02-09-00405-CV

COURT OF APPEALS

SECOND DISTRICT OF TEXAS AT FORT WORTH

In re Franklin Salazar; Jo Ann Patton; Walter Verdin, III; Rod Barber; Chad Bates; Jack Leo Iker; Corporation for the Episcopal Diocese of Fort Worth; and The Episcopal Diocese of Fort Worth,

Relators

Original proceeding from 141st Judicial District Court, Tarrant County (No. 141-237105-09), Hon. John P. Chupp presiding

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RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

The underlying suit is a dispute over property belonging to the Episcopal Diocese of Fort Worth (the "Diocese") and the Corporation of the Episcopal Diocese of Fort Worth (the "Corporation" or "diocesan Corporation"). The Episcopal Church, joined by the Diocese and the Corporation, is suing the former bishop of the Diocese and five former trustees of the Corporation, who have left The Episcopal Church and refused to surrender possession of church property.[1] The plaintiffs are seeking a declaratory judgment, an accounting, an injunction and damages.

The defendants filed a Rule 12 motion, arguing that the attorneys who filed this suit on behalf of the Diocese and Corporation were not authorized to sue on behalf of those entities. The Hon. John P. Chupp, Judge of the 141st Judicial District Court of Tarrant County, denied that motion; and now the defendants are asking this Court to reverse his decision by issuing a writ of mandamus.

THE RECORD

The defendants' record consists of a single volume, tabbed 1-19. Copies of five of these items are also attached to their Petition at Tabs A-E. The

[1] The plaintiffs also sued "the Anglican Province of the Southern Cone's 'Diocese of Fort Worth' holding itself out as 'the Episcopal Diocese of Fort Worth.' "

plaintiffs' record consists of three bound volumes, tabbed A-V.[2] Copies of three items are attached to this Response at Tabs 1-3.

ISSUES

A. Did the trial court abuse its discretion in denying the Rule 12 motion?

   1. Was the trial court required to deny the Rule 12 motion because the identity issues involve the merits of the underlying case?

   2. Did the trial court have discretion to defer a decision on the identity issues to a hearing on the merits, instead of deciding them under Rule 12?

   3. In any event, did Bishop Gulick and the new trustees have the authority to hire attorneys to file suit on behalf of the Diocese and the Corporation?

B. Even if the trial court abused its discretion, do the defendants have an adequate remedy on appeal?

STANDARD OF REVIEW

To obtain mandamus relief, the defendants must show (i) that the trial court abused its discretion and (ii) that they have no adequate remedy by appeal.[3] A trial court abuses its discretion if its decision is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Walker v. Packer*, 827 S.W.2d

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[2] These documents are Bates numbered as ECUSA1 through ECUSA 1719. Thus, "(894)" refers to ECUSA 894. Also, the dates of some documents are shown in brackets. Thus, "JGC [1789]" refers to the Journal of the General Convention for the year 1789.

[3] *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-136 (Tex.2005). *Accord In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 56 (Tex.1998) (holding that the defendants have "the burden of showing an abuse of discretion as well as the inadequacy of appellate remedy. This burden is a heavy one.").

833, 839 (Tex.1992). "With respect to resolution of factual issues . . . the reviewing court may not substitute its judgment for that of the trial court." *Id.* at 839. Therefore, "if there is any evidence to support the trial court's ruling then the court did not abuse its discretion." [4]

Even in an ordinary appeal, a Rule 12 decision is reviewable only for abuse of discretion, and all fact issues must be resolved in favor of the trial court ruling. [5] Moreover, in deciding a Rule 12 motion, the trial court can consider both live testimony and affidavits.[6]

Finally, an appellate remedy is adequate even if "there may be some delay in getting questions decided through the appellate process, or that the court costs may thereby be increased." *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648, 652 (1958). Mandamus "is justified only when parties stand to lose their substantial rights." *Id.*

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[4] *Perry Homes v. Cull*, 258 S.W.3d 580, 602 (Tex.2008).

[5] *Air Park-Dallas Zoning Committee v. Crow-Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 907 (Tex.App.--Dallas 2003, no pet.).

[6] *See Boudreau v. Federal Trust Bank*, 115 S.W.3d 740, 742 (Tex.App.--Dallas 2003, pet. denied) ("The Bonner affidavit and testimony from Clements constituted sufficient evidence for Tipton and Barrett Burke to satisfy their burden of showing that they were prosecuting the case with authority from Federal."); *Spigener v. Wallis*, 80 S.W.3d 174, 184 (Tex.App.--Waco 2002, no pet.) (holding that attorney showed "sufficient authority" by presenting "the affidavits of each of his clients").

FACTS

We will first describe the structure of The Episcopal Church and the history of the Episcopal Diocese of Fort Worth. We will then recount the current controversy and litigation.

The General Convention

After the Revolution, Americans could no longer be part of the Church of England because they could no longer swear loyalty to the Crown. *See* First Mullin aff., p.6 ¶ 13 (922). Accordingly, from 1784 to 1789, clergy and laymen from former Church of England congregations met in the new "Convention of the Protestant Episcopal Church." *Id.*, pp.6-7 ¶ 14.[7] This "General Convention" has governed The Episcopal Church ever since, and it has periodically amended the Church's governing documents--its Constitution, canons, and Book of Common Prayer. *Id.*, pp.7-8 ¶¶ 17-18.[8]

The General Convention is the Church's highest authority, and its powers cannot be limited by a diocese or parish. *Id.*, p.8 ¶ 19. It elects the Presiding Bishop, who is the "Chief Pastor and Primate" of the Church. *Id.*, p.8 ¶ 20.[9] When the General Convention is not in session, the Church is governed by an

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[7] *citing* Journals of General Convention of 1789 ("JGC [1789]"), at 99-100, 101.

[8] The canons are the law of the church. *See* BLACK'S LAW DICTIONARY, 5th ed. p.187.

[9] *citing* Const. Art. I.3; Canon I.2(4). *See* Buchanan aff., Ex. 1 (142, 169-170).

Executive Council under the direction of the Presiding Bishop. *Id.*, p.8 ¶ 21.[10]

The Church hierarchy

The General Convention sits atop a three-tiered hierarchy. *See* First Mullin aff., p.7 ¶¶ 15-16 (923).[11] Immediately below are 111 dioceses, one of which is the Episcopal Diocese of Fort Worth. *Id.*, p.8 ¶ 22.[12] Below the dioceses are about 7,600 congregations, known as "parishes" or "missions." *Id.*, p.10 ¶ 27.[13]

All diocese are "formed with the consent of the General Convention and under such conditions as the General Convention shall prescribe." *Id.*, p.8 ¶ 22.[14] Every diocese is required to "accede" to the Constitution and canons of the Church. *Id.*, p.9 ¶ 23.[15] Every diocese has a constitution and canons, which must be consistent with the Church's Constitution and canons. *Id.*, pp.9-10 ¶ 25.[16] Each diocese is governed by a diocesan convention, consisting of the diocesan bishop and clergy and laity elected by congregations in the diocese. *Id.*, p.9. ¶ 24.

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[10] *citing* Canons I.4(1), (3). *See* Buchanan aff., Ex. 1 (171-174).

[11] *citing* JGC [1789] at 99-100, 101.

[12] *citing* Episcopal Church Annual (2009) at 16-19 (132-134).

[13] *citing Id.*

[14] *quoting* Const. Art. V.1. *See* Buchanan aff., Ex. 1 (146).

[15] "Accede" means to consent or to agree. *See* BLACK'S LAW DICTIONARY, 5th ed., p.12. *See also* Dictionary.com ("to give consent, approval, or adherence; agree; assent; to accede to a request; to accede to the terms of the contract").

[16] *citing* Const. Art. V.1; Canon I.10(4). *See* Buchanan aff., Ex. 1 (146, 186).

The bishop is elected by the diocesan convention, with the consent of the leadership of a majority of the other dioceses. *See* First Mullin aff., p.10 ¶ 26 (926).[17] The bishop must be ordained by at least three Episcopal bishops designated by the Presiding Bishop. *Id.*[18] The diocesan bishop is advised by, and shares some authority with, a "Standing Committee" composed of clergy and laity elected by the diocesan convention. *Id.*[19]

The Episcopal Church is a member of the Anglican Communion, which is "a worldwide fellowship among a group of churches 'in communion with the [Archbishop] of Canterbury.' " *Id.*, p.11 ¶ 30.[20] Each member church, or "province," within the Communion is self-governing and autonomous. *Id.* While The Episcopal Church is hierarchal, the Anglican Communion is not. *Id.*

Origins of the Diocese of Fort Worth

In 1838, The Episcopal Church established the "Missionary District of the Southwest." Second Mullin aff., p.2 ¶ 3 (976).[21] In 1850, a portion of that district was admitted to the General Convention as the Diocese of Texas, after it

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[17] *citing* Const. Art. II.1, 2; Canons III.11(1), (3), (4). *See* Buchanan aff., Ex 1 (142, 239-243).

[18] *Id. See* Buchanan aff., Ex. 1 (144, 239, 240-243).

[19] *citing* Const. Art. IV; Canon I.12(1). *See* Buchanan aff., Ex. 1 (145-146, 190).

[20] *citing* Const. Preamble. *See* Buchanan aff., Ex. 1 (142).

