No. 11-0265

In The
Supreme Court of Texas

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.,
Appellants,

vs.

THE EPISCOPAL CHURCH, ET AL.,
Appellees.

On Direct Appeal from Cause No. 141-252083-11
In the 141st Judicial District Court
Tarrant County, Texas

APPELLEES THE LOCAL EPISCOPAL PARTIES AND CONGREGATIONS' MOTION FOR LEAVE TO FILE ADDITIONAL BRIEF

Appellees the Local Episcopal Parties and Congregations submit this motion for leave to file the Additional Brief attached as Exhibit A. To assist the Court, the proposed brief addresses the pertinent issues raised by the several new filings and case law developments that have occurred since the parties' briefing concluded in this case. Specifically, the proposed brief responds to new papers that have been submitted as recently as September 24, 2012 and new case law developments that have occurred as recently as October 1, 2012.

The parties completed briefing on March 23, 2012. Since that date, there have been several additional filings in this case and in the related case of *Masterson v. Diocese*

of Northwest Texas, No. 11-0332, both set for oral argument on October 16, 2012. These additional filings include:

- *Amicus Curiae* Brief of the Anglican Communion Institute, Inc. ("ACI") (Apr. 23, 2012), **26 pages**;
- *Amicus Curiae* Brief of Liberty Institute (Aug. 29, 2012), **14 pages**;
- *Amicus Curiae* Letter of Liberty Institute (Sept. 24, 2012), **1 page**;
- Petitioners' letter brief in *Masterson* (Sept. 10, 2012), **8 pages**.

These new filings, which total 49 pages, raise a variety of issues that Appellees did not have the opportunity to respond to in their earlier briefing. The proposed Additional Brief responds substantively to these new issues. Further, the Additional Brief provides important context to the new filings. For example, the Additional Brief explains that five of the authors and signatories of the ACI's amicus brief have since repudiated the position taken in that brief. Without the proposed Additional Brief, this important fact might not be brought to the Court's attention, especially if the issue does not come up during oral argument.

In addition to these new filings, there have also been several relevant case-law developments since the parties completed briefing. Permitting the proposed Additional Brief would assist the Court in determining the significance of these decisions to this case. Finally, the proposed Additional Brief corrects several inaccurate factual assertions and arguments made by Appellants in their Reply Brief.

CONCLUSION & PRAYER

For the reasons above, Appellees the Local Episcopal Parties and Congregations respectfully request that the Court grant this motion for leave, order the attached

proposed Additional Brief filed, and grant any other and further relief to which they may be justly entitled.

Respectfully submitted,

/s/ Thomas S. Leatherbury

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CERTIFICATE OF CONFERENCE

We conferred with opposing counsel about the merits of this motion on October 10, 2012. Defendants stated they opposed this motion unless Plaintiffs would agree in advance not to file any briefing at all after oral argument. This motion is therefore submitted to the Court for determination.

/s/ Thomas S. Leatherbury

CERTIFICATE OF SERVICE

I certify that on the 10th day of October, 2012, the attached Motion for Leave to File Additional Brief was filed electronically and as such, this document was served on all counsel listed below.

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A copy of this Motion for Leave to File Additional Brief was also served by facsimile and by email.pdf on the following counsel of record in *Masterson*.

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EXHIBIT A

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October 10, 2012

REFERENCES

Record citations appear as in Plaintiffs-Appellees The Local Episcopal Parties and Congregations' Response Brief ("Resp."). Appendix cites ("App.") herein refer to the Appendix filed with the Response Brief. In addition:

- Defendants-Appellants' Reply Brief is cited as Reply at [pp].
- The April 23, 2012 Amicus Brief of the "Anglican Communion Institute, Inc." *et al.* is cited as ACI at [pp].
- The August 29, 2012 Amicus Brief of "Liberty Institute" is cited as Lib. at [pp].
- The September 10, 2012 supplemental letter from petitioners in *Masterson v. Diocese of Northwest Texas*, No. 11-0332 (pending before the Texas Supreme Court) is cited as Pet. at [pp].

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SUMMARY OF ARGUMENT

This Brief addresses the later-submitted positions of Liberty Institute and the Anglican Communion Institute, and the recently-filed letter brief of petitioners in *Masterson*.[1] What these papers share in common is an attempt to make these cases seem complex and novel, when in reality they are familiar and straight-forward.

In fact, eight state supreme courts, from states as diverse as California, Colorado, Connecticut, Georgia, Nevada, New Jersey, New York, and Pennsylvania, have now ruled for loyal Episcopalians against similar breakaway factions, under both Deference and Neutral Principles. Twice this summer the U.S. Supreme Court denied certiorari in cases in which losing breakaway factions made the precise arguments Defendants raise here. Since 2009, the U.S. Supreme Court has now *three times* denied petitions for certiorari filed by breakaway factions in cases finding for loyal Episcopalians. And every Texas court to decide an ex-Episcopalian breakaway faction case – four since 2009 alone – has ruled in favor of the loyal Episcopalians against parties trying to take property from the Church – under both Deference *and* Neutral Principles.

Facing an overwhelming national consensus against their position, the amici and the *Masterson* petitioners, like Defendants, must ignore both law and undisputed facts to make their case:

(1) Liberty Institute rightly prefers the Deference approach, but it errs by suggesting that there is any genuine "dispute" as to the obvious three-tier hierarchy of

[1] *Masterson v. Diocese of Nw. Tex.*, No. 11-0332 (pending before the Texas Supreme Court).

