

CAUSE NO. 141-237105-09

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| THE EPISCOPAL CHURCH, et al. |) | IN THE DISTRICT COURT OF |
| |) | |
| VS. |) | TARRANT COUNTY, TEXAS |
| |) | |
| FRANKLIN SALAZAR, et al. |) | 141 ST DISTRICT COURT |

**LOCAL EPISCOPAL PARTIES' RESPONSE TO
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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**LOCAL EPISCOPAL PARTIES' RESPONSE TO
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

TO THE HONORABLE COURT:

Subject to and without waiving their motions filed against all of Defendants' attorneys under TEX. R. CIV. P. 12, their special exceptions, and their evidentiary objections, The Local Episcopal Parties¹ file this Response and would respectfully show:²

I. INTRODUCTION

Defendants' motion for partial summary judgment is strikingly wrong – it omits key authorities and urges positions that have been consistently rejected as unconstitutional. For example, Defendants rely on *Chen v. Tseng* to tell this Court: “in 2004 the First Court of Appeals construed a church’s by-laws to decide who controlled its property, but refused to exercise jurisdiction over who could tend the temple altar. This Court must do the same.”³ But Defendants fail to show the Court the 2006 First Court of Appeals opinion rejecting *Chen* in cases like this one:

Appellants also rely on *Chen v. Tseng*, which, as a memorandum opinion, is not binding precedent of this Court. In any event, *Chen* is distinguishable. The *Chen* court was able to determine which board members were the lawful ones because there was no preserved challenge concerning which by-laws applied and what they required [Here,] a higher church authority was disputing whether the local by-laws, on which appellants based their whole case, controlled Determining which version of the by-laws in fact controlled thus involved determining the ecclesiastical powers of the higher church authorities that claimed that their version controlled. In *Chen*, in contrast, the appellants' challenges

¹ This Response is specifically filed by the Rt. Rev. C. Wallis Ohl, Robert Hicks, Floyd McKneely, Shannon Shipp, David Skelton, Whit Smith, Margaret Mieuli, Anne T. Bass, Walt Cabe, the Rev. Christopher Jambor, the Rev. Frederick Barber, the Rev. David Madison, Robert M. Bass, the Rev. James Hazel, Cherie Shipp, the Rev. John Stanley, Dr. Trace Worrell, the Rt. Rev. Edwin F. Gulick, Jr., and Kathleen Wells (“the Local Episcopal Parties”).

² In this Response, “Defendants” is defined as used in Defendants’ Motion for Partial Summary Judgment.

³ Defendants’ Motion at 5 (citing *Chen v. Tseng*, No. 01-02-01005-CV, 2004 WL 35989, at *6 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.)).

indicated that the trial court had found that the religious organization was congregational. In congregational religious organizations, the highest ecclesiastical authority is generally either the majority of the membership or whatever government the congregation has established locally. ***Chen* thus did not involve the situation in which a higher authority, external of the local congregation, was disputing what the document governing the local congregation was.** Moreover, the evidence before the trial court in *Chen* showed that membership in the religious corporation was not co-extensive with membership in the religion.⁴

This authority omitted by Defendants could not be more relevant. Here, there is a higher church authority challenging Defendants' ability to break their vows and amend local rules to seize Church property. Here, there is a challenge concerning which by-laws apply and what they require. This places the present case squarely into the ecclesiastical territory that the First Court of Appeals, like all civil courts, avoids on First Amendment grounds.

The present case involves a dispute between two factions claiming to represent the Episcopal Diocese of Fort Worth, each claiming a right to its identity and property. One faction, including the Local Episcopal Parties, is recognized by The Episcopal Church. The other faction, Defendants – a dissident faction that broke away from The Episcopal Church and joined a church in South America – is not recognized as the Episcopal Diocese by The Episcopal Church.

The Episcopal Church, founded in the late 1780's, established the Episcopal Diocese of Fort Worth in 1983 to continue carrying out its religious mission in the region, and the new Diocese received real and personal property in 24 Texas counties acquired for the mission of the

⁴ *Greanias v. Isaiah*, No. 01-04-00786-CV, 2006 WL 1550009, at *9 (Tex. App.—Houston [1st Dist.] June 8, 2006, no pet.) (emphasis added) (footnotes and citations omitted). Note that the *Greanias* Court at one point accidentally referred to its lower *Greanias* court as the “*Chen* court” while distinguishing *Greanias* from *Chen* (“Additionally, the pleadings and materials that the *Chen* [*sic Greanias*] court considered indicated that a higher church authority was disputing whether the local by-laws...controlled to the exclusion of the UPRs”). *Id.* It is clear that the court meant to refer to the lower *Greanias* court, because (1) UPRs were at issue in *Greanias*, not *Chen*; (2) a higher church authority was present in *Greanias*, not *Chen*; and (3) the opinion next reads, “In *Chen*, in contrast,...the religious organization was congregational. . . . *Chen* thus did not involve the situation in which a higher authority [disputed the by-laws].” *Id.* This mistake is corrected by the bracketed text in the citation above.

Church over the preceding 144 years. As a condition of formation, the Episcopal Diocese unanimously pledged to “fully subscribe to and accede to the Constitution and Canons of The Episcopal Church” and to “recognize[] the authority of the General Convention of said Church.” And its bishops swore in writing, as a condition of ordination, “to conform to the Doctrine, Discipline, and Worship of the Episcopal Church.” By Church law, “[a]ny person accepting any office of this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church.”⁵ And “[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church,”⁶ and “the real property of all parishes and missions as well as Diocesan Institutions, shall be held subject to control of the Church.”⁷

Now, in violation of those promises, Defendants have formed a dissident, splinter faction within the Episcopal Diocese of Fort Worth, which claims to have severed ties with The Episcopal Church and joined a church in South America. Defendants demand, without basis in law, to take the local name and property that the Episcopal Diocese received for the mission of The Episcopal Church, subject to its religious laws, for the benefit of their new church.

Defendants’ motion for partial summary judgment is replete with omitted authority and contentions violating the First Amendment, Texas law, and other doctrine. Defendants have no legal basis for their actions under one hundred years of Texas hierarchical church property law, a body of authority Defendants blatantly fail to address or even acknowledge to this Court (despite the fact that Defendant Iker has availed himself of this law in prior court testimony). While Defendants urge this Court to adopt the alternate “neutral principles” approach used by some

⁵ A675-76 (Ex. D-36, Church Canon I.17.8).

⁶ A660 (Ex. D-36, Church Canon I.7.4).

⁷ A534 (Ex. D-21, Diocesan Art. 13). Article 13 further provided that the Diocesan Corporation was to hold title to “other property belonging to the Diocese, as such,” including trust and endowment accounts. *Id.*

other states, they fail to describe that doctrine accurately and would lose under a proper application of those principles. Defendants attempt to draw a distinction between determining the identity of the church's leadership with respect to property issues and determining those same leaders for all other purposes, but they rely on a superseded memorandum opinion and fail to cite the relevant Texas and United States Supreme Court cases rejecting this very approach.⁸ And while Defendants claim that this case turns on a choice of law between "deference" or "neutral principles," this is a false dichotomy: Defendants cannot justify their actions under any approach. Defendants' motion for partial summary judgment should be denied, and the Local Episcopal Parties' Amended Motion for Partial Summary Judgment should be granted.

II. DEFENDANTS AGREE SUMMARY JUDGMENT IS PROPER IN THIS CASE

Courts around the nation and in Texas routinely grant summary judgment in favor of the hierarchical church and its loyal faction in cases like this one, because the law is well-settled. Here, there is no dispute that The Episcopal Church recognizes the Local Episcopal Parties, and not Defendants ("the breakaway faction"), as the leadership of the Episcopal Diocese of Fort Worth, its Corporation, and its Endowment Fund and as the rightful holders of property the Church has acquired over the last century-and-a-half.

Now, after postponing summary judgment for over six months through a mandamus proceeding on a procedural rule, Defendants have conceded that this case is ripe for

⁸ Defendants even go so far as to suggest splitting the identity of the Bishop in two: "this Court has jurisdiction to decide the identity of the Bishop and Trustees *incident to the question of proper custody of property*, but *not* for any other purposes – such as who should attend TEC's national convention or confirm bishops in other dioceses." Defendants Motion at 4 (original emphasis). But this is exactly the approach the United States Supreme Court rejected, for instance, in *Milivojevich*: "Resolution of the religious disputes at issue here affects the control of church property in addition to the structure and administration of the American-Canadian Diocese. This is because the Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations. **Resolution of the religious dispute over [the Diocesan Bishop's] defrockment therefore determines control of the property. Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.**" *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 709 (1976) (emphasis added).

determination on summary judgment. The parties have filed cross-motions for summary judgment. In their motion, Defendants affirm: “Defendants move for partial summary judgment on all their claims except the form of affirmative relief (declaratory, injunctive, attorney’s fees, etc.), and against all the Plaintiffs’ claims. **There are no questions of material fact** and Defendants are entitled to judgment as a matter of law.”⁹ As the Texas Supreme Court observed:

When both sides file motions for summary judgment, each litigant in support of his own motion necessarily takes the position that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law. While it does not necessarily follow that when both sides file motions for summary judgment there is no genuine fact issue in the case, it does indicate that the legal controversy is one which generally turns upon an interpretation of some rule of law and both sides are prepared to present their respective contentions with reference thereto.¹⁰

The Local Episcopal Parties agree that this dispute is ripe for determination on summary judgment, allowing the parties to return their time and resources to ministry.

III. SUMMARY OF RESPONSE AND FAILURE OF DEFENDANTS’ GROUNDS

Defendants are a dissident breakaway faction attempting to take property acquired for the mission of the mother church over the past 144 years for their own use and for the benefit of another church. As a matter of law, Defendants have not carried their summary judgment burden, and Defendants’ motion fails. This Response proceeds as follows:

1. Defendants lose under controlling Texas law. In Texas, civil courts defer to, and apply for civil law purposes, the hierarchical church’s determination of which faction represents the continuing local church entity, which thereby is entitled to possession and use of the local church’s property. Defendants fail to even acknowledge this century of Texas authority.

⁹ Defendants’ Motion at 1 (emphasis added).

¹⁰ *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 364-65 (Tex. 1966).

2. Defendants also lose under the alternative “neutral principles” approach used by some states. Defendants misstate that doctrine. And Defendants would lose under a proper “neutral principles” analysis. First, Defendants fail to cite relevant authority that, even under a neutral principles analysis, courts are required to defer to hierarchical churches on ecclesiastical issues, even where, as here, those ecclesiastical determinations affect property – such as the hierarchical church’s determinations of whether church officers acted outside their authority or which set of contested corporate by-laws, the ones enacted by local dissidents violating their vows or the ones authorized by the mother church, apply. And Defendants identify, *but wholly fail to analyze*, the four factors used by “neutral principles” states. Defendants also lose under these four factors.

3. The Court of Appeals did not decide the merits of the identity, leadership, or property issues and expressly reserved those issues for this Court’s determination.

4. Defendants’ miscellaneous other arguments have been routinely used by breakaway factions and are just as routinely rejected.

As a result, each of Defendants’ eight “grounds” for summary judgment fails, as noted below and set forth more fully throughout the brief:

1. **Defendants’ First Ground:** “Introduction & Summary.”

Though listed as a ground, it does not meet Rule 166a’s requirements for summary judgment grounds (*see* Special Exceptions at Section X, *infra*).

2. **Defendants’ Second Ground:** “What Texas Courts Can And Cannot Decide.”

Defendants ignore a century of Texas law that lays out exactly how Texas courts decide hierarchical church property disputes. They do not even mention it. Nor do they mention that two Texas courts have already granted summary judgment in favor of local, loyal Episcopal parties against similar breakaway factions since 2009. Nor do they mention that Defendant Iker, while still an Episcopal Bishop in 1994, testified in the Tarrant County District Court consistent with this century of Texas law against another breakaway faction trying to take property, averring: “Such persons are not members of the true Church of the Holy Apostles because they have . . . abandoned communion with

The Episcopal Church . . . [The breakaway faction] is a new creation, having no relation to Holy Apostles and no right to its property” (see Section IV, *infra*, and the evidence cited therein).¹¹

Ignoring this body of law, Defendants wrongly suggest that what the Court can and cannot decide is determined by the law of voluntary associations, which, while consistent with church property law, does not contain the essential First Amendment limitations that control in church cases. Defendants ignore the crucial rule, applied by the United States Supreme Court, that regardless of the state or its law, courts must defer to churches on ecclesiastical issues of the structure, leadership, discipline, and direction of subordinate church bodies, even when those ecclesiastical issues determine property outcomes (“Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.”).¹² Defendants attempt to tell this Court that Texas follows the “neutral principles” approach in these cases when no Texas court has. Defendants list the four factors of a neutral principles analysis but never apply them to the facts of this case; this alone defeats their motion since they move only under neutral principles and fail to meet their own burden. In addition, all four factors support the loyal Episcopalians (see Section V, *infra*, and the evidence cited therein).

3. Defendants’ Third Ground: “The Corporation Owns The Property.”

The Court of Appeals did not decide that Defendant Corporation and Defendants represent the historic continuing Corporation of the Episcopal Diocese. The Corporation is a subordinate Diocesan institution formed as a convenience to hold certain Diocesan property “*for the use of the Church in this Diocese*” and “*held subject to control of the Church*” including the “dedicated and consecrated Churches and Chapels of the several Parishes and Missions of the Diocese” that “may be opened *only* for the services, rites and ceremonies, or other purposes, *either authorized or approved by this Church, and for no other use,*” managed by corporate officers including the Diocesan Bishop who swore in writing “to conform to the Doctrine, Discipline, and Worship of the Episcopal Church” and other officers who must “well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church” – organized under Texas religious corporations law allowing a religious institution to create a corporation to hold “its funds in real and personal property *for the use and benefit and under the discretion of, and in trust for any convention, conference or association . . . which elects its board of directors, or which controls it, in furtherance of the purposes of the member institution.*”

Under a century of controlling Texas church property law, the corporation is subordinate to and part of The Episcopal Church’s Diocese of Fort Worth and therefore subordinate to and part of The Episcopal Church, and the Corporation and other Diocesan leaders are

¹¹ A1015 (Ex. G-2, Iker Aff. at 4).

¹² *Milivojevich*, 426 U.S. at 709 (emphasis added); *id.* at 717 (“Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern; the bishop of a church is clearly one of the central figures in such a hierarchy and the embodiment of the church within his Diocese . . .”).

those recognized by and loyal to The Episcopal Church. Defendants' attempt to sever the corporation, obviously subordinate to and for the benefit of The Episcopal Church and its Diocese, under an erroneous reading of "neutral principles" is a gambit repeatedly tried by breakaway factions and repeatedly rejected by courts including the United States Supreme Court and Texas courts. Defendants' argument that civil courts can adjudicate "the identity of the Bishop and Trustees" of the Diocese and its Corporation, core ecclesiastical issues of internal discipline, leadership, and the government and direction of subordinate bodies, insofar as they are "incident to the question of proper custody of property"¹³ violates and turns First Amendment law on its head: a court cannot invade ecclesiastical questions simply because they are incident to property questions; to the contrary, as case after case has held, courts must abstain from adjudicating ecclesiastical issues and apply the church's findings thereon in civil law matters, even where those ecclesiastical findings affect property rights (*see* Sections IV, V.A.i-ii, and VI.H, *infra*, and the evidence cited therein).

4. **Defendants' Fourth Ground:** "The Plaintiffs Have No Trust Interest"

While no trust interest is required under Texas hierarchical church property law, The Episcopal Church has an obvious trust interest under, *inter alia*, the Dennis Canon (which the Church added in direct response to the Supreme Court's suggestion in *Jones v. Wolf* and has been affirmed by numerous courts), under the Texas religious corporations statute, and under the plain language of local and national governing Episcopal constitutions and canons (*see* Section V.B.i-ii, *infra*, and the evidence cited therein).

5. **Defendants' Fifth Ground:** "The Defendants Are The Corporation's Trustees"

The Court of Appeals did not decide that the Defendants are the Trustees of the Corporation of the Episcopal Diocese of Fort Worth. Defendants are not Trustees of the Corporation of the Episcopal Diocese of Fort Worth because they have abandoned communion with The Episcopal Church, violated their oaths of office, and have been stripped of authority and replaced by the authorized leadership of The Episcopal Church and its Episcopal Diocese of Fort Worth. Under bedrock First Amendment law, the determinations of The Episcopal Church and its Episcopal Diocese regarding these core ecclesiastical issues of internal discipline, leadership, and the direction and governance of subordinate bodies controls, and civil courts must defer to and apply these ecclesiastical determinations in this matter (*see* Sections IV, V.A.i-ii, and VI.H., *infra*, and the evidence cited therein).

6. **Defendants' Ground Six:** "Bishop Iker Is The Diocese's Bishop."

The Court of Appeals did not decide that Iker is the Diocese's Bishop or that the Defendant Diocese is the historic, continuing Diocese. In the words of the Fort Worth Court of Appeals, the "relationships between an organized church and its ministers is its lifeblood. The minister is the primary agent by which a church seeks to fulfill its purpose. Matters concerning this relationship must be recognized as of prime

¹³ Defendants' Motion at 4.

ecclesiastical concern.”¹⁴ Ex-Bishop Iker violated his sworn oath to conform to the Doctrine, Discipline, and Worship of the Episcopal Church. The Presiding Bishop of The Episcopal Church, with the advice and consent of a majority of the members of her Advisory Council, declared that Iker had voluntarily renounced his ordained ministry in the Church and that, pursuant to Church Canon III.12.7(a), he was “therefore, removed from the Ordained Ministry of [the] Church and released from the obligations of Ministerial offices” in the Church.¹⁵ Under Church law, Iker thereby ceased to be a bishop of the Church or the Diocese,¹⁶ and Iker’s positions as Bishop of The Episcopal Church’s Diocese of Fort Worth and Chair of the Board of Trustees of the Diocesan Corporation terminated under the Church’s and the Diocese’s canons.¹⁷ The Church’s core ecclesiastical determination fully and finally resolves the issue, cannot be further adjudicated by civil courts, and must be applied as final for civil law purposes under bedrock First Amendment law (*see* Sections IV, V.A.i-ii, and VI.H, *infra*, and the evidence cited therein).

7. Defendants’ Seventh Ground: “Amended Articles Cannot Be Ultra Vires.”

As a matter of law, breakaway factions cannot violate their obligations to a mother church by amending local documents to seize power and property that they have already committed to use for the benefit and under the rules of their mother church. The rightful leadership of the Episcopal Diocese and its Corporation has already declared Defendants’ improper actions to be null and void, and has already replaced these amended documents. Defendants lack any authority to contest or amend these changes. And in the case Defendants failed to cite that supersedes their own cited authority, the court noted that to the extent the breakaway faction contests that its governing documents should control, this places the dispute into the firmly ecclesiastical territory of whether amendments comport with the constitutions and canons and discipline of the Church (*see* Section V.A.i(2)-(3), *infra*, and the evidence cited therein).

8. Defendants’ Eighth Ground: “Plaintiffs Have No Standing To Assert The Tort Claims.”

The Court of Appeals did not resolve or decide the identity, leadership, or property issues. Defendants’ standing arguments involving the pendent tort claims only prevail if they can sustain their identity claims, which they cannot. In cases like this, courts first decide the identity question – which party is authorized to act on behalf of the local church – and then resolve the pendent claims stemming from that determination. Because the Local Episcopal Parties are the rightful leadership of the Episcopal Diocese and its subordinate institutions as a matter of law, Defendants’ standing claims have no merit. And because Defendants are not the rightful leadership of any of the Episcopal Diocese, Corporation, Congregations, or other entities, their own motion for partial

¹⁴ *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.) (emphasis added) (footnote and citations omitted).

¹⁵ A608 (Ex. D-33, Renunciation of Ordained Ministry and Declaration of Removal and Release).

¹⁶ A730 (Ex. D-36, Church Canon III.12.7(a)).

¹⁷ *Id.*; A537 (Ex. D-21, Diocesan Canon 11).

summary judgment fails for lack of standing and capacity as to claims brought on behalf of these entities, again once the Court resolves the identity question (*see* Sections VI.E-H, *infra*, and the evidence cited therein).

IV. DEFENDANTS LOSE UNDER CONTROLLING TEXAS LAW

A. Texas courts have consistently followed the *Watson* approach to hierarchical church property disputes since 1909 and as recently as last month.

For over one hundred years, Texas courts have held that when there is a schism in a local church that is part of a larger hierarchical church, and two factions both claim to control the local church, courts defer to the hierarchical church as to which faction represents the true, continuing local church entity, with a right to its identity and property.¹⁸ This doctrine was created by the United States Supreme Court in 1871 in *Watson v. Jones* and adopted by the Texas Supreme Court in 1909 in *Brown v. Clark*. As the Dallas Court of Appeals noted: “Our intermediate appellate courts have consistently followed the [*Watson*] deference rule in deciding hierarchical church property disputes since the Texas Supreme Court ruling in *Brown v. Clark*.”¹⁹

In *Brown*, the Texas Supreme Court held:

In *Watson v. Jones* the Supreme Court of the United States stated that the property in question was not charged with any special trust, but was purchased in the ordinary way for the use of a local church, and said: “In the case of an independent congregation we have pointed out how this identity or succession is to be ascertained, *but in cases of this character we are bound to look at*

¹⁸ The United States Supreme Court recognizes two types of churches: congregational and hierarchical. A congregational church is “strictly independent of other ecclesiastical associations, and as so far as church government is concerned, owes no fealty or obligation to any higher authority.” *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722-23 (1871); *accord Dean*, 994 S.W.2d at 395 n.1 (citing *Watson*, 80, U.S. at 722-23). A hierarchical church, in contrast, is one in which the local church is “a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power more or less complete, in some supreme judicatory over the whole membership of that general organization.” *Watson*, 80 U.S. at 722-23; *accord Dean*, 994 S.W.2d at 395 n.1 (citing *Watson*, 80 U.S. at 722-23). Every court in America to consider the question has found that The Episcopal Church is hierarchical. *See* Local Episcopal Parties’ Amended Motion for Partial Summary Judgment, Section VI.A.2. Further, the Local Episcopal Parties exhaustively demonstrated that The Episcopal Church is a hierarchical church as a matter of law in their Amended Motion for Partial Summary Judgment, at Section VI.A.1-5 and incorporates those arguments herein.

¹⁹ *Schismatic & Purported Casa Linda Presbyterian Church in Am. 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).

the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments In this class of cases, we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that, whenever the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.” . . . [Here,] the local church was bound by the orders and judgments of the courts of the church. . . . [T]hose members who recognize the authority of the Presbyterian Church of the United States of America are entitled to the possession and use of the property sued for.²⁰

Half a century later, the Waco Court of Appeals held:

The basic question posed by the foregoing facts is whether a faction which secedes from a church organization is entitled to take with it the church property. We think the answer to this question is that where there has been a division in a congregation, those members who renounced their allegiance to the church lose any rights in the property involved, and the property and the use thereof belong to the members which remain loyal to the church. It is a question of identity.²¹

Three-quarters of a century later, the Dallas Court of Appeals held:

Our state law requires deference to the [hierarchical church's] identity of appellees, the loyal group, as the representative of the local church; consequently, it follows that appellees are entitled to possession and use of all church property.²²

The Texarkana Court of Appeals held:

When a division occurs in 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 is entitled to the*

²⁰ *Brown v. Clark*, 116 S.W. 360, 363-65 (Tex. 1909) (emphasis added) (citing *Watson*, 80 U.S. at 727).

²¹ *Norton v. Green*, 304 S.W.2d 420, 424 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.).

²² *Schismatic*, 710 S.W.2d at 707.

property is answered by determining which of the factions is the representative and 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.²³

Applying Texas law, the Court of Appeals for the Fifth Circuit held:

Having concluded on what we have held to be adequate evidence that the local church was a member of and subservient to the national church, the District Court was correct in enjoining the dissident faction from attempting to exercise acts of possessory control over the local church property and from interfering with the local church property and with the conduct of services therein by the local faction loyal to the national church, and in holding that the deed to the newly created corporation was void.²⁴

The Austin Court of Appeals held:

Where a congregation of a hierarchical church has 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.²⁵

Over a century after *Brown*, a Texas district court recently held:

Defendants may not divert, alienate, or use the real or personal property of Good Shepherd, including the Church Property, except for the mission of the Episcopal Church, as provided by and in

²³ *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865, 871 (Tex. Civ. App.—Texarkana 1977, no writ) (emphasis added) (citing *Norton*, 304 S.W.2d at 424; *Bramlett v. Young*, 93 S.E.2d 873 (S.C. 1956); *St. John's Presbytery v. Cent. Presbyterian Church of St. Petersburg*, 102 So.2d 714 (Fla. 1958); *Adickes v. Adkins*, 215 S.E.2d 442 (S.C. 1975)); see also *Schismatic*, 710 S.W.2d at 705 (quoting *Presbytery of the Covenant*, 552 S.W.2d at 871 (citing *Norton*, 304 S.W.2d at 424; *Bramlett*, 93 S.E.2d 873; *St. John's Presbytery*, 102 So.2d 714; *Adickes*, 215 S.E.2d at 442)).

²⁴ *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975) (citing *Watson*, 80 U.S. at 722, 726; *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N.A.*, 344 U.S. 94, 118 (1952); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 448 (1969); *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Northside Bible Church v. Goodson*, 387 F.2d 534, 547 (5th Cir. 1967)).

²⁵ *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App.—Austin 1991, writ denied) (citing *Presbytery of the Covenant*, 552 S.W.2d at 871 (citing *Norton*, 304 S.W.2d at 424)).

accordance with the Constitutions and Canons of the Episcopal Church and the Diocese **[T]he continuing Parish of the Good Shepherd is identified as and represented by those persons recognized by the Bishop of the Episcopal Diocese of Northwest Texas and . . . the actions of the Defendants in seeking to withdraw Good Shepherd as a Parish of the Diocese and from the Episcopal Church are void and without effect [A]ll real and personal property of the Good Shepherd is held in trust for the Episcopal Church and the Diocese.**²⁶

And over a century after *Brown*, and just last month, another Texas district court affirmed:

The Episcopal Church is a hierarchical church as a matter of law Because the Episcopal Church is such, the Court follows the long established Texas precedent governing hierarchical church property disputes, which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. Under the law articulated by the Texas courts, those are the individuals who remain entitled to the use and control of the church property. Plaintiffs' arguments based on the Texas Corporations Code and trust law do not alter the result dictated by the Texas precedent specifically governing church property disputes.²⁷

B. Texas church property law is consistent with Texas law of voluntary associations.

There is nothing surprising or nefarious about these principles: they flow from the basic equitable idea that a national organization can and must be able to form local chapters and entrust them with property to carry out its mission – and those local chapters can and must abide by their founding promises of loyalty and purpose. Texas's specialized doctrine for hierarchical church property cases is consistent with its law of voluntary associations: a local chapter of a general organization "is not an independent organization, existing solely for the benefit of its members, but . . . it is a part and parcel of a larger organization . . . organized for specific

²⁶ *Diocese of Nw. Tex. v. Masterson*, No. A-07-0237-C, Modified Final Summary Judgment (51st Dist. Ct., Tom Green County, Tex. Dec. 16, 2009), *appeal docketed*, No. 03-10-00015-CV (Tex. App. Jan. 7, 2010) (emphasis added) (attachment A to this Response).

