

|                              |   |                          |
|------------------------------|---|--------------------------|
| THE EPISCOPAL CHURCH, et al. | § | IN THE DISTRICT COURT OF |
|                              | § |                          |
| v.                           | § | TARRANT COUNTY, TEXAS    |
|                              | § |                          |
| FRANKLIN SALAZAR, et al.,    | § | 141ST JUDICIAL DISTRICT  |

**DEFENDANTS’ SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendants file this second motion for partial summary judgment on the claims noted below in this severed action, reserving for another day their right to pursue the remaining claims, damages, and other relief requested in this cause and in the related case, cause number 141-237105-09. There are no questions of material fact and Defendants are entitled to judgment as a matter of law. See Tex. R. Civ. P. 166a.

The Texas Supreme Court remanded this case for the Court to apply neutral principles of Texas corporate, trust, property, and other state law. See *Episcopal Diocese of Fort Worth v. The Episcopal Church*, 422 S.W.3d 646, 652-53 (Tex. 2013) (hereinafter “*Fort Worth*”). The Court must enforce the rules and property rights of the corporation and associations involved here in the same manner as with any other entities. See *Masterson v. The Diocese of Northwest Tex.*, 422 S.W.3d 594, 606 (Tex. 2013) (hereinafter “*Masterson*”). Under neutral principles of state law, Defendants are entitled to summary judgment.

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### Governing Law

Texas law governs all issues in this case, and no one asserts that any other state’s law applies.<sup>1</sup> In addition:

- *Law governing the Corporation.* The Corporation of The Episcopal Diocese of Fort Worth (“the Corporation”) is a nonprofit corporation incorporated and operating in Texas,<sup>2</sup> so issues concerning its officers and control are governed by the Texas Non-Profit Corporation Act.<sup>3</sup> “The [C]orporation was incorporated pursuant to Texas corporation law and that law dictates how the corporation can be operated, including determining the terms of office of corporate directors”;<sup>4</sup>
- *Law governing the Diocese.* The Episcopal Diocese of Fort Worth (“the Diocese”) is an unincorporated association formed and operating

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<sup>1</sup> See Tex. R. Evid. 202 (requiring party asserting other law must “furnish the court sufficient information” to do so); see also *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 685 (Tex. 2006) (“It is true that Texas courts can presume that the determinative law of another state is the same as Texas law absent proof or argument to the contrary.”).

<sup>2</sup> See *Virden Affid.* ¶4; JA00066-069.

<sup>3</sup> See TEX. REV. CIV. STAT. art. 1396-10.02(A) (stating Legislature may provide regulations, provisions, and limitations that are binding upon corporations subject to the Act”); see also RESTATEMENT (2D) CONFLICT OF LAWS (1971) § 304; TEX. BUS. ORGS. CODE § 1.101 (providing that Texas law governs internal affairs of entities formed by certificate of formation from Texas).

<sup>4</sup> *Fort Worth*, 422 S.W.3d at 652; see also *Masterson*, 422 S.W.3d at 606 (holding Texas courts should apply Texas law to “corporate formation, governance, and dissolution, even when religious entities are involved”).

in Texas,<sup>5</sup> so issues concerning its officers and control are governed by the Texas Uniform Unincorporated Nonprofit Association Act,<sup>6</sup> and

- ***Law governing Trusts.*** The trusts existing and alleged involve Texas real property and are administrated by Texas residents,<sup>7</sup> so their existence and control is governed by the Texas Trust Code.<sup>8</sup>

Some of these acts and codes have been codified in the Texas Business Organizations Code, but the new Code does not apply because this suit was filed and all transactions occurred before January 1, 2010.<sup>9</sup> Nevertheless, as the provisions of the former and current statutes are largely the same, citations to the Code are included in the footnotes for the Court's convenience.

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<sup>5</sup> See JA00097-164. "JA" refers to the Joint Appendix of stipulated exhibits.

<sup>6</sup> See TEX. REV. CIV. STAT. art. 1396–70.01; *District Grand Lodge No. 25 v. Jones*, 160 S.W.2d 915, 922 (Tex. 1942) ("It is generally held that the constitution and by-laws of a voluntary association, whether incorporated or not, are controlling as to its internal management."); see also TEX. BUS. ORGS. CODE § 1.103 (providing that Texas law governs internal affairs of entities formed in Texas without necessity of filing with the state).

<sup>7</sup> See JA00113 (1982 FW Const. Art. 13); JA00130 (1982 FW Canon 11.2) (requiring trustees to be canonically resident in Diocese or members of local parishes).

<sup>8</sup> Trusts holding Texas land are governed by Texas law. See *Toledo Soc. for Crippled Children v. Hickok*, 261 S.W.2d 692, 697 (Tex. 1953); *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 877 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); RESTATEMENT (2D) CONFLICT OF LAWS (1971) § 276. Trusts administered by Texas trustees are governed by Texas law. See *Warner v. Florida Bank & Trust Co.*, 160 F.2d 766, 771 (5th Cir. 1947); RESTATEMENT (2D) CONFLICT OF LAWS 2d (1971) § 271(b), *comment a*.

<sup>9</sup> See TEX. BUS. ORGS. CODE § 402.006 ("[P]rior law governs the acts, contracts, or transactions of the entity or its managerial officials, owners, or members that occur before the mandatory application date" of January 1, 2010); *id.* at § 402.014 ("Except as expressly provided by this title, this code does not apply to an action or proceeding commenced before [January 1, 2010]. Prior law applies to the action or proceeding.").

## References to Parties and the Record

|                                     |  |
|-------------------------------------|--|
| <b>TEC</b>                          | The Episcopal Church.  |
| <b>Plaintiffs</b>                   | All parties, real or purported, that filed the pleading styled "Plaintiffs The Episcopal Parties' July 15, 2014 Amended Petition."     |
| <b>Individual Plaintiffs</b>        | All Plaintiffs who are persons rather than entities.   |
| <b>Defendants</b>                   | All parties listed below, regardless of how they are designated in any answers, counterclaims, interventions, or other pleadings.      |
| <b>Individual Defendants</b>        | All Defendants who are persons rather than entities.   |
| <b>the Diocese</b>                  | The Episcopal Diocese of Fort Worth.   |
| <b>the Corporation</b>              | The Corporation of The Episcopal Diocese of Fort Worth.  |
| <b>Bishop Iker</b>                  | Bishop Jack Leo Iker.  |
| <b>Defendant Trustees</b>           | Franklin Salazar, Jo Ann Patton, Walter Virden, III, Rod Barber, Chad Bates, and Bishop Iker.  |
| <b>Defendant Standing Committee</b> | Rev. Thomas E. Hightower, Walter Virden, III, Rev. Christopher T. Cantrell, Judy Mayo, Rev. Timothy Perkins, and Dr. Franklin Salazar. |
| <b>Defendant Congregations</b>      | All parties that filed the "Second Amended Original Plea in Intervention" on July 15, 2014 signed by R. David Weaver.                  |
| <b>JA00066</b>                      | Page 66 of the parties' Joint Appendix filed herewith.   |
| <b>Virden Affid. ¶4</b>             | Walter Virden affidavit, paragraph 4.  |
| <b>Sharpe Affid., Ex. 2</b>         | Exhibit 2 to Shelby Sharpe affidavit.  |

## INTRODUCTION

The primary legal questions for the Court in this dispute are (1) who controls the Corporation that holds title to, and by virtue of church charters controls, the properties at issue herein, and (2) whether that property is subject to a trust in favor of TEC and the minority-group Plaintiffs. The Texas Supreme Court has held that these questions must be decided by Neutral Principles of Texas law.<sup>10</sup> According to the deeds, church charters, and Texas law:

- using neutral principles of Texas law to decide this case is not retroactive;
- the properties at issue are owned by the Corporation;
- the Defendant Trustees are the properly Elected Trustees of the Corporation;
- Bishop Iker is the proper chairman and a member the Corporation's board;
- no express trust exists in favor of Plaintiffs;
- no implied or constructive trust exists in favor of Plaintiffs;
- the Defendants are not estopped to defend themselves; and
- the Defendants properly control the funds, trusts, and endowments at issue.

As a matter of law, the Defendants are entitled to title, control, and use of all of the property at issue in this case, and such other and further relief as allowed by law.

## BACKGROUND FACTS

**The Diocese.** The Diocese was created at a Primary Convention in November 1982 by division of the Diocese of Dallas.<sup>11</sup> Seven weeks later, the Diocese was admitted into union with TEC's governing body, the General

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<sup>10</sup> See *Fort Worth*, 422 S.W.3d 646, 651 (Tex. 2013).

<sup>11</sup> See JA00338-378 (Primary Convention proceedings).

Convention, on December 31, 1982.<sup>12</sup> The Diocese is a Texas unincorporated association,<sup>13</sup> and is governed by its Constitution and Canons as amended from time to time.<sup>14</sup>

**The Corporation.** The Corporation is a Texas non-profit corporation,<sup>15</sup> and is governed by its articles of incorporation, bylaws, and a Board of Trustees.<sup>16</sup> The Corporation was formed to hold title and control of all the real property used by the parishes, missions, and other institutions in the Diocese.<sup>17</sup> Acquisition, construction, and maintenance of all these properties is financed by and attributable to the contributions of local members or other benefactors within the Diocese or its predecessor, the Diocese of Dallas; TEC neither sold nor gave any of the property to the Corporation.<sup>18</sup>

**The Controversy.** In recent years, many in the Diocese believed that TEC's actions reflected "a substantial departure from the biblical and historic faith."<sup>19</sup> Accordingly, in 2007 an amendment was offered at the Diocese's Annual Convention to remove references to TEC from the Diocese's Constitution, and a huge majority (83% of clergy, 77% of lay delegates) voted to adopt the changes.<sup>20</sup> At a second convention in 2008 (as required to amend the Diocese's

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<sup>12</sup> See JA00063.