The Episcopal Church. *Every court in the nation to reach the issue, without exception, has found this three-tier hierarchy* on the face of the record, beginning here with the unanimous writing signed by *every* leader and *every* parish of the Episcopal Diocese of Fort Worth upon formation to "fully subscribe to and accede to the Constitution and Canons of The Episcopal Church [including the Dennis Canon] . . . ."[2]

(2) The ACI brief's tactic – submitting the opinion of a handful of five active and two retired bishops sympathetic to the breakaway faction's agenda – has been tried and rejected before. And while the arguments fail on their own terms, this Court is entitled to know that, just three months after submitting the brief, these same five active bishops joined more than 150 of their colleagues from around the nation in *a unanimous roll call vote* at the 77th triennial General Convention of The Episcopal Church, passing a Mind of the House of Bishops resolution reaffirming that Plaintiff, the Rt. Rev. C. Wallis Ohl, and *not* breakaway Defendant Iker, is the Bishop of the continuing Episcopal Diocese of Fort Worth, thus repudiating the central conclusion of their brief.

(3) On September 10, 2012, petitioners in *Masterson* filed an 8-page "letter" again urging a distorted version of the Neutral Principles doctrine. What that letter did not mention is that these precise arguments have already been rejected, most recently in three 2011 state supreme court cases including two from the Georgia Supreme Court that *created* the Neutral Principles doctrine. And this summer the U.S. Supreme Court twice denied certiorari to breakaway factions urging those same rejected arguments.

[2] App. Ex. A-15 (23CR5008-15); *see also* App. Exs. A-1 (24CR5132); A-3 (24CR5172); A-10 (27CR5911).

Petitioners' letter fails on the face of *Jones.*[3] At some point, this costly breakaway litigation must end.

There is nothing surprising about this overwhelming national consensus. A party cannot use civil courts to wipe out decades of their voluntary intra-church commitments regarding property and discipline that are obvious on the face of the record. This is true under any theory consistent with the First Amendment.

ARGUMENT AND AUTHORITIES

I. LIBERTY INSTITUTE RIGHTLY PREFERS DEFERENCE BUT ERRS ON THE FACE OF THE RECORD.

Under the undisputed facts of this record, Liberty Institute's brief actually supports affirmance in favor of the loyal Episcopalians.

A. Liberty Institute rightly prefers Deference.

Liberty Institute was right to champion *Watson*[4] Deference for intra-church, schismatic property disputes. As Chief Justice Radack, Justice Bland, and Justice Huddle of the First Court of Appeals held last month: "We believe that the hierarchical deference approach is a better fit in this situation because to hold otherwise would interfere with PCUSA's governance in property matters, as set forth in its Book of Order. . . ."[5] And in its unanimous 2012 *Hosanna-Tabor* opinion, the U.S. Supreme Court also signaled its re-embrace of *Watson* Deference, finding: "In *Watson* . . . [we]

[3] *Jones v. Wolf*, 443 U.S. 595 (1979).

[4] *Watson v. Jones*, 80 U.S. 679 (1871).

[5] *Windwood Presbyterian Church, Inc. v. Presbyterian Church (U.S.A.)*, No. 01-10-00861-CV, --- S.W.3d ----, 2012 WL 3771459, at *8 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet. h.).

considered a dispute between antislavery and proslavery factions *over who controlled the property* of the Walnut Street Presbyterian Church. . . . The General Assembly of the Presbyterian Church had recognized the antislavery faction, *and this Court . . . declined to question that determination*."[6] And, recounting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), the Court observed: "*[T]he controversy over the right to use the cathedral was strictly a matter of ecclesiastical government*, the power of the Supreme Church Authority . . . to appoint the ruling hierarch of the archdiocese. . . ."[7] In other words, as Liberty Institute correctly implies, Texas got it right, choosing the better approach of Deference to prevent church-state entanglement under this familiar fact-pattern, where so many other states did not. *See* Resp. at 13-31.

B. But Liberty Institute makes a fundamental error.

Liberty Institute errs by suggesting that the hierarchy of The Episcopal Church above the diocesan level is not "obvious" on the face of the record. It is – *as every court in the nation to consider the matter has found.* Liberty Institute concedes that it "is not an authority on ecclesiastical authority structures," but notes vaguely that it is "aware" that "a dispute exists as to whether the Episcopal Church is hierarchical above the diocesan level." Lib. at 12. But there is no *genuine* dispute – only an echo chamber. Defendants' position is contrary to every uncontested fact and every case on point.

[6] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 704 (2012) (emphasis added).

[7] *Id.* at 705 (emphasis added) (citation and internal quotation marks omitted).

Courts repeatedly and without exception find, as one succinctly put it, the "*geographically-defined dioceses [] belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church. . . .*"[8] Among the innumerable facts demonstrating this point, every new diocese swears "unqualified accession" to the General Church.[9] The Diocese here was created only with the permission of The Episcopal Church and swore unanimously upon formation – in a writing signed by *every* diocesan leader and *every* parish – to "hereby *fully subscribe to and accede to* the Constitution and Canons of The Episcopal Church. . . ."[10] The Diocese stated in Article 1 of its founding constitution that it "recognizes the authority of the General Convention of said Church."[11] It agreed on formation to hold all real and personal property "in trust for *this* Church and the Diocese *thereof*,"[12] and that the "dedicated or 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, either authorized or approved by *this* Church, *and for no other use*."[13] Every Diocesan Bishop, including Defendant Iker, was required to swear in writing as a condition of Ordination to "conform to the Doctrine, Discipline, and Worship of the Episcopal Church."[14] As Iker himself told the Fourth

[8] *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 48 (Ga. Ct. App. 2010), *aff'd*, 718 S.E.2d 237 (Ga. 2011) (emphasis added).

[9] App. Ex. A-1 (24CR5132); App. Ex. A-3 (24CR5172).

[10] App. Ex. A-15 (23CR5008-15) (emphasis added); *see also* App. Ex. A-1 (24CR5132); App. Ex. A-3 (24CR5172); App. Ex. A-10 (27CR5911).

[11] App. Ex. A-14 (23CR5024).

[12] App. Ex. C-1 (24CR5167) (emphasis added).

[13] App. Ex. A-14 (23CR5030) (emphasis added).