²⁷ *St. Francis on the Hill Church v. The Episcopal Church*, Cause No. 2008-4075, Final Summary Judgment, (Dist. Court—El Paso [210th Jud. Dist.], Dec. 17, 2010) (emphasis added) (attachment B to this Response).

purposes, which purposes are to be accomplished by and through such subordinate bodies”²⁸ – just as the Texas Supreme Court held that a local church in a hierarchical religious organization “was but a member of and under the control of the larger and more important Christian organization . . . and the local church was bound by the orders and judgments of the courts of the church. . . . [T]hose members who recognize the authority of the [mother church] are entitled to the possession and use of the property sued for.”²⁹

Equity or “rights of association” do not demand that, after creation by the larger entity, such local chapters – as opposed to their individual members – must be free to “disaffiliate” from the organization that formed them. Indeed, the opposite is true. Although individual members of course can come and go at any time, the local *chapter* as such has no similar right. “[U]nanimous or not, the members of a church organization which is hierarchical as to church government cannot dissolve a local church in contravention of the governing rules or edicts of the mother church, and then re-establish themselves as an independent church or one associated with a schismatic group and take the church property with them.”³⁰

C. Here, Defendants’ motion fails under a century of Texas church property law.

This is a hierarchical church property case, involving a schism between two factions each claiming to represent and control the Episcopal Diocese of Fort Worth and, by extension, its identity and property. It is indisputable that, prior to the local schism, Defendants, acting within

²⁸ See *Minor v. St. John’s Union Grand Lodge of Free & Accepted Ancient York Masons*, 130 S.W. 893, 896 (Tex. Civ. App.—Galveston 1910, writ ref’d).

²⁹ *Brown*, 116 S.W. at 365 (citing *Watson*, 80 U.S. at 727). Defendants’ reliance on the law of voluntary associations, while at the same time ignoring the corpus of Texas hierarchical church property law, is fatally flawed, because Defendants fail to acknowledge that cases involving hierarchical churches involve specific First Amendment limitations not raised in secular voluntary association cases. As a result, Defendants fail to address the relevant constitutional issues and limitations set forth in Federal and Texas church property law, and Defendants set forth improper, unconstitutional arguments in their motion.

³⁰ *Presbytery of the Covenant*, 552 S.W.2d at 871-72.

the Episcopal Diocese of Fort Worth, were part of The Episcopal Church.³¹ Defendants also admit that they have purported to “withdraw[] from the General Convention” and “dissociat[e] from . . . The Episcopal Church.”³² And it is indisputable that The Episcopal Church recognizes only the loyal Local Episcopal Parties as the true, continuing Episcopal Diocese of Fort Worth, and has expressly affirmed that Defendants have no position or authority to represent The Episcopal Church or its Episcopal Diocese of Fort Worth.³³ All of this is set out in detail in the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment and its evidence, supplemental evidence, and second supplemental evidence in support, which is incorporated as if set forth herein.

In November 2008, Defendants, a faction within The Episcopal Diocese of Fort Worth led by then-bishop Defendant Iker, purported to sever ties with The Episcopal Church and join a religious organization located in South America.³⁴ The Church’s Presiding Bishop, acting under the Church’s highest authority, the General Convention, removed Iker from authority within the Church.³⁵ On December 5, 2008, the Presiding Bishop, with the advice and consent of a majority of the members of her Advisory Council, declared that Iker had voluntarily renounced his ordained ministry in the Church and that, pursuant to Church Canon III.12.7(a), he was “therefore, removed from the Ordained Ministry of [the] Church and released from the

³¹ See the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at VII.A-D.

³² A896-97 (Ex. F-5); see also the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at VII.E-F.

³³ See the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at VII.E-G.

³⁴ A883-85 (Ex. F, Wells Aff. at ¶ 4-7); A896-97 (Ex. F-5, “As We Realign”); A898-99 (Ex. F-6, Responses to Attempted Inhibition of the Bishop); see also Section VII(E) *infra*.

³⁵ A608 (Ex. D-33, Renunciation of Ordained Ministry and Declaration of Removal and Release of Rt. Rev. Jack Leo Iker); A900 (Ex. F-7, Notice of Special Meeting of the Convention of the Episcopal Diocese of Fort Worth from the Presiding Bishop of the Episcopal Church (acknowledging that there was, at the time, “no Bishop of the Episcopal Diocese of Fort Worth, or any qualified members of the Standing Committee of the Diocese”)) see also Section VII(F) *infra*.

obligations of Ministerial offices” in the Church.³⁶ Under Church law, Iker thereby ceased to be a bishop of the Church or the Diocese,³⁷ and Iker’s positions as Bishop of The Episcopal Church’s Diocese of Fort Worth and Chair of the Board of Trustees of the Diocesan Corporation terminated under the Church’s and the Diocese’s canons.³⁸ The Episcopal Church recognizes the Local Episcopal Parties, led by Bishop Gulick and now Bishop Ohl, as the leadership of The Episcopal Diocese of Fort Worth and its Corporation and institutions.³⁹ Defendants have been removed from any authority within the Episcopal Diocese and replaced as Trustees of the Corporation of the Episcopal Diocese of Fort Worth and other Episcopal Diocesan institutions.⁴⁰

Under controlling Texas law, this Court should honor, and apply for civil law purposes, The Episcopal Church’s determination that the Local Episcopal Parties constitute the continuing, authorized leadership of the Episcopal Diocese of Fort Worth and its institutions; consequently, the Local Episcopal Parties are entitled to the possession and use of the Episcopal Diocese’s property for The Episcopal Church’s religious mission in this region. Defendants’ motion for partial summary judgment should be denied.⁴¹

³⁶ A608 (Ex. D-33, Renunciation of Ordained Ministry and Declaration of Removal and Release).

³⁷ A730 (Ex. D-36, Church Canon III.12.7(a)).

³⁸ *Id.*; A537 (Ex. D-21, Diocesan Canon 11).

³⁹ A5-7 (Ex. A, Ohl Aff. at ¶ 5); A30-31 (Ex. B, Gulick Aff. at ¶ 7); A867, 869-871, 876 (Ex. E-1, Excerpts from the 2009 Journal of the General Convention); A613-614 (Ex. D-35, Excerpt from The Episcopal Church Annual for 2009); A23-25 (Ex. A-2, Letters of Congratulations and Commendation); A363, 365-366 (Ex. D-3, Excerpts from the Episcopal Church Annual, 2010); *see also* Sections VII(E)-(F) *infra*.

⁴⁰ A29 (Ex. B, Gulick Aff. at ¶ 5); A948 (Ex. F-11, Excerpts from 2009 Journal of Special Convention and Diocesan Convention at p. 33); A31 (Ex. B, Gulick Aff. at ¶ 9); A35-39 (Ex. B-1, Amended and Restated Articles of Incorporation); A1226-30 (Ex. G-12, Amended and Restated Articles of Incorporation).

⁴¹ Defendants’ suggestion that the identity of the Trustees is governed solely by the Texas Non-Profit Corporation Act and the Corporation’s bylaws (Defendants’ Motion at 12-15) again ignores the fact that the Diocesan Corporation is but a subsidiary of the Diocese, which in turn is bound by the rules of the Church, and overlooks the Diocese’s rules requiring that such persons be loyal Episcopalians and the Church’s rules requiring that all officers of the Church carry out their duties in compliance with the Church’s rules. *See* Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at Sections VII.A-C. *See also Green*, 808 S.W.2d at 552 (“The trial court properly found that the members could not invoke the Texas Non-Profit Corporation Act to remove the board of trustees”); *Norton*, 304 S.W.2d at 423-24 (rejecting argument that incorporation of local church meant “that a

D. Defendants fail to acknowledge or even to cite this century of Texas law.

As shown below, the choice between Texas church property law and the “neutral principles” approach used by some other states is ultimately irrelevant. Both approaches end up in the same place, and Defendants’ actions are unlawful under either analysis.

But it is beyond the pale for Defendants to tell this Court that “For Church Property, Texas Courts Apply Neutral Principles, Not Deference.”⁴² Defendants do not even cite for the Court, much less address, the century of law to the contrary. As the Dallas Court of Appeals held:

Prior to *Jones v. Wolf*, the Georgia Supreme Court had adopted the neutral principles of law approach..., **while Texas courts have consistently followed the deference rule.** The difference in state law accounts for the different methods used in the two state courts to resolve hierarchical church property disputes. The Supreme Court approved both methods in *Jones v. Wolf*. . . . **[Appellants] urge us to depart from prior Texas law, which we have shown has consistently followed the deference rule, and to adopt the neutral principles of law rule approved by the United States Supreme Court in Jones** Even though the *Jones v. Wolf* decision now gives the states a choice of methods to resolve hierarchical church property disputes, our supreme court has nevertheless spoken on this issue **Any reconsideration of the deference rule must be made, if at all, by the supreme court.**⁴³

Defendants are certainly able to express their personal preference for a neutral principles approach, but to characterize Texas law in this way is surprising at best.

majority of the corporation could secede from” the hierarchical church under general principles of corporations law, because the general church’s governing documents required that the local church’s corporate “Charter and By-laws must always be in accord with the standards of the [general] Church”). Texas statutory law on point also compels this conclusion, see TEX. REV. CIV. STAT. ANN. ART. 1396, § 2.02(A)(16) (Vernon 2003) (“Any religious ... institution organized under the laws of this State may acquire, own, hold, mortgage, and dispose of and invest its funds in real and personal property *for the use and benefit and under the discretion of, and in trust for* any convention, conference or association ... with which it is affiliated, or which elects its board of directors, or which controls it, *in furtherance of the purposes of the member institution.*”) (emphasis added).

⁴² Defendants’ Motion at 5.

⁴³ *Schismatic*, 710 S.W.2d at 706-07 (emphasis added).

The cases Defendants do cite are off-point and cited misleadingly. Neither *Westbrook v. Penley* nor *Dean v. Alford* was a hierarchical church property case. In *Westbrook*, the Texas Supreme Court considered whether a pastor of a congregational church could be held liable for professional negligence under neutral principles of tort law based on conduct that was required by the disciplinary rules of his church.⁴⁴ Because the plaintiff urged the Court to apply a neutral principles analysis to her tort claim, the court conducted an analysis of the history of the neutral principles doctrine before declining to apply it in that case:

The [United States] Supreme Court again addressed an intra-church dispute over property ownership in *Jones* [and] held that states *may* adopt neutral principles of law as a means of adjudicating such disputes without running afoul of First Amendment concerns, so long as resolution of ownership entails no inquiry into religious doctrine [Plaintiff] urges us to apply the neutral-principles approach to her professional-negligence claim, contending her claim can be resolved under neutral tort principles without resorting to or infringing upon religious doctrine. **But even if we were to expand the neutral-principles approach beyond the property-ownership context as [Plaintiff] requests, we disagree that free-exercise concerns would not be implicated.**⁴⁵

Defendants attempt to suggest that this citation overturns a century of Texas law on an issue that was not even before the Court. But all the Court did was decline to apply neutral principles to a tort case, noting that it would violate the First Amendment under these facts *even if* the doctrine, which originated from a Georgia *property* case, were extended to *tort* cases. Defendants' apparent argument is that the Texas Supreme Court, by implication and without so-stating, selected this case to overturn its own 98-year-old precedent, applied by numerous Courts of Appeals, on an issue not even before it.

⁴⁴ *Westbrook v. Penley*, 231 S.W.3d 389, 391-92 (Tex. 2007).

⁴⁵ *Id.* at 399 (Tex. 2007) (emphasis added) (citation omitted).

Like *Westbrook*, *Dean v. Alford*, is another case that does not involve a hierarchical church property dispute.⁴⁶ In *Dean*, the Fort Worth Court of Appeals decided that the trial court lacked jurisdiction to decide the “purely ecclesiastical” issue of whether a pastor of a *congregational* (as opposed to hierarchical) church was validly removed from his office.⁴⁷ Unlike the numerous cases cited above, this case had nothing to do with two factions within a local unit of a hierarchical church each claiming to be the continuing local entity with a right to the mother church’s local name and property. Despite the fact that *Dean* involved a congregational, not a hierarchical, church, Defendants still urge this Court to use one sentence from *Dean* to depart from the entire body of Texas hierarchical church property law.

With one exception, the other cases Defendants cite in favor of a neutral principles approach for hierarchical church property disputes also involve congregational, not hierarchical, churches and are inapposite.⁴⁸ The exception is *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*,⁴⁹ and it is the only Texas case involving a hierarchical church that Defendants cite in their entire motion. But instead of supporting a neutral principles analysis in hierarchical church property disputes, as Defendants argue it does, that case actually applies the controlling Texas hierarchical church property law in favor of the Episcopal Parties’ position:

When a division occurs in 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,

⁴⁶ 994 S.W.2d 392 (Tex. App.—Fort Worth 1999, no pet.).

⁴⁷ *Id.* at 395-96.

⁴⁸ See *Chen*, 2004 WL 35989, at *6 (mem. op.) (distinguished by *Greanias*, 2006 WL 1550009, at *9, because “the appellants’ challenges indicated that the trial court had found that the religious organization was congregational”); *Hawkins v. Friendship Missionary Baptist Church*, 69 S.W.3d 756, 758 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (reciting trial court finding that the church was “a congregational form of church government”); *Cherry Valley Church of Christ/Clemons v. Foster*, No. 05-00-01798-CV, 2002 WL 10545, at *4 (Tex. App.—Dallas Jan. 4, 2002, no pet.) (“It is undisputed the Cherry Valley Church of Christ has a ‘congregational,’ not ‘hierarchical,’ form of church governance.”); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (“Tabernacle Baptist Church had a congregational form of church government as opposed to a hierarchical system.”).

⁴⁹ 552 S.W.2d at 871.

*the fundamental question as to which faction is entitled to the property is answered by determining which of the factions is the representative and 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.*⁵⁰

Defendants cannot prevail under established Texas law. As shown below, they also cannot prevail under an alternative “neutral principles” approach. But for Defendants to omit any reference to Texas’s body of hierarchical church property law on point is not persuasive.

V. DEFENDANTS LOSE UNDER NEUTRAL PRINCIPLES

Defendants’ suggestion that this case turns on the choice between deference and neutral principles is wrong. In fact, a Texas district court held just last month that another breakaway faction leaving The Episcopal Church had no right to property under both (1) “the long-established Texas precedent governing hierarchical church property disputes [the *Watson* deference approach],” and, in the alternative, (2):

that even if the Court applied neutral principles of law to resolve this church property dispute, the neutral principles considerations favor Defendants [aligned with The Episcopal Church], because (a) the deeds provide that the property is to be held by “St. Francis on the Hill Episcopal Church”; (b) prior to plaintiff’s attempt to leave the Church and the Diocese, the incorporated parish was known as “St. Francis on the Hill Episcopal Church,” and the bylaws of the corporation acceded to the rules of the Church and the Diocese; (c) the Church’s and the Diocese’s longstanding canons provide that parish property is held in trust for the Church and the Diocese and confirm the interest of the Church and the Diocese in seeing to it that property held by Episcopal parishes be used solely for the mission of the Church and the Diocese; (d) the Diocese’s canons further set forth when, how and why a member parish may be allowed to incorporate; and (e) the Texas Non-Profit Corporations Act permits subordinate parts of hierarchical churches to incorporate, but such corporations

⁵⁰ *Id.* (emphasis added) (citing *Norton*, 304 S.W.2d at 424; *Bramlett*, 93 S.E.2d 873; *St. John’s Presbytery*, 102 So.2d 714; *Adickes*, 215 S.E.2d 442; see also *Schismatic*, 710 S.W.2d at 705 (citing *Presbytery of the Covenant*, 552 S.W.2d at 871 (citing *Norton*, 304 S.W.2d at 424; *Bramlett*, 93 S.E.2d 873; *St. John’s Presbytery*, 102 So.2d 714; *Adickes*, 215 S.E. 442)).

remain subject to the rules of the religious organizations that formed them and hold property for the benefit of and in trust for those organizations; 3. that the vestry and/or membership of Plaintiff may not unilaterally alter the status of St. Francis on the Hill Episcopal Church as a parish of the Church and the Diocese; 4. that the real and personal property held by St. Francis on the Hill Episcopal Church is held and may be used only for the ministry and work of the Church and the Diocese and may not be diverted, alienated, or used except as provided by the Constitution and canons of the Church and the Diocese...⁵¹

Indeed, the vast majority of courts in neutral principles states, when presented with the question of ownership of local property within The Episcopal Church, find for The Episcopal Church and its recognized loyal, local factions. Because local Episcopal entities hold their property expressly, in controlling documents, in trust for, for the use of, and subject only to uses authorized by the parent church, the overwhelming majority of courts applying neutral principles find for the parties aligned with The Episcopal Church.⁵²

Defendants do not prevail under the alternate neutral principles approach for at least two reasons. First, Defendants do not properly admit that the neutral principles approach is, in the words of the United States Supreme Court, “severely” circumscribed by the First Amendment and requires deference on the issues that Defendants try to get this Court to adjudicate. Second, while Defendants state the four factors applied in a neutral principles analysis, they fail to apply

⁵¹ *St. Francis on the Hill Church*, Cause No. 2008-4075, Final Summary Judgment (emphasis added).

⁵² See, e.g., *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45 (Ga. App. 2010) ; *In re Episcopal Church Cases*, 198 P.3d 66, 70-71 (Cal. 2009); *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 479-82, 485-86 (Cal. Ct. App. 2008); *Diocese of San Joaquin v. Schofield*, No. 08 CECG 01425, Order on Plaintiffs’ Motion for Summary Adjudication at 4, 7-9, 14-15 (Cal. Super. Ct. July 21, 2009), *vacated on other grounds*, *Schofield v. Superior Court*, 118 Cal. Rptr. 3d 160, 165-67 (Cal. Ct. App. 2010) (attachment C to this Response); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 96, 103 (Colo. 1986); *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in Diocese of Conn.*, 620 A.2d 1280, 1282-85, 1292-93 (Conn. 1993); *Bennison v. Sharp*, 329 N.W.2d 466, 475 (Mich. Ct. App. 1982) (noting that, even under the neutral principles approach, the breakaway parish had no entitlement to the property at issue); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980) (same); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 923-25 (N.Y. 2008); *Trs. of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 79-82 (N.Y. App. Div. 1999).

those factors in their motion and do not carry their burden. As shown here, Defendants lose under the neutral principles factors and have no right to local church property.

A. The neutral principles analysis is “severely” limited by the First Amendment; it provides no basis for civil courts to adjudicate ecclesiastical issues including diocesan corporate leadership and identity, even where those ecclesiastical determinations affect the control of property.

Defendants’ proposed neutral principles analysis bears little resemblance to the four-factor doctrine approved as an alternate approach by the United States Supreme Court. Instead, Defendants wrongly attempt to lead this Court into an analysis that violates the First Amendment and is routinely rejected by the Supreme Court and other courts.

Defendants suggest that the Court can decide the church property question here under a “neutral principles” approach by distinguishing between the leadership of the Diocese’s property-holding corporation (the Corporation of the Episcopal Diocese of Fort Worth) and other Diocesan leadership. Thus, Defendants insist: “in 2004 the First Court of Appeals construed a church’s by-laws to decide who controlled its property, but refused to exercise jurisdiction over who could tend the temple altar. This Court must do the same.”⁵³ Defendants also suggest that this Court can use a “neutral principles” analysis to decide that The Episcopal Church and its Diocese lacked authority under the Diocesan constitution and corporate by-laws to remove Defendants from positions of authority within its subordinate Diocese and institutions.⁵⁴

Courts from the United States Supreme Court down have consistently rejected both positions because – even where neutral principles is the law of the land – the neutral principles approach is expressly constrained by the First Amendment and cannot apply where ecclesiastical issues of internal discipline, doctrine, governance, and polity are implicated.

⁵³ Defendants’ Motion at 5 (citing *Chen*, 2004 WL 35989, at *6).

⁵⁴ Defendants’ Motion at 12, 15.

i. **Even in neutral principles states, questions of church leadership and discipline are of prime ecclesiastical concern and protected from court intervention by the First Amendment.**

The neutral principles approach is expressly limited by the First Amendment and has the principle of deference built into it concerning ecclesiastical questions. As shown below, Defendants wrongly appeal to “neutral principles” to declare that Defendant Iker is the Bishop of the Episcopal Diocese of Fort Worth against the wishes of The Episcopal Church, and that his former Episcopalian followers who left The Episcopal Church with him hold leadership positions within the Episcopal Diocese and its institutions.

In *Jones*, the United States Supreme Court expressly stated that a neutral principles analysis is subject to, and limited by, the First Amendment. “[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. . . . the Amendment requires that civil courts defer to the resolution of issues of religious **doctrine or polity** by the highest court of a hierarchical church organization. *Subject to these limitations, however,*” a state may adopt one of various approaches to church property disputes, including neutral principles.⁵⁵

Courts have provided detailed examples of ecclesiastical or religious issues that are beyond the scope of civil court analysis under the First Amendment,⁵⁶ including: discipline,⁵⁷ the composition of the church hierarchy,⁵⁸ the structure, leadership, or internal policies of religious

⁵⁵ *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (emphasis added) (citations omitted). BLACK’S LAW DICTIONARY (9th ed. 2009) defines polity as “The total governmental organization as based on its goals and policies.”

⁵⁶ BLACK’S LAW DICTIONARY (9th ed. 2009) defines “ecclesiastical” as “of or relating to the church, esp. as an institution.”

⁵⁷ *Milivojevich*, 426 U.S. at 696, 709, 717.

⁵⁸ *Id.*

institutions,⁵⁹ the hierarchy's choice of ministers,⁶⁰ disputes over the government and direction of subordinate bodies,⁶¹ inquiry into church doctrine or resolutions,⁶² and matters relating to the hiring, firing, discipline, or administration of clergy.⁶³ These issues are beyond civil court investigation and cannot be probed with a "neutral principles" analysis; indeed, as the Fort Worth Court of Appeals held: "The relationships between an organized church and its ministers is its lifeblood. The minister is the primary agent by which a church seeks to fulfill its purpose. Matters concerning this relationship must be recognized as of prime ecclesiastical concern."⁶⁴

In *Jones*, the United States Supreme Court also held that, if an identity question implicated church doctrine or polity, deference is required even under a neutral principles analysis. There, Georgia had potentially adopted a presumptive rule of majority representation in local organizations.⁶⁵ The Court reasoned that this state law presumption was permissible under the First Amendment as long as it was "defeasible upon a showing that the identity of the local church is to be determined by some other means," allowing hierarchical churches to order their affairs as they wish, for example, "by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way."⁶⁶ Thus, the Court reasoned that if, "under Georgia law the process of identifying the

⁵⁹ *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877, 889-90 (Tex. App.—Dallas 2000, pet. denied) (citing *Milivojevich*, 426 U.S. at 709).

⁶⁰ *Dean*, 994 S.W.2d at 395.

⁶¹ *Milivojevich*, 426 U.S. at 724-25; accord *Kedroff*, 344 U.S. at 113-14; *Watson*, 80 U.S. at 727.

⁶² *Milivojevich*, 426 U.S. at 708.

⁶³ *Lacy v. Bassett*, 132 S.W.3d 119, 123 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

⁶⁴ *Dean*, 994 S.W.2d at 395 (emphasis added) (footnote and citations omitted).

⁶⁵ *Jones*, 443 U.S. at 607.

⁶⁶ *Id.* at 607-08 ("Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it.")

faction that represents the [local] church involves considerations of religious doctrine and polity,” then “the First Amendment requires that the Georgia courts give deference to the presbyterial commission’s determination of that church’s identity.”⁶⁷

Specifically, the Court noted that under Georgia law (as under Texas law), “a local church affiliated with a hierarchical religious association ‘is part of the whole body of the general church and is subject to the higher authority of the organization and its laws and regulations.’”⁶⁸ The Court also noted that Georgia’s corporations statute allowed general churches to retain ultimate control over local church corporations (as Texas’s statute on religious corporations also does).⁶⁹ Accordingly, the Supreme Court found, before remanding to state court:

All this may suggest that the identity of the “Vineville Presbyterian Church” named in the deeds **must be determined according to terms of the [hierarchical Presbyterian Church’s] Book of Church Order, which sets out the laws and regulations of churches affiliated with the PCUS. Such a determination, however, would appear to require a civil court to pass on questions of religious doctrine, and to usurp the function of the**

⁶⁷ *Id.* at 608-09.

⁶⁸ *Id.* at 608-09 (citing *Carnes v. Smith*, 222 S.E.2d, 322, 325, 328 (Ga. 1976)). Texas law states similarly: “The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. **All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.** But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.” *Westbrook*, 231 S.W.3d at 397 (quoting *Watson*, 80 U.S. at 728-29).

⁶⁹ *Jones*, 443 U.S. at 608-09 (citing GA.CODE §§ 22-5507, 22-5508 (1978)). Texas law states similarly, at TEX. REV. CIV. STAT. ANN. art. 1396, § 3.01(B) (“Any religious society . . . or church . . . may incorporate under this Act with the consent of a majority of its members, who shall authorize the incorporators to execute the articles of incorporation.”), § 2.02(A)(16) (“Any religious . . . institution organized under the laws of this State may acquire, own, hold, mortgage, and dispose of and invest its funds in real and personal property for the use and benefit and under the discretion of, and in trust for any convention, conference or association . . . which elects its board of directors, or which controls it, in furtherance of the purposes of the member institution.”), and § 2.14(B) (“Boards of directors of religious . . . institutions may be affiliated with, elected and controlled by a convention, conference or association organized under the laws of this State . . . whose membership is composed of representatives, delegates, or messengers from any church or other religious association.”). See Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at 49-50 for the companion language in TEX. BUS. ORG. CODE.

commission appointed by the Presbytery, which already has determined that petitioners represent the “true congregation” of the Vineville church. Therefore, if Georgia law provides that the identity of the Vineville church is to be determined according to the “laws and regulations” of the PCUS, then the First Amendment requires that the Georgia courts give deference to the presbyterial commission’s determination of that church’s identity.⁷⁰

Thus, even in a neutral principles state, where, as here, the relationship between a local church entity and the hierarchical church is defined in church documents – including, for example, the local church’s founding promises of loyalty and allegiance to the mother church, and the mother church’s doctrinal requirements of conformance and discipline – a neutral principles analysis cannot reach the question of which faction is the true local church entity.