[21] *citing* excerpts from JGC [1838]. *See* Second Mullin aff., Ex. 1 (984).

acceded to the Constitution and canons of the Church. *Id.*, p.2 ¶ 4.[22] In 1874, the General Convention created the Missionary District of Northern Texas out of a portion of the Diocese of Texas. *Id.*, p.2 ¶ 5.[23] The new district declared that it was "a constituent part of the Protestant Episcopal Church," and it "expressly accede[d] to, recognize[d] and adopt[ed] the Constitution, Canons, Doctrines, Discipline, and Worship of the Protestant Episcopal Church" and "acknowledge[d] their authority." *Id.*, p.2 ¶ 6.[24]

In 1895, the General Convention allowed the Missionary District of Northern Texas to organize as the Diocese of Dallas. *Id.*, p.3 ¶ 7. Here again, the new diocese "accede[d] to the Constitution and Canons of the Protestant Episcopal Church . . . and recognize[d] the authority of the General Convention." [25]

The Denis Canon

Meanwhile, in 1870, the United States Supreme Court allowed courts to decide church property disputes by deferring to the decisions of hierarchical churches. In 1969, the Court ruled that church property disputes could also be decided on the basis of "neutral principles of law." *See infra*, p.28. To allay

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[22] *citing* Journal of the Proceedings of the Bishops, Clergy, and Laity of the Protestant Episcopal Church in the United States [1850]. *See* Second Mullin aff., Ex. 3 (989).

[23] *citing* Journal of the 25th Annual Council of the Protestant Episcopal Church [1874]; JGC [1874]. *See* Second Mullin aff., Ex. 4 & 5 (1002-1007).

[24] *quoting* Diocesan Canon VIII [1876]. *See* Second Mullin, aff. Ex. 6 (142).

[25] Const. of Diocese Dallas [1895], art. II. *See* Second Mullin aff., Ex. 7 (1046).

concern that this "neutral principles" approach might undermine the historical rights of the hierarchical churches, the Court wrote that

> At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property.

Jones v. Wolf, 443 U.S. 595, 606 (1979). One way to do this would be to have "the Constitution of the general Church . . . recite an express trust in favor of the denominational church." *Id.* Accordingly, the General Convention of The Episcopal Church adopted the "Denis Canon," which provides that

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the diocese thereof in which Parish, Mission or Congregation is located.

Canon VI.4 [1979](emphasis added).[26] Similarly, the Constitution of the Diocese of Dallas provided that all diocese, corporation, and parish property would be "held subject to control of the Church." [27]

Foundation of the Diocese of Fort Worth

In 1982, the Diocese of Dallas proposed to divide part of its territory. *See* Second Mullin aff., pp.4-5 ¶¶ 9-10 (978-979).[28] The General Convention

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[26] *quoted* in Hough aff., p.2. *See* Moore aff., Ex. 25 (1460). *See also* Canon II.7 (4), at Buchanan aff., Ex. 1 (181).

[27] Constitution of Diocese of Dallas [1982], p.A-5, Art. 13 (emphasis added). *See* Second Mullin aff., Ex. 11 (1075); Moore aff., Ex. 7 (1226).

[28] *citing* Minutes of Special Convention, (June 19, 1982). *See* Second Mullin aff., Ex. 9 (1054-1058).

approved the proposal, conditioned on "all of the appropriate and pertinent provisions of the Constitution and Canons of the General Convention of The Episcopal Church . . . and the Constitution and Canons of the Diocese of Dallas having been fully complied with." *Id.*, p.5 ¶ 11.[29]

The Diocese of Dallas then called a primary convention of the Episcopal Diocese of Fort Worth "to accede to the National Constitution and Canons." *Id.*, p. 6 ¶ 12.[30] At the convention, all clergy and lay delegates signed a resolution in which they unanimously agreed in writing to "fully subscribe to and accede to the Constitution and Canons of The Episcopal Church." Moore aff., p.6 ¶ 8 (1201).[31] A copy of this signed resolution is attached at Tab 1.

The constitution of the Diocese of Fort Worth

The primary convention adopted a diocesan constitution.[32] Article 1, entitled "Authority of General Convention," reads as follows:

> The Church in this Diocese accedes to the Constitution and Canons of The Episcopal Church of the United States of America and recognizes the authority of the General Convention of said church.

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[29] *citing* JGC [1982], pp. C169-170. *See* Second Mullin aff., Ex. 10 (1061-1062).

[30] *quoting* Journal 87th Meeting of Diocese of Dallas, p.12. *See* Second Mullin aff., Ex. 11 (1066).

[31] *quoting* Resolution, p.1. *See* The Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth [1982], p.24, at Moore aff., Ex. 9 (1265).

[32] *See* Constitution and Canons of the Episcopal Diocese of Fort Worth [1982], pp.1-18, at Moore aff., Ex. 10 (1280-1300).

Constitution and Canons [1982], p.1 (1283, 1131). Similarly, Article 13 (now Article 14), entitled "Title to Church Property," reads as follows:

> The title to all real estate acquired for the use of the Church in this Diocese, including real property of all parishes and missions, as well as Diocesan Institutions, shall be held subject to control of the Church in the Episcopal Diocese of Fort Worth acting by and through a corporation known as "Corporation of the Episcopal Diocese of Fort Worth." All such property, as well as all property hereafter acquired for the use of the Church and the Diocese, including parishes and missions, shall be vested in the Corporation of the Episcopal Diocese of Fort Worth.

Id., p.13 (1295, 1143) (emphasis added). Finally, Article 18 required all diocesan canons to be consistent with "the Constitution and Canons of the General Convention." *Id.*, p.18 (1300, 1148).

The Diocesan Corporation

The primary convention also adopted canons for the new diocese.[33] Canon 11 (now Canon 17) is attached hereto at Tab 2. It provides for creation of the diocesan Corporation to "hold, manage and administer funds and properties acquired by gift or will or otherwise for the use and benefit of the Diocese and any Diocesan institutions." It also provides that the Corporation's affairs will be managed by a Board of Trustees. The Bishop of the Diocese will be the Chairman of the Board, and the other five trustees will be elected for five-year staggered terms from among the "clergy" or "Lay persons in good standing" in the Diocese.

[33] *Id.*, pp.19-63, at Moore aff., Ex 10 (1301-1345).

In 1983, the Diocesan Corporation filed Articles of Incorporation as a Texas non-profit corporation. In accordance with Canon 11, the purpose of the Corporation was to "receive and maintain" all "real or personal property" "acquired for the use of the Episcopal Diocese of Fort Worth as well as the real property of all parishes, missions, and diocesan institutions." [34]

In 1984, the Dallas and Fort Worth dioceses, joined by their respective diocesan corporations, filed a declaratory judgment action to divide the church property. *See* Moore aff., pp.9-10 ¶ 16 (1204-1205). The court granted the requested relief after finding that "[t]he Episcopal Diocese of Fort Worth . . . is a duly constituted religious organization, organized pursuant to the Constitution and Canons of the Protestant Episcopal Church" and that the Corporation had been "duly organized under the Constitution and Canons of the Episcopal Diocese of Fort Worth." Judgment, p.2 ¶¶ 3-4.[35]

Iker ordained as Bishop

Nine years later, in 1993, Jack Leo Iker--one of the defendants--was ordained as Bishop of the Diocese of Fort Worth. During the ceremony, he signed a Declaration of Conformity, as required by the Constitution of the Church and the Book of Common Prayer, in which he "solemnly engage[d] to conform to the

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[34] Articles of Incorporation, p.1, Art. 4(1). *See* Moore aff., Ex. 37 (1578).

[35] *See* Moore aff., Ex. 23 (1443).

Doctrine, Discipline, and Worship of The Episcopal Church." Buchanan aff., p.2 ¶ 5 (129).[36] He also promised "to guard the faith, unity, and discipline of the Church." *Id.* ¶ 6.[37] Upon installation as Bishop, Iker automatically became Chairman of the Board of Trustees of the diocesan Corporation. *See* Moore aff., p.15 ¶ 29(1210).[38] The other five individual defendants subsequently became Trustees of the Corporation. *Id.* They will be called the "old trustees."

The defendants become dissenters.

Ten years later, on November 8, 2003, at the annual meeting of the diocesan convention, Bishop Iker addressed the controversy surrounding the ordination of V. Gene Robinson, as Bishop of the Diocese of New Hampshire. *See* remarks, pp.2-5.[39] A year later, in September of 2004, a special meeting of the diocesan convention passed a resolution opposing Robinson's ordination. *See* Minutes of Special Diocesan Convention, p.22.[40] Thereafter, the six defendants sought to detach the Diocese and the Corporation from The Episcopal Church by attempting to amend the constitution of the Diocese and the articles of the Corporation.

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[36] *quoting* Declaration. *See* Buchanan aff., Ex. 2 (324).

[37] *quoting* Order of Service, p.5. *See* Buchanan aff., Ex. 3 (326).

[38] *citing* Diocesan Canon 11[1982], p.30. *See* Moore aff., Ex 10 (1312).

[39] *See* Moore aff., Ex. 18. (1400-1402). *See also* Moore aff., pp.12-13 ¶ 24.

[40] *Id.*, Ex. 19 (1413).

The attempt to amend the Articles

In 2006, the six individual defendants filed "Amended and Restated Articles of Incorporation" for the Diocesan Corporation. *See* Moore aff., p.15 ¶ 30 (1210). It purported to amend the powers of the Corporation as follows:

> (1) To receive and maintain a fund or funds or real or personal property, or both, from any source ~~including all real property required for the use of the Episcopal Diocese of Fort Worth as well as the real property of all parishes, missions and diocesan institutions.~~
>
> (2) The property so held pursuant to (1) supra shall be administered in accordance with the ~~Constitution and Canons of the Episcopal Diocese of Fort Worth~~, Bylaws of the Corporation as they now exist or as they may hereafter be amended.[41]

Also, these amendments purported to give the Board of Trustees "sole authority to determine the identity and authority of the Bishop" and "sole authority to appoint . . . a Chairman of the Board," if there is a "dispute or challenge about the identity of the Bishop" Moore aff., pp.15-16 ¶ 30.[42]

The attempt to amend the constitution
and to "realign" the Diocese

It requires the vote of two annual meetings to amend the diocesan constitution.[43] That process culminated on November 14 and 15, 2008. *See*

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[41] *Compare* Amended and Restated Articles [2006], pp.1-2 Art. IV, at Moore aff., Ex. 28 (1501-1502), *with* Articles [1983], p.19 Art. IV.1, at Moore aff., Ex. 37 (1578).