[14] App. Ex. A-1 (24CR5134); App. Ex. A-22 (23CR5038).

Circuit, while still an Episcopal Bishop, "ECUSA has a national body *that leads the overall church . . . . Below that* are the various dioceses which are generally geographical in nature [with] *canons that cannot be inconsistent with national canons . . . . A bishop must adhere to the constitution and canons of the Church or be subject to discipline*."[15] Diocesan bishops must be ordained by at least three other bishops designated by the Presiding Bishop of the General Church.[16] Grounds for removing a bishop include abandoning the communion of the General Church, violating the Church's Constitution or Canons, and violating the Ordination vows.[17] This list of undisputed facts showing three-tier hierarchy goes on and on. *See* Resp. at 1-5.

Accordingly, courts have uniformly recognized the obvious three-tier hierarchy of the Episcopal Church. As the Fourth Circuit held: "[T]he Canons of the Episcopal Church clearly establish that it is a hierarchy."[18] As a Pennsylvania court put it, "each tier of the Episcopal Church's polity is bound by, and may not take actions that conflict with, the decisions of a higher tier."[19] As a Georgia court of appeals put it, regional dioceses "belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church. . . ."[20] As a California court of appeals observed: "The Episcopal

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[15] App. Ex. A-25 (25CR5586, 5588, 5593-94) (emphasis added) (referring to "the Episcopal Church USA, hereinafter 'Episcopal Church,' 'ECUSA' or 'the Church'"); *see also* App. Ex. A-1 (24CR5134); App. Ex. A-22 (23CR5038).

[16] App. Ex. A-1 (24CR5131); 24CR5227.

[17] App. Ex. A-1 (24CR5129-30); App. Ex. B-1 (24CR5243-44); App. Ex. B-2 (24CR5278-79).

[18] *Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002).

[19] *In re Church of St. James the Less*, No. 953NP, 2003 WL 22053337, at *7 (Pa. Ct. Com. Pl. Mar. 10, 2003), *aff'd in relevant part*, 888 A.2d 795 (Pa. 2005).

[20] *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 699 S.E.2d at 48.

Church is a hierarchical church with a three-tiered organizational structure. At the highest level is the Episcopal Church itself, ... governed by a 'General Convention,' comprising lay and clerical delegates, which has adopted a constitution and canons that are binding on all subordinate entities [dioceses and parishes] in the church."[21] As a Michigan court held:

> [T]he Episcopal Church is hierarchical in nature . . . [T]he national canons supersede diocesan canons, which themselves supersede parish bylaws. . . . In Article I of the diocesan constitution, the Diocese declares it is a constituent of PECUSA and 'accedes to the doctrine, discipline, worship, constitution, canons and authority of that Church' . . . . The test of *Watson*, that a religious organization is but a subordinate part of a general church in which there are superior ecclesiastical tribunals with a more or less complete power of control, is plainly met here.[22]

Even *Watson*, the U.S. Supreme Court case introducing the notion of hierarchical churches, expressly identified The Episcopal Church as hierarchical over 140 years ago.[23]

Ironically, Liberty Institute has no difficulty noting that, "[w]ere the dispute below the diocesan level, the Court should simply defer to the Church hierarchy." Lib. at 13. The brief thus leaves no doubt about the proper resolution of *Masterson* in favor of the respondents – the loyal Episcopalians.[24] But the same oaths, vows, and submissions that

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[21] *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 469 (Cal. Ct. App. 2008).

[22] *Bennison v. Sharp*, 329 N.W.2d 466, 472-73 (Mich. Ct. App. 1982).

[23] *Watson*, 80 U.S. at 729 ("[L]et reference be had to *the Protestant Episcopal*, the Methodist Episcopal, and the Presbyterian churches. . . .") (emphasis added).

[24] There is irony in Defendant Iker's own amicus brief in *Masterson*, advancing a diocese's plain hierarchy over the subordinate parishes, while ignoring the general church's plain hierarchy over its dioceses. *See* February 22, 2012 amicus brief in *Masterson* at 2-3 (quoting with approval the Austin Court of Appeals' holding that "'in light of the hierarchical nature of the Episcopal Church, we overrule the Former Parish Leaders' second issue.'").

make the parish obviously subordinate to the diocese also make the diocese and its leaders obviously subordinate to the General Church. On the plain face of the record, even under the test set forth by amicus, summary judgment was proper.

II. THE ACI BRIEF IS IMMATERIAL AND WRONG AND HAS BEEN REPUDIATED.

On April 23, 2012, five active and two retired bishops filed an amicus brief supporting the breakaway faction. Their central argument was that the hierarchy of The Episcopal Church stops in the middle, at the level of the diocesan bishop, and so the Court must defer to ex-Bishop Iker as the "highest authority" in this case[25] – despite the fact that The Episcopal Church has repeatedly and indisputably declared that Defendant Iker is *not* the Bishop of the Episcopal Diocese of Fort Worth and has no position or authority within the Church. *See* Resp. at 4-5.

This brief was sponsored by an entity named "The Anglican Communion Institute, Inc.," which describes itself as "an international think tank" in Dallas. *See* ACI at iv. This group was apparently established in 2007,[26] shortly after Defendants unilaterally and illegally tried to delete their accession language from their governing articles (2006),[27]

[25] ACI at 1 ("[I]f the courts use a deference standard, to what church authority should they defer in this dispute. . . . In the present dispute, that bishop is appellant Bishop Jack Iker.").

[26] *See* Franchise Tax Certification of Account Status, https://ourcpa.cpa.state.tx.us/coa/servlet/cpa.app.coa.CoaGetTp?Pg=tpid&Search_Nm=The%20Anglican%20Communion%20Institute%20&Button=search&Search_ID=32030649415 (last visited Oct. 6, 2012).