Accordingly, an appellate court in a neutral principles state (California) recently applied this bedrock principle in a case involving another diocese of The Episcopal Church whose former leaders sought unsuccessfully to take that diocese out of the Church and into the same South American church:

The dispute set forth in the request for declaratory relief in the first cause of action, namely, whether Schofield [the breakaway bishop] or Lamb [the newly elected bishop loyal to The Episcopal Church] is the incumbent Episcopal Bishop of the Diocese of San Joaquin, is quintessentially ecclesiastical **[T]he validity of such removals and appointments are not subject to further adjudication by the trial court. The continuity of the diocese as an entity within the Episcopal Church is likewise a matter of ecclesiastical law, finally resolved, for civil law purposes, by the Episcopal Church’s recognition of Lamb as the bishop of that continuing entity.**⁷¹

Here, when Defendants ask this Court to use “neutral principles” to declare Defendant Iker the Bishop of the Episcopal Diocese, despite the fact that The Episcopal Church has

⁷⁰ *Jones*, 443 U.S. at 609 (emphasis added) (footnotes omitted).

⁷¹ *Schofield*, 118 Cal. Rptr. 3d at 165-66. (emphasis added).

removed him from authority within The Episcopal Church and its Episcopal Diocese (Defendants' Motion at Section V),⁷² or to declare that Defendants are Trustees of the Episcopal Diocese's corporation, despite the fact that The Episcopal Church does not recognize them as such and the authorized Episcopal Diocese has replaced them (Defendants' Motion at Section IV),⁷³ Defendants are thereby asking this Court to invade the ecclesiastical province of the hierarchical church.

As shown below, Defendants' attempts (1) to sever the corporation from other leadership positions, (2) to second-guess the Church's ecclesiastical determinations using church regulations, and (3) to re-write local rules to seize power fail time and time again in neutral principles courts.

- (1) Defendants cannot defeat this bedrock law by drawing a false distinction between a church and its property-holding corporation; courts routinely reject this tactic in neutral principles states.**

Courts around the nation, including the United States Supreme Court, have specifically rejected Defendants' position that a court applying neutral principles can separate a property-holding corporation from the rest of the local religious organization when the leadership of the corporation turns on the leadership of the religious institutions. For example, in *Milivojevich*, the United States Supreme Court held:

⁷² A608 (Ex. D-33, Renunciation of Ordained Ministry and Declaration of Removal and Release of Rt. Rev. Jack Leo Iker); A900 (Ex. F-7, Notice of Special Meeting of the Convention of the Episcopal Diocese of Fort Worth from the Presiding Bishop of the Episcopal Church (acknowledging that there was, at the time, "no Bishop of the Episcopal Diocese of Fort Worth, or any qualified members of the Standing Committee of the Diocese")); *see also* Section VII(F) *infra*.

⁷³ A5-7 (Ex. A, Ohl Aff. at ¶ 5); A30-31 (Ex. B, Gulick Aff. at ¶ 7); A867, 869-871, 876 (Ex. E-1, Excerpts from the 2009 Journal of the General Convention); A613-614 (Ex. D-35, Excerpt from The Episcopal Church Annual for 2009); A23-25 (Ex. A-2, Letters of Congratulations and Commendation); A363, 365-366 (Ex. D-3, Excerpts from the Episcopal Church Annual, 2010); *see also* Sections VII(E)-(F); A29 (Ex. B, Gulick Aff. at ¶ 5); A948 (Ex. F-11, Excerpts from 2009 Journal of Special Convention and Diocesan Convention at p. 33).

[T]he Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations. Resolution of the religious dispute over [the Diocesan Bishop's] defrockment therefore determines control of the property. **Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.**⁷⁴

Where control of a church's property-holding corporation involves membership in the church, a dispute over who controls the corporate property cannot simply be severed from the underlying ecclesiastical dispute and answered on neutral principles grounds.

Numerous other courts have reached this same conclusion. As one court, in a neutral principles state, held:

[W]e must defer to the acts of the representatives of the Episcopal Church in determining who were the true members of the church, **and, under canon law, who were the lawful directors of the Parish corporation.** These are matters of "credentials and discipline" and "polity and administration." As such, as a matter of law the trial court erred in determining that "there was no valid basis for Bishop Mathes' removal and replacement of the board of directors of the corporation; the purported election on Aug. 7, 2006 of a new board was invalid." We must defer to the Episcopal Church's decision on this ecclesiastical matter, even if it incidentally affected control over church property.⁷⁵

And in the *Greanias* case, which Defendants did not cite to this Court, even though *Greanias* expressly distinguished and repudiated Defendants' cited *Chen* case on this exact point,⁷⁶ the First Court of Appeals held:

Appellants argue, in effect, that this controversy involves a simple determination of which by-laws apply and the application of the

⁷⁴ *Milivojevich*, 426 U.S. at 709 (emphasis added); *id.* at 717 ("Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern; the bishop of a church is clearly one of the central figures in such a hierarchy and the embodiment of the church within his Diocese . . .").

⁷⁵ *Kroeger*, 84 Cal. Rptr. 3d at 485 (emphasis added).

⁷⁶ Defendants' Motion at 5 (citing *Chen*, 2004 WL 35989, at *6).

TNPCA's [Texas Non-Profit Corporations Act's] provisions to the corporate organization. **They assert that, in this case, "[c]ompeting church members are arguing about who are the proper directors" and that "[t]his dispute does not involve the question of who are the church's ministers, elders, deacons, et cetera** In sum, appellants argue that the issues in this case may be decided under purely neutral principles of law, without involving consideration of issues of religious discipline, faith, or ecclesiastical rule, custom, or law.

We disagree. The 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. Those are ecclesiastical matters that the First Amendment forbids courts to adjudicate. These issues are inextricably intertwined with appellants' requests for a declaration that the local by-laws controlled and that they were improperly removed and thus represented the Cathedral even after their removal. *This intertwining prevents our resolving this dispute on purely neutral principles of law.*⁷⁷

Courts throughout the country similarly recognize that the secular act of incorporation does not alter the relationship between a local church and its hierarchical parent.⁷⁸ Under these sensible and well-established principles, Defendants cannot avoid their obligations by drawing a false distinction between a Diocese and its subordinate corporation.⁷⁹

⁷⁷ *Greanias*, 2006 WL 1550009 (emphasis added) (internal citations omitted).

⁷⁸ See *Episcopal Diocese of Rochester*, 899 N.E.2d at 922 n.4, 925 (changes to corporate documents did not preclude holding that parish property held in trust for Church and the Diocese); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc.*, 620 A.2d at 1291, 1293 (Conn. 1993) (same); *Huber v. Jackson*, 96 Cal. Rptr. 3d 346, 358 (Ct. App. 2009), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (Ct. App. Sept. 17, 2009), *cert. denied*, 78 U.S.L.W. 3498 (Mar. 1, 2010) (No. 09-708) (rejecting argument that religious corporation was separate from parish and existed outside Church and diocese), 361 (religious corporation subordinate to ecclesiastical body); *New v. Kroeger*, 84 Cal. Rptr. 3d at 479 (religious corporation does not change the ecclesiastical status of congregation). Indeed, to find otherwise would risk First Amendment implications. See *First Born Church of the Living God, Inc. v. Hill*, 481 S.E.2d 221, 222 (Ga. 1997) (“[a]s a matter of constitutional law” local church members have “no legal right [under Georgia corporations code] to wrest the governing of the Church from the [duly elected Church leaders]”).

⁷⁹ Nor should defendants be allowed to suggest that because all parties agree that the Corporation holds the Diocesan assets, defendants should win because they “represent” the Corporation. Defendants’ Motion. at 7. This bald assertion ignores the fact that the identity of which individuals are authorized to control the Diocesan Corporation is at the heart of the dispute in this case, and flies in the face of the Fort Worth Court of Appeals’ June 25, 2010

Defendants' reliance on *Jones v. Maples* is misplaced and fails in the face of the overwhelming legal authority on point.⁸⁰ *Maples*'s narrow holding involving an independent, secular unincorporated cemetery association says nothing about the ability of civil courts to interpret the meanings of the governing documents of hierarchical churches. This 1944 case says nothing about a dispute between two groups claiming to be officers in a church that is organized as an unincorporated association, let alone a case that raises the ecclesiastical questions presented when such a church is affiliated with a hierarchical church. The reason for this is obvious. Unlike a dispute involving the officers of a secular, unincorporated association, the court's jurisdiction in cases involving churches is "severely" circumscribed by the First Amendment. Even where the identity of church leadership is "incident" to issues of church property, the First Amendment forbids inquiry into these ecclesiastical leadership and discipline determinations, which require construction of the hierarchical church's governing documents on polity, internal governance, and duly-qualified leadership. These ecclesiastical issues are not implicated in the secular *Jones v. Maples* case, and that case provides no guidance here.

Here, as in the controlling authority above, the Corporation of the Episcopal Diocese of Fort Worth is automatically led by the diocesan bishop, who must be ordained by The Episcopal Church and is bound by his oath of conformity to The Episcopal Church (subject to discipline

mandamus opinion holding that neither of two competing factions may litigate in the name of an entity whose identity and control is disputed, and that the appellate court and this Court had expressly not yet resolved these questions on the merits. *In re Salazar*, 315 S.W.3d 279, 285-87 (Tex. App.—Fort Worth 2010, orig. proceeding); see also Rule 12 Motion Challenging Authority of Attorneys J. Shelby Sharpe, Scott Brister, and Kendall Gray (filed Dec. 29, 2010).

⁸⁰ Defendant's Motion at 15 ("Under Texas law, an association's constitution, by-laws, or other rules govern its affairs, including the election of its officers. Thus, the person entitled to custody and control of an association's property must be determined by those rules." (citations omitted)).

and removal), or his or her selected representative.⁸¹ And all corporate Trustees must be lay persons in good standing of a parish or mission in the Episcopal Diocese or members of the Clergy canonically resident in the Diocese,⁸² required by The Episcopal Church's Canons to "well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised."⁸³ And under those canons and constitutions, the actions of the corporate Trustees are explicitly circumscribed by that internal Church doctrine, *e.g.*: "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*,"⁸⁴ all real and personal property "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,'"⁸⁵ "may only be conveyed or encumbered with the approval of the Board of Trustees and *in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth*,"⁸⁶ and "may be opened only for the services, rites and ceremonies, or other purposes, *either authorized or approved by this Church, and for no other use*."⁸⁷

The inescapable conclusion, under overwhelming authority, is that, even if neutral principles were the law of Texas for hierarchical church property disputes, the property questions in this case fundamentally turn on ecclesiastical questions and are answered by deferring, as the

⁸¹ A542 (Ex. D-24, Declaration of Conformity signed by Jack L. Iker); A602-05 (Ex. D-31, Order of Service for the Ordination and Consecration of the Rev. Jack Leo Iker); A738-39, 773-74 (Ex. D-36, Church Canons IV.1 and IV.9).

⁸² A885-86 (Ex. F, Wells Aff. at ¶ 9); A537 (Ex. D-21, Diocesan Canon 11).

⁸³ A675-76 (Ex. D-36, Church Canon I.17.8).

⁸⁴ A660 (Ex. D-36, Church Canon I.7.4 (emphasis added)).

⁸⁵ A534 (Ex. D-21, Diocesan Art. 13 (emphasis added)). Article 13 further provided that the Diocesan Corporation was to hold title to "other property belonging to the Diocese, as such," including trust and endowment accounts. *Id.*

⁸⁶ A538 (Ex. D-21, Diocesan Canon 12.1) (emphasis added).

⁸⁷ A539.1 (Ex. D-21, Diocesan Canon 25 (emphasis added)).

Constitution mandates, to The Episcopal Church and its Diocese's ecclesiastical determinations of internal church polity, governance, discipline, and leadership. As in *Milivojevich, Kroeger, et al.*, the composition, duties, and authority of the leadership of the property-holding Diocesan Corporation are inextricably intertwined with The Episcopal Church's and Diocese's doctrine, discipline, internal organization, choice of clergy, internal leadership and policies, and interpretations of whether actions by Trustees are in accordance with the Constitution and Canons of the Church and Diocese. Under these facts, therefore, a neutral principles analysis is not appropriate – even in states where “neutral principles” is the law of the land – and civil courts will defer to The Episcopal Church's and its authorized Diocese's ecclesiastical selection of who controls its subordinate property-holding corporation.

(2) Defendants cannot defeat this bedrock law by attempting to amend local constitutions and by-laws to seize power from the mother church they swore allegiance to.

A party cannot escape this conclusion and rely on neutral principles by amending the local church rules or corporate by-laws to alter the connection between the church and its corporation. The First Court of Appeals explicitly rejected this position in the case Defendants declined to cite (relying instead on the *Chen* position rejected under these facts):

The *Chen* court was able to determine which board members were the lawful ones **because there was no preserved challenge concerning which by-laws applied and what they required** [Here,] a higher church authority was disputing whether the local by-laws, on which appellants based their whole case, controlled Determining which version of the by-laws in fact controlled thus involved determining the ecclesiastical powers of the higher church authorities that claimed that their version controlled. In *Chen*, in contrast, the appellants' challenges indicated that the trial court had found that the religious organization was congregational. In congregational religious organizations, the highest ecclesiastical authority is generally either the majority of the membership or whatever government the congregation has established locally. ***Chen* thus did not involve the situation in which a higher authority, external of the local congregation, was disputing**

what the document governing the local congregation was. Moreover, the evidence before the trial court in *Chen* showed that membership in the religious corporation was not co-extensive with membership in the religion.⁸⁸

Here, too, there is a hierarchical organization, The Episcopal Church, disputing which bylaws, canons, and constitutions are in effect. The dissident faction, Defendants, attempted to amend its governing documents – violating their oaths of conformity and promises of fealty – in an attempt to seize local control and property (including deleting provisions describing the property authorized to be held by the Diocesan Corporation as property “acquired for the use of the Episcopal Diocese of Fort Worth” and inserting provisions purporting to give the Trustees of the Diocesan Corporation the “sole authority to determine the identity and authority of the Bishop” in the event of a dispute or challenge regarding the identity of the Bishop).⁸⁹ But the authorized Local Episcopal Parties (recognized by The Episcopal Church’s Presiding Bishop acting under the Church’s highest authority, the General Convention) have since declared these and other breakaway faction purported amendments null and void, replacing breakaway faction Defendants with duly authorized Corporate Trustees (with the advice and consent of The Episcopal Church), replacing their improper and unauthorized amended by-laws,⁹⁰ and filing Amended and Restated Articles with the Texas Secretary of State after Defendants’ official removal from authority by The Episcopal Church.⁹¹ This dispute over which documents control, and who had authority within the Church and its institutions to alter or amend documents, again

⁸⁸ *Greanias*, 2006 WL 1550009, at *9 (emphasis added) (footnote and citations omitted).

⁸⁹ Compare A1209-12 (Ex. G-8, Original Articles IV(1), IV(2), and VI) with A1222-25 (Ex. G-11, Amended and Restated Articles filed by Iker’s faction). For a fuller listing of Defendants’ amendments to attempt to seize local control, see the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at VII.E.

⁹⁰ A1307 (Ex. M, Shipp Aff. at ¶ 3); A1309-1315 (Ex. M-1, Amended and Restated Bylaws).

⁹¹ A1226-30 (Ex. G-12, Amended and Restated Articles of Incorporation). For a fuller listing of The Episcopal Church’s and the Local Episcopal Parties’ repudiation and revocation of Defendants’ actions, see the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at VII.F.

places this case squarely within the ecclesiastical matters that require deference, even in neutral principles states.

- (3) **Defendants cannot defeat this bedrock law by asking the Court to limit a hierarchical church's authority over its own polity, discipline, and clergy by suggesting that the church did not follow its own rules and regulations.**

Nor can a breakaway faction argue that the hierarchical mother church lacked authority under its constitutions, canons, or by-laws to discipline or replace local leaders or clergy. It is the hierarchical church's choice of leadership, identity, and control, and not its decision-making process, that is dispositive as a matter of law; in fact, as the United States Supreme Court held, and Texas courts have affirmed, inquiry into whether a church complied with its laws and procedures violates the First Amendment.⁹² The Fort Worth Court of Appeals found, quoting the United States Supreme Court:

In *Milivojevich*, the Supreme Court held that the inquiry into whether the church laws and procedures had been complied with violated the First Amendment.... [I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.⁹³

Rejecting the Illinois Supreme Court's finding that a bishop's defrocking was invalid under a neutral principles review of church rules and authority, the United States Supreme Court held:

The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the

⁹² *Patterson v. Sw. Baptist Theological Seminary*, 858 S.W.2d 602, 605-06 (Texas App.—Fort Worth 1993, no writ) (citing *Milivojevich*, 426 U.S. at 713).

⁹³ *Patterson*, 858 S.W.2d at 605-06 (quoting *Milivojevich*, 426 U.S. at 714-15).

issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes. Consistently with the First and Fourteenth Amendments, **civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law (to decide such disputes)** Such a determination ... frequently necessitates the interpretation of ambiguous religious law and usage. 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.⁹⁴

The Court noted: “*Watson* itself requires our conclusion in its rejection of the analogous argument that ecclesiastical decisions of the highest church judicatories need only be accepted if the subject matter of the dispute is within their ‘jurisdiction.’”⁹⁵ In accord, the Supreme Court of Texas has held: “the determination of an ecclesiastical court as to its jurisdiction over a given question is as conclusive upon the civil courts as is its decision of the question when made.”⁹⁶

Thus, Defendants’ arguments that The Episcopal Church and its Diocese lacked authority to replace them (when Defendants attempted to break away from the Church, taking property for a new church, in violation of their oaths of loyalty and disciplinary requirements) are irrelevant. One could engage in a painstaking analysis of Church doctrine to show how Defendants, having violated their promises to the mother church, were properly replaced.⁹⁷ But this analysis is not only unnecessary, it is wholly improper and prohibited by the First Amendment.

Here, there is no legitimate dispute that The Episcopal Church is hierarchical. This position is briefed exhaustively in the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment and, like the rest of that brief and evidence, is incorporated herein. Suffice

⁹⁴ *Milivojevich*, 426 U.S. at 708-09 (parentheticals in original) (citation omitted) (internal quotation marks omitted), quoted with approval in *Hawkins*, 69 S.W.3d at 758.

⁹⁵ *Milivojevich*, 426 U.S. at 713.

⁹⁶ *Brown*, 116 S.W. at 364.

⁹⁷ See The Episcopal Church’s Response to Defendants’ Motion at pp. 8-9 and n.5.

to say here, Defendant Iker swore in writing as a condition of ordination “to conform to the Doctrine, Discipline, and Worship of the Episcopal Church.” By Church law, “[a]ny person accepting any office of this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church.”⁹⁸ And the Diocese itself, on formation, pledged unanimously to “fully subscribe to and accede to the Constitution and Canons of The Episcopal Church,”⁹⁹ “recognize[d] the authority of the General Convention of said Church,”¹⁰⁰ and agreed to have “[c]anons not inconsistent with this Constitution, or the Constitution and Canons of the General Convention.”¹⁰¹ Thus, as the *Westbrook* Court recently affirmed:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. **All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.**¹⁰²

ii. **Even in neutral principles states, where the property question implicates ecclesiastical questions, deference is required.**

⁹⁸ A675-76 (Ex. D-36, Church Canon I.17.8).

⁹⁹ A518-25 (Ex. D-19, Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) at pp. 25-32).

¹⁰⁰ A533 (Ex. D-21, Diocesan Art. 1).

¹⁰¹ A536 (Ex. D-21, Diocesan Art. 18).

¹⁰² *Westbrook*, 231 S.W.3d at 397 (quoting *Watson*, 80 U.S. at 728-29).

As the Texas Supreme Court noted in *Westbrook*, the United States Supreme Court held in *Milivojevich* that a “neutral principles” analysis was improper where the ownership of church property fundamentally turned on the question of who was the true diocesan bishop:

Milivojevich involved an intra-church dispute over control of the property and assets of the Serbian Eastern Orthodox Diocese for the United States and Canada. The Supreme Court rejected the Illinois Supreme Court’s **purported reliance on neutral principles of law** in its holding that the Diocesan reorganization and Milivojevich’s removal as Bishop were invalid, and outlined the broad autonomy our Constitution affords churches in deciding matters that touch upon religious doctrine. Emphasizing that the First Amendment severely limits the role of civil courts in resolving “religious controversies that incidentally affect civil rights,” the Court mandated judicial deference to the church if ownership determinations involve underlying questions of religious doctrine.¹⁰³

As the *Milivojevich* Court held:

Resolution of the religious disputes at issue here affects the control of church property in addition to the structure and administration of the American-Canadian Diocese. This is because the Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations. Resolution of the religious dispute over [the Diocesan Bishop’s] defrockment therefore determines control of the property. **Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.**¹⁰⁴

Similarly, in *Jones*, the Court indicated before remanding the case its concern that “there are at least some indications that under Georgia law the process of identifying the faction that represents the Vineville church involves considerations of religious doctrine and polity,” and as a result, “the ‘Vineville Presbyterian Church’ **named in the deeds must be determined**

¹⁰³ *Westbrook*, 231 at 399 (emphasis added) (citations omitted).

¹⁰⁴ *Milivojevich*, 426 U.S. at 709 (emphasis added).

according to terms of the [hierarchical Presbyterian Church's] Book of Church Order," requiring "deference to the presbyterial commission's determination of that church's identity."¹⁰⁵

And as the court ruled in *Episcopal Diocese of Massachusetts v. Devine*, in another neutral principles state (Massachusetts):

Under a constitutionally permissible alternative approach, where a dispute directly concerns a purely secular matter (such as rights to church property) and does not implicate matters of church doctrine, discipline, or authority, a court may exert jurisdiction over, and resolve, the dispute by the application of neutral principles of law. However, as noted in *Parish of the Advent*, it is often difficult to separate matters of religious doctrine or discipline entirely from a dispute between competing church factions. The present dispute, similar to that in *Parish of the Advent*, arose out of a disagreement over the Diocese's authority to reclassify St. Paul's as a mission and to replace its leaders. **Though the Diocese sought by its complaint to establish its right to control the church property, the action was precipitated by the displaced leaders' refusal to recognize the bishop's authority to remove them and their unwillingness to surrender keys to the property. Because the question of the right to use and possess the St. Paul's church property is inextricably intertwined with the question of which individuals hold authority to act on behalf of St. Paul's (a question that essentially depends on the authority of the Diocese and its bishop over the mission or parish), we consider the matter to be inappropriate for determination by application of neutral principles of law.**¹⁰⁶

In sum, when a civil issue, including a property issue, turns on ecclesiastical questions, such as discipline,¹⁰⁷ internal organization,¹⁰⁸ the hierarchy's choice of ministers,¹⁰⁹ the structure, leadership, or internal policies of a religious institution,¹¹⁰ or matters relating to the

¹⁰⁵ *Jones*, 443 U.S. at 608-09 (emphasis added).

¹⁰⁶ 797 N.E.2d 916, 921-22 (Mass. App. Ct. 2003) (emphasis added) (citations omitted).

¹⁰⁷ *Patterson*, 858 S.W.2d at 605-06 (citing *Milivojevich*, 426 U.S. at 713).

¹⁰⁸ *Id.*

¹⁰⁹ *Dean*, 994 S.W.2d at 395.

¹¹⁰ *Turner*, 18 S.W.3d at 889 (citing *Milivojevich*, 426 U.S. at 709).

hiring, firing, discipline, or administration of clergy,¹¹¹ a neutral principles analysis requires deference – even in states where “neutral principles” is the law of the land.

As the *Westbrook* Court pointed out, *Milivojevich* and *Jones* detail the boundaries and limits of the neutral principles exception. Here, as in *Milivojevich*, resolution of the religious disputes at issue affects the control of church property in addition to the structure and administration of the Diocese, because the Diocesan Bishop and his fellow authorized Episcopalians lead the Episcopal Diocese and because the Bishop is the principal officer of the property-holding corporation; as the *Milivojevich* Court concluded: “this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.”¹¹² And, as in *Jones*, the identity of the local church entity named in the deeds must be determined according to terms of The Episcopal Church’s Constitutions and Canons, because, as shown, Texas law recognizes that local churches who voluntarily associate with a hierarchical church “do so with an implied consent to this government, and are bound to submit to it,”¹¹³ and civil courts are required to defer to the Church’s determination of Diocesan leadership and identity under those rules.¹¹⁴

In sum, even under a neutral principles framework, this case is replete with ecclesiastical disputes requiring First Amendment deference, even where those ecclesiastical facts answer in whole or part the pendant property question. Despite Defendants’ arguments, neutral principles is not an end-run around the First Amendment.

¹¹¹ *Lacy*, 132 S.W.3d at 123.

¹¹² *Milivojevich*, 426 U.S. at 709.

¹¹³ *Westbrook*, 231 S.W.3d at 397 (quoting *Watson*, 80 U.S. at 728-29).

¹¹⁴ *Jones*, 443 U.S. at 609.

Nonetheless, under an application of the four factors of a neutral principles analysis, Defendants *still* would have no right to the property in question, as shown next.

B. Application of the four neutral principles factors defeats Defendants' motion as a matter of law.

Even if this were a “neutral principles” state, and even if ecclesiastical determinations did not conclusively resolve the pendant property issues here under a neutral principles analysis (neither of which is the case, as shown above), Defendants *still* would not prevail under the four factors of a neutral principles analysis. A neutral principles approach allows the court to resolve church property disputes by analyzing (1) deeds to the disputed property, (2) the governing documents of the local church body, (3) the governing documents and rules of the general church body, and (4) any applicable state statutes, to see if the disputed property is impressed with a trust or similar restriction in the general church’s favor.¹¹⁵ Courts have recognized several methods of demonstrating the general church’s interest in locally-held property including the express trust language in The Episcopal Church’s Dennis Canon (which was enacted at the suggestion of *Jones v. Wolf*), language in The Episcopal Church’s governing documents codifying an implied trust relationship, and state statutes providing for a trust in favor of the general church.¹¹⁶

¹¹⁵ *Id.* at 600. Some states have adopted this neutral principles approach in hierarchical church property disputes as an alternative to the prior unconstitutional approach of implying a trust in favor of the general church only if the court found that the general church had adhered to its tenets of faith and practice. *Id.* at 599. Unable to so analyze churches’ adherence to or departure from their own doctrines, these courts have looked instead for alternative bases, under “neutral principles of law,” for implying or recognizing a trust in favor of the general church or otherwise finding that the general church is entitled to ownership of the local property. *Id.* at 600; *Carnes*, 222 S.E.2d at 328.