[42] *quoting* Amended and Restated Articles, p.3. *See* Moore aff., Ex. 28 (1503).

[43] *See* The Constitution of The Episcopal Diocese of Fort Worth, Art. 19. *See* Moore aff. Ex. 32 (1519).

Moore aff., pp.16-17 ¶ 35(1211-1212). Under these purported amendments, Article 1, entitled "Authority of General Convention," *quoted* on p.6 above, would have been called "Anglican Identity" and would have read as follows:

> The Episcopal Diocese of Fort Worth is a constituent member of the Anglican Communion, a Fellowship within the One, Holy, Catholic, and Apostolic Church consisting of those duly constituted Dioceses, Provinces, and regional churches in communion with the See of Canterbury upholding and propagating the historical Faith and Order as set forth in the Old and New Testaments and expressed in the Book of Common Prayer.[44]

Similarly, Article 18, which requires the diocesan canons to be consistent with "the Constitution of Canons of the General Convention," would have been deleted.[45] However, there was no attempt to change the property provisions. Thus, Article 14 (former Article 13), entitled "Title to Church Property," [46] Canon 17 (former Canon 11), which dealt with the diocesan Corporation;[47] and Canon 18 (former Canon 12), which also dealt with church property,[48] were left virtually unchanged.

On November 15, 2008, the diocesan convention considered a resolution to "enter into membership with the Anglican Province of the Southern

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[44] The Constitution of the Episcopal Diocese of Fort Worth [2008], p.1 Art. I. *See* Moore aff., Ex. 32 (1511). *Compare* Constitution [1982], p.1 (quoted *supra*, p.6).

[45] *Compare* Art. 18 [2008] (1518-1519), *with* Art. 18 [1982)] (1300).

[46] *Compare* Art. 14 [2008] (1517), *with* Art. 13 [1982] (quoted *supra*, p.7).

[47] *Compare* Canon 17 [2008] (1532-1533), *with* Canon 11 [1982] (1312).

[48] *Compare* Canon 18 [2008] (1533-1534), *with* Canon 12 [1982] (1313).

Cone" and to "accede to the authority of such Constitutions and Canons of the Anglican Province of the Southern Cone." Proposed Resolution, p.1.[49] The Convention purported to adopt that resolution. *See* Moore aff., p.17 ¶35 (1212).

Iker is disciplined.

On November 16, 2008, Iker published a statement, entitled "As We Realign." It read as follows:

> By voting to change our diocesan Constitution and Canons, we have withdrawn from the General Convention, [and] realigned with another Province of the Anglican Communion . . .
>
> Our Bishop, clergy, and congregations have been received into the fellowship of the Anglican Province of the Southern Cone . . . We now look forward to the formation of an Anglican Province in North America.[50]

Statement, p.1.[51]

On November 20, 2008, a Disciplinary Review Committee of The Episcopal Church certified that Iker had "abandoned the Communion" of the Church. *See* Buchanan aff., p.3 ¶ 7 (130).[52] The Presiding Bishop ordered Iker to "cease all 'Episcopal, ministerial, and canonical acts, except as relate to the

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[49] *See* Moore aff., Ex. 33 (1565).

[50] *See* Moore aff., Ex. 34 (1566).

[51] *See* Moore aff., Ex. 34 (1566)

[52] *quoting* Henderson letter, p.1. *See* Buchanan aff., Ex. 4 (329).

administration of the temporal affairs of the Diocese of Fort Worth.' " *Id.*[53] On December 5, 2008, the Presiding Bishop declared that Iker had renounced his ordained ministry in The Episcopal Church and that he was "therefore, removed from the Ordained Ministry of [the] Church and released from the obligations of Ministerial offices in the church." *Id.*, p.3 ¶ 9. He "thereby ceased to be a bishop of The Episcopal Church or its Diocese of Fort Worth." *Id.*, p.4 ¶ 9.

The 2009 special meeting

On February 7, 2009, the Presiding Bishop convened a special meeting of the convention of the Diocese of Fort Worth. *See* Moore aff., p.17 ¶ 37 (1212). This meeting elected Edwin F. Gulick, Jr., as Provisional Bishop of the Diocese. *Id.*, pp.17-18 ¶ 37. Bishop Gulick was also serving as Bishop of the Diocese of Kentucky. *See* Gulick aff., p.1 ¶ 2 (338). The Presiding Bishop then recognized Gulick as the Bishop of the Diocese of Fort Worth. *See* Buchanan aff., p.4 ¶ 11 (131). As Bishop, Gulick automatically became the Chairman of the Board of Trustees of the diocesan Corporation. *See supra*, p.7.[54]

The Convention adopted a resolution declaring certain diocesan offices to be vacant. *See* Moore aff., p.18 ¶ 38.[55] The Convention or Bishop

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[53] *quoting* Inhibition. *See* Buchanan aff., Ex. 5 (331).

[54] *citing* Canon 11.2 [1982] (now Canon 17.2 [2008]). *See also* Gulick aff., p.1 ¶ 3 (338).

[55] *citing* Resolution. *See* Moore aff., Ex. 35 (1568).

Gulick then filled these offices, including new members of the Standing Committee and deputies to the forthcoming meeting of the General Convention in July of 2009. *See* Gulick aff., p.2 ¶ 4 (339).[56] Also, Bishop Gulick appointed five new trustees of the Board of Diocesan Corporation. *See* Gulick aff., p.2 ¶ 5.[57] These will be called the "new trustees."

Finally, the special meeting passed a resolution declaring that the purported 2008 amendments to the diocesan constitution and canons were *ulta vires* and void. *Id.*, p.2 ¶ 6.[58] The new trustees did the same with regard to the purported 2007 amendments to the Articles of Incorporation. *Id.*, p.4 ¶ 9.[59]

The Church ratifies the
actions of the special meeting.

Five months later, in July of 2009, the General Convention of The Episcopal Church held its triennial meeting. Gulick was seated as the Bishop of the Episcopal Dioceses of Fort Worth and Kentucky. *See* Gulick aff., p.3 ¶ 7 (340). The Fort Worth deputies, who had been elected at the February 2009 special meeting, were also seated. *Id.*, p.3 ¶ 7e. The General Convention then commended Episcopalians in the Diocese of Fort Worth, and three other dioceses,

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[56] *See also* Moore aff., p.18 ¶ 38 (1213).

[57] *See also* Moore aff., p.18 ¶ 39 (1213).

[58] *Id.* ¶ 40, *citing* Report of Resolutions Committee, at Moore aff., Ex. 36 (1572-1577).

[59] *citing* Amended and Restated Articles of Incorporation [2009]. *See* Gulick aff., Ex. 1 (345-349).

"for their unflagging effort . . . during recent difficult times as they reorganize their continuing dioceses." *Id.* ¶ 7f. The General Convention also commended the "leadership of each [such] diocese," "including in particular the Rt. Rev. Gulick, Provisional Bishop of The Diocese of Fort Worth." *Id.*

The House of Bishops has also accepted Gulick as Bishop of the Diocese of Fort Worth, and he and the 2009 Standing Committee were asked to consent to the election of bishops elected by other dioceses. *Id.*, p.3 ¶ 7a & b.[60] The Episcopal Church has also recognized Bishop Gulick and the new trustees as Trustees of the diocesan Corporation. *Id.*, p.4 ¶ 8.

This suit

After the February 7, 2009 special meeting, Bishop Gulick and the new trustees retained attorneys Jonathan Nelson and Kathleen Wells to represent the Diocese and the Corporation.[61] Those attorneys, joined by attorneys for The Episcopal Church, filed this suit against Iker and the five old trustees. *See* Amended Petition, pp.1-3 ¶¶ 2-7 (Tab A) (1-3).

In this suit, the three plaintiffs are seeking a declaratory judgment as to (i) the identity of the Bishop of the Diocese and the Trustees of the Corporation and (ii) the control of church property, including the name and seal of the

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[60] *See supra*, p.3 (*citing* Const. Art. II. 1, 2, II.1, 2; Canons III.11(1), (3), (4)). *See* Buchanan aff., Ex. 1 (142, 239-243).

[61] *See* Gulick aff., p.2 ¶ 3-5 (Realtors' Record, Tab 6).

Episcopal Diocese of Fort Worth. *Id.*, pp.21-22 § VII (a-e) (21-22). They also are asking for damages, an injunction, and an accounting. *Id.*, § VII (f-h) (22). They have also moved for partial summary judgment. *See* Tab B.

The defendants answered and filed a third-party action against the members of the 2009 Standing Committee.[62] They also filed a plea in intervention, in the name of the Corporation, against the new trustees.[63] Finally, they obtained a continuance of the hearing date for the summary judgment motion and filed a Rule 12 motion.

At the hearing on the Rule 12 motion, the trial judge heard testimony from one of the plaintiffs' attorneys.[64] He also admitted the summary judgment motion, affidavits and exhibits, along with Bishop Gulick's affidavit, into evidence.[65] He then reasoned that it would be better to decide the identity issues by a ruling on the merits, at the proper time, rather than under Rule 12.[66] Accordingly, he denied the Rule 12 motion.[67]

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[62] *See* Third-Party Petition, pp.1-2 (Tab Q).