[27] *See* Resp. at 28. As one example, Defendants violated their vows and exceeded their grant of authority by attempting the following modification: "The property so held pursuant to (1) supra shall be administered in accordance with the ~~Constitution and Canons of the Episcopal Diocese of Fort Worth~~ Bylaws of the Corporation as they now exist or as they may hereafter be amended." *Id.* at n.75.

and shortly before they severed ties with, and took property from, their Church (2008).[28] Their brief fails for multiple reasons.

A. This tactic has been tried and rejected before.

First, the tactic itself – filing unsupported opinion evidence from a handful of bishops who continue to receive significant financial benefits from The Episcopal Church and/or their respective dioceses but are aligned with the breakaway faction's agenda – has been rejected as immaterial by the other court in which it was recently attempted. The Nashville Court of Appeals affirmed summary judgment in favor of loyal Episcopalians, and the Supreme Court of Tennessee declined the breakaway faction's application for permission to appeal.[29] The Court of Appeals was presented with "a document entitled Bishops' Statement on the Polity of The Episcopal Church" that "appear[ed] to be authored by fifteen or so bishops and former bishops, but does not appear to be sanctioned by The Episcopal Church or the General Convention," which again claimed that the Church was "a voluntary association of equal dioceses."[30] The breakaway faction urged that this created a fact issue as to Church hierarchy.

The Court of Appeals disagreed, surveying the case law and noting that "there was

[28] 25CR5399-5400, 5416-17; App. Ex. B-11 (25CR5419-20).

[29] *Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens, & Vestrymen of St. Andrew's Parish*, No. M2010-01474-COA-R3-CV, 2012 WL 1454846 (Tenn. Ct. App. Apr. 25, 2012), *perm. app. denied*, No. M2010-01474-SC-R11-CV (Tenn. Sept. 18, 2012).

[30] *Id.* at *17.

no longer any dispute" about the Church's hierarchy.[31] The court dismissed the disaffected bishops' submissions as offering "opinions and interpretations of the constitutions and canons," while those documents "speak for themselves and are determinative of the issue."[32] Applying the legal test for hierarchy to the face of the record, the court "join[ed] the majority of jurisdictions in holding that The Episcopal Church is a hierarchical organization for all purposes. . . ."[33] The court noted that, as here, the breakaway faction "would have us ignore the clear language of these and other documents described earlier in this opinion. This we will not do."[34]

B. The brief fails on its own terms, on the face of the record.

The brief self-servingly argues that the hierarchy of The Episcopal Church conveniently stops with former diocesan bishop Defendant Iker, the leader of the breakaway faction. They falsely claim that whether there is three-tier hierarchy presents "a case of first impression" and would require an "impermissible extensive and searching inquiry" because there is supposedly no "explicit language in the church's governing instrument on which to base its conclusion." ACI at i and 2. Most strikingly, these amici tell the Court that Episcopal bishops "take no 'hierarchical oath,' nor do they pledge obedience to any other body,"[35] when the record indisputably shows that Iker, like all Episcopal Bishops, swore as a condition of Ordination in a signed writing to "conform to

[31] *Id.* at *16 n.13.

[32] *Id.* at *17.

[33] *Id.*

[34] *Id.* at *20.

[35] ACI at 17.

the Doctrine, Discipline, and Worship of the Episcopal Church"[36] and told the Fourth Circuit: "ECUSA has a national body that leads the overall church . . . . *A bishop must adhere to the constitution and canons of the Church or be subject to discipline*."[37]

Ironically, amici support their claim that *diocesan bishops* are the relevant hierarchs by citing the same kind of clerical oaths that those diocesan bishops also make upwards (noting that "[p]riests pledge obedience at their ordination to their diocesan bishop").[38] Thus, amici strain credulity by suggesting that the hierarchy question here is "difficult" or a matter of "substantial controversy." ACI at 2, 16. In truth, as every court from *Watson* onward has found, hierarchy is evident on the face of the record. An issue is not in *genuine* dispute simply because a litigant and its supporters claim to dispute it.

C. Even the authors of this amicus brief have repudiated it.

While wholly unnecessary to its disposition of the case, the Court is nonetheless entitled to know what Defendants and their amici have not disclosed: that even these amici have repudiated their brief. Their core conclusion is stated on page one: "[I]f the Court elects to use a deference standard, it is constitutionally required to defer to the diocese and its bishop. . . . In the present dispute, that bishop is appellant Bishop Jack Iker." *See* ACI at 1. *But on July 8, 2012, the same five active bishops who submitted that brief joined more than 150 of their colleagues in a unanimous roll call vote to affirm a*

[36] App. Ex. A-1 (24CR5134); App. Ex. A-22 (23CR5038).

[37] App. Ex. A-25 (25CR5586, 5588, 5593) (emphasis added) (referring to "the Episcopal Church USA, hereinafter 'Episcopal Church,' 'ECUSA' or 'the Church'"); *see also* App. Ex. A-1 (24CR5134); App. Ex. A-22 (23CR5038).

[38] ACI at 17.

Resolution by the House of Bishops at the General Convention of The Episcopal Church, identifying Plaintiffs Bishop Ohl and the loyal Episcopalian Plaintiffs – and *not* Defendant Iker and his co-Defendants – as the Bishop and the authorized leadership of the continuing Episcopal Diocese of Fort Worth.[39]

There is nothing new about this Resolution. It reaffirmed the nearly identical 2009 Resolution of the *full* General Convention, the Church's highest authority.[40] And that Resolution reaffirmed the 2008 actions of the Church and its Presiding Bishop, acting under the General Convention, in removing Defendant Iker from authority and declaring that the breakaway parties were no longer recognized in their former offices.[41] Those facts are undisputed and dispositive. What the new resolution shows, and what the Court is entitled to know, is that ACI's brief has been squarely repudiated by its own authors.