¹¹⁶ See, e.g., *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 699 S.E.2d at 49-52; *Episcopal Church Cases*, 198 P. 3d at 81. The California Supreme Court has also held that the Dennis Canon “is consistent with earlier-enacted canons that, although not using the word “trust,” impose substantial limitations the local parish’s use of church property and give the higher church authorities substantial authority over that property.” *Episcopal Church Cases*, 198 P. 3d at 80-81.

i. The factors

Here, each of the factors normally analyzed by courts applying neutral principles supports the conclusion that The Episcopal Church and the local entities affiliated with it are entitled to the local property. Like the overwhelming majority of courts in “neutral principles” states, a Texas court applying, *arguendo*, “neutral principles” should conclude that the local faction aligned with The Episcopal Church is the rightful owner of disputed church property.

(1) Governing documents of the general church

The governing documents of The Episcopal Church demonstrate that local property is held in trust and for the benefit of the general church. As in a Georgia case approved by the United States Supreme Court,¹¹⁷ there is an express trust provision in the national governing documents of the Church. Church Canon I.7.4 (“the Dennis Canon”), adopted in 1979,¹¹⁸ before the formation of the Fort Worth Diocese and that Diocese’s accession to Church Canons, states:

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 such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property *so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.*¹¹⁹

In addition to this express trust, the Church’s Canons also provide that “[a]ny person accepting any office in this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church and of the Diocese in which the

¹¹⁷ See *Jones*, 443 U.S. at 600-01 (discussing *Carnes*, 222 S.E.2d at 328, in which the Georgia Supreme Court, after finding no basis for a trust in favor of the general church in the deeds, the corporate charter, or the state statutes dealing with implied trusts, held that the property was properly awarded to the hierarchical church because the hierarchical church’s constitution contained an express trust provision in favor of the general church).

¹¹⁸ The Dennis Canon was adopted as Canon I.6.4 in 1979. See A395 (D-6, Excerpts from the 1979 Journal of General Convention, adopting Dennis (Canon); A454 (D-18, 1979 Constitution and Canons of The Episcopal Church).

¹¹⁹ A660 (Ex. D-36, Church Canon I.7.4).

office is being exercised.”¹²⁰ As a result, no individual at any level of the Church may hold or use property except in accordance with the Church’s own Constitution and Canons. Finally, the Church also demonstrates its interest in and control over local property through Church Canon I.7.3, which provides that “[n]o Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.”¹²¹ The Episcopal Church’s governing documents, by themselves, answer the simple “neutral principles” question of whether the disputed property is impressed with a trust or similar restriction in favor of The Episcopal Church.¹²²

(2) Governing documents of the local church entities

The governing documents of the local entities likewise demonstrate that the local property is intended to be held and used for the purposes of The Episcopal Church. As required by The Episcopal Church’s Constitution and Canons, the Diocese resolved to “fully subscribe to and accede to the Constitution and Canons of The Episcopal Church”¹²³ and provided in its Constitution that the Diocese “accedes to the Constitution and Canons of the Episcopal Church in the United States of America, and recognizes the authority of the General Convention of said

¹²⁰ A675-76 (Ex. D-36, Church Canon I.17.8).

¹²¹ A659 (Ex. D-36). The California Supreme Court recognized that “permitting a disaffiliating local church to take property with it when it reaffiliates with a different church is inconsistent with the prohibition” of this same canon (then Canon II.6.2). *Episcopal Church Cases*, 198 P.3d at 82.

¹²² *Jones*, 443 U.S. at 600-01; *Carnes*, 222 S.E.2d at 328; see also *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 699 S.E.2d at 52 (“The National Episcopal Church enacted the Dennis Canon in response to the United States Supreme Court decision in *Jones v. Wolf* so as to make clear the National Episcopal Church’s implied intention to hold a trust interest in parish property. And courts across the country have recognized that the Dennis Canon effectuates an express trust regarding parish property.”)

¹²³ A518-25 (Ex. D-19).

Church.”¹²⁴ The Diocesan Constitution also provided for the adoption of canons “not inconsistent with . . . the Constitution and Canons of the General Convention.”¹²⁵ These provisions demonstrate that the Diocese accepted the rules by which The Episcopal Church is governed, including the Dennis Canon’s trust on local property and the requirements that local officers of the Church use and hold local property for the purposes of the Church.

Additional provisions in the Diocese’s Constitution and Canons further provide for a trust interest in favor of The Episcopal Church. For instance, Article 13 of the Episcopal Diocese of Fort Worth’s first Constitution (now Article 14) provides that title to all real estate acquired:

*for the use of the Church in this Diocese, including the 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 Corporation of the Episcopal Diocese of Fort Worth.*¹²⁶

Diocesan Canon 12.1 (now Canon 18.1) specified that property held by the Diocesan Corporation “may only be conveyed or encumbered with the approval of the Board of Trustees and in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth,” and the Diocesan Constitution includes the Diocese’s own accession to the Church Constitution impressing an express trust on local property.¹²⁷ Diocesan Canon 25 (now Canon 30) provided that “[t]he dedicated and consecrated Churches and Chapels of the several Parishes and Missions of the Diocese may be opened only for the services, rites and ceremonies, or other purposes,

¹²⁴ A533 (Ex. D-21, Diocesan Art. 1).

¹²⁵ A536 (Ex. D-21, Diocesan Art. 18).

¹²⁶ A534 (Ex. D-21, Diocesan Art. 13 (emphasis added)). Article 13 further provided that the Diocesan Corporation was to hold title to “other property belonging to the Diocese, as such,” including trust and endowment accounts. *Id.*

¹²⁷ A538 (Ex. D-21, Diocesan Canon 12.1); A660 (Ex. D-36, Church Canon I.7.4).

*either authorized or approved by this Church, and for no other use.*¹²⁸ It defies reason to argue, as Defendants apparently do, that The Episcopal Church never has and never will have any say over its own Diocese's use of church property that the Church itself acquired over 144 years and gave to its Diocese in exchange for these promises of loyalty.

(3) Deeds

As to deeds,¹²⁹ Defendants have not supplied or referred to a single one, and they have nothing to support their contention that they, instead of the continuing local entities of The Episcopal Church, own the local property. The August 22, 1984 District Court of Dallas County's declaratory judgment transferring property to the Episcopal Diocese of Fort Worth from The Episcopal Church's Diocese of Dallas states that "The Episcopal Diocese of Fort Worth ... is a duly constituted religious organization, *organized pursuant to the Constitution and Canons of the Protestant Episcopal Church in the United States of America,*" and that "Corporation of the Episcopal Diocese of Fort Worth ... is a Texas non-profit corporation, *duly organized under the Constitution and Canons of the Episcopal Diocese of Fort Worth.*"¹³⁰ This judgment also recognizes that the division of the Episcopal Diocese of Dallas to form the Episcopal Diocese of Fort Worth was "as permitted by Article V of the Constitution of The Episcopal Church."¹³¹ At all times, both the Diocese of Dallas and the Diocese of Fort Worth were and continue to be subordinate parts of The Episcopal Church, holding property and operating only pursuant to and in compliance with the Constitution and Canons of The Episcopal Church. Defendants' unsupported argument that the Episcopal Diocese of Fort Worth is an

¹²⁸ A539.1 (Ex. D-21, Diocesan Canon 25 (emphasis added)). Note: in the Diocesan Constitution and Canons, the term "Church" refers to The Episcopal Church. See A533 (Ex. D-21, Diocesan Constitution, Preamble).

¹²⁹ BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "deed" as a "written instrument by which land is conveyed").

¹³⁰ A1140 (Ex. G-7, Judgment in *The Episcopal Diocese of Dallas v. Mattox* at p. 2) (emphasis added).

¹³¹ A1142 (*Id.* at p. 4);

independent organization that can leave The Episcopal Church as it sees fit, taking property with it, has no basis.

In addition, available individual deeds demonstrate that the local properties have always been held by local Episcopal entities as subordinate parts of The Episcopal Church and for the benefit and purposes of The Episcopal Church.¹³² For example, a deed for property now making up part of Camp Crucis, a property of the Diocese in Hood County, expressly states that the property is conveyed to a “Bishop of the Protestant Episcopal Church, for the Diocese of Dallas, . . . in trust for the use and benefit of the Protestant Episcopal Church” and provides that, in the event there is a vacancy in the bishop’s position, “the senior bishop in the Protestant Episcopal Church in the United States of America shall be held and deemed to be . . . the successor in office of said Bishop.”¹³³ A separate deed for another part of Camp Crucis conveys the property to “A. Donald Davies, Bishop of the Diocese of Dallas *of the Episcopal Church in the United States of America* and his successors in office.”¹³⁴ This deed demonstrates that the property was conveyed to a Diocese of the Episcopal Church for the benefit of The Episcopal Church, not for the breakaway faction and the denomination with which Defendants claim affiliation.

The diocesan property on Alameda Street in Fort Worth similarly was deeded to *Episcopal* entities, not subordinate entities of any other denomination. This property was originally conveyed to “All Saints’ *Episcopal* School,”¹³⁵ then a portion of the school’s property was conveyed to the “*Episcopal* Diocese of Fort Worth.”¹³⁶

¹³² Defendants have resisted discovery of deeds, again relying on their misreading of *Salazar*.

¹³³ A1344-45 (Ex. O-1, Camp Crucis Deed to Bishop Mason).

¹³⁴ A1346 (Ex. O-2, Camp Crucis Deed to Bishop Davies) (emphasis added).

¹³⁵ A1349 (Ex. O-3, All Saints School Deed) (including the property later deeded to the Episcopal Diocese of Fort Worth) (emphasis added).

¹³⁶ A1359 (Ex. O-4, Deed for Alameda Street Property to Episcopal Diocese of Fort Worth) (emphasis added).

These deeds alone are sufficient to find that the local property in this case is held for the benefit of The Episcopal Church.¹³⁷ Defendants, however, despite their professed reliance on what they claim is a neutral principles approach, make no mention of these deeds or any others. Because any one of the neutral principles factors may support a finding that The Episcopal Church is entitled to the local property,¹³⁸ Defendants' complete failure to even address these deeds, as well as other important factors of the neutral principles analysis, is fatal to their motion.

(4) Applicable state statutes

Finally, Texas statutes governing nonprofit religious corporations and voluntary associations also demonstrate according to neutral principles of law that The Episcopal Church and its recognized local entities are entitled to ownership and control of the local property. The Texas Nonprofit Corporations Act provides that “[a]ny religious society . . . or church . . . may incorporate under this Act with the consent of a majority of its members, who shall authorize the incorporators to execute the articles of incorporation.”¹³⁹ When the constituent entity incorporates, the Act provides that the incorporated entity will hold property for the benefit of the general church:

¹³⁷ These deeds concern Diocesan property. It is not clear from Defendants' motion that they are moving with respect to Parish or Mission property, and while the so-called Defendant Congregations appear to be party to Defendants' motion, it is entirely unclear what relief, if any, they are seeking. This is therefore the subject of a special exception to Defendants' motion (*see* Section X *infra*). In any event, all Parish and Mission property is held in express trust for The Episcopal Church under the Dennis Canon, which alone satisfies a neutral principles analysis in favor of The Episcopal Church and the loyal Episcopalians (and against Defendants). And as to mission and parish property, Defendants have failed to provide a single deed, again failing to meet their own burden and defeating their motion. Merely by way of example, the attached local deed for Parish property demonstrates an express trust in favor of The Episcopal Church (*see* A1373-74 (Ex. O-6, St. Mary's Deed) (conveyance to the Bishop of the Missionary District of Northwest Texas, a previous organization of The Episcopal Church covering the territory now part of the Fort Worth Diocese, was “in trust for the use and benefit of the Protestant Episcopal Church.”)).

¹³⁸ *See Jones*, 443 U.S. at 600-01 (citing with approval a case in which the court found no basis for a trust in the deeds, state statutes, or local governing documents, but still awarded property to the general church on the basis of a provision in that church's constitution).

¹³⁹ TEX. REV. CIV. STAT. ANN. art. 1396, § 3.01(B).

Any religious . . . institution organized under the laws of this State may acquire, own, hold, mortgage, and dispose of and invest its funds in real and personal property *for the use and benefit and under the discretion of, and in trust for any convention, conference or association . . . which elects its board of directors, or which controls it, in furtherance of the purposes of the member institution.*¹⁴⁰

Likewise, “[b]oards of directors of religious . . . institutions *may be affiliated with, elected and controlled by a convention, conference or association organized under the laws of this State . . . whose membership is composed of representatives, delegates, or messengers from any church or other religious association.*”¹⁴¹ The Act itself thus recognizes that religious corporations are subordinate to, and hold property in trust for, the religious organizations that formed them.

Texas principles of voluntary association law, which Defendants purport to rely upon, also support the trust interest of The Episcopal Church in the property of its Diocese of Fort Worth. Of course, non-religious voluntary associations do not raise the same First Amendment issues as religious ones, so any hypothetical application of general voluntary associations principles to this case is still subject to the strict limitations on application of neutral principles.¹⁴² When a local Masonic lodge attempted to withdraw from the parent organization (the Grand Lodge) by transferring property to an independent organization, a Texas court held that the local lodge “[was] not an independent organization existing solely for the benefit of its members, but . . . a part and parcel of a larger organization.”¹⁴³ Because “[t]he local lodge came

¹⁴⁰ *Id.* § 2.02(A)(16) (emphasis added).

¹⁴¹ *Id.* § 2.14(B) (emphasis added).

¹⁴² See *Jones*, 443 U.S. at 602. Specifically, while Defendants cite *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.* for the proposition that “courts will interfere in the inner-dealings of a private association if a valuable right or property interest is at stake,” this obviously cannot be true for religious associations because such interference would violate the First Amendment limits discussed in Section V(A)(i).

¹⁴³ *Minor v. St. John’s Union Grand Lodge of Free & Accepted Ancient York Masons*, 130 S.W. 893, 896-97 (Tex. Civ. App.—Galveston 1910, writ ref’d).

into being by virtue of the power conferred upon its members to organize themselves into a subordinate lodge,” the property conveyed to the trustees of the local lodge “was for the use and benefit of this body in carrying out the purposes of its organization under the jurisdiction and authority of the Grand Lodge.”¹⁴⁴ As a result, the remaining members of the local lodge who preserved their allegiance to the Grand Lodge were “entitled to hold the property for the use of this lodge.”¹⁴⁵ Thus, if neutral principles apply, which they do not, Texas voluntary associations law supports the conclusion that local property is held for the purposes of The Episcopal Church.

ii. Defendants’ trust analysis departs from the neutral principles approach and fails on the law.

Instead of engaging in an actual neutral principles analysis by considering the factors identified in *Jones*, Defendants hang their hats on a porous argument that no express trust exists in favor of The Episcopal Church. *Jones* and the other neutral principles cases, however, make clear that no express trust is required – The Episcopal Church has indicated, per *Jones*, its beneficial interest in Church property held by its subordinate entities in both national and local resolutions and rules; Texas law specifically implies a trust in favor of the purposes of a charitable organization like the Diocese of Fort Worth or its Corporation; and even under Defendants’ own analysis purportedly applying private trust law, their argument fails.

(1) While an express trust clearly exists, no express trust is required to find for the loyal Episcopalians under neutral principles.

The *Jones* Court and the other courts applying neutral principles of law to decide hierarchical church property disputes do not require – as Defendants apparently argue this Court

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see also *Progressive Union of Tex. v. Indep. Union of Colored Laborers*, 264 S.W.2d 765, 768 (Tex. Civ. App.—Galveston 1954, writ *ref’d n.r.e.*) (“It is well settled that when a person ceases to be a member of a voluntary association, his interest in its funds and property ceases and the remaining members become jointly entitled thereto, and this rule applies where a number of members secede in a body and although they constitute a majority and organize a new association.”)

should – satisfaction of state law requirements for private express trusts. Instead, these Courts look for *any* basis, in addition to the hierarchical structure of the church, for implying a trust in favor of the general church. As the Georgia Supreme Court recognized less than two months ago, “[a] trust in favor of the general church can be created by the deed on the property, can be implied under state statutes, or can be required by the constitution.”¹⁴⁶ The *Jones* Court explained that “[t]hrough appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency.”¹⁴⁷ The Court similarly noted: “any rule of [local] majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it.”¹⁴⁸ Here, the Church did both: after *Jones*, it added the Dennis Canon to affirm its express trust interest in property held by its subordinate entities, and it maintained numerous constitutional and corporate charter provisions, both national and local, describing the Church’s authority over local clergy, leadership, property, and institutions. Either approach alone would be sufficient, and Defendants’ myopic focus on trusts is misplaced.

Similarly, Defendants’ foray into the minutia of Texas trust law is inapposite. As it turns out, as shown below, Defendants are incorrect on the merits regarding substantive Texas trust law. But at the outset, it is important to note that The Episcopal Church did exactly what the *Jones* Court recommended, in direct response to *Jones*, expressing its intent to affirm its trust

¹⁴⁶ *Kemp v. Neal*, No. S10A0724, 2010 WL 5060252, at *2 (Ga. Nov. 30, 2010).

¹⁴⁷ *Jones*, 443 U.S. at 603.

¹⁴⁸ *Id.* at 607-08.

interest in its subordinate entities' local property.¹⁴⁹ Nowhere did the *Jones* Court suggest that a general church had to craft a sentence in its national documents that complies with the intricacies of trust law in all fifty states. *Jones* requires only that the Church express its intent to retain control of its local property, and this is what the Church did, through both national and local language. Yet Defendants still argue that this Court should ignore the Church's efforts and intent. The relevant question is whether the general church and local church entities intended to create a relationship in which local church property is held for the benefit and purposes of the general church.¹⁵⁰ This intent is abundantly clear from the governing documents of the Church, both locally and nationally.

(2) Here, a trust interest in favor of The Episcopal Church exists both expressly and implicitly, and courts routinely find a trust interest in favor of The Episcopal Church based on the same facts and governing documents.

As discussed above, the applicable deeds, governing documents, and Texas statutes demonstrate, under a neutral principles analysis, that The Episcopal Church and its local subordinate entities are entitled to ownership and control of local church property, both by implication and by The Episcopal Church's express trust language in its Constitution and Canons. Accordingly, based on similar or identical governing documents and statutes, courts that have dealt with property disputes in The Episcopal Church have routinely found a trust interest in favor of The Episcopal Church.¹⁵¹

¹⁴⁹ See *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 699 S.E.2d at 52 ("The National Episcopal Church enacted the Dennis Canon in response to the United States Supreme Court decision in *Jones v. Wolf* so as to make clear the National Episcopal Church's implied intention to hold a trust interest in parish property.").

¹⁵⁰ See *Jones*, 443 U.S. at 603-04; see also *Mote*, 716 P.2d at 100 ("The [*Jones*] Court did *not* restrict the inquiry to a search for explicit language of express trust.") (emphasis in original).

¹⁵¹ See, e.g., *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 699 S.E.2d at 49-55 (finding, even where local congregation received property before any organization of The Episcopal Church in the area, that both implied and express trusts were created by the application of state statutes and local and general church governing documents); *In re Episcopal Church Cases*, 198 P.3d at 70-71; *Kroeger*, 84 Cal. Rptr. 3d at 479-82; *Mote*, 716 P.2d

(3) Texas law expressly provides for implied trusts based on the purposes of charitable organizations like the Diocese of Fort Worth and its Corporation.

Texas law provides that “[a] gift to a charitable institution or society will be presumed to be a charitable gift, though no purpose is named, and such institution or society will be presumed to hold such gifts in trust for those charitable purposes for which it exists.”¹⁵² And, as the California Supreme Court recognized when it considered the trust implications of similar governing documents within The Episcopal Church, “those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.”¹⁵³ The governing documents of the Diocese of Fort Worth and its Corporation similarly demonstrate that their purpose has always been subordinate to the purposes of The Episcopal Church.

The property now held by the Corporation for the Fort Worth Diocese was given to the Corporation by The Episcopal Church through the division of its Diocese of Dallas.¹⁵⁴ The very creation of the Fort Worth Diocese was possible only “as permitted by Article V of the

at 96, 103 (upholding The Episcopal Church’s trust interest based on canons existing even prior to 1979); *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish, Inc.*, 620 A.2d at 1282-85, 1292-93 (finding that the Dennis Canon “merely codified in explicit terms a trust relationship that has been implicit . . . since the [Church’s] founding”); *Harnish*, 899 N.E.2d at 925 (finding Episcopal Church Canons dispositive because they “clearly establish an express trust” in favor of the Church); *Trs. of the Diocese of Albany*, 684 N.Y.S.2d at 79-82 (finding that the Dennis Canon “expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal Church”).

¹⁵² *Boyd v. Frost Nat’l Bank*, 196 S.W.2d 497, 505 (Tex. 1946) (quoting *De Camp v. Dobbins*, 29 N.J. Eq. 36, 1878 WL 8095, at *6 (1878)). See also *Blocker v. State*, 718 S.W.2d 409, 416 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.) (stating that property donated to a charitable corporation is subject to implicit charitable limitations defined by the donee’s organizational purpose and agreeing that “[b]y their very incorporation for purely charitable and benevolent purposes [charitable corporations] have made a contract with the State and with the beneficiaries named in the charters effectually constituting those in charge of the enterprises *trustees of an express trust, and their charters in their last analysis and in their legal effect become declarations of trust*”) (emphasis in original) (citation omitted).

¹⁵³ *In re Episcopal Church Cases*, 198 P.3d at 84.

¹⁵⁴ A1142, 1144 (Judgment in *Episcopal Diocese of Dallas v. Mattox*, at pp. 4, 6).

Constitution of The Episcopal Church.”¹⁵⁵ The Corporation—organized pursuant to the Constitution and Canons of the Diocese subject to the Diocese’s accession to the Constitution and Canons of the Church—was thus created to hold property for the benefit and purposes of The Episcopal Church. As a result, Texas law recognizes a trust interest in this property in favor of the purposes of The Episcopal Church.

(4) Even on Defendants’ own terms, their argument fails; the Diocesan Convention’s signed unanimous resolution to “fully subscribe to and accede to the Constitution and Canons of The Episcopal Church” created a valid trust under Texas law.

On November 13, 1982, the clergy and lay delegates to the Primary Convention of the Episcopal Diocese of Fort Worth unanimously chose to “fully subscribe to and accede to the Constitutions and Canons of The Episcopal Church.”¹⁵⁶ This unanimous decision conclusively demonstrates their intent to create a trust in favor of The Episcopal Church as set forth in the Dennis Canon,¹⁵⁷ and it was signed by the authorized representatives of the Diocese and each congregation of the Diocese. Because the signed unanimous resolution plainly refers to the Constitution and Canons of The Episcopal Church, and those canons contain words demonstrating with reasonable certainty the intended property, object, and beneficiary of the trust, a valid trust was established.¹⁵⁸

¹⁵⁵ A1142 (*Id.* at p. 4).

¹⁵⁶ A518-25 (Ex. D-19). This resolution was submitted to comply with Church Constitution Article V.1 and Canon I.9.4 (now I.10.4), which required accession to the Church Constitution and Canons before any new diocese could be formed in union with the General Convention of The Episcopal Church. *Id.*; A130, 172 (Ex. D-1, Church Constitution and Canons (2009)).

¹⁵⁷ The Dennis Canon, which became effective in 1979 and remains unchanged today, states that “[a]ll 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 such Parish, Mission, or Congregation is located.” A395 (Ex. D-6, 1979 Journal of the General Convention, adopting the Dennis Canon); A454 (D-18, 1979 Constitution and Canons of The Episcopal Church).

¹⁵⁸ See *Hubbard v. Shankle*, 138 S.W.3d 474, 483-84 (Tex. App.—Fort Worth 2004, pet. denied); see also TEX. PROP. CODE § 112.001(1) (providing that a trust may be created by “a property owner’s declaration that the owner holds the property as trustee for another person”). It does not matter that the trust’s terms appear in a separate document because the signed unanimous resolution clearly expresses the Diocesan Convention’s and each

(5) The trust in favor of The Episcopal Church has never been revoked in a sufficient writing.

Defendants' argument that the trust in favor of The Episcopal Church was revoked assumes what they have failed to show in their motion—that the Episcopal Diocese of Fort Worth and its Corporation are independent of the Church and entitled to control local church property. In any event, Defendants' argument fails on its own terms because revocation of a trust created by a written instrument must be in writing,¹⁵⁹ and no such written revocation exists. The unanimous resolution that created the trust pursuant to the Dennis Canon was signed by the Bishop and each and every one of the representatives of each and every parish making up the Fort Worth Diocese,¹⁶⁰ but Defendants have provided no writing signed by these or any other representatives as evidence of revocation.¹⁶¹ In any event, as demonstrated above, any such alleged revocation would be void. The express trust in favor of the Church is still in effect.

VI. DEFENDANTS' MISCELLANEOUS OTHER ARGUMENTS FAIL

As shown, Defendants' positions fail because they ignore a century of controlling Texas hierarchical church property law. And these positions also fail under the alternate neutral principles analysis. In addition, Defendants raise a bevy of miscellaneous arguments that do not bolster their position.

congregation's intent to "fully subscribe to" that separate document, and "an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged. The language used is not important provided the document signed . . . plainly refers to another writing." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (quoting *Owen v. Hendricks*, 433 S.W.2d 164, 166 (Tex. 1968)).

¹⁵⁹ TEX. PROP. CODE § 112.051(c) ("If the trust was created by a written instrument, a revocation . . . of the trust must be in writing.").

¹⁶⁰ A518-25 (Ex. D-19).

¹⁶¹ Instead, Defendants merely refer the Court to an unsigned 1989 amendment of Diocesan Canon 12, which cannot qualify as a writing as required by § 112.051 of the Texas Property Code.

A. Defendants' bizarre argument that this Court should ignore Constitutional limits in favor of common law principles fails as a matter of law.