[63] *See* Plea in Intervention, p.2 (Tab R).

[64] *See* Transcript 47/3--53/21 (Relator's Record, Tab 10).

[65] *Id.* 43/25--44/18.

[66] *See* colloquy, 14/23--15/3, 18/14-21, 20/6-14 (Petitioner's Rec. Tab 16). *See also* Petition, p.1 ("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.").

[67] *See* Order, p.2 (Relators' Record, Tab 11). *See* Petition, pp.7-8.

The defendants then filed their mandamus petition, and this Court granted an immediate stay. As a result, the summary judgment motion was not heard, and the defendants have filed no summary judgment response.

On the day after the stay was issued, a petition in intervention was filed in the trial court by another attorney purporting to represent 47 parishes and missions in the Diocese of Fort Worth.[68] Finally, the defendants in a related suit, who are represented by the defendants' attorney in this suit, have filed another Rule 12 motion and attached a copy of this Court's stay order.[69]

After suit was filed, Gulick resigned as Provisional Bishop of the Episcopal Diocese of Fort Worth. *See* Resolution, p.1 (1582).[70] The diocesan convention accepted his resignation "regretfully but with gratitude for his exemplary service to the diocese and the Church." *Id.* After consulting with the Presiding Bishop, the diocesan Convention has elected the Rt. Rev. C. Wallis Ohl as the new Provisional Bishop of the Episcopal Diocese of Fort Worth. *Id.*

SUMMARY OF THE ARGUMENT

The underlying suit involves a dispute over control of the property of the Episcopal Diocese of Fort Worth. Most of this property is held or managed by

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[68] *See* Original Plea in Intervention (Tab S).

[69] *See* Rule 12 Motion (Tab V).

[70] Attached to Coggin aff. (Tab N).

the diocesan Corporation in trust for the Diocese and its congregations, although some property may be held directly by the Diocese or by the Bishop. Two groups claim to control this property. Gulick and Iker both claim to be the Bishop of the Diocese and, as such, to also be the Chairman of the Board of Trustees of the Corporation.[71] Also, five members from either side are claiming the five remaining Board positions. To decide this case, the trial court must first decide the identity issues, to-wit: Who is the Bishop and who are the Trustees? Once those questions are answered, it can then decide the property issue, to-wit: Who controls the property?

This mandamus proceeding arises out of the trial court's denial of the defendants' Rule 12 motion. That motion would have required those attorneys who filed this suit for the Diocese and Corporation as plaintiffs to show that they were, in fact, retained by those entities.[72] It is undisputed that Bishop Gulick and the new trustees retained the attorneys, but the defendants say that Gulick and the new trustees could not retain attorneys for the Diocese and the Corporation because they were not, in fact, the Bishop of the Diocese and the Trustees of the Corporation. This raises the very identity issues referred to above: Who is the

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[71] Since Bishop Gulick did not resign until after the Rule 12 hearing, we will continue to refer to him, rather than Bishop Ohl, his successor. *See supra*, p.17.

[72] No Rule 12 motion was filed to challenge the attorneys for The Episcopal Church, which is also a plaintiff.

Bishop and who are the Trustees? *See supra*, p.18. The trial judge, however, concluded that the identity issues should be decided on the merits, not under Rule 12; and he denied the Rule 12 motion. Now the defendants are asking this Court to overturn that ruling on mandamus.

The Rule 12 order is reviewable for abuse of discretion, and the trial court did not abuse its discretion for three reasons. First, as this Court has held, Rule 12 may not be used as a shortcut to decide an issue in the underlying suit. Since the identity issues lie at the heart of this church property dispute, the trial court properly denied the Rule 12 motion, which sought to raise those very issues.

Second, even if Rule 12 could be used to decide the identity issues, the trial court had discretion to postpone that decision until the merits of the case were decided in the normal course of litigation. Like many church property disputes, this case involves significant First Amendment issues. The United States Supreme Court has held that such constitutional decisions should be based on a "mature and full bodied record." But Rule 12 provides for an expedited procedure; and if it were used to decide the identity issues in our case, the resulting record might be inadequate, especially since the defendants have not responded to the summary judgment motion.

Third, even if the court had reached the underlying identity issues, it would have been required to decide those issues by deferring to The Episcopal

Church. Under the First Amendment, the identity of the Bishop and the identity of the Trustees are ecclesiastical questions that can be decided only by The Episcopal Church. During the 2009 special meeting, Gulick was chosen as Bishop and the new trustees were placed on the Board. The General Convention then ratified these actions. The First Amendment prohibits the courts from going behind these church decisions.

The defendants argue that the actions of the 2009 special meeting were contrary to the constitution and canons of the Diocese and the articles of the diocesan Corporation. They want this court to construe these church documents in accordance with "neutral principles of law." But the Church, not this Court, is the sole arbiter as to the meaning of its documents, and its interpretation of those documents, even if arbitrary, cannot be questioned.

To be sure, courts in some states have allowed church property documents to be interpreted in light of "neutral principles of law," although no Texas court has taken this approach. But that can only be done to resolve the property issue. In our case, only the identity issues were before the trial court in this Rule 12 proceeding, and "neutral principles" can play no part in deciding those issues. The Episcopal Church, not the courts, must identify the Bishop and the Trustees and decide what its own church documents mean.

ARGUMENT

1. The trial court was required to deny the Rule 12 motion because it concerned the merits of the suit.

To resolve the underlying church property dispute, the trial court must first decide "a simple question of identity." [73] First, the court must identify the Bishop of the Diocese of Fort Worth. Is it Gulick, or is it Iker? Under the First Amendment, The Episcopal Church, not the court, decides that issue. In this case, the Church has decided that Gulick is its Bishop; and as Bishop, he is automatically Chairman of the Board of Trustees for the diocesan Corporation.

Second, the trial court must also identify the other five members of the Board of Trustees. Are they the old trustees, who left The Episcopal Church in 2008, or the new trustees named by the special meeting in 2009? Here again, the courts must defer to the Church, which has decided for the new trustees.

Once the court resolves the identity issues, it can easily decide the property issue. Any property held in the name of the Diocese or the Bishop will be controlled by the Bishop; and any property held in the name of the Corporation will be controlled by the Board. Moreover, even if the defendants were to remain

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[73] *Schismatic and Purported Casa Linda Presbyterian Church in America v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 705 (Tex.App.--Dallas 1986, writ ref'd n.r.e.), *cert denied*, 484 U.S. 823 (1987) (hereinafter "*Casa Linda.*") (*quoting Presbytery of the Covenant v. First Presbyterian Church of Paris*, 552 S.W.2d 865, 871 (Tex.Civ.App.--Texarkana 1977, no writ)).

in control the Board, they would still hold the property in trust for the Diocese. But this lies in the future. The property issue is not part of the Rule 12 proceeding, which only involves the "question of identity."

Rule 12 provides an expedited procedure for requiring the plaintiffs' attorneys to show their "authority to act." Rule 12, TEX.R.CIV.P. But in this case the defendants sought to use Rule 12 to require Bishop Gulick and the new trustees to show their "authority to act." Thus, the defendants sought to raise the identity issues in the Rule 12 proceeding. The trial judge, however, ruled that the identity issues should be decided on the merits, not under Rule 12. *See supra*, p.16.

Rule 12 "has long been the exclusive method for questioning the authority of an attorney to bring suit." *Phillips v. Phillips*, 244 S.W.3d 433, 435 (Tex.App.--Houston [1st Dist.] 2007, no pet.) (emphasis added).[74] In the typical Rule 12 proceeding, the issue is simple: Did the named plaintiff hire the attorney who filed the suit? [75] Thus, in *Sloan v. Rivers*, 693 S.W.2d 782 (Tex.App.--Fort Worth 1985, no writ), the Rule 12 motion was granted because the plaintiff's attorney was not hired by the named plaintiff. Rather, he was hired by an undisclosed assignee of the plaintiff. *See Sloan*, 693 S.W.2d at 783.

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[74] *citing Angelina County v. McFarland*, 374 S.W.2d 417, 423 (Tex.1964). *See also Victory v. State*, 138 Tex. 285, 158 S.W.2d 760, 766 (1942) (*citing* TEX.REV.CIV.STAT. art. 320).

[75] In 1981, the rule was broadened to apply to attorneys for any party. *See Phillips*, 244 S.W.3d at 435.

Again, it is undisputed that the plaintiffs' attorneys were hired by Bishop Gulick and the new trustees. But in their Rule 12 motion, the defendants contended that Gulick is not the Bishop and that the new trustees were not properly chosen. Therefore, they did not have authority to hire attorneys to file suit for the Diocese and the Corporation, or so we are told. Thus, the defendants sought to use Rule 12 to resolve the "simple question of identity" that lies at the heart of this church property dispute. But this Court has held that Rule 12 should not be used as a shortcut to decide an underlying issue in a suit.

