. Ann. art. 1396-70.01 § 7(a) (Vernon 2003 & Supp. 2009).

66 *See Air Park-Dallas Zoning Comm.*, 109 S.W.3d at 907-08 (reversing Rule 12 order because even though individual members of unincorporated association who hired attorney had no authority to do so, association later ratified their acts).

67 *See Waddill v. Phi Gamma Delta Fraternity*, 114 S.W.3d 136, 141 (Tex. App.—Austin 2003, no pet).

68 The power to pass legislation for the Diocese resides in its Diocesan Convention, consisting of bishops, clergy, and lay delegates from the Fort Worth area. App. C, art. 2. In the interim, an Executive Council "shall exercise all the powers of the Convention between meetings thereof, implementing the directives and policies of that body, initiating and developing new work, but not acting in conflict with the expressed will of the Convention." App. C, art. 11.

concerning the filing of suits on the Diocese's behalf.[69] It is undisputed that the regular Annual Convention did not authorize the hiring of the Plaintiffs' attorneys or the filing of this suit.[70] While the Executive Council governs the Diocese in the interim between Conventions, it cannot do so "in conflict with the expressed will of the Convention."[71] The Executive Council did not authorize this suit either, and indeed could not have done so because this suit conflicts with the Convention's expressed will to leave TEC.[72]

The Plaintiffs claim they took over the Diocese at a special meeting of the Convention in February 2009. The Diocese's Constitution, however, requires that special meetings of the Convention be called by the Bishop of the Diocese or a majority of the Standing Committee.[73] Plaintiffs allege this special meeting was called

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[69] *Square 67 Dev. Corp.*, 559 S.W.2d at 138 ("[T]the president of a corporation is not authorized to employ an attorney to conduct litigation for the company absent express authority or implied authority (such as entrustment with broad powers of management of the corporate business) set forth in the bylaws or by proper action of the board of directors.").

[70] *See* R5 at ¶ 53; R6 at ¶ 4.

[71] App. C, art. 11.

[72] The Convention voted overwhelmingly to change affiliations in its November 2008 annual meeting.

[73] App. C, art. 4.

by TEC's Presiding Bishop, Katharine Jefferts Schori;[74] but she could not call the Convention because she was neither a bishop elected by the Diocese nor a representative of the Standing Committee. As already noted, the Diocesan Constitution specifically provides for election of the Bishop by its Convention. *See supra* § II.B.2. That Constitution requires a Nominating Committee to make a recommendation to the Convention, which can then add additional nominees before taking a vote.[75] Similarly, the Diocese's Treasurer is elected by the Diocese convention.[76]

The Plaintiffs cannot ignore these provisions merely because they lost the vote at the Diocesan Convention. Nor can an outside bishop call a special convention to elect someone as its Bishop, as one does not become entitled to call a special convention of this Diocese until after that convention and election takes place. Accordingly, the Trial Court did not have discretion to deny the Rule 12 Motion with respect to the Diocese.

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74 *See* R6, Aff. of Rt. Rev. Edwin F. Gulick, Jr., at ¶ 4.

75 App. D, Canon 40 §§ 40.6, 40.8, pp. 68-69.

76 App. D, Canon 5, p. 28.

3. *The Plaintiffs have not asserted a derivative suit*

Finally, the Plaintiffs' attorneys have no authority to file suit in the name of the Diocese or the Corporation merely because they have been retained by individual members of the Diocesan Minority.

As already noted, an unincorporated association is a legal entity separate from its members.[77] Members may bring suit against an unincorporated association in their own names under the doctrine of virtual representation. *See Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (quoting *Davis v. Hudgins*, 225 S.W. 73, 76 (Tex. Civ. App.—Dallas 1920, no writ)). But under Rule 12 their only authority to do so is as individual members, not as the association.

Nor can the Plaintiffs bring a derivative suit against the Corporation. The Plaintiffs claim the Individual Relators vacated their offices as trustees and officers of the Corporation by *ultra vires* acts.[78] But, the Texas Non-Profit Act provides only three means for challenging *ultra vires* acts of a non-profit corporation: (1) a suit by a member against the corporation to enjoin the action, (2) a suit by the corporation acting "through members in a representative suit," and (3)

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[77] Tex. Rev. Civ. Stat. Ann. art. 1396-70.01 § 7(a) (Vernon 2003 & Supp. 2009).