In an effort to persuade the Court to use Texas common law governing general voluntary associations to decide the limits on the court's power to decide the ecclesiastical questions underlying this case, the breakaway faction's summary judgment motion misapplies the prudential doctrine under which courts decline to address constitutional questions if an issue can be decided on other grounds. Courts employ this avoidance doctrine chiefly in cases like those cited by the breakaway faction, where a party brings claims under both the constitution and some other non-constitutional body of law.¹⁶² In those cases, if the plaintiff can recover under the non-constitutional body of law, then the court can avoid making a constitutional ruling because it is "unnecessary."¹⁶³ But that doctrine has no place in a case like this, where the First and Fourteenth Amendments restrict the subject matter jurisdiction of a state court to second-guess ecclesiastical determinations made by the highest authority within a hierarchical church.¹⁶⁴

The United States Supreme Court and the Texas Supreme Court have held that the First Amendment's prohibition on courts' ability to adjudicate religious questions, such as matters of church government, polity, and administration, forms a subject-matter bar to jurisdiction,¹⁶⁵

¹⁶² *Sw. Bell Tel., L.P. v. Harris County Toll Rd. Auth.*, 282 S.W.3d 59, 61 (Tex. 2009) (Southwestern Bell sued Harris County alleging that the governmental entity had violated its statutory and constitutional rights); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508 (2009) (Texas utility district challenged restrictions placed on it under the Voting Rights Act by challenging the constitutionality of the Act and by alleging that it was eligible for a "bailout" from the Act's requirements under the terms of the statute).

¹⁶³ *See, e.g., Holder*, 129 S. Ct. at 2508 ("Th[e] constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of § 5.").

¹⁶⁴ *Milivojevich*, 426 U.S. at 710 ("The First Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. This principle applies with equal force to church disputes over church polity and church administration." (citation and internal quotation marks omitted)).

¹⁶⁵ *Jones*, 443 U.S. at 602 ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." (citations omitted)); *Westbrook*, 231 S.W.3d at 394 n.3 ("Most courts agree that the general

because “[t]he First Amendment’s limitations on government extend to its judicial as well as its legislative branch.”¹⁶⁶ Thus, because the First Amendment gives churches “a fundamental right to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,”¹⁶⁷ this court does not have subject matter jurisdiction to overturn The Episcopal Church’s decision on a matter of church discipline, polity, administration, and government.¹⁶⁸ That Texas courts have more authority when deciding cases involving property disputes within voluntary associations that do not raise the constitutional issues presented by this case which involves the internal church governance of a hierarchical church is irrelevant to the court’s determination of the limits on its ability to decide certain issues in this case. The breakaway faction’s motion bizarrely argues otherwise,¹⁶⁹ suggesting that the common law can override Constitutional limits to a court’s jurisdiction.

B. Defendants’ “majority rules” argument is wrong.

Defendants repeatedly note that they are a local majority, but this fact has no legal impact on the present case. The First Amendment requires that civil courts defer to the highest authorities within hierarchical churches on questions of church polity and administration. That doctrine would be meaningless if the hierarchical church’s decision could be overridden by a majority of the congregants of a subordinate unit of the church. Accordingly, Texas courts have routinely deferred to the decisions of the highest authority of a hierarchical church when

prohibition on the adjudication of religious questions, once triggered, precludes further adjudication of the issue in question.”)

¹⁶⁶ *Westbrook*, 231 S.W.3d at 395.

¹⁶⁷ *Id.* at 397 (citation and internal quotation marks omitted).

¹⁶⁸ *Dean*, 994 S.W.2d at 394 (“Because the issue presented to the trial court was purely ecclesiastical in nature, the trial court was without jurisdiction to resolve the controversy.”).

¹⁶⁹ Defendants’ Motion at 3 (“Two principles – one constitutional and one common-law – limit which of these two disputes a Texas court can decide. As courts do not address constitutional questions if an issue can be decided on other grounds, the common-law limitation is addressed first.”).

considering disputes between two factions claiming to be the subordinate unit of the church, even when the mother church decided that the minority faction was the “true” subordinate unit.¹⁷⁰ In fact, in *Presbytery of the Covenant*, the court held that even if the local church had voted unanimously to leave its hierarchical church and take the property with them, the unanimous vote would still not override a decision by the mother church that the breakaway group could not vote to take the property of the subordinate unit of the hierarchical church.¹⁷¹ Thus, again the breakaway faction’s argument misunderstands the role of the First Amendment in this case by appealing to voluntary associations’ law that does not apply in a case involving a hierarchical church.

C. Defendants’ invented “qualified accession” argument fails for multiple reasons.

Defendants assert that the Diocese did not make an “unqualified accession” to the Church’s Constitution and Canons because, at the time the Diocese was admitted into the General Convention, Article V of the Church Constitution required only “accession” to the Church’s Constitution and Canons, not “unqualified accession.”¹⁷² Bizarrely, Defendants make this claim even though the Episcopal Diocese of Fort Worth unanimously stated in writing upon formation that, “pursuant to approval of the 67th General Convention of The Episcopal Church, [the Episcopal Diocese] hereby *fully subscribe[s] to and accede[s] to* the Constitution and Canons of The Episcopal Church.”¹⁷³ Similarly, upon formation, the Diocese adopted the

¹⁷⁰ *Schismatic*, 710 S.W.2d at 702; *Presbytery of the Covenant*, 552 S.W.2d at 871-72; *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197, 198 (Tex. App.—Amarillo 1988, no writ).

¹⁷¹ *Presbytery of the Covenant*, 552 S.W.2d at 871-72 (“[U]nanimous or not, the members of a church organization which is hierarchical as to church government cannot dissolve a local church in contravention of the governing rules or edicts of the mother church, and then re-establish themselves as an independent church or one associated with a schismatic group and take the church property with them.”).

¹⁷² Defendants’ Motion at 9.

¹⁷³ A518-25 (D-19, Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) at pp. 25-32) (emphasis added).

following straight-forward Constitutional Article 1: “The Church in this Diocese accedes to the Constitution and Canons of the Episcopal Church in the United States of America, and recognizes the authority of the General Convention of said Church.”¹⁷⁴

These Diocesan statements of accession contain absolutely no qualifying language. And Defendants’ attempt to manufacture a qualification now – nearly thirty years later – by reference to a separate local passage in the Diocese’s Constitution, is unavailing.

Defendants argue that their accession was qualified because, it believes, “[The Episcopal Church] first began requiring unqualified accessions on January 1, 1983. Yet the Diocese was admitted *the day before* – December 31, 1982. Since TEC did not require an unqualified accession in 1982, the Diocese did not make one.”¹⁷⁵ This point is incorrect as a matter of internal church doctrine, polity, and discipline: The Episcopal Church has always required full accession (which the Episcopal Diocese of Fort Worth gave), and the addition of the word “unqualified” in 1983 was ministerial and did not affect centuries of church governance.¹⁷⁶ Moreover, Defendants’ “one day early” analysis fails as a matter of church law: the Constitution of the Diocese became effective on the same date as the Church’s Amendment became effective – January 1, 1983.¹⁷⁷ Thus, on January 1, 1983, the Diocese acceded “to the Constitution and

¹⁷⁴ A533 (Ex. D-21, Diocesan Art. 1).

¹⁷⁵ Defendants’ Motion at 9.

¹⁷⁶ See A113 (Ex. C-1, Statement of Robert Bruce Mullin at ¶ 174 (noting that “the General Convention had supreme authority over every unit of the Church”); A65 (*Id.* at ¶ 58 (“[N]o ultimate rights were reserved for the states or the dioceses.”)); A77, 86 (*Id.* at ¶¶ 87, 111 (under the old Article V, “in a number of instances state conventions were denied membership because they failed adequately to accede”)); *cf. id.* A113 (*Id.* at ¶ 115 (although accession to the Constitution implied accession to the Church’s canons, the requirement was made explicit in an amendment to the Constitution in 1901)).

¹⁷⁷ See A1272 (Ex. J-1, Resolution Number 1982-A010 to Amend Constitution Article V.1); A629-30 (Ex. D-36 Church Art. XII (providing that amendments go into effect “on the first day of January following the adjournment” of the General Convention); A536 (Ex. D-21, Enabling Clause for Diocesan Constitution, providing that (“[t]his Constitution shall commence and be in full force and effect on January 1, 1983.”).

Canons of the Episcopal Church in the United States of America”¹⁷⁸ as they existed on that day, “unqualified accession” and all. The Diocese’s evidence that the Diocese was *admitted* into union with the General Convention on December 31, 1982, is inapposite. The General Convention admitted the Diocese based on the Diocese Constitution, which was to become effective on January 1, 1983, and which swore accession to the Church Constitution that was to be in effect on January 1, 1983. Moreover, Texas law of voluntary associations, which Defendants repeatedly invoke, holds that a local chapter of a voluntary association is *fully bound* by the general organization’s rules,¹⁷⁹ and the local chapter is bound by the national association’s rules *as they are amended over time*.¹⁸⁰

Of course, all of this is a dispute about internal church governance, polity, and discipline, not subject to further adjudication by civil courts. Defendants cannot second-guess (thirty years later) the ecclesiastical fact that Church doctrine has always required unqualified accession (after, indeed, Defendants “fully subscrib[ed] to and acced[ed] to the Constitution and Canons of The Episcopal Church”¹⁸¹ and “recognize[d] the authority of the General Convention of said

¹⁷⁸ A533 (Ex. D-21, Diocesan Art. 1).

¹⁷⁹ See, e.g., *Dist. Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones*, 138 Tex. 537, 160 S.W.2d 915, 923 (1942) (a voluntary association’s internal rules are “part and parcel of the contract the [members] made for themselves when they became members”); *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 74 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (“A member, by becoming such, subjects himself to his organization’s power to administer, as well as its power to make, its rules.”).

¹⁸⁰ See, e.g., *Sovereign Camp, W. O. W. v. McCrory*, 156 S.W.2d 570, 573 (Tex. Civ. App.—Beaumont 1941, writ ref’d w.o.m.) (“Being a member of the organization, and being represented in all of its deliberations, each member is bound by all the provisions of the constitution of the Society, by-laws, rules and regulations thereof, *and all amendments thereto* enacted by such representatives.”) (emphasis added); 6 AM. JUR. 2D *Associations & Clubs* § 9 (“The constitution and bylaws of a voluntary association become part of the contract entered into by a member when he or she joins such association; and by the same logic, any duly adopted additions or amendments to such constitution and bylaws during the continuance of such membership are equally binding on the member.”).

¹⁸¹ A518-25 (D-19, Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) at pp. 25-32).

Church”¹⁸²). Defendants are wrongly and unconstitutionally asking the Court to “impermissibly substitute[] its own inquiry into church polity and resolutions.”¹⁸³

But even if Defendants *could have* qualified their accession (they could not), they *did not* qualify it. Their statements of accession were plain and straightforward. They “fully” subscribed and acceded.¹⁸⁴ Defendant Iker swore to “conform to the Doctrine, Discipline, and Worship of the Episcopal Church.”¹⁸⁵ Their ex-post-facto argument is that Article 13 of the diocesan constitution somehow “qualifies” these plain statements of unqualified accession because, they argue, Article 13 is inconsistent with the *Church’s* Canon 1.7.4 (“the Dennis Canon”), which establishes the Church’s trust interest in all subordinate Church property as *Jones* recommended churches to do. Once again, weighing Defendants’ ad-hoc argument requires a close-reading, interpretation, and comparison of *two* internal church documents (a national Canon and a local Constitution): clearly, this is exactly the type of inquiry forbidden by the United States Supreme Court (“We will not delve into the various church constitutional provisions relevant to this conclusion, for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs”).¹⁸⁶ Suffice to say here, this is a core ecclesiastical question of church governance, and The Episcopal Church’s determination that a local constitutional provision is consistent or inconsistent with the Church’s overriding beneficial interest in its property held by its subordinate entities is controlling.

¹⁸² A533 (Ex. D-21, Diocesan Art. 1).

¹⁸³ *Milivojevich*, 426 U.S. at 708.

¹⁸⁴ A518-25 (D-19).

¹⁸⁵ A627-28 (Ex. D-36, Church Art. VIII); *see also* Sections VII(A)-(C) *infra*.

¹⁸⁶ *Milivojevich*, 426 U.S. at 721.

But, just for the moment, *in arguendo*, engaging in Defendants' forbidden, unconstitutional analysis, they are wrong. They suggest that this Article 13 qualifies accession because it "expressly prohibited any other encumbrances (like a trust in favor of TEC) without the consent of each parish."¹⁸⁷ But nothing in the plain language of this Article prohibits an overriding beneficial interest of the Church in its property held by subordinate entities; indeed, the Article states in pertinent part:

The title to all real estate acquired *for the use of the Church in this Diocese, including the 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 Corporation of the Episcopal Diocese of Fort Worth.¹⁸⁸

Canon 12 of the Diocese, which Defendants cite, also contains similar language: "The title to all real estate and other property owned or hereafter acquired *for the use of the Church in this Diocese*, as well as to property conveyed to Diocesan Institutions or for their use, shall be vested as provided in Article 13 of the Constitution."¹⁸⁹ These provisions echo the language and intent of the Dennis Canon that Church property be used for Church purposes, held subject to the control of the Church. To the extent Defendants' interpretations of the relevant provisions conflict, the Court must abide by the hierarchical Church's interpretation of the church documents.¹⁹⁰ Furthermore, Defendants' interpretation of the Constitution and Canons of the Diocese cannot conflict with the Constitution and Canons of the Church, including the Dennis

¹⁸⁷ Defendants' Motion at 9.

¹⁸⁸ A534 (Ex. D-21, Diocesan Art. 13 (emphasis added)). Article 13 further provided that the Diocesan Corporation was to hold title to "other property belonging to the Diocese, as such," including trust and endowment accounts.

¹⁸⁹ A538 (Ex. D-21, Diocesan Canon 12.2) (emphasis added).

¹⁹⁰ See *Milivojevich*, 426 U.S. at 708.

Canon.¹⁹¹ Moreover, Defendants' argument turns on the wrong idea that, for the national 1979 Dennis Canon to trump the local 1983 Article 13, the Church would have to garner the express consent of each parish, but this is completely backwards: by reorganizing in 1983 as a new Diocese created from a division of the existing Episcopal Diocese of Dallas – all from within the hierarchical Episcopal Church – under Texas law, as the Texas Supreme Court noted in *Westbrook*, “[a]ll who unite themselves to such a body do so **with an implied consent** to this government, and are bound to submit to it.”¹⁹²

Notably, in this case, Defendants rely on the affidavit of Charles A. Hough, III to deny the applicability of the Dennis Canon.¹⁹³ In a prior case, Defendants relied on another “Hough affidavit” to assert rights on behalf of the Diocese against another breakaway faction *under the Dennis Canon*.¹⁹⁴

Thus, Defendants could not, and did not, qualify their accession. But even if they *had*, it would have no meaningful legal effect here. Defendants could not use this “qualified” accession to argue that The Episcopal Church is not hierarchical, with all the constitutional deference and authority afforded hierarchical churches. Under the United States Supreme Court’s definitions, a hierarchical church does not require total accession, just “a general and ultimate power of control **more or less** complete.”¹⁹⁵ In contrast, a congregational church must be “**strictly** independent,” and, “so far as church government is concerned, owe[] **no fealty or obligation** to any higher

¹⁹¹ See A536 (Ex. D-21, Diocesan Art. 18 (“Canons not inconsistent with this Constitution, or the Constitution and Canons of the General Convention, may be adopted”)); A1062-63 (Ex. G-5, Iker Amicus Brief at 10-11 (“The national church is governed by the Constitution and Canons of [The Episcopal Church], as Revised by the Convention of 2000. *The dioceses have canons that cannot be inconsistent with national canons.*”) (emphasis added)).

¹⁹² *Westbrook*, 231 S.W.3d at 397 (quoting *Watson*, 80 U.S. at 728-29) (emphasis added).

¹⁹³ Defendants’ Motion at 9, 12.

¹⁹⁴ A1039 (Ex. G-3, Hough Aff.).

¹⁹⁵ *Watson*, 80 U.S. at 722-23 (emphasis added); *accord Dean*, 994 S.W.2d at 395 n.1 (citing *Watson*, 80 U.S. at 722-23).

authority.”¹⁹⁶ Thus, the Supreme Court was careful to affirm that “hierarchy” requires only more or less complete control, while the definition of a non-hierarchical, congregational church is absolute: it must owe “no fealty” and be “strictly independent.” As a result, even if Defendants could manufacture – thirty years after granting full accession – some invented “qualification,” this would not change its status as a subordinate unit of a hierarchical church, subject to all the legal doctrines attending hierarchical churches in Texas and beyond.

This issue is a red-herring, designed to attempt to escape inescapable conclusions. It fails as a matter of law for the numerous reasons above.

D. Defendants cannot plausibly suggest that individual bishops are the ultimate authority in The Episcopal Church; Defendant Iker has told another court the opposite.

The breakaway faction wrongly argues that “the ecclesiastical authority in the Episcopalian tradition is the local bishop.”¹⁹⁷ Defendants’ only support for this proposition is a dictionary definition of “episcopacy” [lower case “e”] as “the office of a bishop.” But it is indisputable that Episcopal Bishops are subordinate to the General Convention of The Episcopal Church, and Defendant Iker has told another court this obvious fact.

The Episcopal Church has a three-tiered structure composed of a national General Church led by its General Convention, 111 regional dioceses below the General Convention, and over 7,000 local congregations.¹⁹⁸ As a condition of formation, each diocese is required to accede to “the Constitution and Canons of this Church.”¹⁹⁹ Defendant Iker has told a prior court that dioceses are organized “below” the General Convention, that “a national body leads the overall

¹⁹⁶ *Id.*

¹⁹⁷ Defendants’ Motion at 6.

¹⁹⁸ A53, 54, 56 (Ex. C-1, Statement of Robert Bruce Mullin at ¶¶ 24, 29, and 35); *see also* Sections VII(A)-(C) *infra*.

¹⁹⁹ A625, 665 (Ex. D-36, Church Art. V.1 and Church Canon I.10.4); A1272 (Ex. J-1, Resolution Number 1982-A010 to Amend Constitution Article V.1); *see also* Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at Sections VII(A)-(C).

church,” and that dioceses cannot have canons inconsistent with national canons.²⁰⁰ Each diocese’s bishop pledges, as a condition of ordination, to “conform to the Doctrine, Discipline, and Worship of the Episcopal Church.”²⁰¹

The General Church’s highest authority is the General Convention, which elects the Church’s Chief Pastor and Primate, the Presiding Bishop.²⁰² The Episcopal Church also has an Executive Council comprised of elected bishops, priests, and lay persons that, under the leadership of the Presiding Bishop, manages the fiscal and programmatic affairs of the Church between meetings of the General Convention.²⁰³

In order to become the Bishop of an Episcopal Diocese, that person must be approved by the leadership of a majority of the other dioceses of the General Church²⁰⁴ and must be ordained by at least three other bishops designated by the Presiding Bishop of the General Church.²⁰⁵ Similarly, before ordination, each Bishop must affirm the General Church’s written Declaration of Conformity, which states: “I do solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church.”²⁰⁶

²⁰⁰ A1062-63 (Ex. G-5, Iker Amicus Brief at 10-11) (“ECUSA has a national body that leads the overall church through its General Conventions, with the first national convention in 1789 and the most recent in 2000. Among other things, the General Convention is the body which alters and revises the Canons of the Church. Below that are various dioceses which are generally geographical in nature. The national church is governed by the Constitution and Canons of ECUSA, as Revised by the Convention of 2000. The dioceses have canons that cannot be inconsistent with national canons.”) (footnotes omitted).

²⁰¹ A627-28 (Ex. D-36, Church Art. VIII); ; *see also* Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at Sections VII(A)-(C).

²⁰² A621-22 (Ex. D-36, Church Art. I.3).

²⁰³ A650-55 (Ex. D-36, Church Canon I.4).

²⁰⁴ A623 (Ex. D-36, Church Art. II.2).

²⁰⁵ *Id.*; A722 (Ex. D-36, Church Canon III.11.6).

²⁰⁶ A627-28, 722 (Ex. D-36, Church Art. VIII and Canon III.11.8).

The General Church can discipline or remove a bishop, including for “abandonment of the communion” of the General Church; violation of the Church’s Constitutions or canons; or violation of the vows required of a bishop-elect in the Ordination Service for a bishop.²⁰⁷

Defendants’ position is further contradicted by Defendant Iker’s own statements to other courts indicating that an individual bishop is not the ultimate authority within The Episcopal Church:

- An “Episcopal bishop, unlike perhaps a bishop of the Roman Catholic Church, *is governed by the constitution and canons of the Church.*”²⁰⁸
- “A bishop *must adhere to the constitution and canons of the Church or be subject to discipline.*”²⁰⁹
- “[I]n a *constitutionally ordered church such as ECUSA* that freely permits movement of its clergy between dioceses, the decision of a bishop must be governed by a more objective standard.”²¹⁰
- “*To allow each diocesan bishop absolute freedom to determine who is and is not duly qualified would, in part, render ECUSA a loose association of independent regional church bodies. There must be some national standard by which ‘duly qualified’ can be determined.*”²¹¹
- “[The breakaway clergy and members of the vestry calling themselves the Church of the Holy Apostles] are not members of the true Church of the Holy Apostles because they have joined the Antiochian Orthodox Church and thereby *have abandoned communion with The Episcopal Church...*”²¹²

E. The breakaway faction’s standing arguments misstate the Court of Appeals’ holding and only prevail if it can sustain its identity claims, which it cannot.

Ignoring the Court of Appeals’ express language in which it declined to reach the merits of the identity issue and reserved that issue, in the first instance for a dispositive motion in this

²⁰⁷ A738-39, 773-74 (Ex. D-36, Church Canons IV.1 and IV.9).

²⁰⁸ A1054 (Ex. G-5, Iker Amicus Brief at 2 (emphasis added)).

²⁰⁹ A1056 (Ex. G-5, Iker Amicus Brief at 4 (emphasis added)).

²¹⁰ A1065 (Ex. G-5, Iker Amicus Brief at 13 (emphasis added)).

²¹¹ A1063 (Ex. G-5, Iker Amicus Brief at 11 (emphasis added)).

²¹² A1015 (Ex. G-2, Iker Aff. at 4 (emphasis added)).

Court, the breakaway faction argues that the Local Episcopal Parties lack standing to bring the tort claims listed in their amended petition because those claims belong to the Diocese and its Corporation. Moreover, the Local Episcopal Parties have not moved for summary judgment on any of those claims; at this stage of the litigation, they have only sought what they have sought throughout the course of this litigation: a ruling on the merits that they are the rightful leaders of the Diocese and its Corporation.²¹³ After such a ruling, they plan to re-plead their tort claims in the names and in the capacities of the Diocese and its Corporation. In pursuing such a course, the Local Episcopal Parties follow the great weight of authority dealing with identity disputes between two factions that claim to be a subordinate unit of a hierarchical church. In cases like this, courts first decide the identity question – which party is authorized to act on behalf of the local church – and then resolve the pendent claims stemming from that determination.²¹⁴

²¹³ Defendants' throwaway argument that the Local Episcopal Parties have not alleged derivative or representative claims as well as individual claims is simply contradicted by the Local Episcopal Parties' pleadings, and is in any event a red-herring until this Court resolves the Diocesan identity and leadership issues raised in these cross-motions. See Individual Plaintiff's Sixth Amended Original Petition at ¶¶ 3-5; Fourth Amended Answer and Counterclaims to Southern Cone Corporation's Plea in Intervention and Third-Party Petition at ¶¶ 17-19; Fourth Amended Answer and Counterclaims to Southern Cone Diocese's Third-Party Petition at ¶¶ 17-19; and Fourth Amended Answer to Southern Cone Congregation's First Amended Original Plea in Intervention and Counterclaim Against Southern Cone Congregations at ¶¶ 17-20 (all filed December 21, 2010). Without a ruling on Diocesan identity and leadership, it would be premature to dismiss any of the Local Episcopal Parties' claims for alleged lack of standing. Presumably, this is why Defendants never set their Motion to Enforce Appellate Mandate and Strike Amended Pleadings for hearing.

²¹⁴ *Presbytery of the Covenant*, 552 S.W.2d at 871 ("When a division occurs in 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 is entitled to the property is answered by determining which of the factions is the representative and 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.") (citations omitted).

F. By the same token, because Defendants cannot prevail on the identity claims, their summary judgment motion purportedly on behalf of “the Episcopal Diocese of Fort Worth” and “the Corporation of the Episcopal Diocese of Fort Worth” fails because they lack standing and capacity to assert or defend claims on behalf of those entities.

Instead, because the breakaway faction cannot prevail on its identity claims – since the Local Episcopal Parties are the rightful leaders of the Episcopal Diocese of Fort Worth and the Corporation of the Episcopal Diocese of Fort Worth – it is in actuality the breakaway faction that does not have standing to bring claims that allege the breach of interests that belong to the Diocese and its Corporation. Thus, once this Court reaches and resolves the identity question, Defendants’ motion for partial summary judgment should be denied to the extent it is purportedly, and improperly, brought by the “Episcopal Diocese of Fort Worth” or the “Corporation of the Episcopal Diocese of Fort Worth.”

“A plaintiff has standing when it is personally aggrieved.”²¹⁵ However, in order to confer standing, the legal right that has allegedly been breached must belong to the plaintiff; the plaintiff must base its standing on its own rights, “**not somebody else’s.**”²¹⁶ In other words, “[w]ithout a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate.”²¹⁷ This requirement stems from “the fundamental rule of standing . . . that the person whose primary legal right has been breached is the only person who may seek redress for an injury.”²¹⁸ Accordingly, the breakaway faction does not have standing to assert the claims

²¹⁵ *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (quoting *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)).

²¹⁶ *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995) (emphasis added).

²¹⁷ *Gleason v. Taub*, 180 S.W.3d 711, 713 (Tex. App.—Fort Worth 2005, pet. denied) (citing *Brunson v. Woolsey*, 63 S.W.3d 583, 587 (Tex.App.—Fort Worth 2001, no pet.)).

²¹⁸ *Denman v. Citgo Pipeline Co.*, 123 S.W.3d 728, 731-32 (Tex. App.—Texarkana 2003, no pet.) (citing *Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976)) (“It is a fundamental rule of law that only the person whose primary legal right has been breached may seek redress for an injury. . . . Without breach of a legal right belonging to the plaintiff no cause of action can accrue to his benefit. A suit to set aside a deed obtained by fraud can only be maintained by the defrauded party. A party who was not defrauded by the conveyance has not suffered an invasion

contained in its Third-Party Petitions because those claims allege an injury to rights that do not belong to the breakaway faction, even though the faction brought its Third-Party Petitions in the name of the parties that would possess standing to assert those rights.