In *Mobile Homes of America, Inc. v. Easy Living, Inc.*, 527 S.W.2d 847 (Tex.Civ.App.--Fort Worth 1975, no writ), suit was filed on behalf of a corporation. The trial court granted the defendant's Rule 12 motion because the corporation's charter "had been forfeited for failure to pay franchise taxes." *Id.* at 849. Therefore, the trial court ruled, the corporation "had no authority to sue in the courts of the State and, consequently, had no authority to hire attorneys for that purpose." *Id.* (emphasis added). This Court reversed, holding that the issue should have been raised by plea in abatement, not by a Rule 12 motion. *See Mobile*, 527 S.W.2d at 848. The issue before the trial court involved "right of [the plaintiff] to bring suit," not "the right of any particular attorneys to present themselves as attorneys for [the plaintiff]." *Id.* Under these circumstances, "[a] consideration of Rule 12 in the instant case only serves to confuse." *Id.*

"[T]he main purpose behind [Rule 12] is that a person is entitled to know which person or party in fact authorized the suit." *Boudreau*, 115 S.W.3d at 742. Thus, in *Sloan* , the Rule 12 motion was proper because the name of the person who hired the attorney was not disclosed. *See supra*, p.22. But in our case it is undisputed that Gulick and the new trustees hired the plaintiffs' attorneys. Thus, defendants' "complaint does not implicate the policies behind Rule 12." [76]

Some courts have said that Rule 12 serves "to protect defendants from groundless suits." Based on such pronouncements, the defendants argue that Rule 12 can be used to decide the merits of the underlying suit. *See* Petition, p.13.[77] But in those cases, the suits were "groundless" only because the plaintiff's attorney had not been hired by the plaintiff. They were not "groundless" because the underlying claims lacked merit.[78]

The defendants cite two cases in which Rule 12 was used to challenge the authority, not of an attorney, but of those who hired the attorney. *Id.*, pp.15-16. In *Square 67 Dev. Corp. v. Red Oak State Bank*, 559 S.W.2d 136 (Tex.Civ.App.--Waco 1977, writ ref'd n.r.e.), the president of a corporation authorized a suit

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[76] *Tri-Steel Structures, Inc. v. Baptist Foundation*, 166 S.W.2d 433, 454 (Tex.App.--Fort Worth 2005, pet. denied) (footnote omitted).

[77] *quoting Angelina County*, 374 S.W.2d at 422-423.

[78] *See Sloan v. Rivers*, 693 S.W.2d at 784 ("[T]he rule's purpose is to discourage and cause dismissal of suits brought without authority so as to protect defendants from groundless suits.") (*citing Mobile Homes*, 527 S.W.2d at 848). *See also Air Park-Dallas*, 109 S.W.3d at 906 (same).

against a bank, but the corporation's board of directors passed a resolution stating that the suit was not authorized. The bank filed a Rule 12 motion; and the trial court ruled that the board, not the president, had the authority to act for the corporation and dismissed the suit. The question of the attorney's authority was not the underlying issue in *Square 67*. Rather, that question was ancillary to the main suit, which was a dispute between the corporation and a bank.[79]

In *Gulf Regional Educ. Television Affiliates v. Univ. of Houston*, 746 S.W.2d 803 (Tex.App.--Houston [14th Dist.] 1988, writ denied), GRETA sued the University over broadcasting on the University's television station. *Id.* at 805. The trial court granted the University's Rule 12 motion. The court of appeals affirmed because GRETA was part of the University and could not sue without the University's consent. *See* 746 S.W. 2d at 809.

While these facts are closer to our case than *Square 67*, the fact remains that GRETA and the University were separate organizations, even though one controlled the other. But in our case, there is only one Episcopal Diocese of Fort Worth and one Corporation, and two groups claim to control them. Absent a Supreme Court decision,[80] this court should follow *Mobile Homes*.

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[79] The defendants are simply wrong when they describe *Square 67* as "a fight for control of the plaintiff corporation." Petition, p.32.

[80] The *GRETA* court cited *Angelina County*, 374 S.W.2d at 423, but the *Angelina County* court did not reach the Rule 12 issue, as the *GRETA* court acknowledged. *See* 746 S.W.2d at 809.

2. Alternatively, the trial court had the discretion to decide the identity issues on the merits, rather than under Rule 12.

In *Mobile Homes*, *Square 67*, and *GRETA*, the trial court granted the defendants' Rule 12 motion and the plaintiff appealed from that decision.[81] But in our case the trial court denied the Rule 12 motion, and the defendants are seeking mandamus review. Certainly, in cases such as ours, where the Rule 12 motion concerns the merits of the underlying suit, a court has discretion to deny Rule 12 relief and decide the case on the merits. Indeed, we can find no case in which a court of appeals has reversed a trial court's denial of a Rule 12 motion, whether on mandamus or by appeal.

According to the defendants, Rule 12 is merely one of several methods of challenging a party's authority to file suit.[82] They concede that the identity issue could also be decided on summary judgment or by a trial on the merits or by a plea in abatement. *See* Petition, p.16 n.46.[83] Even so, they say that, once they filed their Rule 12 motion, the trial court had "no discretion." *Id.*, p.22. It had to decide the identity issue under Rule 12, rather than deciding it on the

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[81] *See Mobile Homes*, 527 S.W.2d at 848; *Square 67*, 559 S.W.2d at 137; *GRETA*, 746 S.W.2d at 804.

[82] *See* Petition, p.13 (arguing that "other means exist for challenging a party's standing or capacity to file suit for a named party.").

[83] *See also* Petition, p.13 ("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."); *Id.*, p.16 n.46. (arguing that Rule 12 motion was not "improper merely because there were alternative forms of relief."

merits, or so we are told. To support this remarkable position, the defendants argue that a decision under Rule 12 would have been quicker and cheaper than a decision on the merits.

The defendants point out that, a Rule 12 proceeding is "simple and expedited." Petition, p.31. "It requires nothing except a sworn motion and ten days notice." *Id.*, p.30. Thus, a trial court can decide a Rule 12 motion without requiring the parties "to marshal their evidence" and without giving them an "adequate time for discovery." *Id.*, p.30. Also, no jury trial is available.[84] But these are not reasons why Rule 12 should be used to decide the identity issues in this case. They are reasons why Rule 12 should not be used. Our case involves First Amendment issues, and decisions as to constitutionality should be made on "an adequate and full bodied record." [85] Indeed, according to the Supreme Court, the identity issue must be decided "on the merits, and cannot be decided as a

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[84] *See Miller v. Stout*, 706 S.W.2d 785, 787 (Tex.App.--San Antonio 1986, no writ) ("We have found no case holding that there is a right to a jury in hearings on pleas in abatement or a Rule 12 motion. We are unwilling to extend the right to a jury to preliminary and incidental proceedings which do not involve the question of liability.").

[85] *See Public Affairs Assoc. Inc. v. Rickover*, 369 U.S. 111, 113 (1962) ("Adjudication of such problems, certainly by way of resort to a discretionary declaratory judgment, should rest on an adequate and full-bodied record."); *Klepp v. New Mexico*, 426 U.S. 529, 546 (1976) ("We have often declined to decide important questions regarding the scope and constitutionality of legislation . . . in the absence of an adequate and full-bodied record.") (internal quotation marks deleted).

preliminary question." *Watson v. Jones*, 80 U.S. 679, 714 (1871).[86] Accordingly, the trial court did not abuse its discretion by refusing to grant Rule 12 relief.

3. In deciding the identity issues, the courts must defer to the Church.

The trial court denied the Rule 12 motion, and that decision can be upheld on the merits if there is any evidence that Gulick and the new trustees were, in fact, authorized to act for the Corporation. In other words, to reverse the Rule 12 order, this Court will have to decide, as a matter of law, that Gulick is not the Bishop and that the new trustees are not the Trustees.

a. Texas courts follow the deference rule.

There are two methods for deciding church property disputes. The first--known as the "deference" rule--was recognized in *Watson v. Jones*, cited above. In that case, the U.S. Supreme Court held that, in a case involving a hierarchical church, the courts must defer to the decision of the church's highest body. A century later, the Court held that church property disputes could also be decided by applying "neutral principles of law." *See supra*, p.4. Either approach is constitutionally permissible. *See generally Casa Linda*, 710 S.W.2d at 703-707.

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[86] *Cf. Bland Indep. School Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex.2000) ("[T]he proper function of a dilatory plea does not authorize an inquiry so far into substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction. Whether determina-tion of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion.") (emphasis added).

In 1986, the Dallas Court of Appeals surveyed Texas case law and concluded that Texas courts had universally followed the deference rule. *See Casa Linda*, 710 S.W.2d at 705-706.[87] It explained that rule as follows:

> When a division occurs at a local church affiliated with a hierarchical religious body, and a dispute arises between rival groups as to the ownership or control of the local church property, the fundamental question as to which faction it is entitled to the property is answered by determining which of the factions is the representative successor to the church as it existed prior to the division, and that is determined by which of the two factions adheres to or is sanctioned by the appropriate governing body of the organization. It is a simple question of identity. In making such a determination, the civil court exercises no role in determining ecclesiastical questions. It merely settles a dispute as to identity which in turn necessarily settles a dispute involving property rights.

Casa Linda, 710 S.W.2d at 705 (emphasis added).[88] Thus, in another dispute involving the Presbyterian Church of the United States ("PCUS"),

> [i]t became the prerogative of the governing judicatories of PCUS to determine if the withdrawing faction or those on the church roll who remained faithful to PCUS and who wish to remain members of it constituted the lawful congregation of the First Presbyterian Church of Paris U.S. That question has been considered and finally ruled upon by those authorities. Those persons constituting the loyal faction have submitted themselves to the judicatories of PCUS and have been recognized by such as the duly existing local congregation. They therefore have the identity to make of them the First Presbyterian Church of Paris, U.S., and they are entitled to possession and control of the property conveyed to that church.

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[87] *See also* Plaintiffs' Motion for Partial Summary Judgment, pp.39-41 (57-59).

[88] *quoting Presbytery of the Covenant*, 552 S.W.2d at 871.

Presbytery of the Covenant, 552 S.W.2d at 871 (emphasis added).[89]

The *Casa Linda* court found no Texas case in which a court had actually decided a church property dispute using "neutral principles of law." It did note that, while the court in *Presbytery of the Covenant* had

> purported to apply neutral principles of law in the mistaken belief that the [United States Supreme Court] decision[s] required their application, the court, in fact, applied the deference rule in reaching its decision.