[78] *See* R5 at ¶¶ 50-51.

a suit by the Attorney General.[79] The first and third options clearly do not apply: the latter because this suit is not brought by the Attorney General, and the former because this suit was not brought by a member

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[79] *See* Tex. Rev. Civ. Stat. Ann. art. 1396-2.03(B) (Vernon 2003). Article 1396-2.03(B) provides in relevant part:

> [T]hat such act, conveyance or transfer was, or is, beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation or inconsistent with any such expressed limitations of authority, may be asserted:
>
> (1) In a proceeding by a member against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation. If the unauthorized act or transfer sought to be enjoined is being, or is to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceedings and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as part of the loss or damage sustained.
>
> (2) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through members in a representative suit, against the incumbent or former officers or directors of the corporation for exceeding their authority.
>
> (3) In a proceeding by the Attorney General, as provided in this Act, to dissolve the corporation, or in a proceeding by the Attorney General to enjoin the corporation from performing unauthorized acts, or to enforce divestment of real property acquired or held contrary to the laws of this State.

against the Corporation but was pleaded as if brought ***by*** the Corporation.[80]

The second option allows suit to be brought in the Corporation's name "through members in a representative suit."[81] But the Corporation here has no "members" as such. The Act defines "[m]ember" as "one having membership rights in a corporation in accordance with the provisions of its articles of incorporation or its by-laws."[82] The Corporation's articles and by-laws provide for trustees and officers, but do not provide for other "members." Moreover, an individual bringing suit in the Corporation's name cannot do so anonymously.[83]

The Plaintiffs complain that if this Rule 12 motion were granted, no one could ever appear for their interests in the litigation.[84] This of course is not true. Relators do not challenge the authority of the

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80 *See Governing Bd. v. Pannill*, 561 S.W.2d 517, 524 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.) (holding that *ultra vires* acts can be challenged in a suit "asserted by a member in an action against the corporation to enjoin the activity.").

81 Tex. Rev. Civ. Stat. Ann. art. 1396-2.03(B)(2) (Vernon 2003).

82 *See* Tex. Rev. Civ. Stat. Ann. art. 1396-1.02(A)(6) (Vernon 2003).

83 *Cf. In re Schmitz*, 285 S.W.3d at 457 (stating reasons why shareholders must disclose their names before bringing a derivative suit).

84 R9 at 2.

plaintiffs' attorneys to represent TEC or Bishop Gulick or the people chosen to supplant the current trustees of the Corporation. But like any other challenger in an estate administration or proxy fight, these individuals must sue ***in their own names*** unless and until they show the right to sue or be sued as the Diocese or Corporation.

Relators concede that both the Corporation and the Diocese can sue or be sued in their own names.[85] But there is only one Corporation and one Diocese, and a party cannot sue itself. They cannot be represented by both the Plaintiffs' attorneys and the Relators' attorneys in this case.[86]

D. The Trial Court Abused Its Discretion In Refusing Complete Relief Under Rule 12

It is apparent from the trial judge's comments that he denied this Rule 12 motion because he believed the issue was better decided by a different procedural vehicle. The Trial Court correctly concluded that the merits of this case turn on whether the events at the 2007 and 2008

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85 *See* Tex. Rev. Civ. Stat. Ann. art. 1396-2.02(A)(2) (Vernon 2003) (allowing non-profit corporations to sue and be sued); *id.* art. 1396-70.01 § 8(a) (allowing unincorporated association to sue and be sued in its own name); Tex. R. Civ. P. 28 (allowing private corporation and unincorporated association to sue and be sued in assumed name).