<sup>13</sup> See Iker Affid. ¶4.

<sup>14</sup> See *id.* ¶4; JA00097-164 (1982 version); JA00165-245 (2006 version).

<sup>15</sup> See Virden Affid. ¶4; JA00066-069 (1983 Articles); JA00070-074 (2006 Articles); JA00076-89 (1983 Bylaws); JA00090-96 (2006 Bylaws).

<sup>16</sup> See JA00066-69 (1983 Articles); JA00070-74 (2006 Articles); JA00076-089 (1983 Bylaws); JA00090-96 (2006 Bylaws).

<sup>17</sup> See JA00071-072.

<sup>18</sup> See Virden Affid. ¶¶5 & 7.

<sup>19</sup> See Iker Affid. Ex. 3, p. 48.

<sup>20</sup> See *id.* ¶9 & Ex. 3, pp. 80, 93 (vote on Amendment D).

Constitution<sup>21</sup>), the changes were adopted by similar majorities (79% of clergy, 80% of lay delegates<sup>22</sup>) and went into effect.

**The Diocese Attempts Conciliation.** Recognizing that in a handful of churches a significant majority of the members wanted to remain affiliated with TEC, the Diocese adopted procedures for an amicable separation.<sup>23</sup> Three parishes took advantage of the offer, and in February 2009 the Corporation transferred property to them.<sup>24</sup>

**TEC Files Suit.** TEC soon put an end to conciliation. On April 14, 2009, this suit was filed by TEC and Individual Plaintiffs who were in the minority at the 2007 and 2008 Conventions and who had withdrawn from the Diocese.<sup>25</sup> TEC's decision to file this suit came from the Presiding Bishop acting on her own authority; the General Convention (TEC's governing body) has never directly authorized it.<sup>26</sup> Plaintiffs demanded turnover of more than 50 church properties in the Diocese, including 38 churches in which not a single member was willing to appear as a Plaintiff associated with TEC.<sup>27</sup> All told, the contested properties have an insured value in excess of \$100 million dollars.<sup>28</sup>

**The Appeals.** The Second Court of Appeals held that Plaintiffs' counsel had shown no authority to represent the Diocese or the Corporation. *See In re Salazar*, 315 S.W.3d 279, 287 (Tex. App.—Fort Worth 2010, orig. proceeding). In a

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<sup>21</sup> See JA00117; JA00191.

<sup>22</sup> See Iker Affid. ¶9 & Ex. 4, pp. 49, 82 (vote on Amendment to Article I).

<sup>23</sup> See *id.* Ex. 3, pp. 42, 73 (amendment to Canon 32).

<sup>24</sup> See Virden Affid. ¶13 & Ex. 4.

<sup>25</sup> See Sharpe Affid. Ex. 1.

<sup>26</sup> See *id.* Ex. 4 (Schori depo pp. 44-45); *id.* Ex. 5 (Beers Affid. p. 6).

<sup>27</sup> See *id.* Ex. 2, Table A (listing representative plaintiffs for 12 churches and 38 others without any).

<sup>28</sup> See Virden Affid. ¶11.

separate direct appeal, the Texas Supreme Court held Neutral Principles of Texas corporate, property, and trust law govern this case, and remanded for proceedings consistent with that opinion. *See Fort Worth*, 422 S.W.3d at 651.

## I. APPLYING NEUTRAL PRINCIPLES HERE IS NOT RETROACTIVE

***Summary: The Supreme Court held that church property disputes in Texas should be decided by neutral principles of state law. Since the Court also held this approach was substantively reflected in Brown v. Clark in 1909, applying that approach here is not retroactive.***

### A. Neutral Principles of Texas law govern this case as law of the case

Texas courts must apply the neutral principles approach “in determining which faction of a religious organization is entitled to the property when the organization splits.”<sup>29</sup> This Court must decide “non-ecclesiastical issues such as property ownership and whether trusts exist based on the same neutral principles of secular law that apply to other entities.”<sup>30</sup> The Supreme Court said that on remand this Court should decide ownership and control of the church property based on:

- the property deeds and instruments of title;
- state laws;
- the Diocese’s charters (its Constitution and Canons);
- the Corporation’s charters (its articles of incorporation and bylaws);
- TEC’s charters (its Constitution and Canons); and
- any other applicable Neutral Principles of state law.<sup>31</sup>

### B. Applying neutral principles is not unconstitutionally retroactive

The Texas Supreme Court remanded TEC’s claim that Neutral Principles could not be retroactively applied, but stated the following for this Court’s guidance:

Finally, as to the argument that application of neutral principles may pose constitutional questions if they are retroactively applied, we

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<sup>29</sup> See *Fort Worth*, 422 S.W.3d at 651.

<sup>30</sup> *Id.* at 650.

<sup>31</sup> *Id.* at 651-52 (citing *Jones v. Wolf*, 443 U.S. 595, 602–03 (1979)).

note that over a century ago in *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909), our analysis and holding substantively reflected the neutral principles methodology.<sup>32</sup>

This Court cannot disregard the Supreme Court’s holding that Texas law has substantively reflected the Neutral Principles approach for over a century.<sup>33</sup> So applying it here cannot be retroactive application of a new rule.

Furthermore, there is no rule that courts cannot adopt *and* apply Neutral Principles in the same case. A footnote in *Jones v. Wolf* noted there was no “claim” of retroactivity in that case, as the Georgia Supreme Court had telegraphed its intent to follow Neutral Principles in earlier cases<sup>34</sup> (just as the Texas Supreme Court did in *Brown v. Clark* in 1909). That did not establish a constitutional test. Indeed, reading it as such would itself create a constitutional problem: courts cannot issue an advisory opinion that announces a new rule but does not apply it in that case.<sup>35</sup> Even when appellate courts limit the retroactivity of an opinion, they still apply the new rule to the parties before them.<sup>36</sup>

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<sup>32</sup> *Id.* at 653.

<sup>33</sup> See *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007) (holding Texas Supreme Court’s statements of law should have been followed by lower courts whether or not essential to the outcomes in two previous cases).

<sup>34</sup> See *Jones*, 443 U.S. at 606, n.4.

<sup>35</sup> See *Texas Ass’n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (“The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties.”); see also *Chafin v. Chafin*, 133 S. Ct. 1017, 1023, 185 L. Ed. 2d 1 (2013) (“Federal courts may not decide questions that cannot affect the rights of litigants in the case before them.”) (internal quotation omitted).

<sup>36</sup> See, e.g., *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 720 (Tex. 1996) (“[T]oday’s holding applies in this case . . . and to every such assignment executed after today.”); *Elbaor v. Smith*, 845 S.W.2d 240, 251 (Tex. 1992) (“[T]his holding shall be applicable only in the present case . . . and to those actions tried on or after [today]”); *Huston v. F.D.I.C.*, 800 S.W.2d 845, 849 (Tex. 1990); *Friedman v. Texaco, Inc.*, 691 S.W.2d 586, 589 (Tex. 1985); *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984); *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983); cf. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 434 (Tex. 1984) (declining to apply new rule of comparative causation because defendant failed to tender evidence of pilots’ negligence). The only exception appears to be in tax cases, where refunds to thousands of taxpayers raise insuperable logistical problems. See *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d

“Nothing in the Constitution alters the fundamental rule of *retrospective* operation that has governed judicial decisions . . . for near a thousand years.” *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 94 (1993) (emphasis added) (internal quotation omitted). In the 35 years since *Jones v. Wolf*, virtually every state has adopted Neutral Principles, and not a single court has hinted that doing so might be unconstitutionally retroactive unless the rule had been clearly announced in advance.

There is nothing unfair, much less unconstitutional, in applying Neutral Principles here. Plaintiffs had years of notice and opportunity to arrange church affairs as they wished under Texas law. This suit was filed in 2009;<sup>37</sup> that was:

- **100 years** after *Brown v. Clark* looked to the deeds, church documents, and state law to decide a church property dispute;
- **30 years** after *Jones v. Wolf* named that approach the Neutral Principles approach; and
- **10 years** after the Fort Worth court of appeals held: “Neutral principles of law must be applied to decide such matters.”<sup>38</sup>

TEC accepted the Diocese’s 1982 Constitution and Canons placing all property in a Texas corporation and prohibiting any trust interests not signed by the local parishes,<sup>39</sup> and admitted the Diocese on that basis.<sup>40</sup> TEC did nothing to arrange its property relations differently after *Jones v. Wolf* other than to adopt the so-called Dennis Canon in 1979, a provision that is invalid in Texas.<sup>41</sup> Plaintiffs had

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489, 521 (Tex. 1992).

<sup>37</sup> See Sharpe Affid. Ex. 1, p. 21.

<sup>38</sup> *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App. – Fort Worth 1999, no pet.); see also *Smith v. N. Tex. Dist. Council of Assemblies of God & House of Grace*, No. 2-05-425-CV, 2006 WL 3438077, at \*2 (Tex. App. – Fort Worth Nov. 30, 2006, no pet.).

<sup>39</sup> See Part V, *infra*.

<sup>40</sup> See JA00063.