Casa Linda, 710 S.W.2d at 705. A comparison of *Presbytery of the Covenant* with *Casa Linda* reveals that this is correct. In both cases, the courts first determined that the local churches were part of a hierarchical church. They then awarded the church property to the faction recognized by the national church.[90] This is the essence of the "deference" approach. Moreover, our survey of recent Texas cases reveals that nothing has changed. While some courts have noted the availability of the "neutral principles" approach, no Texas court has used "neutral principles" to decide a church property dispute.[91]

> [W]here the law is settled, the obligatory course for an intermediate court is judicial-self restraint. Any reconsideration of the deference

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[89] *quoted in Casa Linda*, 710 S.W.2d at 705.

[90] *See Presbytery*, 552 S.W.2d 870-872; *Casa Linda*, 710 S.W.2d at 706-707.

[91] *See, e.g., Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex.App.--Austin 1991, writ denied) ("Where a congregation of a hierarchical church is split, those members who renounce their allegiance to the church lose any rights in the property involved and the property belongs to the members who remain loyal to the church. It is a simple question of identity.").

rule must be made, if at all, by the Supreme Court.

Casa Linda, 710 S.W.2d at 707.[92] Finally, "neutral principles of law" can only be considered in resolving the property issue. They cannot be used to resolve the identity issues, which are the only issues before this Court.

b. The identity of the Bishop and the "realignment" of the Diocese are ecclesiastical questions, which the courts cannot decide.

Iker contends that he is still the Bishop of the Diocese of Fort Worth, but The Episcopal Church has removed him from that position. Iker cites the 2006 amendments to the Articles of Incorporation, which purport to give the Trustees "sole authority to determine the identity and authority of the Bishop." *See supra*, p.10. He points out that "[n]one of the [old] trustees decided the dispute in favor of Bishop Gulick." Petition, p.21. These facts recall the widely cited *Milivojevich* case,[93] attached at Tab 3. That case arose out of a dispute between the Serbian Orthodox Church and one of its bishops. The Serbian Orthodox Church is a hierarchical church governed by a Holy Assembly of Bishops in Yugoslavia. *See Milivojevich*, 426 U.S. at 699. The Holy Assembly is

> presided over by a Bishop designated by the Assembly to be Patriarch. The Church's highest executive body, The Holy Synod of Bishops, is composed of the Patriarch and four Diocesan Bishops selected by the

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[92] *citing Watson v. Zep Mfg. Co.*, 582 S.W.2d 178, 180 (Tex.Civ.App.--Dallas 1979, writ ref'd n.r.e.).

[93] *See Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976).

Holy Assembly.

Id. at 699. In 1927, orthodox congregations in the United States and Canada formed a diocese, which acknowledged that it was "an organic part of the Serbian Orthodox Church" and that it was subject to all "statutes and rules" of the Mother Church. *Id.* at 700-701. The diocese also chartered an Illinois non-profit corporation, which took title to property owned by the diocese. *Id.* at 702.

In 1939, the Holy Assembly elected "Bishop Dionisije as Bishop of the American-Canadian Diocese." *Id.* at 702. He later became controversial, and the Holy Assembly disciplined him and "reorganized the American-Canadian Diocese into three new dioceses." *Id.* at 702-703. Like Iker in our case, Dionisije argued that these decisions were not "in compliance with the constitution and laws of the Mother Church," and he "declared the Diocese completely autonomous." *Id.* at 704-705. The Holy Synod then "divested him of his episcopal and monastic ranks." *Id.* at 706.

The Illinois Supreme Court ruled for Dionisije in an opinion that "relied on purported 'neutral principles' for resolving property disputes." *Id.* at 721.[94] It held that "Dionisije's removal and defrockment had to be set aside as arbitrary" because they were not in accord with the church's constitution and laws. *Id.* at 708 (emphasis added). It also held that "the Diocesan reorganization was

[94] *quoting Serbian Eastern Orthodox Diocese for the United States of American and Canada v. Milijovech*, 60 Ill.2d 477, 328 N.E.2d 268, 282 (1975), *rev'd*, 426 U.S. 696 (1976).

beyond the scope of the Mother Church's authority." *Id.* The United States Supreme Court reversed, holding that the Illinois court had impermissibly rejected "the decisions of the highest ecclesiastical tribunals of this hierarchical church" and "impermissibly substitute[d] its own inquiry into church polity." *Id.* at 708.

> To permit civil courts to probe deeply enough into the allocation of power within a (hierarchical) church so as to decide . . . religious law (governing church polity) . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.

Id. at 709.[95] Thus, courts must accept the decision of a hierarchical church "on matters of discipline, faith, or ecclesiastical rule, custom, or law." *Id.* at 710 (emphasis added). The *Milivojevich* court expressly held that the appointment of a bishop is "at the core of the ecclesiastical concern." *Id.* at 717.[96]

The *Milivojevich* decision is directly on point. No one denies that The Episcopal Church is hierarchical. Indeed, its structure is similar to that of the

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[95] *quoting Md. and Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring).

[96] *See Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) ("[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."); *HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 642 (Tex.2007) (holding that the government "can not determine the qualifications a cleric should have or whether a particular person has them."); *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex.App.--Fort Worth 1999, no pet.) (holding that "the issue of a pastor's ouster is ecclesiastical in nature. Courts may not attempt to right wrongs related to the hiring, firing, discipline or administration of clergy."); *Tran v. Fiorenza*, 934 S.W.2d 740, 743 (Tex.App.--Houston [1st Dist.] 1996, no pet.) (holding that courts will "not intrude into church's governance of 'religious' or 'ecclesiastical' matters, such as theological controversy, church discipline [or] ecclesiastical government"); *Green v. United Pentecostal Church Int'l*, 899 S.W.2d 28, 30 (Tex.App.--Austin 1995, writ denied) ("[O]nce a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated.").

Serbian Orthodox Church. Again, The Episcopal Church's highest authority is its General Convention, and executive power rests in the Presiding Bishop. *See supra*, p.2. Similarly, in the Serbian Orthodox Church, the Holy Assembly is the highest authority, and executive power rests in the Patriarch and the Holy Synod. *See supra*, p.31.

Also, the Episcopal Diocese of Fort Worth and its predecessors repeatedly acknowledged that they were "a constituent part" of The Episcopal Church and that they acceded to the Constitution and canons of the Church. *See supra*, pp.3 & 6. Similarly, in *Milivojevich*, the American-Canadian Diocese acknowledged that it was "an organic part" of the Mother Church and subject to all of the church's statues and rules. *See supra*, p.32. Under these facts, The Episcopal Church easily qualifies as a hierarchical church,[97] and the courts have uniformly recognized this is so.[98]

Because The Episcopal Church is hierarchical, it had the final say as to the identity of the Bishop of its Fort Worth Diocese. Just as the *Milivojevich* court could not go behind the decision of the Holy Synod to remove Bishop Dionisije, so our court cannot go behind the decision to remove Bishop Iker and

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[97] *See generally Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197, 198-199 (Tex.App.--Amarillo 1998, no writ) (setting forth factors indicating that a church is hierarchical); *Green*, 808 S.W.2d at 550-551.

[98] *See* Motion for Partial Summary Judgment, p.9 n.1 (Tab A) (27)..

elect Bishop Gulick. Because these are ecclesiastical matters, they must be decided by The Episcopal Church, not by the courts.[99]

In the same way, The Episcopal Church will have the final say as to the defendants' contention that the Diocese is autonomous and can leave the church. Just as the Serbian Orthodox Church's decision to divide the American-Canadian diocese into three new diocese was an ecclesiastical matter, so The Episcopal Church's decision that the Fort Worth diocese cannot leave the church is also an ecclesiastical matter.

c. The identity of the Trustees is also an ecclesiastical question.

As to the Corporation, the defendants point out that it was chartered by the State of Texas as a non-profit corporation. But the churches are frequently incorporated, and that has not stopped the courts from deferring to their decisions.[100] Indeed, *Milivojevich* is applicable to "a[ny] religious organization making an ecclesiastical decision." *Patterson v. Southwestern Baptist Theological Seminary*, 858 S.W.2d 602, 604-605 (Tex.App.--Fort Worth 1999, no writ).

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[99] *See* Church Canon IV.14.1 ("Disciplinary proceedings under this title are . . . ecclesiastical in nature and represent determinations by this Church of who shall serve as Members of the Clergy of this Church and further represent the polity and orders of this hierarchical Church.") (emphasis added). *See* Constitution and Canons [2006], p.161, at Buchanan aff., Ex. 1 (301).

[100] *See e.g., Presbytery of the Covenant*, 552 S.W.2d at 869 ("The First Presbyterian Church of U.S. of Paris, Inc. was started as a Texas corporation . . . for the purpose of holding property for the First Presbyterian Church of Paris."); *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599 (5th Cir.1975).

In this regard, one Texas court has held that "[i]n a conflict between the general procedures outlined in the Texas Non-Profit Corporation Act and the specific procedures contained in the church bylaws, we must defer to the church bylaws." *Green*, 808 S.W.2d at 552.

Moreover, as detailed on page 6, the corporation and the diocese are hopelessly entangled, as follows:

- The Corporation was chartered pursuant to the constitution and canons of the diocese and The Episcopal Church.
- The purpose of the Corporation was to "receive and maintain" all "real or personal property" required for the use of the Diocese as well as the real property of all parishes, bishops, and diocesan institutions and to hold title to "all real estate acquired for the use of the Church in the Diocese." [101]
- Under Diocesan Canon 11 (Now canon 17), the Trustees must be members of the "clergy" or "Lay persons in good standing."