Similarly, because the Local Episcopal Parties are the rightful leaders of the Diocese and its Corporation, the breakaway faction has not brought its claims in a capacity under which it can (1) assert its purported claims or (2) be entitled to its requested relief. “[T]he issue of capacity ‘is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate.’”²¹⁹ “[A] party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.”²²⁰ However, because the breakaway faction consists of former leaders of the Local Episcopal Entities, who therefore no longer have the ability to litigate claims on behalf of those Entities, the individuals who make up the breakaway faction lack the “personal qualifications,”²²¹ the “legal authority,”²²² and the “personal right”²²³ to litigate claims in the capacity of the Diocese and its Corporation. Therefore, because the breakaway faction has only brought claims in a capacity in which it lacks the authority to proceed, it has failed to bring claims in any capacity—such as, in their individual names, or as some other unincorporated association—in which it has the “legal authority to act.”

of a legal right and therefore does not have standing to bring suit based on that fraud. The plaintiffs here are not the defrauded party but are creditors of the alleged defrauded party. Any cause of action which may have been created can only be asserted by Macoa, Inc. and does not accrue to the benefit of the plaintiffs. The plaintiffs lack standing to bring the present action, not because they incompletely pleaded the elements of a fraudulent conveyance but because they pleaded fraud, and under those pleadings they were not the defrauded party.” (citations omitted)).

²¹⁹ *Lovato*, 171 S.W.3d at 848 (citing 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1559, at 441 (2d ed. 1990)).

²²⁰ *Nootsie*, 925 S.W.2d at 661; *see also Lovato*, 171 S.W.3d at 849 (“Capacity has been defined as a party’s personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest.”) (citing WRIGHT, MILLER & KANE, § 1559, at 441).

²²¹ *Lovato*, 171 S.W.3d at 848 (citing WRIGHT, MILLER & KANE, § 1559, at 441).

²²² *Nootsie*, 925 S.W.2d at 661.

²²³ *Lovato*, 171 S.W.3d at 849 (quoting WRIGHT, MILLER & KANE, § 1559, at 441).

G. Similarly, the so-called Defendant Congregations also lack standing and capacity once the identity question is resolved. The Local Episcopal Congregations and their leaders, the clients of Frank Hill, are the continuing historic congregations, parishes, and missions of the Diocese, and their leaders, with standing and capacity to bring all the claims they have alleged.

Just as the Defendants wrongly appearing as the Diocese and Corporation lack standing and capacity to pursue their claims once this Court has resolved the identity issue, so too do the so-called “Defendant Congregations” purporting to bring claims on behalf of the Parishes and Missions (collectively, Congregations) of the Episcopal Diocese of Fort Worth. Defendants have moved for partial summary judgment in the name of “Defendant Congregations,” which they define as “All parties that filed the ‘First Amended Original Plea in Intervention’ as ‘Intervening Congregations’ on November 12, 2010 signed by R. David Weaver.”²²⁴ These Defendant Congregations purport to be 47 Parishes and Missions of the Episcopal Diocese of Fort Worth²²⁵ that are “in union with the Convention of the Episcopal Diocese of Fort Worth.”²²⁶

²²⁴ Defendants’ Motion at “Parties” (unmarked second page).

²²⁵ The so-called “Intervening Congregations,” affiliated with Defendants’ breakaway faction (hereafter, the breakaway congregants), list themselves as the following: St. Anthony of Padua Church (Alvarado), St. Alban’s Church (Arlington), St. Mark’s Church (Arlington), Church of St. Peter & St. Paul (Arlington), Church of St. Philip the Apostle (Arlington), St. Vincent’s Cathedral (Bedford), St. Patrick’s Church (Bowie), St. Andrew’s Church (Breckenridge), Good Shepherd Church (Brownwood), St. John’s Church (Brownwood), Church of St. John the Divine (Burkburnett), Holy Comforter Church (Cleburne), St. Matthew’s Church (Comanche), Trinity Church (Dublin), Holy Trinity Church (Eastland), Christ The King Church (Ft. Worth), Holy Apostles Church (Ft. Worth), Iglesia San Juan Apostol (Ft. Worth), Iglesia San Miguel (Ft. Worth), St. Andrew’s Church (Ft. Worth), St. Anne’s Church (Ft. Worth), Church of St. Barnabas The Apostle (Ft. Worth), St. John’s Church (Ft. Worth), St. Michael’s Church (Richland Hills), Church of St. Simon of Cyrene (Ft. Worth), St. Timothy’s Church (Ft. Worth), St. Paul’s Church (Gainesville), Good Shepherd Church (Granbury), Church of the Holy Spirit (Graham), St. Andrew’s Church (Grand Prairie), St. Joseph’s Church (Grand Prairie), St. Laurence’s Church (Southlake), St. Mary’s Church (Hamilton), Trinity Church (Henrietta), St. Mary’s Church (Hillsboro), St. Alban’s Church (Hubbard), St. Stephen’s Church (Hurst), Church of St. Thomas the Apostle (Jacksboro), Church of Our Lady of The Lake (Laguna Park), St. Gregory’s Church (Mansfield), St. Luke’s Church (Mineral Wells), Church of St. Peter by the Lake (Graford), All Saint’s Church (Weatherford), All Saint’s Church (Wichita Falls), Church of the Good Shepherd (Wichita Falls), Church of St. Francis of Assisi (Willow Park), and Church of the Ascension & St. Mark (Bridgeport).

²²⁶ First Amended Original Plea in Intervention (filed 11/12/10), at 2. In the pleadings filed by Weaver, these parties are sometimes identified by the exact names of the historic congregations that have been a part of the Episcopal Diocese of Fort Worth since 1983 and, for some congregations, a part of The Episcopal Church for much longer; other times, the word “Episcopal” is dropped from their names (for example, one group in the breakaway congregants identified itself as “St. Alban’s Episcopal Church (Arlington)” in their Response to Request for Disclosures, but they identified themselves only as “St. Alban’s Church (Arlington)” in their First Amended Original Plea in Intervention). Despite the fluctuating names, it is clear that the breakaway congregants, though they

The parties appearing as “Defendant Congregations” are not the historic Parishes and Missions of the Episcopal Diocese of Fort Worth, and they are not Congregations “in union with the Convention of the Episcopal Diocese of Fort Worth.” As with the Episcopal Diocese and its Corporation, each Congregation within the Episcopal Diocese has two factions – one that has remained in The Episcopal Church and its Episcopal Diocese of Fort Worth (appearing in this case as the “Local Episcopal Congregations”) and another that has left the Church and is in communion with breakaway Bishop Iker and a South American church (the breakaway congregants). In the Church hierarchy, Parishes and Missions are subordinate to their Diocese, which in turn is subordinate to The Episcopal Church.²²⁷ For each Congregation, the authorized polity and leadership is that recognized by the highest authority within the hierarchical church to determine this ecclesiastical matter.²²⁸

Here, Bishop Ohl, as the Provisional Bishop of the Episcopal Diocese of Fort Worth, recognized as such by The Episcopal Church, has averred that the persons affiliated with the so-called “Defendant Congregations” do not represent “any Parishes or Missions in union with the

claim no affiliation with The Episcopal Church, imply that they have authority to act as the historic Episcopal congregations that have existed as parts of The Episcopal Church, some since the mid-19th Century, and under its Episcopal Diocese of Fort Worth since as early as 1983, both by claiming to be in union with the Episcopal Diocese, and by claiming the historic names of the Episcopal congregations. In another pleading, Weaver also purports to represent All Saints’ Episcopal Church (Fort Worth), which is a Parish that has been affiliated with The Episcopal Church since its inception, although this Defendant entity is not listed as one of the Defendant-parties moving for summary judgment. Defendant All Saints’ Episcopal Church’s Original Answer to Third Amended Counterclaim by Third-Party Defendants (filed 12/7/10), at 4; Defendant All Saints’ Episcopal Church’s Original Answer to Individual Plaintiffs’ Fifth Amended Original Petition (filed 12/7/10), at 4. To the extent Defendants might claim this party is somehow moving for summary judgment, it too should lose for lack of standing and capacity. See Episcopal Parties Rule 12 Motion Challenging Authority of R. David. Weaver, incorporated as if fully set forth herein.

²²⁷ See, e.g., A669 (Ex. D-36, Church Canon I.13.1) (“Every Congregation of this Church shall belong to the Church in the Diocese in which its place of worship is situated.”); A539 (Ex. D-21, Diocesan Canon 22) (“For the formation of a new Parish, the written consent of the Ecclesiastical Authority of the Diocese must first be obtained” and requires that members of the new Parish sign an “Article of Conformity” stating that they “promise to abide by and conform to the Constitution and Canons of the General Convention and of the Diocese of Fort Worth.”).

²²⁸ See Sections IV and V.A *supra*.

Convention of the Episcopal Diocese of Fort Worth.”²²⁹ As a matter of church discipline, Bishop Ohl has inhibited or deposed these persons, removing them from any authority within any Congregation in the Episcopal Diocese of Fort Worth, “on the grounds of their undisputed abandonment of the communion of The Episcopal Church or The Episcopal Church.”²³⁰ The rightful leaders of the Missions and Parishes within the Episcopal Diocese of Fort Worth are listed in the First Amended Original Plea in Intervention of Episcopal Congregations (filed November 15, 2010), all aligned with The Episcopal Church and not with Defendants.²³¹ As Bishop of the Episcopal Diocese of Fort Worth, the Rt. Rev. Ohl is the authorized representative of all Missions within the Diocese, which are listed in Paragraph 3 of Individual Plaintiffs’ Sixth Amended Original Petition (filed December 21, 2010).²³² These core ecclesiastical determinations of Church discipline, governance, and polity are controlling as a matter of law.

Because the parties appearing as “Defendant Congregations” cannot prevail on their identity claims – since they are not the rightful leadership of those congregations under bedrock First Amendment law – they lack standing and capacity to bring their claims. Thus, once this Court reaches and resolves the identity question, Defendants’ motion for partial summary judgment should be denied to the extent it is purportedly, and improperly, brought by the “Defendant Congregations” (defined as 47 Parishes and Missions of the Episcopal Diocese of Fort Worth “in union with the Convention of the Episcopal Diocese of Fort Worth”) or against the Local Episcopal Congregations based on the standing and capacity law set forth in section F, *supra*.

²²⁹ A1286 (Ex. L., Jan. 5, 2011 Ohl Aff. at ¶5)

²³⁰ A1287-88 (*Id.* at ¶¶ 7-8).

²³¹ A1285-86 (*Id.* at ¶¶ 4-6).

²³² A1285 (*Id.* at ¶3).

H. Defendants misread and cannot rely on the Court of Appeals' *Salazar* opinion for any kind of determination on the merits of the identity, leadership, and/or property issues.

Defendants ignore critical language in *Salazar* and misread *Salazar* in an attempt to leverage an interlocutory appellate ruling into the law of the case and a ruling on the merits of the identity, leadership, and property issues. The Court of Appeals expressly declined to rule on the merits: “The trial court did not determine on the merits which Bishop and which Trustees are the authorized persons within the Corporation and the Fort Worth Diocese, *nor do we*. *The question of ‘identity’ remains to be determined in the course of the litigation.*”²³³ It reserved the merits for a decision by this Court on a dispositive motion. The Court of Appeals did not decide that the Defendant Corporation was the historic, continuing Corporation or that the Defendant Diocese was the historic, continuing Diocese, or that any of the individual Defendants was an authorized, legitimate leader of the Diocese, the Corporation, or any other Diocesan institution. Those questions are, in the first instance, before this Court. Defendants’ reliance on “the law of the case” here is misplaced when the Court of Appeals expressly left open those questions.²³⁴

VII. THE LOCAL EPISCOPAL PARTIES’ ALSO PREVAIL ON THEIR AFFIRMATIVE DEFENSES

As set forth in Sections VI.C and D in this Response and in Sections VI.A.4, VI.B.4, VI.C.2, and VII.D in the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment, Defendants are quasi-estopped and/or judicially estopped from taking positions

²³³ *Salazar*, 2010 WL 2555622 at *6.

²³⁴ *Id.* at *5-*6. The “law of the case” doctrine applies only to “questions of law” previously decided on appeal. *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003) (quoting *Hudson v. Wakefield*, 711 S.W.2d 638, 630 (Tex. 1986)). Here, because the Court of Appeals expressly declined to address the true identity of the Bishop and Trustees of the Diocese and Corporation, this question has not been decided, and the “law of the case” doctrine does not apply. Instead of addressing the identity questions, the Court of Appeals merely upheld and applied this Court’s factual finding on a more limited record that the attorneys had not discharged their Rule 12 burden to show their authority. Even if the Court of Appeals had addressed the identity questions, “[a] decision rendered on an issue before the appellate court does not absolutely bar re-consideration of the same issue on a second appeal.” Instead, “[a]pplication of the doctrine lies within the discretion of the court, depending on the particular circumstances surrounding that case.” *Id.*

contrary to their or their purported leaders' admissions in prior litigation.²³⁵ Jack Leo Iker, Charles Hough, III, and/or Billie Boyd have taken the positions in prior litigation that The Episcopal Church is a hierarchical church in which dioceses are subordinate to the General Convention;²³⁶ that church officials and other individuals who leave The Episcopal Church are no longer qualified to serve in church offices and have no authority over Church property;²³⁷ that parish property is impressed with an express trust in favor of the Diocese and The Episcopal Church;²³⁸ that the unqualified accession to the Constitution and Canons of The Episcopal Church is binding on parishes and/or missions of the Diocese;²³⁹ and that Episcopal bishops are governed by the Constitution and Canons of the Church and must be subject to Church discipline.²⁴⁰ In addition, these statements are judicial admissions by Defendants and their purported leaders that conclusively prove, as a matter of law, that Defendants have no authority over or right to use or possess property of The Episcopal Church, the Episcopal Diocese of Fort Worth, the Corporation of the Episcopal Diocese of Fort Worth, the Fund for the Endowment of the Episcopate, or any parishes, missions, or congregations of the Diocese.²⁴¹

²³⁵ See *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008), *cert. denied*, 129 S. Ct. 1003 (2009) (stating that the “doctrine of judicial estoppel precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding”); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000) (“Quasi-estoppel precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position previously taken.”).

²³⁶ A1062-63 (Ex. G-5, Iker Amicus Brief at 10-11).

²³⁷ A1015 (Ex. G-2, Iker Aff. at 4).

²³⁸ A1039 (Ex. G-3, Hough Aff. at 2).

²³⁹ A1036-37 (Ex. G-3, Boyd Aff. at 1-2).

²⁴⁰ A1054, 1056 (Ex. G-5, Iker Amicus Brief at 2, 4).

²⁴¹ See *Mendoza v. Fid. & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980) (“A judicial admission is conclusive upon the party making it, and it relieves the opposing party’s burden of proving the admitted fact, and bars the admitting party from disputing it.”); *Brown v. Lanier Worldwide, Inc.*, 124 S.W.3d 883, 900 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (stating requirements for judicial admissions).

The individual defendants also are not entitled to any relief because they have unclean hands, having violated their promise to “conform to the Doctrine, Discipline, and Worship of the Episcopal Church”²⁴² and their duty to “well and faithfully perform the duties of [their offices] in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised.”²⁴³

VIII. INCORPORATION OF ALL EPISCOPAL PARTIES’ MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND THE EPISCOPAL CHURCH’S RESPONSE TO DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT

In support of these arguments, and to avoid repetition, the Local Episcopal Parties incorporate by reference as if fully set forth herein the grounds, arguments, and authorities of their Amended Motion for Partial Summary Judgment, filed December 21, 2010, of The Episcopal Church’s Motion for Summary Judgment, filed October 18, 2010, and of The Episcopal Church’s Response to Defendants’ Motion for Partial Summary Judgment, filed January 7, 2011.

IX. SUMMARY JUDGMENT EVIDENCE

The following summary judgment evidence is incorporated herein as if fully set forth in this Response: (1) Appendix to All Episcopal Parties’ Motions for Summary Judgment and Partial Summary Judgment, filed jointly by The Episcopal Church and the Local Episcopal Parties on October 18, 2010, containing Appendix pages A1-1264; (2) Plaintiff The Episcopal Church’s Supplemental Evidence in Support of Its Motion for Summary Judgment, filed October 22, 2010 and adopted and incorporated by the Local Episcopal Parties on October 28, 2010, containing Appendix pages A1265-69; (3) Second Supplemental Evidence in Support of All

²⁴² A627-28 (Ex. D-36, Church Art. VIII).

²⁴³ A675-76 (Ex. D-36, Church Canon I.17.8); *see In re Francis*, 186 S.W.3d 534, 551 (Tex. 2006) (“The clean hands doctrine requires that one who seeks equity, does equity. Equitable relief is not warranted when the plaintiff has engaged in unlawful or inequitable conduct with regard to the issue in dispute.”).

Episcopal Parties' Motions for Summary Judgment and Partial Summary Judgment, filed December 21, 2010, containing Appendix pages A1270-1284; and (4) Supplemental Evidence in Support of All Episcopal Parties' Responses to Defendants' Motion for Partial Summary Judgment filed with this Response and containing Appendix pages A1285-1377 as listed below. In this Response, citations to this evidence will follow the format A[start page]-[end page] (Ex. [letter]-[tab], [description]).

Pursuant to Rule 166a(d) of the Texas Rules of Civil Procedure, the Local Episcopal Parties give notice to all parties that they intend to rely on Intervening Congregations' Supplemental Response to Request for Disclosure, as served on all counsel of record on January 4, 2011, as evidence in support of this Response to Defendants' Motion for Partial Summary Judgment.

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| EXHIBIT A | Affidavit of The Rt. Rev. C. Wallis Ohl (A1-10) |
| TAB 1 | Report of the Resolutions Committee, 27 th Annual Convention, November 13-14, 2009 (A11-22) |
| TAB 2 | Letters of Congratulations and Commendation (A23-25) |
| TAB 3 | Notice of Deposition of Priests and Deacons (A26-27) |
| EXHIBIT B | Affidavit of The Rt. Rev. Edwin F. Gulick (A28-34) |
| TAB 1 | Amended and Restated Articles of Incorporation of Corporation of The Episcopal Diocese of Fort Worth (April 14, 2009) (A35-39) |
| TAB 2 | March 3, 2009 letter to the Hon. William T. McGee, Jr. from Kathleen Wells, Chancellor of The Episcopal Diocese of Fort Worth (A40-41) |
| EXHIBIT C | Third Affidavit of Robert Bruce Mullin (A42-43) |
| TAB 1 | Statement of Robert Bruce Mullin (A44-113) |
| EXHIBIT D | Second Affidavit of Mark Duffy (A114-119) |
| TAB 1 | Constitution & Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church (Church Publishing Inc., 2009) (A120-293) |
| TAB 2 | Revised Title IV in effect until July 1, 2011 (A294-358) |

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| TAB 3 | Excerpts from <u>The Episcopal Church Annual</u> (Morehouse Church Resources, 2010) (A359-366) |
| TAB 4 | 1785, 1786, and 1789 Journals of the General Convention, collected in <u>Journals of the General Conventions of the Protestant Episcopal Church in the United States of America, from the Year 1784, to the Year 1814, Inclusive</u> (Philadelphia: John Bioren, 1817) (A367-386) |
| TAB 5 | Excerpts from <i>The Book of Common Prayer</i> (New York: The Church Hymnal Corporation, September 1979) (A387-392) |
| TAB 6 | Excerpts from the 1979 Journal of the General Convention (A393-400) |
| TAB 7 | Excerpts from the 1868 Journal of the General Convention (A401-403) |
| TAB 8 | Excerpts from the 1940 Journal of the General Convention (A404-407) |
| TAB 9 | Excerpts from the 1904 Journal of the General Convention (A408-414) |
| TAB 10 | Deposition of the Right Rev'd Robert W. Duncan dated September 19, 2008 (A415) |
| TAB 11 | Resolution adopted by the Executive Council at its meeting on June 11-14, 2007 (A416) |
| TAB 12 | Excerpts from the 1838 Journal of the General Convention (A417-418) |
| TAB 13 | Excerpts from the 1895 Journal of the General Convention (A419-421) |
| TAB 14 | Excerpts from the 1895 Constitution of the Diocese of Dallas (A422-424) |
| TAB 15 | Excerpts from the 1896 Canons of the Diocese of Dallas (A425-429) |
| TAB 16 | Excerpts from the Minutes of the June 18, 1982, Special Convention of the Diocese of Dallas (A430-432) |
| TAB 17 | Excerpts from the 1982 Journal of the General Convention (A433-435) |
| TAB 18 | Constitution & Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church (Seabury Prof'l Servs., 1979) (A436-503) |
| TAB 19 | The Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) (A504-525) |
| TAB 20 | Journal of the Eighty-Seventh Annual Meeting of the Diocese of Dallas (1982) (A526-531) |
| TAB 21 | Excerpts from the 1982 Constitution and Canons of the Episcopal Diocese of Fort Worth (A532-539) |
| TAB 22 | Declaration of Conformity executed by the Rt. Rev. A. Donald Davies (A540) |
| TAB 23 | Declaration of Conformity executed by the Rt. Rev. Clarence C. Pope (A541) |
| TAB 24 | Declaration of Conformity executed by the Rt. Rev. Jack Leo Iker (A542) |

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| TAB 25 | Excerpts from The Proceedings of the Seventh Annual Convention of the Episcopal Diocese of Fort Worth (Oct. 6-7, 1989) (A543-546) |
| TAB 26 | Excerpts from the Journal of the Special Diocesan Convention (Sep. 27, 2003) (A547-549) |
| TAB 27 | Excerpts from the 1985, 1988, 1991, 1994, 1997, 2000, 2003, and 2006 Journals of the General Convention (A550-573) |
| TAB 28 | Excerpts from the Journal of the Twelfth Annual Meeting of the Diocese of Fort Worth (Oct. 7-8, 1994) (A574-577) |
| TAB 29 | Excerpts from the Journal of the Episcopal Diocese of Fort Worth 2006 (A578-597) |
| TAB 30 | Excerpts from the Journal of the Tenth Annual Meeting of the Diocese of Fort Worth (Oct. 2-3, 1992) (A598-601) |
| TAB 31 | Excerpts from The Order of Service for the Ordination and Consecration of the Reverend Jack Leo Iker to be a Bishop in the Church of God and Bishop Coadjutor of the Diocese of Forth Worth (A602-605) |
| TAB 32 | Excerpts from the Journal of the Thirteenth Annual Meeting of the Diocese of Fort Worth (Nov. 3-4, 1995) (A606-607) |
| TAB 33 | Renunciation of Ordained Ministry and Declaration of Removal and Release of the Rt. Rev. Jack Leo Iker dated December 5, 2008 (A608) |
| TAB 34 | Forms signed by Bishop Edwin F. Gulick (Oct. 15, 2009) and the members of the Standing Committee of the Diocese of Fort Worth (Nov. 12, 2009) consenting to the ordination and consecration of Scott A Benhase as Bishop of the Diocese of Georgia (A609-610) |
| TAB 35 | Excerpts from <u>The Episcopal Church Annual</u> (Morehouse Church Resources, 2009) (A611-614) |
| TAB 36 | Constitution & Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church (Church Publishing Inc., 2006) (A615-802) |
| TAB 37 | Excerpts from <u>The Episcopal Church Annual</u> (Morehouse-Barlow Co., 1984) (A803-804) |
| TAB 38 | Excerpts from Proceedings of a Convention of the Clergy and Laity of the Protestant Episcopal Church in the State of Texas, 1849 (A805-808) |
| TAB 39 | Excerpts from the 1850 Journal of the General Convention (A809-821) |
| TAB 40 | Excerpts from the Journal of the Twenty-Fifth Annual Council of the Protestant Episcopal Church in the Diocese of Texas, May 28-30, 1874 (A822-824) |
| TAB 41 | Excerpts from the 1874 Journal of the General Convention (A825-859) |

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| TAB 42 | Excerpts from the Journal of the Fourth Annual Convocation of the Protestant Episcopal Church in the Missionary District of Northern Texas, May 30 through June 1, 1878 (A860-863) |
| EXHIBIT E | Affidavit of Gregory S. Straub (A864-865) |
| TAB 1 | Excerpts from the 2009 Journal of the General Convention (A866-876) |
| TAB 2 | 2009 Annual Report of the Episcopal Diocese of Fort Worth (A877-880) |
| EXHIBIT F | Affidavit of Kathleen Wells (A881-888) |
| TAB 1 | September 8, 2008 Third Report from the Bishop and Standing Committee concerning The Anglican Province of the Southern Cone (A889) |
| TAB 2 | "10 Reasons Why Now Is the Time to Realign", September 2008 (A890-892) |
| TAB 3 | Report of the Committee on Constitution and Canons to the 26 th Annual Convention of the Episcopal Diocese of Fort Worth (A893-894) |
| TAB 4 | Proposed Resolution for Admission to the Anglican Province of the Southern Cone (A895) |
| TAB 5 | "As We Realign" (A896-897) |
| TAB 6 | Responses to Attempted Inhibition of the Bishop (A898-899) |
| TAB 7 | Notice of Special Meeting of the Convention of the Episcopal Diocese of Fort Worth, Feb. 7, 2009 (A900) |
| TAB 8 | Certificates of Registration of Diocesan Name and Seal (A901-904) |
| TAB 9 | Documents Showing Use of Diocesan Name and Seal (A905-916) |
| TAB 10 | Excerpts from the Proceedings of the Twenty-Fifth Annual Convention of the Episcopal Diocese of Fort Worth, November 2007 (A917-932) |
| TAB 11 | Excerpts from the Journal of the Twenty-Seventh Annual Convention of the Episcopal Diocese of Fort Worth, November 13-14, 2009 & Special Meeting of Convention, February 7, 2009 (A933-973) |
| TAB 12 | Applicable Canon regarding Corporation of the Episcopal Diocese of Fort Worth (A974-975) |
| EXHIBIT G | Affidavit of Jonathan Nelson (A976-981) |
| TAB 1 | Plaintiffs' Second Amended Original Petition in <i>Corp. of the Episcopal Diocese of Fort Worth v. McCauley</i> (A982-1001) |
| TAB 2 | Plaintiffs' Motion for Summary Judgment, including Affidavits of Bishop Jack Iker and Reverend Canon Billie Boyd, filed in <i>Corp. of the Episcopal Diocese of Fort Worth v. McCauley</i> (A1002-1033) |
| TAB 3 | Plaintiffs' Second Supplemental Evidence in Support of Their Motion for Summary Judgment, including Affidavits of Reverend Canon Billie Boyd and The Reverend Canon Charles A. Hough, III, filed in <i>Corp. of the Episcopal Diocese of Fort Worth v. McCauley</i> (A1034-1041) |