<sup>41</sup> See Part V, *infra*.

many years to comply with Texas law and arrange their affairs differently if they desired; nothing in the First Amendment immunizes Plaintiffs from complying with Texas law

## II. THE DEFENDANT CORPORATION OWNS THE PROPERTY

***Summary: Applying Neutral Principles of Texas law, (a) the deeds show title in the Corporation expressly or by reason of the 1984 judgment allotting title to it; (b) the Diocese's charters vest title and control of all local church realty in the Corporation; (c) TEC's charters make no claim to title and assert only an invalid trust; and (d) the Plaintiffs' pleadings concede title is in the Corporation.***

### A. The Deeds & the 1984 Judgment

As shown by the Affidavit of Chad Bates filed herewith, the Corporation owns the properties at issue in this suit.

The deeds listed on Exhibit A to the Bates Affidavit all predate the creation of the Fort Worth Diocese and show title in the Diocese of Dallas or one of its bishops.<sup>42</sup> As the division of that diocese split one charitable entity into two, Texas law required service on the Attorney General and a court judgment to make that division.<sup>43</sup> In the judgment signed August 22, 1984, the 95th District Court of Dallas County vested title in the Corporation for the following assets and property:

All real property which as of December 31, 1982, stands in the name of Episcopal Diocese of Dallas or in the name of any of its Bishops as Bishop of Dallas, including Bishop Alexander C. Garrett, Bishop Harry T. Moore, Bishop Charles Avery Mason, Bishop A. Donald Davies or Bishop Donis D. Patterson, which is physically located in the counties of Archer, Bosque, Brown, Clay, Comanche, Cooks, Eastland, Erath, Hamilton, Hill, Hood, Jack, Johnson, Mills,

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<sup>42</sup> See Bates Affid. ¶4 & Ex. A with record citations listed therein.

<sup>43</sup> See Act of April 29, 1959, 56th Leg., R.S., ch. 115, § 1, 1961 TEX. GEN. LAWS 203, 203 (modified and currently codified at Tex. Prop. Code § 123.001-.002).

Montague, Palo Pinto, Parker, Somervell, Stephens, Tarrant, Wichita, Wise, and Young, State of Texas.<sup>44</sup>

The legal effect of this judgment was to vest title in the Corporation as a muniment of title.<sup>45</sup> Accordingly, the 1984 judgment supersedes the previous deeds and places title in the Corporation for the properties in Exhibit A. As the Texas Supreme Court said here: “The 1984 judgment vested legal title of the transferred property in the Fort Worth Corporation.”<sup>46</sup> That question having been decided by the court of last resort, it governs this case in all subsequent stages.<sup>47</sup>

The 1984 judgment also vested title to the following additional properties in the Corporation:

- certain properties described in the judgment located in Dallas County, Texas but held for the use and benefit of the Episcopal parishes of St. Andrew’s and St. Joseph’s in Grand Prairie, Texas;<sup>48</sup>
- 35% in value of certain funds as of December 31, 1982, and specifically designated or otherwise known as the Fund for the Endowment for the Episcopate, Episcopal Funds, and the Memorial Scholarship Fund out of both the Common Trust-Growth Fund and the Common Trust-Income Fund, Operating Fund, Revolving Fund, Diocesan Discretionary Fund, St. Peter’s Loan Fund, Ada S. Price Estate, Hispanic Ministries Fund, and World Missions Funds (Diocese of Mexico);<sup>49</sup>

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<sup>44</sup> See JA00006.

<sup>45</sup> See *Campbell v. McLaughlin*, 280 S.W. 189, 189 (Tex. Comm’n App. 1926, holding approved, judgment adopted) (holding that judgment in previous lawsuit “was admissible as muniment of title precisely as though the [plaintiff in the earlier lawsuit] had executed a conveyance to the interveners in that case”); see also 61 TEX. JUR. 3d, Muniments of Title § 82 (West 2013) (“A muniment of title, or link in the party’s chain of title, may be shown by: . . . a deed, even if containing an erroneous description[;] . . . a judgment or decree that is res judicata.”).

<sup>46</sup> *Fort Worth*, 422 S.W.3d at 648.

<sup>47</sup> See *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986).

<sup>48</sup> See JA00006-7.

<sup>49</sup> See JA00007.

- all interests in real property and improvements of the E. D. Farmer Foundation not located in Dallas County, Texas;<sup>50</sup>
- Camp Crucis located in Hood County, Texas;<sup>51</sup> and
- control of the non-profit corporation Episcopal Pastoral Center, and Canterbury Houses at University of Texas at Arlington, Arlington, Texas (Anselm at St. Alban's), Texas Christian University, Fort Worth, Texas (St. Edward's at Trinity), and Tarlton State University.<sup>52</sup>

The 1984 judgment transferred these properties and funds to the Corporation as well.

The deeds listed on Exhibit B to the Bates Affidavit show title in one of the Defendant Congregations.<sup>53</sup> For the reasons stated in the next section, the Diocese's charters subject those properties to the control of the Corporation for the use of the Defendant Congregations that occupy them.<sup>54</sup>

The deeds listed on Exhibit C to the Bates Affidavit show title directly in the Corporation.<sup>55</sup>

Plaintiffs allege that "many" deeds convey property to "The Episcopal Diocese of Fort Worth."<sup>56</sup> While many deeds convey property to "*The Corporation of* The Episcopal Diocese of Fort Worth," that of course is a conveyance to the Corporation, not the Diocese. There are a handful of deeds directly to the Diocese, all superseded by subsequent deeds from the Diocese to

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<sup>50</sup> See JA00010-11.

<sup>51</sup> See JA00007.

<sup>52</sup> See JA00008.

<sup>53</sup> See Bates Affid. ¶6 & Ex. B with record citations listed therein.

<sup>54</sup> See Part II(B), *infra*.

<sup>55</sup> See Bates Affid. ¶7 & Ex. C with record citations listed therein.

<sup>56</sup> See Sharpe Affid. Ex. 2 (¶62).

the Corporation.<sup>57</sup> To the extent any other deeds to the Diocese have not been so transferred, they are still subject to the control of the Corporation for the reasons stated in the following section.

#### **B. The Diocese's Charters**

Since its inception, the Diocese's Constitution has provided that title to all real property used in the Diocese is vested in the Corporation:

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.<sup>58</sup>

Accordingly, all church properties used by parishes, missions, or others in the Diocese are subject to control of the Corporation, regardless of who holds record title.

#### **C. TEC's Charters**

TEC's Constitution and Canons include more than 200 pages of detailed regulations, but only four short clauses mention local property ownership or control. Two require a local bishop's consent to encumber parish property,<sup>59</sup> which of course grants no rights to TEC or the Plaintiffs. The remaining two contain the so-called Dennis Canon, which purports to impose a trust on all

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<sup>57</sup> See JA01133-1142; JA01500-1511; JA02008-2022.

<sup>58</sup> See JA00113 (1982 FW Const. Art. 13); JA00186 (2006 FW Const. Art. 14).

<sup>59</sup> See JA00484 (2006 TEC Canon I.7.3) (requiring bishop's approval for encumbrance of parish property); JA00507 (2006 TEC Canon II.6.2) (requiring bishop's consent for parishes to hold or encumber property).

Episcopalian property anywhere in the world.<sup>60</sup> That Canon makes no claim to title, so it has no effect on the Corporation's title to the properties at issue here. Its invalidity as a trust is addressed in part V, *infra*.

#### **D. The Plaintiffs' Pleadings**

Plaintiffs concede in their pleadings that "The Corporation holds title to substantial real and personal property of the Diocese acquired pursuant to the judgment [in 1984] and subsequently[.]"<sup>61</sup> Under Texas law, such "[a]ssertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions."<sup>62</sup> This judicial admission not only relieves Defendants from having to prove the fact but also bars the Plaintiffs from disputing it.<sup>63</sup>

#### **Conclusion: the Corporation holds title and control**

Applying Neutral Principles of Texas law, (a) the *deeds* show title in the Corporation expressly or by reason of the 1984 judgment allotting title to it; (b) the *Diocese's charters* vest title and control of all local church property in the Corporation; (c) *TEC's charters* make no claim to title and assert only an invalid trust; and (d) the *Plaintiffs' pleadings* concede title is in the Corporation. The Court should grant summary judgment declaring that the Corporation has ownership and control of all the property at issue in this case.

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<sup>60</sup> See JA00485 (2006 TEC Canon I.7.4) (Dennis canon); JA00507 (2006 TEC Canon II.6.4) (Dennis canon re consecrated churches).

<sup>61</sup> See Sharpe Affid. Ex. 2 (¶53 & ¶118) ("[T]he Corporation holds legal title to the property.").

<sup>62</sup> *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983).

<sup>63</sup> See *Gevinson v. Manhattan Construction Co.*, 449 S.W.2d 458, 466 (Tex. 1969).