86 *See, e.g.*, Tex. R. Civ. P. 8 (stating that "the attorney whose signature first appears on the initial pleadings for any party . . . shall be responsible for the suit as to such party.").

conventions caused the defendants to automatically vacate their offices. But he then stated that "I don't think this is the right vehicle to do what you want to do,"[87] and that it would "save everybody a lot of money and a lot of time" to proceed to trial without deciding the Rule 12 issue.[88]

But Rule 12 is not discretionary. If an attorney files suit without authority, the rule says the court "shall" strike the pleading. A party is not required to litigate a case brought by an intermeddler just because the judge would prefer to leave the question until later. There are alternatives to Rule 12, but those alternatives are slower and more expensive. Postponing this question until trial means incurring the usual expenses of discovery and trial preparation. And setting it for summary judgment would require Relators to marshal their evidence after an "adequate time for discovery."[89]

By contrast, Rule 12 places no such burdens on the movant. It requires nothing except a sworn motion and ten-days' notice.[90] No

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87 R16 at 14.

88 R16 at 18.

89 *See* Tex. R. Civ. P. 166a(a), (i).

90 *See* Tex. R. Civ. P. 12.

written response is required;[91] the challenged attorney simply appears and shows his or her authority. There is nothing difficult about asking attorneys to show that someone with authority hired them to file suit. The simple and expedited procedures called for by Rule 12 allow an unauthorized claim or suit to be dismissed at the outset with little cost or delay. If a trial court has discretion to insist that some vehicle other than Rule 12 be employed, the benefits provided by the rule against frivolous claims will be lost.

Nor can Rule 12 be disregarded because the complaints might have been raised in some other form. The University of Houston might have filed a plea in abatement in *Gulf Regional* challenging the plaintiff's capacity to file suit,[92] or a summary judgment motion to the same effect.[93] And the Bank in *Square 67* might have waited until trial to complain that the president had neither standing nor capacity to file suit against the wishes of its board of directors.[94] But in neither case

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[91] *See Bridges v. Samuelson*, 73 Tex. 522, 11 S.W. 539, 539 (1889).

[92] *See, e.g., El T. Mexican Restaurants, Inc. v. Bacon*, 921 S.W.2d 247, 250 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

[93] *See, e.g., Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991).

[94] *See, e.g., T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

was the Rule 12 motion improper merely because there were alternative forms of relief.

It is true that in some cases the Rule 12 motion may touch on the ultimate issue in the case. In several cases questioning the mental competence of a party to hire an attorney, Texas courts have adjudicated competence in the Rule 12 context even though the party's competence was also the ultimate issue in the underlying case.[95] Similarly, in *Gulf Regional* the heart of the suit was whether the unincorporated association was a part of the university; in deciding that it was, the Rule 12 motion decided the case.[96] And *Square 67* was a fight for control of the plaintiff corporation, a fight the Rule 12 motion decided by finding that the president could not disregard the decisions of the board of directors.[97] But an attorney without valid authority cannot prosecute a suit merely because the authority issue also touches on other issues in the case.

In this case, there is clearly some relation between TEC's authority to file suit in the Diocese's name, and its rights in the

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95 *See Logan v. McDaniel*, 21 S.W.3d 683, 689 (Tex. App.—Austin 2000, pet. denied); *Vela*, 763 S.W.2d at 603; *Coleson v. Bethan*, 931 S.W.2d 706, 712 (Tex. App.—Fort Worth 1996, no writ).

96 *Gulf Reg'l Educ. Television Affiliates*, 746 S.W.2d at 809.

97 *Square 67 Dev. Corp.*, 559 S.W.2d at 138.

property it seeks. But the Rule 12 motion will only decide whether the plaintiffs can file suit in the name of the Corporation or Diocese, not whether they can exercise authority on whatever theory TEC asserts at trial. Accordingly, the Trial Court had no discretion to deny the Relators motion by signing an order that failed to decide it.

E. The Benefits Of Mandamus Relief Outweigh The Detriments

"There is no definitive list of when an appeal will be 'adequate,' as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding."[98] Relators concede that in many cases the benefits of reviewing a denial of a Rule 12 motion would not outweigh the delay and interruption that mandamus proceedings can entail.