Indeed, the 2008 amendments to the Articles of Incorporation (which plaintiffs do not accept) would have increased this entanglement by giving the board "sole authority to determine the identity and authority of the Bishop." *See supra*, p.10.

Because selection of the Trustees is also an ecclesiastical decision, The Episcopal Church had the authority to decide who the Trustees would be. In *Greanias v. Isaiah*, No. 01-04-00786-CV, 2006 WL 1550009 (Tex.App.--Houston

[101] *Cf. Patterson*, 858 S.W.2d at 605 ("The uncontroverted evidence shows the Seminary is owned by the Southern Baptist Convention for the purpose of training ministers to serve the Baptist faith. Therefore, the Seminary is a religious organization entitled to protection under the First Amendment.").

[1st Dist.] June 8, 2006, no pet.) (not designated for publication), Metropolitan Isaiah was the hierarch of the regional division of the Greek Orthodox Archdiocese of America. *Id.* at *1. He named a new priest for the Greek Orthodox Cathedral in Houston, who came into conflict with the Cathedral's board of trustees, known as the "parish council," whose members were elected to three-year staggered terms. *Id.* at *2.

The Metropolitan demanded that the council members resign because they had broken their oath to "uphold 'the discipline and regulations of the Greek Orthodox Archdiocese.' " *Id.* at **2-3. He also appointed an interim parish council. *Id.* Members of the original parish council sued the Metropolitan, the new priest, and the members of the interim parish counsel for declaratory judgment. *Id.* Like the defendants in our case, they argued that, under the Texas Non-Profit Corporation Act, the Cathedral's "local by-laws controlled the Cathedral's governance." *Id.* at *4. They contended that, under these local bylaws, the Metropolitan "did not have the power to dismiss the original parish council" and that he "could not create an interim parish council." *Id.* The court of appeals rejected that argument, holding that

> [t]he controversy inherently and inextricably involves a presiding hierarch's power to discipline a local parish council; his power to determine whether that council's members have violated their oath to obey the church's hierarchy, discipline, and canons, and an archdiocese's right to insist on what by-laws may be adopted by its subordinate parishes.

Id. at *8. The court held that these "are ecclesiastical matters that the First Amendment forbids courts to adjudicate." *Id.* (emphasis added).[102] It rejected the plaintiffs' claims, because "[t]hose matters are at the heart of this dispute, and they are inextricably intertwined with the ecclesiastical issues of church governance, polity, and doctrine that we may not determine." *Id.*[103]

d. The Church, not the courts, must interpret church documents.

The defendants say that the identity issue "is not religious." Petition, p.2. They say that the Diocese and Corporation are nothing more than "a Texas unincorporated association" and "a Texas non-profit corporation." *Id.* Thus, the courts can interpret the constitution and canons of the Diocese and the articles and bylaws of the Corporation using "neutral principles of law," or so we are told.

The defendants complain that the 2009 meeting did not comply with the diocesan constitution. Specifically, they say that the Presiding Bishop ("an outside bishop") could not call a special meeting. *See* Petition, p.25. Rather, we are told, the diocesan constitution "requires that a special meeting of the Convention be called by the Bishop of the Diocese, or a majority of the Standing

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[102] *citing Milivojevich*, 426 U.S. at 717; *Green v. United Pentecostal Church Int'l*, 899 S.W.2d 28, 30 (Tex.App.--Austin 1995, writ denied); *Mangum v. Searingin*, 565 S.W.2d 957, 959 (Tex.Civ.App.--San Antonio 1978, writ ref'd n.r.e.).

[103] *See generally*, BLACK'S LAW DICTIONARY, 5th ed. at 459 (defining "ecclesiastical" as "[p]ertaining to anything belonging to or set apart for the church, as distinguished from 'civil' or 'secular' with regard to the world.").

Committee." *Id.*, p.24.[104] They also say that the Trustees could not be removed except as "provided in the articles of incorporation or by-laws." *Id.* at 18 & 20.[105] Nor could they all be selected at once. Rather, we are told, one trustee had to be elected at each annual convention. *Id.* at 21. Finally, the defendants insist that the Diocese made itself autonomous by purportedly amending its constitution in 2008 and that the Constitution and canons of the Church did not prohibit this. *See* Petition, p.4.[106]

But once again, only the Church has the power to decide what these church documents mean. In our case, the defendants are inviting this Court to construe the diocesan constitution and canons and the Articles of Incorporation under "neutral principles" of law. Bishop Dionisije made this same request in *Milivojevich*, arguing that the decision of the Mother Church contravened the language of church documents. He relied on dicta from an earlier Supreme Court decision suggesting that the courts could intervene if the Mother Church's decision

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[104] *citing* Diocesan Const. Art.4.

[105] *citing* TEX.REV.CIV.STAT. art. 1396-2.15(D).

[106] On pages 26-28 of the Petition, the Defendants also argue that a suit by a non-profit corporation must be brought "through member in a representative suit." Petition, p.27 n.79 (*quoting* TEX.REV.CIV.STAT. art. 1396-2.03(B)). But that statute also allows suits "by the corporation, whether acting directly or through a receiver, trustee or other legal representative."

was "arbitrary." *Id.* at 711-712.[107] But the *Milivojevich* court ruled that there was

> no "arbitrariness" exception in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations.

Id. at 713 (emphasis added).[108] Thus, the Mother Church would be the final arbiter as to the meaning of its documents, even if its interpretation was "not always consistent." *Id.* at 718. Indeed, the church's interpretation did not even have to be "rational or measurable by objective criteria." *Id.* 714-715. This is because the First Amendment gives "religious bodies" the power "to decide for themselves, free from state interference, matters of church government." *Id.* at 721-722 (emphasis added).[109]

Our case is an excellent example as to why the courts cannot delve into the meaning of church documents. As previously noted, the diocesan canons require the trustees to be "clergy" or "Lay persons in good standing." *See supra*, p.7. Whether a particular trustee qualifies as "clergy" or as a "Lay person in good

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[107] *citing Gonzalez*, 280 U.S. at 16 ("In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights are accepted in litigation before the secular courts as conclusive.").

[108] *Accord Green*, 899 S.W.2d at 30 (holding that "there is no 'arbitrariness' exception to the general rule that civil courts are bound to accept the decisions of ecclesiastical tribunals on religious matters.").

[109] *Cf. Watson*, 80 U.S. at 729 ("Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches)," has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitutes a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with.") (emphasis added).

standing" is an ecclesiastical question. Again, the *Greanias* trustees were removed because they had broken their oath to "uphold 'the discipline and regulations of the Greek Orthodox Archdiocese." *See supra*, p.37. Only the church could decide whether they had, in fact, broken their oath.

Similarly, in *Cherry Valley Church of Christ/Luther Clemons v. Foster*, No. 05-00-01798-CV, 2002 WL 10545 (Tex.App.--Dallas Jan. 4, 2002, no pet.) (not designated for publication), the church minister removed and replaced five members of the board of trustees. *Id.* at *1. This was a congregational church, and his decision was supported by the congregation, which voted to elect new trustees. *Id.*[110] The new trustees then sued the old trustees to prevent them from expending funds, acting for the church, or attempting to hire a minister. *Id.* They also sought custody of the church's books, records, and keys. *Id.* The trial court granted summary judgment in favor of the new trustees. *Id.*

On appeal, the old trustees argued that the church had been incorporated as a non-profit corporation and that, under the articles and the bylaws, they had been improperly removed from their positions as trustees. *Id.* at 3. In affirming, the court of appeals held that the articles and bylaws could not be interpreted under "neutral principles" of law because they provided that the

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[110] *See Martinez v. Primera Assemblea de Dios, Inc.*, No. 05-96-01458-CV, 1998 WL 242412, at **2-3 (Tex.App.--Dallas May 15, 1998, no pet.) (not designated for publication) (holding that "*Milivojevich* applies to congregational churches.").

directors of the corporation shall at all times be selected according to the custom and practices of the church." *Id.* (emphasis added).

> By embedding the phrase "custom and practices of the church" in its articles of incorporation, this non-profit corporation removed any dispute regarding the selection of its directors from the purview of the judicial system. Interpreting this phrase would . . . require the state court to examine the historical, administrative, and ecclesiastical affairs of a religious organization and decide the outcome of this issue based on its determination of what are the custom and practices of the church.

Id. Citing *Milivojevich*, the court held that because it could not "determine the issues of internal church government," it could "not delve into those issues." *Id.* Similarly, in our case, by embedding the phrase "Laypersons in good standing" in the Diocesan canons, the Church removed any dispute regarding the selection of the Trustees from the purview of the judicial system.[111]

The fact that a state may have chosen to adjudicate church property disputes under "neutral principles of law" will make no difference in this regard, because

> there may be cases where the deed, the corporate charter, or the constitution of a general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instrument of ownership would require the civil courts to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical

[111] *See Martinez*, 1998 WL 242412, at *3 (holding that court could not adjudicate appeal of expulsion of church member under provision that "related to persons who believe to be right with God and are not violating the requirements that must characterize a Christian, or a member of the assembly.").

body.

Jones v. Wolf, 443 U.S. at 604 (emphasis added) (*citing Milivojevich*, 426 U.S. at 709).

e. The identity issue decides the property issue.