### III. THE DEFENDANT TRUSTEES ARE THE ELECTED TRUSTEES OF THE CORPORATION

**Summary: Applying Neutral Principles of Texas law, (a) state corporate law mandates that election and removal of corporate directors must follow the Corporation's bylaws; (b) those Bylaws provide for election of one Trustee per year at the Diocese's convention, and do not allow TEC or any minority group to remove Trustees or appoint new ones; (c) the Diocese's Constitution does not allow anyone to call a special convention except the local bishop and Standing Committee; and (d) TEC's own charters prevent the Plaintiffs from convening the special convention on which their claims are based.**

#### A. State laws

The Texas Supreme Court said: "The [C]orporation was incorporated pursuant to Texas corporation law and that law dictates how the corporation can be operated, including determining the terms of office of corporate directors . . . ." <sup>64</sup> The Texas Non-Profit Corporation Act requires that election and removal of corporate directors must comply with the corporation's own articles of incorporation or bylaws:

- "[D]irectors shall be *elected* ... in the manner and for the terms provided in the articles of incorporation or the by-laws"; <sup>65</sup>
- "A director may be *removed* from office pursuant to any procedure therefor provided in the articles of incorporation or by-laws"; <sup>66</sup>
- "Unless removed in accordance with the provisions of the articles of incorporation or the by-laws, each director shall *hold office* for the term for which he is elected"; <sup>67</sup> and

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<sup>64</sup> *Fort Worth*, 422 S.W.3d at 652; *see also Masterson*, 422 S.W.3d at 606 (holding Texas courts should apply Texas law to "corporate formation, governance, and dissolution, even when religious entities are involved").

<sup>65</sup> *See* TEX. REV. CIV. STAT. art. 1396-2.15(B) (codified at Tex. Bus. Orgs. Code § 22.206).

<sup>66</sup> *See id.* at art. 1396-2.15(D) (codified at Tex. Bus. Orgs. Code § 22.211).

<sup>67</sup> *See id.* at art. 1396-2.15(C) (codified at Tex. Bus. Orgs. Code § 22.208).

- “Unless otherwise provided in the articles of incorporation or the by-laws, any *vacancy* occurring in the board of directors shall be filled by the affirmative vote of a majority of the remaining directors.”<sup>68</sup>

Similarly, Texas law provides that any property rights or interests of an unincorporated association like the Diocese must be determined by its constitution or other governing documents.<sup>69</sup>

## B. The Corporation’s Articles & Bylaws

The Corporation is governed by a board of directors called “Trustees.”<sup>70</sup> The Corporation’s articles of incorporation state that the manner of electing trustees “shall be fixed by the bylaws of the corporation as the same may be adopted and from time to time amended.”<sup>71</sup> So under Texas corporate law, the Corporation’s bylaws dictate the properly elected Trustees.

The Corporation’s bylaws contain the following provisions for appointment and removal of Elected Trustees:

- (1) Trustees must be *elected* one per year at the Diocese’s annual convention;<sup>72</sup>

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<sup>68</sup> See *id.* at art. 1396-2.16(A) (codified at Tex. Bus. Orgs. Code § 22.212).

<sup>69</sup> *Jones v. Maples*, 184 S.W.2d 844, 847 (Tex. Civ. App.—Eastland 1944, writ ref’d) (*disapproved of on other grounds by Cox v. Thee Evergreen Church*, 86 S.W. 2d 167, 170 n.4 (Tex. 1992)) (“The Association ... has the right that its funds be paid out only on the order of the president and be paid by check of the treasurer, as provided in the constitution and by-laws.”). Cf. TEX. BUS. ORGS. CODE § 1.002(35)(A) (“‘Governing authority’ means a person or group of persons who are entitled to manage and direct the affairs of an entity under this code and the governing documents of the entity.”); *id.* § 252.017(b) (providing that definitions in chapter 1 of the Code apply to nonprofit associations).

<sup>70</sup> See *Viriden Affid.* ¶4; JA00067 (1983 Articles, Art. 6); JA00073 (2006 Articles, Art. VI); see also TEX. REV. CIV. STAT. art. 1396-2.14(A), (D) (codified at Tex. Bus. Orgs. Code § 22.201) (“The affairs of a corporation shall be managed by a board of directors. . . . The board of directors may be designated by any name appropriate to the customs, usages, or tenets of the corporation.”).

<sup>71</sup> See JA00067 (1983 Articles); JA00073 (2006 Articles).

<sup>72</sup> See *Viriden Affid.* ¶6; JA00091 (2006 Bylaws, Art. II, § 3); JA00077 (1983 Bylaws, Art. II,

- (2) Trustees are *eligible* only if they are clergy or lay persons in “the body now known as the Episcopal Diocese of Fort Worth”;<sup>73</sup>
- (3) Trustees may *resign* by giving written notice thereof to the Board;<sup>74</sup>
- (4) Trustees can be *removed* only by majority vote of the Corporation’s Board;<sup>75</sup> and
- (5) Trustees can be appointed to fill a temporary *vacancy* only by majority vote of the Board.<sup>76</sup>

The Defendant Trustees were elected as Trustees one-per-year in the years before this dispute arose, and re-elected one-per-year on a rolling basis thereafter.<sup>77</sup> They are members in good standing of parishes or missions in the Diocese.<sup>78</sup> They have not resigned or been removed by majority vote of the Board.<sup>79</sup> Each of them was listed as a Trustee in the Corporation’s Amended and Restated Articles of Incorporation filed in 2006,<sup>80</sup> which by state statute are “deemed to be articles of incorporation of the corporation.”<sup>81</sup>

By contrast, the Plaintiffs’ alleged trustees took office when a 2009 “special convention” declared that all these offices were vacant (impliedly admitting that the convention had no authority to remove existing Trustees) and filled them all in

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§ 2).

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*; JA00092 (2006 Bylaws, Art. II, § 8); JA00079 (1983 Bylaws, Art. II, § 7).

<sup>75</sup> *See id.*; JA00092 (2006 Bylaws, Art. II, § 10); JA00080 (1983 Bylaws, Art. II, § 9).

<sup>76</sup> *See id.*; JA00092 (2006 Bylaws, Art. II, § 9); JA00079 (1983 Bylaws, Art. II, § 8).

<sup>77</sup> *See Iker Affid.* ¶11 & Ex. 5.

<sup>78</sup> *See id.*

<sup>79</sup> *See Virden Affid.* ¶9.

<sup>80</sup> *See JA00073* (2006 Articles, Art. VI).

<sup>81</sup> *See* TEX. REV. CIV. STAT. art. 1396–4.06(F) (currently codified as Tex. Bus. Orgs. Code § 3.063).

one fell swoop.<sup>82</sup> None of the Plaintiffs' nominees are members in good standing of the Diocese or canonically resident within it.<sup>83</sup> Accordingly, placing them on the Corporation's Board would violate *all* of the Corporation's bylaws noted above: (1) they were not elected one-per-year at the Diocese's annual convention; (2) they are not affiliated with the Defendant Diocese; (3) there were no vacancies created or appointments made to vacancies by majority vote of the Board.

As the Texas Supreme Court held in *Masterson*, no "outside entity has authority to control" a Texas nonprofit corporation "absent corporate documents and law so providing."<sup>84</sup> Nothing in the Corporation's articles or bylaws authorized any outside group to remove or replace the Defendant Trustees. As a matter of law, placing the Plaintiffs' purported trustees in office would violate Texas corporate law and the Supreme Court's orders.

### C. The Diocese's Charters

Similarly, no outside entity has authority to control a Texas unincorporated association absent authority to do so stated in the association's rules.<sup>85</sup>

The Diocese's affairs are governed by its Constitution and Canons.<sup>86</sup> The provisions in those charters regarding the Corporation mirror the Corporation's bylaws, containing the following provisions regarding Trustees:

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<sup>82</sup> See Sharpe Affid. Ex. 2 (¶¶66, 147); *id.* at Ex. 3 (Gulick depo, p. 96: "Q. How many trustees were elected at the February 7, 2009, special meeting? A. I believe all of the trustees were elected at that meeting." Q. And that would be, what, five? . . . A. I need to be reviewed on the number that were required. I just remember all of them were.").

<sup>83</sup> See Iker Affid. ¶12.

<sup>84</sup> *Masterson*, 422 S.W.3d at 609-10.

<sup>85</sup> *Jones v. Maples*, 184 S.W.2d 844, 847 (Tex. Civ. App.—Eastland 1944, writ ref'd) ("The Association . . . has the right that its funds be paid out only on the order of the president and be paid by check of the treasurer, as provided in the constitution and by-laws."). Cf. TEX. BUS. ORGS. CODE § 1.002(35)(A) ("'Governing authority' means a person or group of persons who are entitled to manage and direct the affairs of an entity under this code and the governing documents of the entity."); *id.* § 252.017(b) (providing that definitions in chapter 1 of the Code apply to nonprofit associations).

- (1) Trustees must be *elected* one-per-year at the Diocese's annual convention;<sup>87</sup>
- (2) the Diocese's *annual convention* to elect Trustees must be called by the local Bishop and Executive Council;<sup>88</sup>
- (3) those *eligible* as Trustees are lay persons in good standing of a local parish or clergy canonically resident in the Diocese;<sup>89</sup> and
- (4) any temporary *vacancy* can be filled only by majority vote of the Board.<sup>90</sup>

The Defendant Trustees have been elected as Trustees one-per-year in accordance with the rules of the Diocese.<sup>91</sup> They are members in good standing of parishes or missions in the Diocese.<sup>92</sup> As already noted, none of the Plaintiffs' nominees are members in good standing of the Diocese or canonically resident within it, and none were elected one-per-year at the Diocese's annual convention.<sup>93</sup> As Plaintiffs' provisional bishop admitted at his deposition, the Diocese's charters contain "no specific language" to support removing and replacing Trustees as the Plaintiffs purported to do.<sup>94</sup>

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<sup>86</sup> See Iker Affid. ¶4; JA00097-164 (1982 version); JA00165-245 (2006 version).

<sup>87</sup> See Virden Affid. ¶ 6; JA00211 (2006 FW Canon 17.3); JA00130 (1982 FW Canon 11.3).