But this case is different. In *Republican Party of Texas v. Dietz*, the Supreme Court of Texas held that "mandamus jurisdiction may be properly invoked when First Amendment rights are at issue." 940 S.W.2d 86, 94 (Tex. 1997). Like that case, this one involves First Amendment rights in the context of an issue of statewide application. *See id.* While the rights at issue here concern religion rather than

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[98] *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

speech, there are constitutional problems with the theory that postponing protection of First Amendment rights until years later on appeal is good enough.

But there are other case-specific facts that must weigh heavily in the benefits/detriment balance for several reasons. First, the Trial Court's order defeats the Legislature's will as stated in the Texas Non-Profit Corporation Act. The Legislature there provided for suit in a corporation's name only in three instances, none of which apply here. The Supreme Court of Texas recently granted mandamus relief when a shareholder sued without complying with the statutory requirements for derivative suits, noting that refusing to do so "would defeat the substantive right involved."[99] Allowing this case to proceed to trial in the name of the Corporation and Diocese would defeat the substantive right protected by the statute. The Legislature having weighed in on one side of the balance of benefits and detriments here, the courts must give deference to that decision.[100]

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99 *In re Schmitz,* 285 S.W.3d at 459; *In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding).

100 *In re Gulf Exploration, LLC,* 289 S.W.3d at 842; *In re McAllen Med. Ctr., Inc.,* 275 S.W.3d at 462.

Second, Rule 12 orders can have collateral consequences.[101] By granting the Rule 12 motion only with respect to the Diocese or Corporation "associated with Bishop Iker," the Trial Court impliedly endorsed the plaintiffs' view that there are ***two*** Corporations and ***two*** Dioceses.[102] This can only create confusion, possibly with severe consequences. Without a definitive Rule 12 order, other courts may assume the Diocesan Minority and its attorneys are authorized to represent the Corporation and Diocese.[103] With that imprimatur of authority, they could file eviction actions to oust Relators and scores of church congregations from their current places of worship.[104] In that

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101 *See Logan*, 21 S.W.3d at 689 (holding that denial of Rule 12 motion collaterally estopped daughter from relitigating issue of her father's capacity at the time he retained attorney); *Volume Millwork, Inc. v. W. Houston Airport Corp.*, 218 S.W.3d 722, 727 (Tex. App.—Houston [1st Dist] 2006, pet. denied) (holding denial of Rule 12 motion implicated issue of possession in eviction action and thus precluded appeal to court of appeals).

102 *See* App. A; R11.

103 *See City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 758 (Tex. 2003) ("[c]lass counsel stated at oral argument that a motion to show authority was filed in the trial court, but nothing in the record indicates that such a motion was filed or that the trial court made any ruling thereon. Thus, we must assume that Ramon Garcia is the cities' attorney.").

104 *See Volume Millwork, Inc.*, 218 S.W.3d at 727 (denying review of denial of Rule 12 motion in eviction action).

event, there would be no opportunity to return to this Court for review and relief.[105]

Third, the Diocesan Minority has no basis in neutral principles of law for filing suit in the name of the Corporation and the Diocese. Instead, they claim authority based on unwritten understandings about religious history and practice. By declining to decide Relators' Rule 12 motion on neutral legal principles, the Trial Court risks becoming entangled in religious claims and controversies that are beyond its jurisdiction. And the longer the authority of these lawyers remains in question, the more intrusive is that entanglement.

"The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.[106] That interest requires a ruling as to who represents—and ***does not*** represent—the Diocese and Corporation in this litigation.

IV. Conclusion And Prayer

Relators did not file this suit, and do not yet ask this Court to take sides in the underlying controversy concerning the ownership of

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105 *See id.*; Tex. Prop. Code § 24.007 (Vernon 2008) (prohibiting appeal to the courts of appeals of eviction suits involving non-residential property).

106 *Jones v. Wolfe*, 443 U.S. at 602.

property. But this Court and the Trial Court have a duty to make sure suits are not filed under false flags or in fictitious names by persons with no authority to file them.[107] The Diocesan Minority is not entitled to disguise the nature of this case by proceeding upon a fiction that it is the ***actual*** Diocese.