III. COURTS REJECT THE DISTORTED VERSION OF NEUTRAL PRINCIPLES URGED IN THE *MASTERSON* LETTER AND BY DEFENDANTS.

Despite efforts by breakaway litigants across the country to distort the Neutral Principles approach, the vast majority of courts have consistently reaffirmed the true analysis approved by the U.S. Supreme Court in *Jones*. Resp. at 32. And, on June 18, 2012, the Supreme Court again denied certiorari to two breakaway factions urging the same distortions of Neutral Principles that the *Masterson* petitioners (and Defendants)

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[39] *See, e.g.*, *Church Resolution X022 Affirming Continuing Dioceses' Leadership and Ministry*, GENERAL CONVENTION OF THE EPISCOPAL CHURCH, http://www.generalconvention.org/gc/resolutions?by=number&id=x022 (last visited Oct. 6, 2012).

[40] *See* Resp. at 1 (citing 22CR4531-32; App. Ex. A-1 (24CR5129-30)) and 4.

[41] *See* Resp. at 4 (citing App. Ex. B-10 (24CR5113); App. Ex. B-12 (25CR5422)).

urge here.[42] While of course denial of certiorari does not have precedential effect, the Court has now twice this summer declined to revisit the prevailing understanding of *Jones* that petitioners' letter decries. And the Court has now *three times* denied certiorari to breakaway factions in cases finding for loyal Episcopalians since 2009.[43]

In reality, it is petitioners' letter that contradicts the plain meaning of *Jones.* Petitioners starkly tell this Court that "no requirement exists in *Jones* or otherwise that a court slavishly follow a 'specific four-factor permissible Neutral Principles test' or examine any fixed set of factors or evidence."[44] By contrast, as Chief Justice Burger and Justices Powell, Stewart, and White put it, "the 'neutral principles of law' approach operates as a restrictive rule of evidence. ***A court is required to examine*** the deeds to the church property, the charter of the local church (if there is one), the book of order or discipline of the general church organization, and the state statutes governing the holding of church property."[45] Or, as the majority in *Jones* put it, under "the 'neutral principles of law' approach" it found constitutional "[a]t least in general outline," courts consider "the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church

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[42] *See Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302 (Conn. 2011), *cert. denied*, 132 S. Ct. 2773 (2012); *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446 (Ga. 2011), *cert. denied*, 132 S. Ct. 2772 (2012).

[43] *Gauss*, 28 A.3d 302 (Conn. 2011), *cert. denied*, 132 S. Ct. 2773 (2012); *In re Episcopal Church Cases*, 198 P.3d 66 (Cal.), *cert. denied sub nom. Rector, Wardens & Vestrymen of St. James Parish in Newport Beach, Cal. v. Protestant Episcopal Church in Diocese of L.A.*, 130 S. Ct. 179 (2009); *Huber v. Jackson*, 96 Cal Rptr. 3d 346 (Cal. Ct. App. 2009), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (2009), *cert. denied*, 78 U.S.L.W. 3498 (2010).

[44] Pet. at 2 n.1.

[45] *Jones*, 443 U.S. at 611 (Burger, C.J., and Powell, Stewart, and White, JJ., dissenting) (emphasis added).

concerning the ownership and control of church property."[46] Or, as the Georgia Supreme Court, which originated the *Jones* Neutral Principles approach, put it:

> To avoid First Amendment concerns, Georgia courts apply 'neutral principles of law' to determine whether the local congregation or the parent, or general, church in a hierarchical denomination like the Episcopal Church has the right to control local church property, while avoiding any inquiry into religious doctrine. ***These neutral principles include*** *deeds and other instruments of title, state statutes, and documents regarding local and general church government.*[47]

And the relevant statutes are expressly those "*governing the holding of church property*," not "the litany of other generic statutes. . . ."[48]

The *Masterson* petitioners attempt to distract from the dominant authority against their position by (i) focusing on three outlier cases (one from the Indiana Supreme Court[49] and two from intermediate courts in Missouri – all non-Episcopal Church cases), and (ii) criticizing the proper holding of Chief Justice Radack and Justices Bland and Huddle in *Windwood*, which accurately stated the four-factor analysis of *Jones*.[50] But

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[46] *Id*. at 602-03.

[47] *Christ Church*, 718 S.E.2d at 241 (emphasis added) (citations and footnote omitted).

[48] *Id*. at 245 & n.7 (emphasis in original).

[49] *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012). While the Indiana Court failed to apply the proper Neutral Principles analysis and misinterpreted the holdings of *Gauss* and *Timberridge*, even under that court's analysis, the loyal Episcopalians here would prevail. *See, e.g.*, *id.* at 1106 n.7 ("Thus, under Indiana law, a claim of trust by the purported beneficiary (e.g., insertion of a trust clause into a denominational church organization's constitution), without indicia of intent on the part of the owner (settlor), is insufficient to impose a trust"). But here, the case is replete with such indicia of intent, including unanimous submissions to Church authority (including the Dennis Canon and other property law) (*see* Resp. at 1-5).

[50] *Windwood*, 2012 WL 3771459, at *4 ("One acceptable approach, referred to as the 'neutral principles' approach, permits the state courts to examine legal documents of title, state statutes governing the holding of church property, and the secular provisions of church documents, including the terms of the local church charters and the provisions of the constitution of the general church concerning the ownership and control of church property").

courts have repeatedly rejected the positions set forth in petitioners' letter. The breakaway defendants-appellants in *Gauss* similarly claimed that the Dennis Canon did not present the parties' pre-dispute intent in a "legally cognizable form" under *Jones*, because the trust language did not comply with Connecticut rules governing disputes between secular organizations, including the Marketable Title Act (which "extinguishes interests which remain unrecorded for [forty] years"), the statute of frauds, and Connecticut trust law.[51] The Connecticut Supreme Court disagreed, holding:

> [D]efendants omit the explanation that precedes the court's tatement that a trust must be in a "legally cognizable form" in order to be enforceable. *Jones v. Wolf*, supra, 443 U.S. at 606, 99 S. Ct. 3020. That statement, in its entirety, reads as follows: "Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At *any time before the dispute erupts*, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.*"[52]

Similarly, the Georgia Supreme Court in *Timberridge* held that "the fact that a trust was not created under our state's generic express (or implied) trust statutes does not preclude the implication of a trust on church property under the neutral principles of law

[51] *Gauss*, 28 A.3d at 325.