<sup>88</sup> See JA00175 (2006 FW Const. Art. 3) ("The Convention of this Diocese shall assemble in the month of November at a place, time, and date set by the Bishop and Executive Council."); JA00103 (1982 FW Const. Art. 3) (same, only stating the annual meeting would be in October).

<sup>89</sup> See JA00211 (2006 FW Canon 17.2); JA00130 (1982 FW Canon 11.2).

<sup>90</sup> See JA00211 (2006 FW Canon 17.3; JA00130 (1982 FW Canon 11.2).

<sup>91</sup> See Iker Affid. ¶11.

<sup>92</sup> See *id.*

<sup>93</sup> See Iker Affid. ¶12; Sharpe Affid. Ex. 3 (Gulick depo, p. 96: "Q. How many trustees were elected at the February 7, 2009, special meeting? A. I believe all of the trustees were elected at that meeting." Q. And that would be, what, five? ... A. I need to be reviewed on the number that were required. I just remember all of them were.").

<sup>94</sup> See Sharpe Affid. Ex. 3 (Gulick depo, p. 107: "[I]n the emergency situation we found ourselves in, even though no specific language about replacement in such an unforeseen

Plaintiffs allege the Defendant Trustees are disqualified because they are “no longer members in good standing of the Episcopal Church.”<sup>95</sup> But the Diocese’s Constitution and Canons require that Trustees be “Lay Communicants in good standing of a Parish or Mission *in the Diocese* or members of the Clergy canonically resident *in the Diocese*.”<sup>96</sup> As Plaintiffs concede, only the Diocese (not TEC) can determine whether a lay person is in good standing or clergy canonically resident *in the Diocese*.<sup>97</sup> In fact, it is impossible for the Trustees to be members of TEC, as it is an association of dioceses rather than of individual members.<sup>98</sup>

Plaintiffs also allege they represent the true diocese because TEC recognizes them as such.<sup>99</sup> But under Texas law, an unincorporated association like the Diocese “is a legal entity separate from its members,”<sup>100</sup> and is governed by its own written rules.<sup>101</sup> Thus, it does not matter who an outsider deems to be the

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emergency situation existed, we did the very best we could to get the trustees we got.”); *id.* p. 108 (“Are you aware of any language that says that the Diocese -- the Diocese can remove all of the trustees? ... A. I cannot point you to specific language.”).

<sup>95</sup> See *id.* Ex. 2 (¶147).

<sup>96</sup> See JA00211 (2006 FW Canon 17.2); JA00130 (1982 FW Canon 11.2).

<sup>97</sup> See Sharpe Affid. Ex. 2 (¶144); see also JA00468 (TEC Canon I.1.6(b)); JA00222 (2006 FW Canon 26) & JA00150 (1982 FW Canon 29) (providing that rector of a local parish reports lay members in good standing); JA00122 (1982 FW Canon 3) & JA00194 (2006 FW Canon 1.5) (providing that local Bishop lists who is canonically resident in the Diocese).

<sup>98</sup> See Iker Affid. ¶15; see also JA00490 (TEC Canon I.10); White & Dykman, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, 29 (Church Publishing Inc. 1981) (noting that TEC polity reflects “its origin in a federation of equal and independent Churches in the several states”).

<sup>99</sup> See Sharpe Affid. Ex. 2 (¶69).

<sup>100</sup> TEX. REV. CIV. STAT. art. 1396–70.01, § 7(a) (currently TEX. BUS. ORGS. CODE § 252.006).

<sup>101</sup> See *Dist. Grand Lodge No. 25 v. Jones*, 160 S.W.2d 915, 922 (Tex. 1942) (“It is generally held that the constitution and by-laws of a voluntary association, whether incorporated or not, are controlling as to its internal management.”); *Jones*, 184 S.W.2d at 847 (“The Association ... has the right that its funds be paid out only on the order of the president and be paid by check of the treasurer, as provided in the constitution and by-laws.”); see also TEX. BUS. ORGS. CODE § 1.102(35)(A) (“‘Governing authority’ means a person or group of persons who are entitled to manage and direct the affairs of an entity under this code and the governing documents of the

Diocese's officers, but who has been elected according to its own rules.<sup>102</sup> TEC did not form the Fort Worth Diocese, has never been an officer or member of it, and never exercised any direct control over it in the 25 years before suit was filed.<sup>103</sup> As the provisional bishop elected by the Plaintiffs' minority group admitted, the diocese he represents was "reconstituted" as a new entity.<sup>104</sup> TEC may recognize any group it chooses, but it cannot claim the property rights of an existing Texas association by forming a new group contrary to the association's rules and giving it the same name.

The Plaintiffs allege they removed and appointed all the Corporation's Trustees at a "special convention" held in February 2009.<sup>105</sup> But Texas law governing unincorporated associations does not allow an outside entity to control an association unless that is what the association's charters state.<sup>106</sup> None of the Plaintiffs had any authority to call a special convention; since 1982, the Diocese's Constitution has authorized only the local Bishop or Standing Committee to do so.<sup>107</sup> The Plaintiffs' 2009 special convention was not called by the local bishop or Standing Committee;<sup>108</sup> as the provisional bishop Plaintiffs elected conceded, "we did our best to comply with that Canon, given there was no Standing

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entity" (emphasis added)); *id.* § 252.017(b) (providing that definitions in chapter 1 of the Code apply to nonprofit associations).

<sup>102</sup> *See id.*

<sup>103</sup> *See Iker Affid.* ¶5.

<sup>104</sup> *See Sharpe Affid.* Ex. 3 (Gulick depo, p. 10).

<sup>105</sup> *See id.* Ex. 2 (¶¶66, 147).

<sup>106</sup> *See Masterson*, 422 S.W.3d at 609-10.

<sup>107</sup> *See Iker Affid.* ¶10; *JA00176* (2006 FW Const. Art. 4) ("The Bishop, or a majority of all members of the Standing Committee, may call a special meeting of the Convention upon thirty (30) days notice thereof."); *JA00104* (1982 FW Const. Art. 4) (same).

<sup>108</sup> *See Iker Affid.* ¶10.

Committee.”<sup>109</sup> The Plaintiffs’ had neither chicken nor egg—they could not elect local officials without a convention, and they could not call a local convention without local officials already in place.

#### D. TEC’s Charters

TEC’s charters contain no provisions addressing elections to or control of a diocesan corporation.<sup>110</sup> Persons elected to those positions by the Diocese need no approval from TEC or anyone else.<sup>111</sup> As Plaintiffs concede, only the Diocese (not TEC) can decide who serves as Trustees of the Corporation.<sup>112</sup> Their witnesses could point to nothing in TEC’s Constitution stating that local corporate officials vacate their positions in the event of disaffiliation.<sup>113</sup>

Furthermore, TEC’s charters expressly prohibit what Plaintiffs tried to do here. Plaintiffs claim the “special convention” at which they elected new trustees was convened by TEC’s Presiding Bishop on her own authority.<sup>114</sup> Yet TEC’s

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<sup>109</sup> See Sharpe Affid. Ex. 3 (Gulick depo, p. 76: “It is my recollection that we -- we did our best to comply with that Canon, given there was no Standing Committee. Q. So Section 1.5, since there was no Standing Committee and there wasn't a Bishop, are you saying that that wasn't followed for this meeting in February? A. I would say we attempted to follow all of the Canons to the best of the ability -- of our ability considering the emergency situation we found ourselves in. Q. But the language of 1 .5, as to the letter, was not followed. You just followed it as best you could. Is that your testimony? ... A. We honored all Canons as best we could.”).

<sup>110</sup> See Iker Affid. ¶15.

<sup>111</sup> See *id.* ¶15; Sharpe Affid. Ex. 3 (Gulick depo, p. 65: “Q. When you are making appointments as Bishop, did you send it to that body and to the Presiding Bishop for approval before they were made? A. No.”)

<sup>112</sup> See Sharpe Affid. Ex. 2 (¶144).

<sup>113</sup> See *id.* Ex. 3 (Gulick depo, pp. 57-58: “Can you point me to a Constitutional or a Canon provision if a Diocese withdraws from association with the Episcopal Church then all offices within it are vacated? Can you point me to a provision that says that? ... A: My understanding would be that in order -- in order for a person to exercise an office in a Diocese of the Episcopal Church, that person has to be a member in good standing of the Episcopal Church.”)); *id.* Ex. 4 (Schori depo, p. 28 (“Q. Are you aware of any Canon that addresses a diocese within The United States withdrawing? A. No.”).

<sup>114</sup> See Sharpe Affid. Ex. 3 (Gulick depo, p. 36: “[T]hat opening convention was convened by the Presiding Bishop.”); *id.* at Ex. 4 (Schori depo p. 56: “Am I correct that you called a special

Constitution and Canons both *expressly prohibit* anyone but the locally elected authorities—either the local bishop or the local Standing Committee—from performing “episcopal acts” such as calling a diocesan convention:<sup>115</sup>

No Bishop shall perform episcopal acts or officiate by preaching, ministering the Sacraments, or holding any public service in a Diocese other than that in which the Bishop is canonically resident, without permission or a license to perform occasional public services from the Ecclesiastical Authority of the Diocese in which the Bishop desires to officiate or perform episcopal acts.<sup>116</sup>

As TEC itself defined the term, the “Ecclesiastical Authority” is the local bishop, or if there is none, then the local Standing Committee.<sup>117</sup> This prohibition dates back to the founding of the church in 1789.<sup>118</sup>

The Presiding Bishop is not the highest authority in the TEC hierarchy. TEC’s Constitution made no provision for a presiding bishop until 1901, and the first election of a presiding bishop was not until 1925.<sup>119</sup> Since then, the General Convention has rejected proposals to give the presiding bishop her own diocese or

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convention of the Diocese in February 2009? A. That is correct.”).