This is a dispute between a national church body and its agents against a local diocese and its duly elected Trustees and Bishop. Nothing gives the Plaintiffs authority to file suit in the name of the Diocese or the Corporation. Nothing grants them authority to proceed on behalf of anyone other than TEC and its individual agents. The Trial Court had no discretion to refuse to dismiss the ***plaintiff*** Diocese and Corporation in this case.

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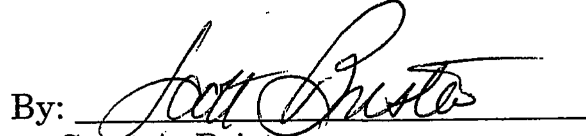
107 *See* Tex. R. Civ. P. 13 (prohibiting fictitious suits and fictitious pleadings).

Respectfully submitted,

ANDREWS KURTH LLP

By: 

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VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

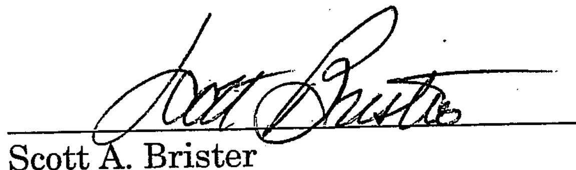
BEFORE ME, the undersigned authority, on this day personally appeared Scott A. Brister, a person whose identity is known to me, and after being duly sworn and upon oath stated as follows:

1. "My name is Scott A. Brister. I am above the age of twenty-one (21) years and I am fully competent to testify to the matters stated herein. I am one of counsel for Relators in the above-captioned cause.

2. I have read Relators' Petition For Writ Of Mandamus (the "Petition"). All of the factual statements in the Petition are within my personal knowledge obtained from review of the underlying record and are true and correct."

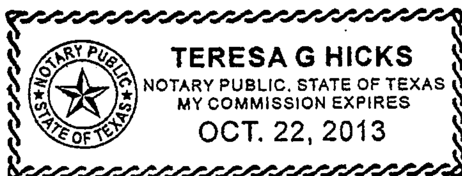
Further Affiant Sayeth Not.

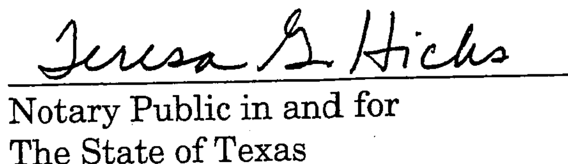
SIGNED this the 12th day of November, 2009.



Scott A. Brister

SWORN TO and SUBSCRIBED before me by Scott A. Brister, this 12th day of November, 2009, to certify which witness my hand and seal of office.





Notary Public in and for
The State of Texas

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing document were served on all counsel of record by hand delivery or FedEx as indicated below on this 13th day of November, 2009, as follows:

Jonathan D.F. Nelson *(via hand delivery)*[108]
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(Counsel for The Episcopal Church)

108 Mr. Nelson and Ms. Wells are, procedurally, the real parties in interest. Rule 12 stipulates that the respondents to a motion to show authority are the counsel whose authority is challenged. Tex. R. Civ. P. 12. Mr. Nelson and Ms. Wells contend that they represent the Diocese and the Corporation who bring this original proceeding in which the Diocese and the Corporation argue that they have no such authority.

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I hereby certify that true and correct copies of the foregoing document were served on all counsel of record by hand delivery or FedEx as indicated below on this 13th day of November, 2009, as follows:

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The Honorable John P. Chupp *(via hand delivery)*
Judge, 141st District Court
Family Law Center
200 East Weatherford Street, 4th Floor
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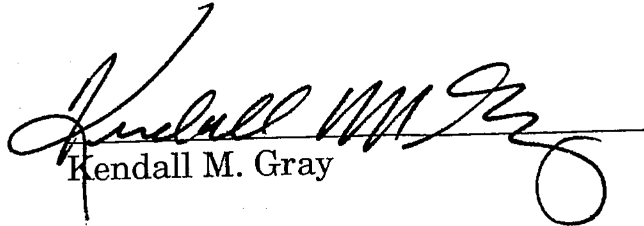

Kendall M. Gray