[52] *Id.* (emphasis in original).

doctrine."[53] Justice Nahmias, writing for the Georgia Supreme Court, reaffirmed that, under the Neutral Principles doctrine that court created in *Jones*, as approved by the U.S. Supreme Court, "our ultimate goal is to determine 'the intentions of the parties' at the local and national level regarding beneficial ownership of the property at issue as expressed 'before the dispute erupt[ed]' in a 'legally cognizable form.'"[54] He concluded: "Applying the neutral principles with an even hand, we simply enforce the intent of the parties as reflected in their own governing documents; to do anything else would raise serious First Amendment concerns."[55] Discussing *Jones* at length, the court affirmed that "[r]equiring compliance with [Georgia's generic trust statute] would be inconsistent with the teaching of *Jones v. Wolf* that the burden on a national church and its member churches to provide which one will control local church property in the event of a dispute will be 'minimal.'"[56] The court noted that churches

> can modify their deeds, amend their charters, or draft a separate legally recognized document to establish an express trust as set forth in [Georgia's generic trust statute]. But that is not the *only way* in which the parties can ensure that local church property will be held in trust for the benefit of the national church; it may also be done through the national church's constitution, for example, by making it "recite an express trust." *Jones*, 443 U.S. at 606. If, as the Court of Appeals held in this case, hierarchical denominations must fully comply with [Georgia's trust statute] for the parent church to retain control of local church property when there is a schism and a majority of the local church congregation disaffiliates, then an enormous number of deeds and corporate charters would

[53] *Timberridge*, 719 S.E.2d at 454.

[54] *Id.* at 450 (quoting *Jones*, 443 U.S. at 603, 606).

[55] *Id.* at 458.

[56] *Id.* at 452-53 (citation omitted).

> need to be examined and re-conveyed or amended; *the burden on the parent churches, the local churches that formed the hierarchical denominations and submitted to their authority, and the free exercise of religion by their members would not be minimal but immense*.[57]

The Georgia Supreme Court similarly rejected the breakaway argument that a trust had been "unilaterally imposed" on the local church.[58] The court noted that, as in this case, "Timberridge's act of affiliating with the PCUSA in 1983 with the trust provision already in its governing constitution demonstrated that Timberridge assented. . . . And Timberridge's continued membership in the PCUSA, for nearly a quarter of a century in all, with the trust provision always in full effect, further bolsters this conclusion."[59]

There, as here, the local church had transferred property to a corporation subject to its agreement to hold it in trust for the mother church. Notably, in *Timberridge*, the local church had brought its own property *into* the national church, whereas here, the newly-formed Episcopal Diocese of Fort Worth *accepted* the transfer of historic Episcopal property (accumulated over 144 years) from an existing Episcopal Diocese *after* agreeing to use that property for the mission of the Church and for no other purpose. Resp. at 1-4.

Petitioners' letter next claims, like the breakaways in *Gauss* and Defendants here, to explain away the overwhelming majority of case law against them through differences in state statutes governing church property or variations in fact patterns.[60] But the *Gauss*

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[57] *Id.* at 453 (second emphasis added).

[58] *Id.* at 456.

[59] *Id.*

[60] Pet. at 6-7.

Court rejected this position as well, correctly noting that the same types of overriding agreements as to church discipline and property appeared throughout the case law, demonstrating clear pre-dispute intent not dependent on the claimed variations in law.[61] The only Texas statute concerning church property expressly authorizes what the Church and its parishioners here *did*: form a subordinate corporation "[t]o effect its [the Church's] purposes" and hold property "for the use and benefit of, under the discretion of, and in trust for" the Church "by which it is controlled."[62] *See* Resp. at 25-29.

Nor does petitioners' newly-raised citation to the Texas Business Organizations Code negate the parties' obvious commitments. The rule petitioners cite applies expressly to the subordinate corporation and its officers, not to the religious association by which they are controlled: "This subchapter does not authorize *a domestic entity or a managerial official of a domestic entity* to exercise a power in a manner inconsistent with a limitation on the purposes or powers of the entity contained in its governing documents, this code, or other law of this state."[63] And here it is only *Defendants* that have violated their limited powers as corporate officers of a religious corporation.[64] And there is nothing "inconsistent" with any state law in Defendants abiding by the "limitation[s] on the purposes or powers of the entity contained in its governing documents," set forth in plain language in their many intra-church agreements as a condition of their offices.

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[61] *Gauss*, 28 A.3d at 327-28.

[62] Tex. Bus. Orgs. Code Ann. § 2.102. Texas's predecessor statute contained substantially similar language. Tex. Rev. Civ. Stat. Ann. art. 1396-2.02A(16).

[63] Tex. Bus. Orgs. Code Ann. § 2.113(a).

[64] *See* Resp. at 25-29.

In both *Gauss* and *Timberridge*, the breakaway factions petitioned the U.S. Supreme Court. And in both cases, that Court declined to revisit the plain meaning of *Jones*. The breakaway faction in *Timberridge* retained Carter Phillips at Sidley Austin and framed the issue just as Defendants have here.[65] The faction in *Gauss* hired Winston & Strawn and did the same.[66] Defendants cannot claim their ideas did not get a fair hearing or counsel capable of attracting the Court's attention when the Court declined again to alter the straight-forward Neutral Principles test.[67]

Notably, since Georgia had been a Neutral Principles state for three decades, *Timberridge* did not involve, as here, the additional free-exercise concerns of a "retroactive application of a neutral-principles approach," as the *Jones* Court cautioned.[68] While petitioners' letter criticizes the "misguided application of stare decisis" expressed by the Methodist, Presbyterian, Greek Orthodox, Lutheran, and Episcopal amici in *Masterson*, it was the U.S. Supreme Court, not those amici, that first raised this concern.