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| TAB 4 | Affidavit of The Rt. Rev. William C. Wantland, filed in <i>Corp. of the Episcopal Diocese of Fort Worth v. McCauley</i> (A1042-1046) |
| TAB 5 | Brief of <i>Amici Curiae</i> Rt. Rev. Jack Leo Iker, Bishop of the Episcopal Diocese of Fort Worth, and Rt. Rev. Robert Duncan, Bishop of the Episcopal Diocese of Pittsburgh, filed in <i>Dixon v. Edwards</i> (A1047-1073) |
| TAB 6 | Petition in <i>The Episcopal Diocese of Dallas v. Mattox</i> , No. 84-8573 (95 th District Court Dallas) (A1074-1138) |
| TAB 7 | Judgment in <i>The Episcopal Diocese of Dallas v. Mattox</i> (A1139-1206) |
| TAB 8 | Articles of Incorporation of Corporation of the Episcopal Diocese of Fort Worth (Filed February 28, 1983) (A1209-1212) |
| TAB 9 | Articles of Amendment to the Articles of Incorporation of Corporation of the Episcopal Diocese of Fort Worth (Filed November 4, 1987) (A1213-1214) |
| TAB 10 | Articles of Amendment to the Articles of Incorporation of Corporation of the Episcopal Diocese of Fort Worth (Filed November 27, 1991) (A1215-1221) |
| TAB 11 | Amended and Restated Articles of Incorporation of Corporation of the Episcopal Diocese of Fort Worth (Filed September 5, 2006) (A1222-1225) |
| TAB 12 | Amended and Restated Articles of Incorporation of Corporation of the Episcopal Diocese of Fort Worth (Filed April 14, 2009) (A1226-1230) |
| TAB 13 | Certificate of Correction to Amended and Restated Articles of Incorporation of Corporation of the Episcopal Diocese of Fort Worth (filed April 21, 2009) (A1231-1236) |
| EXHIBIT H | Affidavit of The Rev. Canon Charles K. Robertson (A1237-1238) |
| TAB 1 | Letter to The Most Rev'd Katharine Jefferts Schori from the Rt. Rev'd Dorsey F. Henderson, Jr. dated January 9, 2008, and regarding the Rt. Rev'd John-David Schofield (with attachment) (A1239-1248) |
| TAB 2 | Deposition of the Right Rev'd John-David M. Schofield dated March 12, 2008 (A1249) |
| TAB 3 | Letter to The Most Rev'd Katharine Jefferts Schori from the Rt. Rev'd Dorsey F. Henderson, Jr. dated December 17, 2007, and regarding the Rt. Rev'd Robert W. Duncan (with attachment) (A1250-1261) |
| TAB 4 | Forms signed by Bishop Wallis C. Ohl (June 14, 2010 & July 17, 2010) consenting to the ordination and consecration of bishops (A1262) |
| TAB 5 | Letter to six former members of the Standing Committee of the Diocese of Fort Worth from The Most Rev'd Katharine Jefferts Schori dated December 15, 2008 (A1263-1264) |
| EXHIBIT I | Supplemental Affidavit of Mark Duffy (A1265-1266) |
| TAB 1 | Excerpts from the 1979 Journal of the General Convention (A1267-1269) |

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| EXHIBIT J | Second Supplemental Affidavit of Mark Duffy (A1270-1271) |
| TAB 1 | 1982 Resolution Number 1982-A010 to Amend Constitution Article V.1 (A1272) |
| TAB 2 | 1982 Resolution Number 1982-B018 to Ratify the Division of the Diocese of Dallas Into Two Jurisdictions (A1273) |
| EXHIBIT K | November 29, 2010 Supplemental Affidavit of Kathleen Wells (A1274-1275) |
| TAB 1 | 2010 Constitution and Canons of the Episcopal Diocese of Fort Worth (A1276-1284) |
| EXHIBIT L | January 5, 2011 Affidavit of The Rt. Rev. C. Wallis Ohl (A1285-1288) |
| TAB 1 | Excerpts from The Directory of the Episcopal Diocese of Fort Worth (REDACTED) (A1289-1302) |
| TAB 2 | Notice of Deposition of Priests and Deacons (A1303-1304) |
| TAB 3 | Notices of Inhibition (A1305-1306) |
| EXHIBIT M | January 4, 2011 Affidavit of Cherie Shipp (A1307-1308) |
| TAB 1 | Amended & Restated Bylaws of the Corporation of the Episcopal Diocese of Fort Worth (A1309-15) |
| EXHIBIT N | Intervening Congregations' Supplemental Response to Requests for Disclosure (A1316-1342) |
| EXHIBIT O | Certified Copies of Deeds to Local Church Property |
| TAB 1 | Deed for Camp Crucis Property to Charles Avery Mason, as Bishop of the Protestant Episcopal Church, for the Diocese of Dallas (A1343-45) |
| TAB 2 | Deed for Camp Crucis Property to A. Donald Davies, Bishop of the Diocese of Dallas of the Episcopal Church in the United States of America (A1346-48) |
| TAB 3 | Deed for Alameda St. Property to All Saints Episcopal School (A1349-58) |
| TAB 4 | Deed for Alameda St. Property to Episcopal Diocese of Fort Worth (A1359-65) |
| TAB 5 | Deed for Alameda St. Property from Diocese to Corporation (A1366-72) |
| TAB 6 | Deed for St. Mary's Property to Alexander C. Garrett, as Bishop of the Protestant Episcopal Church, for the Missionary District of Northern Texas (A1373-77) |

X. INADEQUACY OF DEFENDANTS' MOTION – SPECIAL EXCEPTIONS

A. The Local Episcopal Parties specially except and object to the Defendants' Motion for Summary Judgment as it deliberately fails to specify what affirmative form of relief is sought by Defendants.²⁴⁴

B. The Local Episcopal Parties further specially except and object to Defendants' Motion for Summary Judgment insofar as it purports to cover all of Defendants' claims and all of Plaintiffs' claims (as defined by Defendants). The Motion is vague and ambiguous, especially with respect to any relief sought by the Southern Cone Congregations, the parties represented by R. David Weaver. While the Defendants' Motion purports to cover all of Defendants' claims, including the Southern Cone Congregations' claims, and all of the Plaintiffs' claims, including the Local Episcopal Parties' claims, the Motion raises no grounds and makes no specific arguments and produces and cites no specific evidence concerning the Southern Cone Congregations or any of their claims or defenses. Because of Defendants' indiscriminate use of "Plaintiffs" and "Defendants" to cover both Diocesan-level and congregational-level parties, the Local Episcopal Parties are left to guess and speculate about the grounds for the Defendants' Motion, particularly any grounds relating to the Southern Cone Congregations. By way of example and without limitation, the Local Episcopal Parties specially except and object to Section VII of Defendants' Motion which wrongly alleges that "Plaintiffs have no standing to assert the tort claims." Defendants lump the Local Episcopal Parties in with The Episcopal Church represented by Sandra Liser and with the Local Episcopal Congregations represented by Frank Hill. Defendants' arguments in this section, based on a flawed reading of the Court of

²⁴⁴ See Defendants' Motion at 1.

Appeals opinion, cannot possibly pertain to The Episcopal Church or to the Local Episcopal Congregations, who were not parties to the Court of Appeals proceeding.

C. The Local Episcopal Parties further specially except and object to Defendants' Motion for Partial Summary Judgment as it purports to pertain to any or all of Defendants' claims against or any and all claims by the Local Episcopal Congregations represented by Frank Hill. Defendants raise no grounds and make no arguments and no specific arguments as to the Local Episcopal Congregations and produce and cite no evidence about the Local Episcopal Congregations. Defendants' Motion is inadequate to dispose of all of these claims for this reason as well.

D. The Local Episcopal Parties further specially except and object to Defendants' Motion as it purports to pertain to any parish, mission, or congregation-specific identity, property, or leadership issues. The Motion raises no grounds and makes no arguments and no specific arguments concerning any parish-, mission-, or congregation-specific identity, property, or leadership issues and is inadequate to cover any of those issues.

E. The Local Episcopal Parties' further specially except and object to Defendants' Motion insofar as it purports to cover all of Defendants' claims and all of Plaintiffs' claims because Defendants raise no grounds and make no arguments and cite no evidence concerning the identity of the members of the Diocesan Standing Committee. Defendants' Motion is inadequate, therefore, to cover any contention that, as a matter of law, Judy Mayo, Julia Smead, the Rev. Christopher Cantrell, the Rev. Timothy Perkins, the Rev. Ryan Reed, and the Rev. Thomas Hightower are the members of the Diocesan Standing Committee.

F. The Local Episcopal Parties further specially except and object to Defendants' stated first "ground" for summary judgment (Introduction and Summary) as it fails to comply with Rule 166a's requirements for summary judgment grounds.

Defendants' Motion is inadequate to support summary judgment as to the following because Defendants raise no grounds, make no arguments, and produce and cite no evidence concerning:

1) any claims or defenses alleged, or any relief sought by the Southern Cone Congregations represented by R. David Weaver;

2) any claims or defenses alleged, or any relief sought by the Local Episcopal Congregations represented by Frank Hill;

3) any claims or defenses alleged, or any relief sought by any of the Defendants against the Local Episcopal Congregations represented by Frank Hill;

4) any claims or defenses alleged, or any relief sought by Defendants who claim to be members of the Diocesan Standing Committee – Judy Mayo, Julia Smead, the Rev. Christopher Cantrell, the Rev. Timothy Perkins, the Rev. Ryan Reed, and the Rev. Thomas Hightower;

5) any claims or defenses alleged, or any relief sought by the Rev. Thomas Hightower, who has defaulted and never filed an answer; and

6) any parish-, mission-, or congregation-specific identity, leadership, or property issues.

XI. IN THE ALTERNATIVE, THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO DEFENDANTS' GROUNDS

The Local Episcopal Parties prevail on their claims and Defendants' claims fail, as a matter of law, under undisputed facts, as set forth *supra*. In the alternative, there are genuine

issues of material fact as to each of Defendants' grounds for summary judgment relief, excepting ground one, which does not state a ground for summary judgment and instead reads "Introduction & Summary," set forth as follows. In the alternative, there is a genuine issue of material fact as to Defendants' second ground, "What Texas Courts Can And Cannot Decide," *inter alia*, as to what extent each office is "incident" to the control of property, as to whether this incidence can be separated from other aspects of the office, as to whether or not said officers performed their duties in accordance with their governing obligations, rules, and vows, and as to whether such officers were duly authorized in their actions or were acting beyond or without authority, as to any neutral principles analysis given Defendants' lack of evidence as to deeds. *See* Sections IV and V, *supra*, and the evidence cited therein. In addition and in the alternative, there is a genuine issue of material fact as to Defendants' third ground, "The Corporation Owns The Property," *inter alia*, as to who the authorized Trustees of the corporation are, as to what property is at issue, as to what extent the corporation owns the property at issue, as to whether or not said officers performed their duties in accordance with their governing obligations, rules, and vows, and as to whether such officers were duly authorized in their actions or were acting beyond or without authority. *See* Sections IV, V.A.i-ii, and VI.H, *supra*, and the evidence cited therein. In addition and in the alternative, there is a genuine issue of material fact as to Defendants' fourth ground, "The Plaintiffs Have No Trust Interest," *inter alia*, as to whether the loyal Episcopal parties have a trust interest, as to the relevant documents that might or might not create such a trust interest, as to the deeds that might or might not create such a trust interest, as to statutes and constitutions and other documents that might or might not create a trust interest, and as to whether Defendants took actions sufficient to revoke any trust interest. *See* Sections IV and V.B.i-ii, *supra*, and the evidence cited therein. In addition and in the alternative, there is a

genuine issue of material fact as to Defendants' fifth ground, "The Defendants Are The Corporation's Trustees," *inter alia*, as to who the authorized Trustees of the corporation are, as to what extent the corporation owns the property at issue, as to whether or not said officers performed their duties in accordance with their governing obligations, rules, and vows, as to whether such officers were duly authorized in their actions or were acting beyond or without authority, and as to whether or not Defendants were removed from such office. *See* Sections IV, V.A.i-ii, and VI.H, *supra*, and the evidence cited therein. In addition and in the alternative, there is a genuine issue of material fact as to Defendants' sixth ground, "Bishop Iker Is The Diocese's Bishop," as to who is the authorized bishop of the Episcopal Diocese, as to what extent Defendant Iker's actions were consistent with his governing obligations, rules, and vows, as to whether Defendant Iker was duly authorized in his actions or was acting beyond or without authority, and as to whether Defendant Iker was removed from authority or said office. *See* Sections IV, V.A.i-ii, and VI.H, *supra*, and the evidence cited therein. In addition and in the alternative, there is a genuine issue of material fact as to Defendants' seventh ground, "Amended Articles Cannot Be Ultra Vires," *inter alia*, as to who amended the articles, whether or not those amendments were consistent with the governing obligations, rules, and vows, as to whether such persons amending such documents were duly authorized in their actions or were acting beyond or without authority, and as to which articles are controlling and in effect currently. *See* Sections IV and V.A.i(2)-(3), *supra*, and the evidence cited therein. In addition and in the alternative, there is a genuine issue of material fact as to Defendants' eight ground, "Plaintiffs Have No Standing To Assert The Tort Claims," *inter alia*, as to who is authorized to act for the Diocese and Corporation and other Diocesan institutions, whether Defendants are authorized to act for the Diocese, Corporation, or other Diocesan institutions, whether Defendants were removed from

such authority, and whether Defendants have violated their governing oaths, vows, rules, or regulations or are or were acting without or beyond their authority. *See* Sections IV, V.A, and VI.E-H, *supra*, and the evidence cited therein. In addition and in the alternative, there is a genuine issue of material fact as to all of Defendants' grounds as to whether Defendants have standing or capacity to assert any of their claims or grounds for summary judgment, as to whether Defendants are estopped, quasi-estopped, judicially estopped from asserting their claims or grounds, as to whether Defendants have unclean hands, and as to whether Defendants waived any of their claims or grounds. *See* Sections IV, V, VI.E-H, and VII, and the evidence cited therein.

Finally, while Defendants' Motion is inadequate to cover these claims or to raise these grounds, in the alternative, there are at least fact issues concerning which are the continuing, historic Episcopal congregations, parishes, and missions,²⁴⁵ who is the recognized leadership of those continuing, historic Episcopal congregations, parishes and missions,²⁴⁶ any parish-, mission-, or congregation-specific identity, property, or leadership issues,²⁴⁷ who are the authorized members of the Diocesan Standing Committee. *See* Sections IV, V, VI.E-H, and VII, and the evidence cited therein.

XII. CONCLUSION AND PRAYER

Plaintiffs and Third Party Defendants/Counter-claimants, the Local Episcopal Parties, identified at note 1, *supra*, pray that the Court sustain their Special Exceptions, strike Defendants' Motion or require Defendants to amend their Motion to replead more specifically, deny Defendants' Motion for Partial Summary Judgment, and enter by summary judgment an

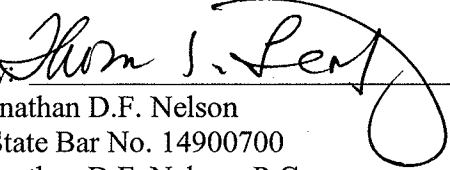
²⁴⁵ A1285-88 (Jan. 5, 2011 Ohl Aff. at ¶¶ 4-8.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

order dismissing any affirmative relief requested in the Defendants' Motion for Partial Summary Judgment. In addition, for the reasons stated herein and the reasons stated in the Local Episcopal Parties' Amended Motion for Partial Summary Judgment filed December 21, 2010, the Local Episcopal Parties pray that the Court grant their Amended Motion for Partial Summary Judgment and enter by summary judgment an order granting all the affirmative relief requested in the Local Episcopal Parties' motion, and grant any other relief to which the Local Episcopal Parties are justly entitled.

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Local Episcopal Parties' Response to Defendants' Motion for Partial Summary Judgment has been sent this 7th day of January, 2011, by facsimile or hand-delivery and by email, to:

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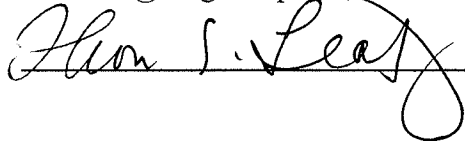
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A

The court hereby issues a DECLARATORY JUDGMENT pursuant to Texas Civil Practice and Remedies Code §§ 37.001, et seq. declaring that Defendants may not divert, alienate, or use the real property of Good Shepherd, including the church premises and improvements located at 3355 W. Beauregard Ave., San Angelo, Tom Green County, Texas; the 5.287 tract of land in the Hillside Subdivision of San Angelo, Texas; and any other real property held in the name of the Episcopal Church of the Good Shepherd;

The court hereby issues a DECLARATORY JUDGMENT that the continuing Parish of the Good Shepherd is identified as and represented by those persons recognized by the Bishop of the Episcopal Diocese of Northwest Texas and that the actions of the Defendants in seeking to withdraw Good Shepherd as a Parish of the Diocese and from the Episcopal Church are void and without effect;

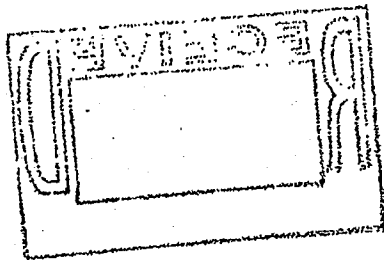
The court hereby issues a DECLARATORY JUDGMENT pursuant to Texas Civil Practice and Remedies Code §§ 37.001, et seq. declaring that all real and personal property of the Good Shepherd is held in trust for the Episcopal Church and the Diocese;

The court hereby ORDERS the Defendants to relinquish control of all real and personal property of the Episcopal Church of the Good Shepherd within one (1) week of the signing of this judgment and deliver said property to the Vestry of the Episcopal Church of the Good Shepherd.

This judgment is final, disposes of all claims and all parties, and is appealable.

The court orders execution to issue for this judgment.

SIGNED on December 16, 2009.



W. H. Ching
PRESIDING JUDGE
By Assignment

B

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

210TH JUDICIAL DISTRICT

FILED
GILBERT SANCHEZ
DISTRICT CLERK
2010 DEC 17 AM 10:12
EL PASO COUNTY, TEXAS
BY _____
DEPUTY

ST. FRANCIS ON THE HILL CHURCH,)
a Texas non-profit Corporation,)
Formerly known as ST. FRANCIS ON THE)
HILL EPISCOPAL CHURCH,)

Plaintiff,)

v.)

Cause No. 2008-4075

THE EPISCOPAL CHURCH, a Non-Profit)
Unincorporated Association, THE DIOCESE OF)
THE RIO GRANDE, a Non-Profit)
Unincorporated Association, and THE TRUSTEES)
OF PROPERTY OF THE EPISCOPAL CHURCH,)
DIOCESE OF THE RIO GRANDE, IN TEXAS,)
A Texas Non-Profit Corporation,)

Defendants.)

FINAL SUMMARY JUDGMENT

The Court, having considered the pleadings, the parties' cross-motions for summary judgment and the responses thereto, the evidence on file, and the argument of counsel, denies Plaintiffs' Motion for Summary Judgment, grants Defendants' Motions for Summary Judgment, and renders Judgment for the Defendants.

The Court hereby issues a Declaratory Judgment, pursuant to Texas Civil Practices and Remedies Code §37.001:

1. that The Episcopal Church is a hierarchical church as a matter of law and that Plaintiff, prior to October 28, 2008 was a mission and later a parish member of said Church. Because the Episcopal Church is such, the Court follows the long-established Texas precedent governing hierarchical church property disputes,

which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. *See, e.g., Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909); *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865 (Tex. Civ. App.-Texarkana 1977, *no writ*). Under the law articulated by the Texas courts, those are the individuals who remain entitled to the use and control of the church property. *Id.* Plaintiff's arguments based on the Texas Corporations Code and trust law do not alter the result dictated by the Texas precedent specifically governing church property disputes;

2. that even if the Court applied neutral principles of law to resolve this church property dispute, the neutral principles considerations favor Defendants, because (a) the deeds provide that the property is to be held by "St. Francis on the Hill Episcopal Church"; (b) prior to plaintiff's attempt to leave the Church and the Diocese, the incorporated parish was known as "St. Francis on the Hill Episcopal Church," and the bylaws of the corporation acceded to the rules of the Church and the Diocese; (c) the Church's and the Diocese's longstanding canons provide that parish property is held in trust for the Church and the Diocese and confirm the interest of the Church and the Diocese in seeing to it that property held by Episcopal parishes be used solely for the mission of the Church and the Diocese; (d) the Diocese's canons further set forth when, how and why a member parish may be allowed to incorporate; and (e) the Texas Non-Profit Corporations Act permits subordinate parts of hierarchical churches to incorporate, but such

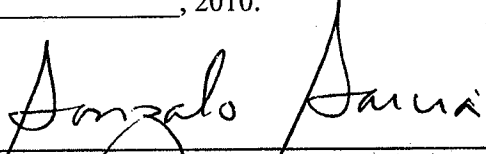
- corporations remain subject to the rules of the religious organizations that formed them and hold property for the benefit of and in trust for those organizations;
3. that the vestry and/or membership of Plaintiff may not unilaterally alter the status of St. Francis on the Hill Episcopal Church as a parish of the Church and the Diocese;
 4. that the real and personal property held by St. Francis on the Hill Episcopal Church is held and may be used only for the ministry and work of the Church and the Diocese and may not be diverted, alienated, or used except as provided by the Constitution and canons of the Church and the Diocese;
 5. that St. Francis on the Hill Episcopal Church is represented by those of its members who have remained part of The Episcopal Church, under the leadership of the clergy recognized by the Church and the Diocese;
 6. that Plaintiff is enjoined from diverting, alienating, or using the real or personal property of St. Francis on the Hill Episcopal Church except as provided by the Constitution and canons of the Church and the Diocese; and
 7. that possession and control of the property held by St. Francis on the Hill Episcopal Church is awarded to the continuing Episcopal congregation for use in furtherance of the parish/mission's ministry and mission pursuant to the Constitution and canons of the Church and the Diocese.

Based on the above, it is therefore ORDERED, ADJUDGED, AND DECREED:

1. that Plaintiff's motion for summary judgment is DENIED;
2. that Defendants' motions for summary judgment are GRANTED;

3. that within thirty (30) days of the signing of this judgment, Plaintiff shall relinquish control of all real and personal property of St. Francis on the Hill Episcopal Church and deliver said property to the Vestry/Bishop's Committee of St. Francis on the Hill Episcopal Church or the appropriate Diocesan agency;
4. that execution shall issue for this judgment;
5. that within sixty (60) days of the signing of this judgment, Plaintiff shall render an accounting to the Vestry/Bishop's Committee of St. Francis on the Hill Episcopal Church of the disposition of all property of St. Francis on the Hill Episcopal Church since October 20, 2008;
6. that within sixty (30) days of the signing of this judgment, Plaintiff shall permit members of the Diocesan archive access to the records of St. Francis on the Hill Episcopal Church for the purpose of obtaining copies of all documents related to St. Francis, the Diocese and/or the Episcopal Church;
7. that this judgment is final, disposes of all claims of the parties, and is appealable;
and
8. that all other relief not expressly granted herein is denied.

SIGNED this 16 day of December, 2010.



Gonzalo Garcia, Judge
210th Judicial District Court

C

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FILED

JUL 21 2009

FRESNO SUPERIOR COURT

By _____ DEPT. 97A - DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
CENTRAL DIVISION

| | |
|-----------------------------------|-----------------------------|
| DIOCESE OF SAN JOAQUIN; THE RT.) | No. 08 CECG 01425 |
| REV. JERRY A LAMB, in his) | Dept. 97A |
| capacity as the Episcopal) | |
| Bishop of San Joaquin; and THE) | |
| EPISCOPAL CHURCH,) | ORDER ON PLAINTIFFS' MOTION |
|) | FOR SUMMARY ADJUDICATION |
| Plaintiffs,) | |
|) | |
| v.) | |
|) | |
| DAVID MERCER SCHOFIELD, also) | |
| known as JOHN-DAVIS SCHOFIELD,) | |
| an individual; THE EPISCOPAL) | |
| FOUNDATION OF SAN JOAQUIN, INC.) | |
| an unknown entity; THE) | |
| DIOCESAN INVESTMENT TRUST OF) | |
| THE DIOCESE OF SAN JOAQUIN, a) | |
| California corporation; THE) | |
| ANGLICAN DIOCESE HOLDING) | |
| CORPORATION; MERRILL, LYNCH,) | |
| PIERCE, FENNER & SMITH, INC., a) | |
| Delaware corporation (d/b/a) | |
| Merrill Lynch); and DOES 1-300,) | |
| inclusive,) | |
|) | |
| Defendants.) | |

On May 5, 2009, this court heard oral argument on Plaintiffs' Motion for Summary Adjudication. The Court having considered the moving, opposing and reply papers, as well as the arguments of counsel, now rules as follows:

1 judgment." (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138
2 Cal. App. 4th 1135, 1154-55.)

3
4 Mootness

5 Subsequent to oral argument, defendants have suggested in a
6 letter brief directed to this court that this motion has been
7 mooted by the filing of the Fourth Amended Complaint, as this
8 motion was brought when the allegations of the Second Amended
9 Complaint were active. However, neither the intervening Third
10 Amended Complaint, which was filed before oral argument, nor the
11 current Fourth Amended Complaint, have changed the allegations of
12 the first cause of action as to which summary adjudication is
13 sought. The motion is not moot.

14 Defendants' authority, *Perry v. Atkinson* (1987) 195
15 Cal.App.3d 14 does not suggest otherwise. In that case, summary
16 adjudication was granted on a first amended complaint although
17 leave had been granted to file a second amended complaint amending
18 the very cause of action on which summary adjudication was
19 granted. (*Id.* at p. 18.) Accordingly, *Perry* is distinguishable.