<sup>115</sup> See Iker Affid. ¶15.

<sup>116</sup> See JA00552 (2006 TEC Canon III.12.3(e)); JA00448 (2006 TEC Const. Art. II, § 3) (“A Bishop shall confine the exercise of such office to the Diocese in which elected, unless requested to perform episcopal acts in another Diocese by the Ecclesiastical Authority thereof . . . .”); JA00383 (1979 TEC Constitution, Art. II, § 3) (same).

<sup>117</sup> See JA00616 (2006 TEC Canon IV.15) (“Ecclesiastical Authority shall mean the Bishop of the Diocese or, if there be none, the Standing Committee or such other ecclesiastical authority established by the Constitution and Canons of the Diocese.”).

<sup>118</sup> See White & Dykman, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, 51 (Church Publishing Inc. 1981) (quoting Article 4 of the 1789 Constitution: “And every Bishop of this Church shall confine the exercise of his Episcopal office to his proper Diocese or District, unless requested to ordain or confirm or perform any other act of the Episcopal office, by any Church destitute of a Bishop.”).

<sup>119</sup> See *id.* at 26-28.

any juridical power.<sup>120</sup> The presiding bishop has no diocese; she is the “Chief Pastor” of the church, but speaks for the church only as to those policies and programs authorized by the General Convention.<sup>121</sup>

Because TEC’s own governing documents prohibit the Presiding Bishop from calling a “special convention” in a diocese where she is not canonically resident, Plaintiffs have no basis in TEC’s governing documents for their purported convention or purported removal of the Corporation’s Trustees.

**Conclusion: the Defendant Trustees are the Elected Trustees of the Corporation**

Applying Neutral Principles of Texas law, (a) state *corporate law* mandates that election and removal of corporate directors must be according to the Corporation’s charters; (b) the *Corporation’s Bylaws* provide for election of one Trustee per year by the local Diocese, and do not allow TEC or any minority group to remove Trustees or appoint new ones; (c) the *Diocese’s Constitution* does not allow anyone to call conventions except the local bishop and Standing Committee; and (d) TEC’s charters prevent anyone from convening a convention in a diocese without the permission of the local bishop or Standing Committee. The Court should grant summary judgment declaring that the Defendant Trustees are the only elected trustees of the Corporation.

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<sup>120</sup> *Id.* at 29; *see* Sharpe Affid. Ex. 3 (Gulick depo, pp. 60-61: “[D]oes the Presiding Bishop have a Diocese? A. No.”).

<sup>121</sup> *See* JA00473-474 (2006 TEC Canon I.2.4).

#### IV. BISHOP IKER IS CHAIRMAN OF THE CORPORATION'S BOARD

**Summary: Applying Neutral Principles of Texas law, (a) state law mandates that election and removal of the officers of a Texas corporation or association must comply with its governing charters; (b) under the Corporation's Bylaws, the Board has sole authority to decide disputes about its Chairman, and has done so in favor of Bishop Iker; (c) the Diocese's Constitution prohibits Plaintiffs as outsiders and a minority group from calling a special convention to replace Bishop Iker; and (d) TEC's charters prohibited anyone from convening such a local convention without the permission of the existing local bishop or Standing Committee.**

##### A. State laws

Courts have no jurisdiction to decide who a church body should recognize as a minister.<sup>122</sup> But courts must exercise jurisdiction to decide who holds a particular office when property ownership is contested.<sup>123</sup> The Texas Supreme Court instructed this Court on remand to “decide non-ecclesiastical issues such as property ownership . . . based on the same neutral principles of secular law that apply to other entities.”<sup>124</sup> As already noted, neutral principles of Texas corporate law limit the election and removal of corporate directors to the provisions in the entity's charters—which in this case means the Corporation's bylaws.<sup>125</sup> And under neutral principles of Texas association law, the election and removal of an association's officers is also subject to the entity's rules—which in this case means the Diocese's Constitution and Canons.<sup>126</sup> Under all those charters, Bishop Iker is the chairman of the Corporation's Board.

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<sup>122</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694, 706 (2012); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

<sup>123</sup> See *Fort Worth*, 422 S.W.3d at 650; *Masterson*, 422 S.W.3d at 596 (holding Texas courts have a “constitutional duty” to decide such disputes); *Jones*, 184 S.W.2d at 847-48.

<sup>124</sup> See *Fort Worth*, 422 S.W.3d at 650.

<sup>125</sup> See Part III(A)-(B), *supra*.

<sup>126</sup> See Part III(A) & (C), *supra*.

## B. The Corporation's Articles & Bylaws

The Corporation's articles and bylaws both provide that the sixth member of the Board of Trustees is the Diocese's Bishop.<sup>127</sup> Since August of 2006—more than two years before the Plaintiffs withdrew from the Diocese—those articles and bylaws have provided that the Corporation's own Board has “sole authority” to determine who sits on the Board as its chairman.<sup>128</sup> This is a common provision in corporate documents, allowing creditors and others to be certain they are dealing with a corporation's authorized officers.<sup>129</sup>

The Board has determined that Bishop Iker is the Chairman of the Board and a Trustee of the Corporation.<sup>130</sup> Bishop Iker has called and chaired almost

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<sup>127</sup> See JA000090 (2006 Bylaws, Art. II.2) (“The bishop recognized by the body now known as the Episcopal Diocese of Fort Worth (the ‘Bishop’) shall be a trustee and a member of the Board.”); JA00073 (2006 Articles of Incorporation, Art. VI) (“The Bishop (herein so called) of the body now known as the Episcopal Diocese of Fort Worth shall be the Chairman of the Board.”); JA00130 (1982 FW Const. & Canons, Canon 11.2) (“The management of [the Corporation's] affairs shall be conducted and administered by a Board of Trustees of five (5) elected members . . . , in addition to the Bishop of the Diocese who shall serve as Chairman of the Board or may designate the President or other officer of the corporation to serve as such.”).

<sup>128</sup> See Virden Affid. ¶10; JA00073 (2006 Articles, Art. VI) (“In the event of a dispute or challenge regarding the identity of the Bishop of the body now known as the Episcopal Diocese of Fort Worth, the Elected Trustees shall have the sole authority to determine the identity and authority of the Bishop, as provided in the Bylaws of the Corporation, for purposes of these Amended and Restated Articles of Incorporation.”); JA00090 (2006 Bylaws, Art. II, § 2) (same).

<sup>129</sup> See *United States v. Speer*, 419 F. App'x 562, 568 n.6 (6th Cir. 2011) (quoting testimony that an incumbency certificate “tells you who is authorized to sign on behalf of [the company] to have [the] transaction executed and issued”); *United States v. Faulkenberry*, 614 F.3d 573, 583 (6th Cir. 2010) (noting that “incumbency certificates” for bonds “essentially state that the entities issuing the bonds were corporations duly organized and validly existing under the laws of the State of Ohio, that the officers who signed the bonds had the positions the bonds represented them to have, and that the officers' signatures were genuine”); *George A. Nation III, Agency Law and Secured Transactions: The Use of Agents in the Creation of Security Interests*, 11 Geo. Mason L. Rev. 739, 746 (2003) (“Incumbency certificates are also used to indicate what individuals hold which offices of the borrower.”); Stephan Hutter, *The Corporate Opinion in International Transactions*, COLUM. BUS. L. REV. 427, 444 (1989) (“An incumbency certificate is intended to establish [t]he identity of those corporate officers authorized to represent the corporation in the transactions in question.”); see also 7 TEX. ADMIN. CODE §§ 83.302(2)(C)(ii)(III) & 83.302(2)(C)(iv)(III); *Massingill v. State*, 297 S.W.2d 842, 843 (Tex. Crim. 1957).

<sup>130</sup> See Virden Affid. ¶10; Sharpe Affid. ¶8.

every meeting of the Corporation's board of trustees for the last 10 years, has not resigned from the Board, has not been removed by majority vote of the Board, and is still the Bishop of the Defendant Diocese, which is the body known as the Diocese through 2006.<sup>131</sup> As the Corporation's bylaws confer the "sole authority" to make this decision on the Board, that determination is binding on the Court under Texas corporate law.<sup>132</sup>

Plaintiffs allege the 2006 amendments to the Corporation's charters were *ultra vires* and void for religious reasons.<sup>133</sup> The Texas Supreme Court rejected that argument: "Texas law dictates . . . how and when corporate articles and bylaws can be amended."<sup>134</sup> Under Texas law, a corporation's board may amend its articles and bylaws,<sup>135</sup> and the Board adopted the 2006 amendments unanimously.<sup>136</sup> Nothing gives any of the Plaintiffs any right to notice, approval, or veto of these amendments. As the Texas Supreme Court held in *Masterson*, "under neither the former nor the current statute is an external entity empowered

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<sup>131</sup> See Virden Affid. ¶10.

<sup>132</sup> See TEX. REV. CIV. STAT. art. 1396-2.15(B) ("[D]irectors shall be elected, appointed, or designated in the manner and for the terms provided in the articles of incorporation or the by-laws.") (currently codified at Tex. Bus. Orgs. Code § 22.206).

<sup>133</sup> See Sharpe Affid. Ex. 2 (¶58).

<sup>134</sup> See *Masterson*, 422 S.W.3d at 613 ("[T]he secular legal questions of whether the vote by the parish members to amend the bylaws and articles of incorporation was valid under Texas law and whether the bylaws and articles of incorporation were validly amended, are not entitled to deference.").