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[65] Petition for Writ of Certiorari, *Timberridge Presbyterian Church, Inc. v. Presbytery of Greater Atlanta, Inc.*, 132 S. Ct. 2772 (2012) (No. 11-1101), 2012 WL 755072 ("Whether the 'neutral principles' doctrine embodied in the Religion Clauses of the First Amendment permits imposition of a trust on church property when the creation of that trust violates the state's property and trust laws.").

[66] Petition for a Writ of Certiorari, *Gauss v. Episcopal Church in the Diocese of Conn.*, 132 S. Ct. 2773 (2012) (No. 11-1139), 2012 WL 900636 (Framing the issue as: "Whether the First Amendment, as interpreted by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), requires state civil courts to enforce an alleged trust imposed on local church property by provisions in denominational documents, regardless of whether those provisions would be legally cognizable under generally applicable rules of state property and trust law.").

[67] The U.S. Supreme Court also declined to hear a case adverse to a loyal Presbyterian group from Louisiana, but unlike *Gauss* and *Timberridge*, this was an appeal from an intermediate state appellate court, which the U.S. Supreme Court rarely takes; nor does it typically act to correct outlier cases. *See Carrollton Presbyterian Church v. Presbytery of S. La. of the Presbyterian Church (USA)*, 77 So. 3d 975 (La. Ct. App. 2011), *writ denied*, 82 So. 3d 285 (La. Feb. 17, 2012), *cert. denied*, --- S. Ct. ----, 2012 WL 1833937 (Oct. 1, 2012); *see also* Sup. Ct. R. 10 (discussing when "state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. . . .").

[68] *Jones*, 443 U.S. at 606 n.4.

IV. DEFENDANTS' SUNDRY REPLY ARGUMENTS FAIL.

Like amici and the *Masterson* petitioners, Defendants' Reply runs contrary to the record and the First Amendment. Beyond the positions rejected in *Gauss* and *Timberridge* discussed above, Defendants' Reply contains sundry incorrect arguments:

A. No third approach.

Defendants suggest that Plaintiffs have proposed a "third" method for intra-church property disputes. Not so. There are only two methods expressly approved by the U.S. Supreme Court, *Watson* Deference and *Jones* Neutral Principles. Unable to prevail under either, Defendants assail TEC's use of the term "Identity" to describe *Watson* Deference, and accuse the Church of promoting the verboten "English Method," in which *civil courts* attempted to adjudge whether a church had adhered to its *religious principles*. This is a desperate, straw-man argument. Defendants know that the term "Identity" was used here to describe how, under *Watson* Deference, civil courts defer to a *church's identification* of which faction represents the continuing local church entity in a schismatic dispute. The only parties proposing a "third" approach are Defendants, whose impermissible substitution of all generally applicable state laws for the actual Neutral Principles analysis ignores *Jones* and its First Amendment protections.

B. No parade of horribles.

Without evidence, Defendants warn that continuing Texas's 103-year application of *Watson* Deference will lead to dire consequences for churches, including the inability to get loans or conduct business. This is nonsense: such chaos has failed to materialize over the past 100 years, despite an unbroken chain of Texas cases applying *Watson*

Deference to hierarchical church property disputes. *See* Resp. at 8-13. Of course, trustees and officers of foundations and corporations change all of the time, yet those organizations continue to transact business. And Texas law applying Deference has actually made things quite common-sensical: the people leading the Episcopal Diocese of Fort Worth are the ones authorized by The Episcopal Church to do so. In truth, it is only Defendants who are sowing confusion for churches, by contradicting settled law in the pursuit of assets.[69]

C. No unfairness to Defendants.

Defendants assert that *Watson* Deference is unfair, or even unconstitutional, because it supposedly prefers hierarchical churches over non-hierarchical ones. Reply at 11. To the contrary, the U.S. Supreme Court not only reaffirmed the constitutionality of *Watson* in 2012, but championed it as "radiat[ing] a spirit of freedom for religious organizations. . . ."[70] There is no unfairness in reflecting the religious or theological *choice* of individuals to organize as a hierarchical church and to submit voluntarily to its authority and governance. Indeed, the opposite is true: not only is this doctrine perfectly fair to Defendants, but it would be manifestly unfair and unconstitutional to enforce the chosen organizational structure of congregational churches while refusing to do so with hierarchical churches. As this Court found: "'All who unite themselves to [a religious] body do so with an implied consent to [church] government, and are bound to submit to

[69] Reply at 21-22. Defendants also assert, again without explanation or evidence, that recognizing the right of adherents to organize their church as a hierarchical church would require courts to enforce Sharia law. Scaremongering is not legitimate argument.

[70] *Hosanna-Tabor*, 132 S. Ct. at 704 (citations and modifications omitted).

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.'"[71]

D. No novelty.

Hoping to distinguish their case from the overwhelming national authority against them, Defendants state wrongly: "This case is different from all previous Episcopalian property appeals, which have addressed disputes only between a parish and a diocese – with TEC claiming no interest." Reply at 3. As the appellate court put it in *Schofield v. Superior Court*, 118 Cal. Rptr. 3d 160 (Cal. Ct. App. 2010), which involved a breakaway faction claiming, as here, to take an Episcopal Diocese out of the Episcopal Church: "*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*."[72] Nor does Defendants' chart about whether The Episcopal Church was or was not a party to other lawsuits mean anything: in the vast majority of cases, the Church's diocesan bishops and officers take seriously their "solemn" oaths of loyalty and fiduciary responsibility, and the national Church did not have to participate directly to protect its interests.[73] And, as shown, there is no merit in the false distinction between "diocese cases" and "parish cases" when the

[71] *Westbrook v. Penley*, 231 S.W.3d 389, 397 (Tex. 2007) (emphasis added) (quoting *Watson*, 80 U.S. at 729).