Although the property issue is not before the Court in this mandamus proceeding, it may be helpful to see how it will be decided once the stay is lifted. The process will be simple because "[r]esolution of the religious disputes at issue here affects control of church property." *Milivojevich*, 426 U.S. at 709. Again, the trial court must accept the Church's determination that Gulick is Bishop of the Diocese and that the actions of the 2009 special meeting were proper. Therefore, any property owned directly by the Bishop or the Diocese will be under the control of Bishop Gulick or the diocesan convention, as constituted in 2009. Similarly, Bishop Gulick and the new trustees constitute the Board of the Diocesan Corporation. Therefore, any property owned by the Corporation will be under their control.[112]

But even if Iker and the old trustees were to retain control of the Corporation, that corporation would merely "hold legal title to the physical property of the church. The equitable title to this property is in the church, not in

[112] *See Brown v. Clark*, 102 Tex. 323, 16 S.W.3d 363 (1909) (holding that "the church to which the deed was made still owns the property and whatever body is identified as being the church . . . must still hold the title.").

the corporation." [113]

Finally, the defendants cite the recent South Carolina decision in *Waccamaw*.[114] *See* Petition, pp.19-20. That decision stands *Milivojevich*, on its head by ignoring the fact that the non-profit corporation was a church. It also runs counter to the many decisions that have held for The Episcopal Church in these kinds of cases,[115] and U.S. Supreme Court review is being sought.

4. Relators have an adequate remedy by way of appeal.

Generally, mandamus is not available "to supervise or correct incidental rulings of a trial court, when there is an adequate remedy by appeal." *Abor v. Black*, 695 S.W.2d 564, 566-567 (Tex.1958).[116] Such incidental rulings include:

> (1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, (5) motions for instructed verdict, (6) motions for judgment non obstante verdicto, (7) motions for new trial, and a myriad of interlocutory orders and judgments

Id.[117] A Rule 12 motion qualifies as an "incidental ruling." [118] The defendants

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[113] *David v. Carter*, 222 S.W.2d 900, 904 (Tex.Civ.App.--Eastland 1939).

[114] *See All Saints Parish Waccamaw v. The Protestant Episcopal Church and the Diocese of South Carolina*, 385 S.C. 428, 685 S.E.2d 163 (2009).

[115] *See* Motion for Partial Summary Judgment, pp.63-64 (81-82). *See also* The Episcopal Church cases, 45 Cal.4th 467, 198 P.3d 66 (2009), *cert. denied*, 130 S.Ct. 179 (2009).

[116] *Accord In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 197 (Tex.2002).

[117] *quoting Pope v. Ferguson*, 445 U.S. 950, 954 (Tex.1969), *cert. denied*, 397 U.S. 997 (1970).

have "not cited, and we have not found any case that has held that mandamus relief is appropriate to correct trial court rulings on Rule 12 motions." [119]

The defendants cite *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 94 (Tex.1997), in which a trial court ordered the Republican Party to provide the plaintiff a booth and advertising space at its upcoming statewide convention. *Id.* at 87-88. The order was issued June 14, and the convention was scheduled for June 20. Since there was no time for an appeal, the Republican Party sought mandamus directly from the Texas Supreme Court. *Id.* On June 19, the day before the convention, the court heard arguments and issued an order staying enforcement of the order.[120] Later, it issued an opinion explaining its ruling. *Id.* at 88.

The Court first ruled that there had been no "state action" and hence no First Amendment violation. *Id.* at 88-93. It then turned to the second mandamus requirement--lack of an adequate appellate remedy. The Court explained that the circumstances of the case were "unique and compelling." *Id.* at 93.

> The district court's injunction affected a statewide political convention that was based on claims of statewide importance. The state's highest court should determine such issues.

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[118] *Cf. Walker*, 827 S.W.3d at 804 n.8 (collecting cases).

[119] *Wells Fargo Bank v. Wittig*, No. 01-88-01082-CV, 1988 WL 131828 (Tex.App.--Houston [1st Dist.] 1988, Dec. 1, 1988, orig. proceeding).

[120] *See Republican Party of Texas v. Dietz*, 924 S.W.2d 932 (Tex.1996).

Id. at 93-94. *Dietz* thus turns on the fact that the convention would have been over long before an appeal could have reached the "state's highest court." But in our case there is no danger of mootness. If the "state's highest court" wants to decide this case, it can do so by ordinary appeal.

The defendants also cite *In re Schmitz*, 285 S.W.3d 451 (Tex.2009), which involved the merger of two corporations. A month before the scheduled closing, the board of directors of one of the corporations received a shareholder's letter demanding that the merger be canceled "in light of a superior offer." *Id.* at 452. The merger closed as scheduled, and the shareholder filed a derivative suit against the former directors, seeking rescission and damages. *Id.* at 453. The former directors moved to dismiss the suit because the plaintiff had failed to comply with a statute requiring a pre-suit demand before filing a derivative suit. *Id.* at 453. After the trial court and the court of appeals denied this request, the former directors sought mandamus from the Texas Supreme Court. *Id.*

The Supreme Court ruled that the demand letter "fell . . . woefully short" of the statutory requirements, and that it had come "too late for [the] board to entertain a new analysis of the competing merger offers, or authorize an inquiry by independent and disinterested directors." *Id.* at 459. Thus, to allow the suit "would defeat the substantive right [that] the Legislature sought to protect," which was to give the directors meaningful knowledge of a competing offer in time for

them to do something about it. *Id.* (emphasis added).

In our case, the defendant argues that they will lose a "substantive right" because a suit can be brought "in a non-profit corporation's name only in three instances, none of which apply here." Petition, p.34.[121] But that argument can be addressed on appeal.

The defendants also express concern that a denial of mandamus relief would have "collateral consequences." Petition, p.35. If this Court denies mandamus, they fear that we could use the order of denial to evict dissenting parishes within the Diocese of Fort Worth. *Id.* But the dissenting parishes have intervened in our suit, and the trial judge would decide whether this could be done. *See supra*, p.17.

Finally, the defendants say that, if mandamus is denied, the trial court "risks becoming entangled in religious claims and controversies that are beyond its jurisdiction." But, as we have seen, the law requires the trial court to defer to The Episcopal Church in order to avoid religious controversy.

CONCLUSION AND PRAYER

The defendants are seeking to dismember The Episcopal Church and take its property. Under their plan, dissenters will amend local church documents

[121] This appears to be a reference to Art. 1396-2.03(B), discussed on pages 26-28 of the petition.

to purportedly make a diocese or parish independent of the Church. Then, when their actions are challenged, they will invoke "neutral principles of law." Before allowing this plan to go forward, the Court should remember that The Episcopal Church is not the only hierarchical church.[122] Many such churches are beset by the kind of cultural controversies--such as the ordination of women--that have moved the defendants to leave the Church in our case.

Under established law, dissenters can leave a hierarchical church, but they cannot take church property with them. Any decision to change that rule must come from the state's highest court, and it should be based upon "an adequate and full-bodied record." The defendants in our case, however, are attempting to raise the identity issues in an expedited Rule 12 proceeding, which circumvents due process. Their plans miscarried in the trial court, and now they want this Court to intervene by writ of mandamus. This Court should not decide these weighty issues in a Rule 12 proceeding. Accordingly, the petition for mandamus

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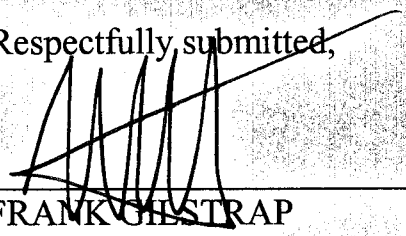
[122] *See, e.g., Brown v. Clark*, 102 Tex.323, 116 S.W. 360 (1909) (Cumberland Presbyterian Church); *Casa Linda*, 710 S.W.2d at 705) (Presbyterian Church of the United States); *Tran v. Fiorenza*, 934 S.W.2d 740 (Tex.App.--Houston [1st Dist.] 1996) (Catholic Church); *Browning v. Burton*, 275 S.W.2d 131, 133-135 (Tex.Civ.App.--Austin 1954) (African Methodist Episcopal Church); *Kedorff v. St. Nicholas Cathedral*, 344 U.S. 94, 115 (1952) (Russian Orthodox Church); *Milivojevich*, 426 U.S. at 699 (Serbian Orthodox Church); *Greanias v. Isiah*, 2006 WL 150009 (Greek Orthodox Church); *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 601 (5th Cir.1975) (Church of God in Christ); *Temple Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2s 197, 198-199 (Tex.App.--Amarillo 1988) (Evangelical Church, Inc.); *Green v. United Pentecostal Church*, 899 S.W.2d 28 (Tex.Civ.App.--Austin 1995, writ denied) (United Pentecostal Church); *Alexander v. Allen*, No.14-04-01110-CV, 2005 WL 3369884 (Tex.App.--Houston [14th Dist.] 2005) (Christ Temple Apostolic [Pentecostal] Church).

should be denied, and the plaintiffs should be awarded costs.

Respectfully submitted,



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STATE OF TEXAS §
§ VERIFICATION
COUNTY OF TARRANT §

Before me, the undersigned authority, on this day personally appeared Frank Gilstrap, a person whose identity is known to me, and after being duly sworn and upon oath stated as follows:

1. My name is Frank Gilstrap. 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 the Real Parties in Interest in the above-captioned cause.

2. I have read the Real Parties in Interest Response to the Petition for Writ of Mandamus (the "Response."). All of the factual statements in the Response are within my personal knowledge obtained from review of the underlying record and are true and correct."

Further Affiant Sayeth Not.

SIGNED this the 19th day of January, 2010.

Frank Gilstrap

Sworn to and subscribed before me, a notary public, this 19th day of January, 2010.

Amy Rodriguez

AMY L. RODRIGUEZ
Notary Public
STATE OF TEXAS
My Comm. Exp. 03/28/2013

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing response was served on January 19, 2010, on the following persons:

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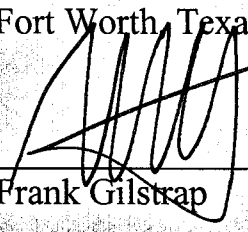

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