<sup>135</sup> See TEX. REV. CIV. STAT. art. 1396-4.02(A)(2) (providing that amendments to articles of incorporation "shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office"); art. 1396-2.09(B) ("A corporation's board of directors may amend or repeal the corporation's by-laws.") (current versions at Tex. Bus. Orgs. Code §§ 22.107, 22.102).

<sup>136</sup> See Virden Affid. ¶8.

to amend [corporate documents] absent specific, lawful provision in the corporate documents.”<sup>137</sup>

The Plaintiffs also allege that Bishop Iker “abandoned his position on the Board” upon disaffiliation in 2008.<sup>138</sup> But the Corporation’s bylaws have always required resignations to be in writing, and Bishop Iker has never resigned in writing or otherwise.<sup>139</sup> The minority group’s “diocese” is an “external entity” with respect to the Corporation and has no authority to elect or remove officers “absent corporate documents and law so providing.”<sup>140</sup> Nothing in the Corporation’s articles or bylaws provide that the Plaintiffs as outsiders could remove or replace Bishop Iker as the Board’s chairman.

The Plaintiffs were certainly entitled to form a diocese of their own and choose its leader. But they could not override Texas law and the Corporation’s charters. As the Board has sole authority to decide the identity of the Bishop “of the body now known as the Episcopal Diocese of Fort Worth,” this dispute was settled by the Board’s determination in favor of Bishop Iker.

### C. The Diocese’s Charters

The Diocese’s Constitution provides that the Bishop is chosen by majority vote of both the clergy and the laity at the Diocese’s Convention.<sup>141</sup> The Diocese’s Canons require a large nominating committee to review the candidates for bishop and propose nominees.<sup>142</sup> The Convention can then select anyone it chooses.<sup>143</sup>

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<sup>137</sup> See *Masterson*, 422 S.W.3d at 610.

<sup>138</sup> See Sharpe Affid. Ex. 2 (¶146).

<sup>139</sup> See Virden Affid. ¶10.

<sup>140</sup> See *Masterson*, 422 S.W.3d at 609-10.

<sup>141</sup> See JA00116 (1982 FW Const. Art. 16); JA00189 (2006 FW Const. Art. 17).

<sup>142</sup> See JA00120-121 (1982 FW Canon 2); JA00236-240 (2006 FW Canon 40).

<sup>143</sup> See *id.*

There is no other procedure in the Diocese's Constitution or Canons (or in TEC's) for selecting a bishop in an existing diocese.<sup>144</sup> The Plaintiffs admit Bishop Iker was properly elected, and for many years has served as Bishop and a Trustee of the Corporation.<sup>145</sup>

There is nothing in the Diocese's charters that allows removal of the Diocese's bishop.<sup>146</sup> Plaintiffs allege TEC's Presiding Bishop removed Bishop Iker on her own authority.<sup>147</sup> Nothing in the Diocese's or TEC's charters authorizes her to do so.<sup>148</sup> The Diocese withdrew from TEC as it had a constitutional right to do,<sup>149</sup> and the Plaintiffs withdrew from the Diocese; after that, neither had authority to act for or control the other absent some provision in the Diocese's charters that so provided.<sup>150</sup> Plaintiffs also allege they elected a new bishop at their "special" convention in February 2009, which the Presiding Bishop convened on her own authority.<sup>151</sup> But as noted above,<sup>152</sup> the Diocese's Constitution and Canons do not allow an outside entity to call a convention.<sup>153</sup> The Diocese's rules also require a nominating committee to select candidates for bishop,<sup>154</sup> but the Plaintiffs' nominee was selected by TEC's Presiding Bishop on

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<sup>144</sup> See Iker Affid. ¶8.

<sup>145</sup> See Sharpe Affid. Ex. 2 (¶56, ¶85).

<sup>146</sup> See Iker Affid. ¶8.

<sup>147</sup> See Sharpe Affid. Ex. 2 (¶57).

<sup>148</sup> See Iker Affid. ¶8 & ¶15.

<sup>149</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Freedom of association . . . plainly presupposes a freedom not to associate.").

<sup>150</sup> See *Masterson*, 422 S.W.3d at 609-10.

<sup>151</sup> See Sharpe Affid. Ex. 3 (Gulick depo, p. 36: "[T]hat opening convention was convened by the Presiding Bishop.").

<sup>152</sup> See part III(C), *supra*.

<sup>153</sup> See JA00176 (2006 FW Const. Art. 4); see also Part III(C), *supra*.

<sup>154</sup> See JA00327-328 (2008 FW Canon 40); see Sharpe Affid. Ex. 3 (Gulick depo, pp. 44-45).

her own authority.<sup>155</sup> Because Plaintiffs' officers were not elected in accordance with the Diocese's Constitution and Canons, recognizing Plaintiffs' nominee as Chairman of the Corporation's board would violate Texas association law and the Supreme Court's order on remand.<sup>156</sup>

#### D. TEC's Charters

TEC's charters also do not grant the Presiding Bishop authority to intervene in a local diocese's selection of a bishop as she did here.

TEC has no power or authority to appoint a local bishop. Since 1789, TEC's Constitution has provided that bishops must be chosen by each diocese according to its own rules.<sup>157</sup> At all relevant times here, TEC's Constitution stated: "In every Diocese the Bishop . . . shall be chosen agreeably to *rules prescribed by the Convention of that Diocese.*"<sup>158</sup> Accordingly, even if the Corporation's bylaws did not leave this to the sole discretion of the Board, TEC's own Constitution prohibited the Plaintiffs from calling a convention contrary to the Diocese's rules.<sup>159</sup>

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<sup>155</sup> See Sharpe Affid. Ex. 3 (Gulick depo at Ex. 1 and at 36: "Ted was duly nominated by the Presiding Bishop.").

<sup>156</sup> See *Dist. Grand Lodge No. 25*, 160 S.W.2d at 922 ("It is generally held that the constitution and by-laws of a voluntary association, whether incorporated or not, are controlling as to its internal management.").

<sup>157</sup> See White & Dykman, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, 51 (Church Publishing Inc. 1981) (quoting Article 4 of the 1789 Constitution: "The Bishop or Bishops in every State shall be chosen agreeably to such rules as shall be fixed by the Convention of that State.").

<sup>158</sup> See JA00383 (1979 TEC Const. Art. II, § 1) (emphasis added); JA00448 (2006 TEC Const., Art. II, § 1).

<sup>159</sup> See *Jones*, 184 S.W.2d at 847-48 (holding officers entitled to control association's property were those "duly elected" under cemetery association's constitution and by-laws); cf. TEX. PROP. CODE § 204.004(c) (providing that board of homeowners associations "must be elected or appointed in accordance with . . . the association's articles of incorporation or bylaws").

**Conclusion: Bishop Iker is Chairman of the Corporation's Board**

Applying Neutral Principles of Texas law, (a) *state law* mandates that election and removal of the officers and directors of a Texas corporation or association must comply with their governing charters; (b) in accordance with the *Corporation's Bylaws*, the Board has sole authority to decide disputes about its Chairman and has decided that issue in favor of Bishop Iker; (c) the *Diocese's Constitution* prohibited Plaintiffs as outsiders and a minority group from calling a special convention to replace Bishop Iker; and (d) *TEC's charters* prohibited anyone from convening such a convention without the permission of the existing local bishop or Standing Committee. The Court should grant summary judgment declaring that Bishop Iker is the sixth trustee and chairman of the Corporation's Board.

## V. PLAINTIFFS HAVE NO EXPRESS TRUST INTEREST

***Summary: Applying Neutral Principles of Texas law, (a) state law prohibits an express realty trust that was not signed by the owner, allows trusts to be revoked, and settles title by adverse possession and limitations; (b) the deeds create no express trust for Plaintiffs; (c) the Diocese's charters did not impose an express trust for TEC in 1982, and revoked any alleged trust in 1989; (d) TEC's charters do not impose an irrevocable trust; and (e) Texas courts cannot recognize a "contractual trust" theory contrary to Texas statutes.***

### A. State Laws

Plaintiffs' express trust allegations are based on the Diocese's 1982 accession to TEC's Constitution and Canons in 1982, and the 1984 judgment dividing the Dallas and Fort Worth dioceses.<sup>160</sup> Neither created a valid trust under Texas trust law, and in any event any express trust was validly revoked under Texas law.

#### 1. Statute of Frauds

The statute of frauds in section 112.004 of the Texas Property Code requires that express trusts be in writing and signed by the owner.<sup>161</sup> As shown below, there is no trust for TEC that is signed by the owner of these properties—the Diocese of Dallas before the August 22, 1984 judgment, and the Corporation at all times thereafter.

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<sup>160</sup> See Sharpe Affid. Ex. 2 (¶¶87-95).

<sup>161</sup> See TEX. PROP. CODE § 112.004 ("A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent."); see also Texas Trust Act § 7 (formerly TEX. REV. CIV. STAT. art. 7425b-7), Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234 ("Provided, however, that a trust in relation to or consisting of real property shall be invalid, unless created, established, or declared . . . [b]y a written instrument subscribed by the trustor or by his agent thereunto duly authorized by writing; . . .").