[72] *Schofield*, 118 Cal. Rptr. 3d at 166 (emphasis added). *Schofield* was a church property dispute that the loyal Episcopalians won on summary judgment. The appeal focused on the trial court's treatment of ecclesiastical facts, not the property issues directly. If *that* is the distinction Defendants use to ignore *Schofield*, relying on the imprecise phrase "property appeals," it reveals a certain desperation.

[73] *See* Reply at Tab B; *see also* App. Ex. A-1 (24CR5134-35); 24CR5227.

same undisputed facts show that both are subordinate layers of the larger Church.

E. No word games.

Similarly, Defendants attempt to read phrases like "members of the Church in this Diocese" or "subject to control of the Church in the Episcopal Diocese of Fort Worth" to mean the Diocese, independent of the Church. Reply at 29. But using a geographical designation like "the Church in this diocese" does not somehow remove the fact that, under the plain language, it is "*the Church* in this diocese" – not the diocese, free from its unanimous full accession to the Church and its laws.[74] Such language merely reflects the plain fact that, as the New Jersey Supreme Court put it, "the [] Episcopal Church is a completely integrated hierarchical body," and the Diocese is the regional embodiment of the Church.[75] Nor can Defendants misconstrue the Dennis Canon, when all real and personal property is "held in trust for <u>*this*</u> Church *and* the Diocese <u>*thereof*</u>. . . ."[76]

V. DEFENDANTS CANNOT TAKE CHURCH PROPERTY UNDER ANY PROPER ANALYSIS.

Despite Defendants' and amici's numerous positions requiring response, the analysis remains straightforward. Plaintiffs prevail under Deference, because the highest authorities of The Episcopal Church have repeatedly determined that Plaintiffs are the parties authorized to lead the Episcopal Diocese of Fort Worth and use its property.[77] *See*

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[74] In the Diocesan Constitution and Canons, the term "Church" expressly refers to The Episcopal Church. *See* App. Ex. A-14 (23CR5024) (Preamble). Indeed, Defendant Iker himself uses this convention. *See* App. Ex. A-25 (25CR5586) (referring to "the Episcopal Church USA, hereinafter 'Episcopal Church,' 'ECUSA' or 'the Church'").

[75] *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 21-22, 24 (N.J. 1980).

[76] App. Ex. C-1 (24CR5167) (emphasis added).

[77] Resp. at 31.

Resp. at 1-4, 31-32. Plaintiffs prevail under Neutral Principles for two reasons. First, the core holding of *Milivojevich*[78] resolves the dispute without further inquiry: even if the Court were to change Texas law from *Watson* Deference to *Jones* Neutral Principles, the Court would immediately encounter several ecclesiastical questions, requiring deference to the Church's decisions. Here, for example, where the *ex-officio* chair of the property-holding corporation is the Bishop who has sworn obedience to the Church, and where the corporation itself was formed pursuant to Church law to hold property "subject to control of the Church" and "only for the services, rites and ceremonies, or other purposes, either authorized or approved by *this* Church, *and for no other use*,"[79] then, just as in *Milivojevich*, "the Diocesan Bishop . . . is the principal officer of respondent property-holding corporations. *Resolution of the religious dispute over [his] defrockment therefore determines control of the property*."[80]

Second, even if the Court went further, Plaintiffs would still prevail under Neutral Principles because, among other reasons, (1) the most recent deed, a 1984 declaratory judgment, vests property in a corporation formed expressly subject to the control of the Church,[81] (2) the Church documents in effect when the Episcopal Diocese was formed

[78] *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976).

[79] App. Ex. A-1 (24CR5134); App. Ex. A-22 (23CR5038); App. Ex. A-14 (23CR5025) (emphasis added); App. Ex. C-1 (24CR5167) (emphasis added); App. Ex. A-14 (23CR5030) (emphasis added).

[80] *See* Resp. at 33-36; *Milivojevich*, 426 U.S. at 709 (emphasis added); *id*. at 717.

[81] And, while the Court need not reach it to find for Plaintiffs, the summary judgment record contains additional deed evidence pre-dating the 1984 declaratory judgment, including for example deeds for Camp Crucis that grant parcels expressly to the "Bishop *of the Protestant Episcopal Church. . . in trust for the use and benefit of the Protestant Episcopal Church*," and additionally deeds Defendants failed to produce until after summary judgment. *See* Resp. at 39-41, 49-50.

plainly require all real and personal property to be held in trust for the use and benefit of the Church and the Diocese *thereof*, (3) the local governing documents signed by the diocese and every parish now purporting to break away fully submit to Church authority and commit that property may be used only for services and other purposes authorized or approved by the Church, and (4) the Texas statutes regarding church property allow hierarchical churches to form subordinate corporations to hold property under the discretion of, controlled by, and in trust for the higher church: exactly what the parties did here. *See* Resp. at 26-27, 36-42.

CONCLUSION AND PRAYER

It is not surprising that, under any constitutionally permissible analysis, parties cannot submit to Church law and property rules, accept 144 years worth of historic Church property under those commitments, and then take that property for the use and benefit of a new and different entity decades later, by using civil courts to void their intra-church commitments. This is true under *Watson*, under *Jones*, and under *Milivojevich* – as well as under any approach consistent with the free exercise of religion. This Court should affirm the trial court's summary judgment under Texas's 103-year application of *Watson* Deference, or under any analysis consistent with the First Amendment. The Episcopal Parties are entitled to closure in this matter and the chance to direct all their resources back to ministry and mission, and not to litigation that presses interminably against clear First Amendment protections.

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