20
21 First Cause of Action for Declaratory Relief

22 The first cause of action for declaratory relief alleges, in
23 relevant part:

24 101. Defendants take the position that defendant Schofield
25 was authorized to revise the articles of "The Protestant
26 Episcopal Bishop of San Joaquin, a corporation sole" in 2006
27 and 2008, and that defendant Schofield may continue as the
28 incumbent of "The Protestant Episcopal Bishop of San Joaquin,
a corporation sole" and as President of the Episcopal
Foundation and the Investment Trust after leaving the
Episcopal Church and being deposed.

102. Plaintiffs contend to the contrary, that the purported

1 amendments to the articles of the corporation sole were ultra
2 vires, invalid and void, and that defendant Schofield may not
3 continue as the incumbent of "The Protestant Episcopal Bishop
4 of San Joaquin, a corporation sole," or as President of the
5 Episcopal Foundation or the Investment Trust, after leaving
6 the Episcopal Church and being deposed.

7 Secular courts, when resolving church property disputes, must not
8 entangle themselves in disputes over church doctrine or infringe
9 the free exercise of religion. (*In re Episcopal Church Cases*
10 (2009) 45 Cal.4th 467, 478-479.) In *In re Episcopal Church Cases*,
11 *supra*, 45 Cal.4th 467, the California Supreme Court held that we
12 must apply the "neutral principles of law" approach to resolving
13 church property disputes in a hierarchical church organization.

14 In doing so, "State courts must not decide questions of
15 religious doctrine; the court must defer to the position of the
16 highest ecclesiastical authority that has decided the point. But
17 to the extent the court can resolve a property dispute without
18 reference to church doctrine, it should apply neutral principles
19 of law. The court should consider sources such as the deeds to the
20 property in dispute, the local church's articles of incorporation,
21 the general church's constitution, canon, and rules, and relevant
22 statutes, including statutes specifically concerning religious
23 property, such as Corporations Code section 9142." (*In re*
24 *Episcopal Church Cases, supra*, 45 Cal.4th at p. 485.)

25 A hierarchical church is one in which individual churches are
26 organized as a body with other churches having similar faith and
27 doctrine, and with a common ruling convocation or ecclesiastical
28 head vested with ultimate ecclesiastical authority over the
29 individual congregations and members of the entire organized
30 church. (*New v. Kroeger* (2009) 167 Cal.App.4th 800, 815 (*New*.)

1 In a hierarchical church, an individual local congregation that
2 affiliates with the national church body becomes a member of a
3 much larger and more important religious organization, under its
4 government and control, and bound by its orders and judgments. In
5 contrast, a congregational church is defined as one strictly
6 independent of other ecclesiastical associations, and one that so
7 far as church government is concerned, owes no fealty or
8 obligation to any higher authority. (*Id.* at p. 816.)

9 Defendants argue that the issue of whether the relationship
10 between an Episcopal diocese and the Episcopal General Convention
11 is one of first impression. It is true that cases regarding the
12 Episcopal Church have involved the relationship between parishes
13 and their dioceses. However, it is beyond dispute that the
14 Episcopal Church is a hierarchical church. Both the California
15 Supreme Court in *In Re: Episcopal Church Cases* and the appellate
16 court in *New v. Kroeger* found it to be so. (*In Re: Episcopal*
17 *Church Cases, supra*, 45 Cal.4th at p. 494; *New v. Kroeger, supra*,
18 167 Cal.App.4th 816-817.) The fact that the Supreme Court and the
19 Fourth District were ultimately analyzing the actions of a parish,
20 rather than the actions of a diocese, do not invalidate the
21 findings regarding the nature of the Church as a whole. Moreover,
22 and more importantly, a review of the Constitution and Canons of
23 the Church indicates that it is indeed hierarchical.

24 The Episcopal Church's Constitution provides for the
25 establishment of a General Convention composed of two houses, the
26 House of Bishops and the House of Deputies, each with the right to
27 originate and propose legislation. (Mullin Decl. Exhibit 1,
28 Constitution of Episcopal Church Article I, Sec. 1.) Among the

1 duties of the General Convention is the enactment and amendment of
2 the Canons. (See Mullin Decl. Exhibit 1, Canons of Episcopal
3 Church Title 1, Canon 1, sec. (2)(n)(3), Title V, Canon 1, Sec.1.)
4 The General Convention approves and consents to the admission of
5 new dioceses and the election of new bishops. (Mullin Decl.
6 Exhibit 1, Constitution of Episcopal Church Article II, Sec. 2,
7 Article V, Sec. 1.) Currently, new dioceses must express
8 "unqualified accession to the Constitution and Canons" before they
9 can be in union with the general convention and admitted to the
10 Episcopal Church. (Mullin Decl. Exhibit 1, Constitution of
11 Episcopal Church Article V, Sec. 1.)

12 Defendant's attempt to dispute the hierarchical nature of the
13 Episcopal Church with the declaration of Rev. Wantland is
14 unavailing. His declaration as to the nature of the Church is an
15 inadmissible opinion and a legal conclusion. "[It] is thoroughly
16 established that experts may not give opinions on matters which
17 are essentially within the province of the court to decide."
18 (*Carter v. City of Los Angeles* (1945) 67 Cal.App.2d 524, 528.)

19 Nor is the hierarchical nature of the church something to be
20 determined on a "case by case basis" or based on a showing of the
21 powers and authority ceded to the general Church by the various
22 constituent Dioceses, as defendants have argued. The hierarchical
23 nature of the Church is apparent from its governing documents as a
24 matter of law.

25 "The interpretation of a written instrument, even though it
26 involves what might properly be called questions of fact
27 [citation], is essentially a judicial function to be exercised
28 according to the generally accepted canons of interpretation so

1 that the purposes of the instrument may be given effect. (See Civ.
2 Code, § 1635- 1661; Code Civ. Proc., § 1856- 1866.) . . . It is
3 therefore solely a judicial function to interpret a written
4 instrument unless the interpretation turns upon the credibility of
5 extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965)
6 62 Cal.2d 861, 865.)

7 Defendants would distinguish *New* on the grounds that in *New*,
8 the parish bylaws incorporate the General Church and Diocese
9 Constitution and Cannons that must prevail when there is a
10 conflict with the parish bylaws. Defendants argue that there is
11 no such supremacy clause in the relationship between a diocese and
12 the General Convention and thus nothing to prevent disaffiliation
13 because the Diocese could always amend their constitution and
14 canons to disaffiliate from the General Church.

15 Defendants' right to amend their constitution and canons is
16 not unrestricted and unlimited. The constitution of the Diocese
17 has always permitted amendments. (Additional Material Fact No.
18 69, *Kamai Decl. Exhibits 4 and 7 Constitution of Diocese of San*
19 *Joaquin, Article XIII.*) However, from the inception of the
20 Diocese as a Missionary District, it acceded to the Constitution
21 of the Protestant Episcopal Church in the United States of America
22 and recognized the authority of the General Convention of the
23 same. (*Mullin Decl. Exhibit 7, Constitution of Missionary*
24 *District of San Joaquin, Article II.*) When the Missionary
25 District Petitioned to become a Diocese in 1961, the petition
26 clearly stated in conclusion, "As evidenced by the resolution of
27 the Special Convocation above referred to, the Church in the
28 Missionary District of San Joaquin has acceded to the Constitution

1 and Canons for the Government of the Protestant Episcopal Church
2 in the United States of America." (Mullin Decl. Exhibit 9,
3 Petition and Memorial of Missionary District of San Joaquin.) The
4 Constitution of the new Diocese of San Joaquin likewise acceded to
5 the Constitution of the Episcopal Church and recognized the
6 authority of the General Convention. (Mullin Decl. Exhibit 11,
7 Constitution of Diocese of San Joaquin, Article II.)

8 Although defendants make much over the fact that the Diocese
9 acceded only to the Constitution, and not the Canons of the
10 Episcopal Church, the court finds that the only reasonable
11 interpretation of the documents before it is that the Diocese
12 implicitly acceded to both the Constitution and Canons by virtue
13 to acceding to the Constitution. The function of the Constitution
14 is to form a legislative body, the General Convention. The
15 General Convention adopted and amends the Canons. Acceding to the
16 Constitution that creates the legislative body, and recognizing
17 the authority of the legislative body, while simultaneously
18 denying accession to the product of the legislative body is
19 nonsensical. Moreover, the Petition for the Erection of the
20 Diocese of San Joaquin mentions accession to both the Constitution
21 and Canons. This certainly reflects that it was always the
22 intention of the Diocese to accede to both documents. (See *In re*
23 *Episcopal Church Cases, supra*, 45 Cal.4th at pp. 488.) Finally,
24 the Constitution of the Episcopal Church in place in 1961 required
25 accession to both the Constitution and Canons. (Mullin Decl.
26 Exhibit 8, Constitution of Episcopal Church, Article VI.)

27 Accordingly, the 2008 amendments to the Diocese's
28 Constitution purporting to strike the accession clause and insert

1 new language relative to joining the Province of the Southern Cone
2 were ultra vires and void.

3 Defendants contend that there was no legal impediment to
4 their 2006 amendment qualifying the accession clause such that
5 they acceded to the Episcopal Church's Constitution only to the
6 extent that it was not inconsistent with the Constitution and
7 Canons of the Diocese, as amended from time to time and further
8 this 2006 amendment allowed for the 2008 amendment deleting the
9 accession clause entirely and withdrawing from the Episcopal
10 Church. Defendants are incorrect. The original accession clause
11 itself prevents such amendment. If the Constitution of the
12 Diocese incorporates and accedes to the Constitution and Canons of
13 the Episcopal Church, which require accession, then the
14 Constitution of the Diocese cannot be amended to remove such
15 language.

16 Defendants cite *Iglesia Evangelica Latina, Inc. v. Southern*
17 *Pacific Latin American Dist. of the Assemblies of God* (2009) 173
18 Cal.App.4th 420 (*Iglesia*) and *New, supra*, 167 Cal.App.4th 800 for
19 the proposition that this court can examine the special meeting at
20 which Lamb was elected Bishop. Specifically, defendants claim
21 that the calling of the special meeting was not in accordance with
22 the Constitutions and canons of either the Episcopal Church or the
23 Diocese of San Joaquin. In neither *Iglesia* nor in *New* did the
24 appellate court review the procedures used to select and recognize
25 a church primate. In both, the court reviewed the selection of
26 corporate directors of the church corporation. The distinction is
27 material.

28

1 Both the United States Supreme Court and California courts
2 have held that in the case of hierarchical religious entities the
3 civil courts must accept as binding and defer to decisions by
4 religious tribunals with respect to religious doctrine, practice,
5 faith, ecclesiastical rule, discipline, custom, law, membership,
6 polity, clergy credentials and discipline, as well as religious
7 entity governance and administration. (*Jones v. Wolf* (1979) 443
8 U.S. 595, 602, 603-604; *Concord Christian Center v. Open Bible*
9 *Standard Churches* (2005) 132 Cal.App.4th 1396, 1411; *Serbian*
10 *Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 708-709,
11 713; *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 449;
12 *Rosicrucian Fellow. v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121,
13 131-132.)

14 Accordingly since the Episcopal Church has seen fit to
15 recognize Lamb as the new Bishop of the Diocese of San Joaquin, we
16 must do so as well. (See UMF No. 66 -- Undisputed that Lamb has
17 been asked to consent to the ordination of new bishops, performed
18 baptisms and confirmations, attended the 2008 meeting of the house
19 of bishops as the Bishop of San Joaquin and attended the 2008
20 Lambeth Conference of Bishops as the Bishop of San Joaquin.)
21 Moreover, the Episcopal Church has deposed Schofield as Bishop.
22 (UMF No. 55.)

23
24 *Lamb is the Incumbent of the Corporation Sole*
25 Corporations Code section 10002 provides: "A corporation sole
26 may be formed under this part by the bishop, chief priest,
27 presiding elder, or other presiding officer of any religious
28 denomination, society, or church, for the purpose of administering

1 and managing the affairs, property, and temporalities thereof."
2 "Historically, a corporation sole consists of one person only and
3 his successors, in some particular station, who are incorporated
4 by law in order to give them legal capacities and advantages,
5 particularly that of perpetuity, which in their natural persons
6 they could not have." (*Estate of Zabriskie* (1979) 96 Cal.App.3d
7 571, 576-577.) Religious corporations are merely "permitted as a
8 convenience to assist in the conduct of the temporalities of the
9 church. Notwithstanding incorporation the ecclesiastical body is
10 still all-important. The corporation is a subordinate factor in
11 the life and purposes of the church proper." (*Wheelock v. First*
12 *Presb. Church* (1897) 119 Cal. 477, 483.)

13 "The Protestant Episcopal Bishop of San Joaquin, a
14 Corporation Sole" was created to hold title to property belonging
15 to the Missionary District and, later, Diocese of San Joaquin.
16 (UMF Nos. 23, 28, 34.) The Corporation's initial articles stated
17 that it was formed because "the rules and regulations of the
18 Protestant Church in the Missionary District of San Joaquin ...
19 require that the bishop of said Missionary District shall become a
20 corporation sole under the laws of the State of California by the
21 title of The Protestant Episcopal Bishop of San Joaquin for the
22 distraction of the temporalities thereof and the management of the
23 state and property thereof." (UMF No. 23.) When the Missionary
24 District became a Diocese Cannon XVII, sections 411 and 412
25 continued to require the Bishop to be a corporation sole "by the
26 title of 'The Protestant Episcopal Bishop of San Joaquin, a
27 Corporation Sole' " and to hold title to "[t]rust funds and real
28 estate acquired by gift or purchase for the use of the Diocese of

1 San Joaquin, or for any unincorporated parish therein, or for the
2 use of the Protestant Episcopal Church in any place within this
3 Diocese where there is no organized congregation." (UMF No. 34.)

4 The documents are clear. Only the "Bishop" of the Diocese of
5 San Joaquin has the right to the incumbency of the corporation
6 originally entitled "The Protestant Episcopal Bishop of San
7 Joaquin, a Corporation Sole" and given the number C0066488 by the
8 Secretary of State. Moreover, the Episcopal Church has recognized
9 Revered Lamb as the Bishop of the Diocese of San Joaquin.

10 Defendants assert that questions about Lamb's election as Bishop
11 constitute disputed material facts, but this court has no power to
12 rule on the validity of the Episcopal Church's election of its
13 Bishops and thus any dispute is immaterial for the purposes of
14 this motion.

15 Defendants contend that there was no proper notice of the
16 March 29, 2008 special convention at which Lamb was elected. It
17 is true that there is no competent evidence that 30 days notice of
18 the meeting was given. Hall's declaration only establishes that
19 he received the notice on March 2, 2008. (Decl. Hall ¶ 20;
20 Exhibit 9.) He did not mail the notice. It is undated.

21 Defendants also contend that the deposition of Schofield was
22 contrary to Church policy, procedure and law. However, we may not
23 look into the propriety of the election and deposition of church
24 officers according to church regulations and rules. (Serbian
25 Orthodox, *supra*, 426 U.S. at pp. 708-709; *Maxwell v. Brougher*
26 (1950) 99 Cal.App.2d 824, 826; see *Vukovich v. Radulovich* (1991)
27 235 Cal.App.3d 281, 292-293]; *Higgins v. Maher* (1989) 210
28 Cal.App.3d 1168, 1173.)

1 As the Episcopal Church has seen fit to recognize Lamb as the
2 true Bishop of the Diocese of San Joaquin, this court is without
3 the power to countermand that decision. Defendants cite *Singh v.*
4 *Singh* (2004) 114 Cal.App.4th 1264, 1283 for the proposition that a
5 court has jurisdiction to review whether a religious corporation
6 adhered to its own internal rules and bylaws. *Singh* is
7 distinguishable. In that case an orally elected board of
8 directors sued for judicial determination of the validity of their
9 election or to order a new election and determine the rights of
10 the members to vote, pursuant to Corporations Code section 9418,
11 subdivision (c). The appellate court determined that the trial
12 court, under neutral principals of law, could validly interpret
13 the bylaws of the corporation as it applied to the election of a
14 board of directors and their term of office. It did not decide
15 the matter of who was the ecclesiastical authority of the church.

16

17 *Lamb is the President of the Episcopal Foundation and Investment*
18 *Trust*

19 Diocesan Canon XXVII, section 28.02 states that the "Bishop
20 of the Diocese shall serve as President and Chairman of the Board"
21 of the Episcopal Foundation. (UMF No. 35.)

22 The Investment Trust's articles of incorporation provide that
23 the Bishop of the Diocese of San Joaquin "shall be ex officio
24 president of the Board of Trustees." (UMF No. 36.)

25 Therefore, Lamb holds both these offices.

26

27

28

1 *The Amendment of the Articles of Incorporation in 2006 and 2008*
2 *Are Void*

3 On March 21, 2006 Schofield filed amendments to the articles
4 of incorporation that removed references that, before a new bishop
5 could be ordained, consent from the majority of Diocesan Bishops
6 and Standing Committees of the Episcopal Church must be obtained
7 and the bishop must be consecrated by three Episcopal bishops.
8 (UMF No. 41.) However, this amendment was void because it
9 violated the accession clause and was thus not in conformity with
10 the "rules, regulations or laws" of the Episcopal Church. (See
11 Corp. Code, § 10003.) Moreover, when amending the articles of
12 incorporation of a corporation sole, the incumbent must "sign and
13 verify a statement setting forth the provisions of the amendment
14 and stating that it has been duly authorized by the religious
15 organization governed by the corporation." (Corp. Code, § 10010.)
16 Because the amendment was in direct contravention of the
17 Constitution and Canons of the Episcopal Church at the time it was
18 made, the accession clause prevented the Diocese from "duly
19 authorizing" it.

20 The 2008 amendment changing the name of the corporation to
21 "The Anglican Bishop of San Joaquin" is likewise void. The
22 Diocese of San Joaquin had not "duly authorized" the name change
23 when it occurred. The only purported authorization came about
24 after Schofield was deposed as a Bishop and the Anglican
25 defendants were no longer recognized by the Episcopal Church as
26 the Diocese of San Joaquin. Schofield resigned as Bishop on March
27 7, 2008. (UMF No. 54.) The Church purported to depose him on
28 March 12, 2008. (UMF Nos. 55-56.) The Diocese adopted at its

1 convention in October 2008, a resolution ratifying the amendment
2 changing the name of the corporation sole. (AMF No. 94.)
3

4 *The Diocese is Properly a Party Plaintiff*

5 Defendants contend that the Diocese of San Joaquin, by which they
6 mean the Anglican Diocese of San Joaquin, has not been joined as a
7 party and judgment may not be had unless it is joined because the
8 declaratory relief action seeks to invalidate its acts.
9

10 There are two problems with this line of reasoning. First, it
11 ignores the fact that the Episcopal Church has, rightly or
12 wrongly, procedurally correctly or not, recognized the
13 organization headed by Lamb as the true and surviving Diocese of
14 San Joaquin. (See UMF Nos. 55, 57-59, 66.) That Diocese is a
15 party plaintiff.

16 Second, this is not a breach of contract action as defendants
17 suggest in their memorandum of points and authorities. The
18 Diocese is not being sued for breaching a contract with the
19 Church. Although the rule regarding necessary parties is not
20 relaxed in actions brought to obtain declaratory relief, the
21 Diocese is not a necessary party. (See *Lloyd v. County of Los*
22 *Angeles* (1940) 41 Cal.App.2d 808, 812.) No judgment or order
23 against the Diocese directing them to pay or do anything is
24 sought. Rather, Schofield is being sued for declaratory relief
25 for his actions in amending the articles of incorporation of the
26 corporation sole and in refusing to give up the incumbency of
27 three corporations.
28

1 *The Corporation Sole is a Party Plaintiff*

2 Defendants claim that the corporation sole that is a party
3 plaintiff is not the true corporation sole known as No. C0066488,
4 the latter of which they claim to operate. Defendants are
5 incorrect for the reasons previously expressed above. The Diocese
6 of San Joaquin (plaintiffs) is not a new organization that "split
7 off" from defendants' older organization. It is the older
8 organization from which defendants' removed themselves.

9
10 *Plaintiffs Have Standing to Sue*

11 Defendants' arguments that plaintiffs are not validly
12 constituted as the Diocese and Bishop of the Diocese of San
13 Joaquin, or indeed of any subpart of the Episcopal Church, are
14 poorly taken. The defendants have voted to leave an organization
15 (the Episcopal Church) and that organization has a right to name
16 defendants' successors.

17
18 *Trust Beneficiaries Need Not Be Named or Noticed*

19 Defendants claim that because this action is to remove
20 Schofield from his position as incumbent of a corporation that
21 holds property in trust for unincorporated missions and parishes,
22 these beneficiaries are necessary parties and are required to be
23 given notice of this action by virtue of Probate Code section
24 17203. Probate Code section 17203 applies only to proceedings
25 under the probate code applicable to express trusts. The interest
26 at stake here is incumbency in a corporation sole. The fact that
27 the corporation sole holds property in trust does not mean that a
28 petition for the removal of a trustee pursuant to Probate Code

1 section 17200 has been filed.

2

3 Procedural Issues

4 Defendants claim that the motion must be denied because
5 plaintiffs have failed to comply with Rule of Court 3.150, which
6 Rule requires that the specific cause of action must be stated
7 specifically in the notice of motion and be repeated, verbatim in
8 the separate statement of undisputed material facts.
9 Specifically, plaintiff's notice of motion and separate statement
10 seek summary adjudication on "Count I" not the "First Cause of
11 Action." This distinction is immaterial. As Weil and Brown note,
12 that although few lawyers and judges use the term "count," the
13 term may be used interchangeably with the phrase "cause of
14 action." (Weil & Brown, *Civil Procedure Before Trial* (The Rutter
15 Group 2008) "Pleadings" § 6:105-6:106.)

16 Defendants also take issue with the separate statement's
17 failure to place the supporting facts in the first column
18 underneath the supported fact. [Rule of Court, Rule 3.1350,
19 subdivision (d)] and failure to place all supporting evidence
20 under one separate cover separately bound with a table of
21 contents. [Rule of Court, Rule 3.1350, subdivision (g).]
22 However, these minor technical violations did not impede the
23 court's to review the motion and are not grounds to deny the
24 motion.

25 Defendants contend that because the first cause of action is
26 broken into subparts seeking declaratory relief on several issues,
27 each issue had to be separately identified in the separate
28 statement of facts in support of summary judgment and the separate

1 statement organized so that it could be determined which fact
2 related to each issue. Code of Civil Procedure section 437c,
3 subdivision (f)(1), provides: "A party may move for summary
4 adjudication as to one or more causes of action within an action,
5 one or more affirmative defenses, one or more claims for damages
6 [as specified in Section 3294 of the Civil Code], or one or more
7 issues of duty . . . A motion for summary adjudication shall be
8 granted only if it completely disposes of a cause of action, an
9 affirmative defense, a claim for damages, or an issue of duty."
10 As such the cause of action for declaratory relief stands or fails
11 as a whole and the plaintiffs were not required to break the
12 separate statement into sub "issues" for adjudication, as this
13 would have been improper.

14
15 Evidentiary Rulings

16 *Supplemental Declarations in Reply*

17 At oral argument, the Court indicated its tentative ruling
18 was to sustain the objections to the supplemental declarations in
19 reply. The Court now rules on the objections to the supplemental
20 declarations in reply as follows:

21 The objection to the Declaration of Dr. Robert Bruce Mullin
22 is sustained and the Declaration is stricken.

23 The objection to the Declaration of the Rt. Rev. John
24 Buchanan is overruled, except as to Exhibit 1, which is stricken.

25 The objection as to the Declaration of the Rt. Rev Jerry A.
26 Lamb is overruled.

27 The objection as to the Declaration of the Rev. Mark Hall is
28 overruled.

1 A trial court may properly consider new evidence submitted
2 with a reply brief "so long as the party opposing the motion for
3 summary judgment has notice and an opportunity to respond to the
4 new material." (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349,
5 362, fn. 8.) In exercising its discretion to receive late-filed
6 evidence, the trial court must also consider the opposing party's
7 due process rights. (See *San Diego Watercrafts, Inc., v. Wells*
8 *Fargo Bank* (2002) 102 Cal.App.4th 308, 316 (San Diego
9 *Watercrafts*.) Here, the original declarations identified the
10 substantive evidence upon which plaintiffs sought summary
11 judgment. The supplemental declarations allowed herein simply
12 added foundational facts; they did not constitute new evidence.
13 They merely stated that the declarant was personally present when
14 various events described in the previous declaration occurred.
15 This was implicit in the first declarations. The facts from the
16 documents and declarations the plaintiffs were relying on in
17 support of the motion were referenced in its separate statement of
18 undisputed material facts and remained unchanged. While
19 defendants have objected to the supplemental declarations at the
20 hearing on the summary adjudication motion, they have identified
21 no prejudice from their admission.

22 This is not a situation like that in *San Diego Watercrafts*,
23 whereby the court's reliance on evidence submitted with the moving
24 party's reply, the party opposing the summary judgment motion was
25 not informed of the issues it was required to meet in order to
26 oppose the motion. (*San Diego Watercrafts, supra*, 102 Cal.App.4th
27 at p. 316.) As the facts were contained within the plaintiffs'
28 separate statement, defendant was aware of the issues they needed

1 to address. Having received due notice and an opportunity to be
2 heard, there was no violation of the right to due process. (See
3 *Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1098-
4 1099.)

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Plaintiffs' Objections to Defendants' Evidence

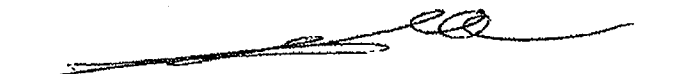
1. Sustained.
2. Sustained.
3. Sustained.
4. Sustained.
5. Sustained.

Defendants' Objections to Plaintiffs' Evidence

1. Overruled.
2. Overruled.
3. Overruled.
4. Overruled.
5. Overruled.
6. Overruled.
7. Overruled.
8. Overruled.
9. Overruled.
10. Sustained as to "February 28, 2008"; overruled as to
remainder.
11. Overruled.
12. Overruled.
13. Overruled.
14. Overruled.

- 1 15. Overruled.
- 2 16. Overruled.
- 3 17. Overruled.
- 4 18. Overruled.
- 5 19. Overruled.
- 6 20. Overruled.
- 7 21. Overruled.
- 8 22. Overruled.
- 9 23. Overruled.
- 10 24. Overruled.
- 11 25. Overruled.
- 12 26. Overruled.
- 13 27. Overruled.
- 14 28. Overruled.
- 15 29. Sustained.
- 16 30. Overruled.
- 17 31. Overruled.
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DATED this 21st day of July 2009.



Adolfo M. Corona
Judge of the Superior Court