## 2. *Trusts irrevocable only by express terms*

The Texas Supreme Court held that all trusts are revocable under Texas law unless the express terms of the trust say otherwise:

But regarding the trial court's consideration of the issue, we note that in *Masterson* we addressed the Dennis Canon and Texas law. There we said that even assuming a trust was created as to parish property by the Dennis Canon and the bylaws and actions of a parish non-profit corporation holding title to the property, the Dennis Canon "simply does not contain language making the trust expressly irrevocable . . . . Even if the Canon could be read to imply the trust was irrevocable, that is not good enough under Texas law. [Texas Property Code § 112.051] requires express terms making it irrevocable."<sup>162</sup>

None of the Plaintiffs' purported trusts are irrevocable by their express terms.<sup>163</sup>

## 3. *Limitations & adverse possession*

The Corporation has held title and control since 1984, establishing its claim for title by adverse possession against all comers.<sup>164</sup> Texas law declares that adverse possession for periods of three, five, ten, and twenty-five years establishes title in the adverse possessor of land.<sup>165</sup> TEC was given actual and constructive notice in 1982 by the Diocese's qualified accession, and again in 1989 by receipt of amendments to its Canons, that no trust in favor of TEC was intended but instead was expressly denied.<sup>166</sup> Plaintiffs filed suit on April 14, 2009.<sup>167</sup> As Plaintiffs

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<sup>162</sup> *Fort Worth*, 422 S.W.3d at 653 (citing *Masterson*, 422 S.W.3d at 413); see also TEX. PROP. CODE § 112.051(a) ("A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.").

<sup>163</sup> See Iker Affid. ¶15; Viriden Affid. ¶7.

<sup>164</sup> See Part II, *supra*.

<sup>165</sup> See TEX. CIV. PRAC. & REM. CODE § 16.024 (requiring suit against adverse possessor under title or color of title within three years); §16.025(a) (requiring suit against adverse possessor under continuous use, tax payments, and recorded deed within five years); § 16.026(a) (requiring suit against adverse possessor under continuous use within ten years); § 16.028 (requiring suit against one in adverse possession in good faith under recorded deed within 25 years).

<sup>166</sup> See Iker Affid. ¶7; Koehler Affid. ¶3 (noting that TEC Canon 1.6.5 requires dioceses to

have known since 1982 and 1989 that Defendants expressly denied any trust for TEC, their claims are barred by limitations.

## **B. The Deeds and the 1984 judgment**

Plaintiffs allege that the petition filed to divide the Dallas Diocese in 1984 created an express trust.<sup>168</sup> The petition and judgment both said only that:

- the Corporation was duly organized under the Constitution and Canons of the Diocese<sup>169</sup> – which expressly limited any trust interests to the parishes that paid for and used the church properties; and
- the Diocese was duly organized under the Constitution and Canons of the Protestant Episcopal Church<sup>170</sup> – whose Dennis Canon the Diocese did not accede to, and expressly repudiated in 1989.

As a matter of law, neither of those statements created an express trust for TEC. Both organizations were also duly organized under Texas law, but that gave the state no interest in their property. That the Diocese was organized under TEC's rules is a statement of how it was *organized*, not who owned its property.

## **C. The Diocese's Charters: the qualified accession and the Dennis Canon**

Plaintiffs' primary basis for alleging an express trust is the Diocese's 1982 accession to TEC's Constitution and Canons, which they claim was an express property agreement. But TEC historically has played no part in Episcopalian property disputes,<sup>171</sup> and its almost 200-page charters include only four short

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forward to TEC journals showing changes to diocesan charters, and stating that it was the Diocese's regular practice in 1987 to 1991 to do so); *see also* Part V(C), *infra*.

<sup>167</sup> *See* Sharpe Affid. Ex. 1.

<sup>168</sup> *See id.* Ex. 2 (¶90).

<sup>169</sup> *See* JA00002 (1984 Judgment, p. 2).

<sup>170</sup> *See id.*

<sup>171</sup> *See* Sharpe Affid. Table A.

clauses mentioning real property;<sup>172</sup> in that context, a general accession reflected an agreement to religious affairs rather than property arrangements. Nevertheless, the Diocese's general accession to TEC's charters did not create an express trust under Texas law for the following reasons.

**1. *The qualified accession did not create an express trust for TEC***

First, Texas law requires the owner of property to declare an intention to create a trust.<sup>173</sup> TEC cannot unilaterally name itself beneficiary of a trust involving someone else's property.<sup>174</sup> "An express trust can come into existence only by the execution of an intention to create it by the one having legal and equitable dominion over the property made subject to it."<sup>175</sup> The Corporation is the sole owner of the property in dispute,<sup>176</sup> and Plaintiffs do not allege that the Corporation ever manifested any intent to create a trust for TEC.

Second, the statute of frauds bars any express trust based on the Dennis Canon.<sup>177</sup> Plaintiffs never allege that the Corporation that held title ever signed

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<sup>172</sup> See JA00397 (1979 TEC Canon I.6.3 (requiring bishop's approval for encumbrance of parish property) & Canon I.6.4 (Dennis canon)); JA00408 (1979 TEC Canon II.7.2) (requiring bishop's consent for sell consecrated property) & Canon II.7.4) (Dennis canon re consecrated churches)).

<sup>173</sup> See TEX. PROP. CODE § 112.002; see also *id.* at § 112.001 ("A trust may be created by: (1) a property owner's declaration that the owner holds the property as trustee for another person; (2) a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person; (3) a property owner's testamentary transfer to another person as trustee for a third person ..."); *id.* at § 111.004(4); *State v. Rubion*, 308 S.W.2d 4, 10 (Tex. 1957); RESTATEMENT (2D) OF TRUSTS § 351 ("A charitable trust is created only if the settlor properly manifests an intention to create a charitable trust.").

<sup>174</sup> See *Best Inv. Co. v. Hernandez*, 479 S.W.2d 759, 763 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) ("Declarations of the purported beneficiary of the trust are not competent to establish the trust.").

<sup>175</sup> See *Mills v. Gray*, 210 S.W.2d 985, 987 (Tex. 1948) (quoting 54 AM. JUR. 22, § 5).

<sup>176</sup> See Part II, *supra*.

<sup>177</sup> See TEX. PROP. CODE § 112.004 ("A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent.").

any agreement to hold local property in trust for TEC. The delegates to the Diocese's Primary Convention adopted and signed an accession clause, but none of them owned any of the church property at issue here. The properties were transferred directly from the Diocese of Dallas to the Corporation by the 1984 judgment – two years *after* the Diocese's 1982 Primary Convention.<sup>178</sup>

Third, even that accession was qualified. "Accession" is a term from the international law of treaties,<sup>179</sup> which allows parties to qualify accession to a treaty unless reservations are expressly forbidden,<sup>180</sup> or another party promptly objects.<sup>181</sup> At the Diocese's Primary Convention, the delegates purposefully added by floor amendment a provision that expressly prohibited local church properties from being "encumbered in any way" without the written consent of the parishes using them.<sup>182</sup> This qualified accession to TEC's charters was allowed until

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<sup>178</sup> See JA00001-014 (1984 judgment); JA00338-78 (1982 Primary Convention).

<sup>179</sup> *Avero Belgium Ins. v. Am. Airlines, Inc.*, 423 F.3d 73, 79 n.7 (2d Cir. 2005) ("Accession is the act whereby a State accepts the offer or the opportunity of becoming a party to a treaty already signed by some other States.") (quoting Lord McNair, *THE LAW OF TREATIES* 149 (1961); see also *BLACK'S LAW DICTIONARY* 15 (9th ed. 2009) (defining "accession" as "3. *Int'l law.* A method by which a nation that is not among a treaty's original signatories becomes a party to it."); *RESTATEMENT (3D) OF FOREIGN RELATIONS LAW* § 312 *cmt. d* (1987) ("'Accession' refers to the action of a state in expressing its consent to be bound by an agreement drafted by other states through a procedure in which the acceding state did not participate, or which for other reasons the acceding state did not sign.").

<sup>180</sup> See *RESTATEMENT (3D) OF FOREIGN RELATIONS LAW* § 313(1) (1987) ("(1) A state may enter a reservation to a multilateral international agreement unless (a) reservations are prohibited by the agreement, (b) the agreement provides that only specified reservations not including the reservation in question may be made, or (c) the reservation is incompatible with the object and purpose of the agreement."). As the Dennis Canon was not adopted until 1979 and unqualified accessions were not required until 1983, it is hard to argue that either was critical to the object and purpose of the two-hundred-year-old denomination before those dates.

<sup>181</sup> See *id.* § 313(3) (1987) ("A reservation established with regard to another party in accordance with Subsection (2)(c) modifies the relevant provisions of the agreement as to the relations between the reserving and accepting state parties but does not modify those provisions for the other parties to the agreement *inter se.*"); *id.* at *cmt. e* ("[A] reservation is considered to have been accepted by a state unless it raises an objection to it within twelve months after notification of the reservation or by the date when it expressed its consent to be bound, whichever is later.").

<sup>182</sup> See JA00113 (1982 FW Const. Art. 13); JA00131 (1982 FW Canon 12.4).

January 1, 1983,<sup>183</sup> and the Diocese was admitted into union *the day before* — December 31, 1982.<sup>184</sup> TEC accepted the Diocese’s Constitution and Canons and admitted the Diocese into union with full knowledge it was doing so on the basis of this qualified accession.<sup>185</sup> This specific limitation on encumbrances prevails over any inference from the Diocese’s general accession clause because under Texas law (1) a specific provision controls over a general provision,<sup>186</sup> and (2) courts cannot construe one provision to render another meaningless.<sup>187</sup>

## 2. *The Diocese revoked any trust for TEC in 1989*

In 1989, the Diocese amended Canon 18 (“Title To Property”) to revoke any such trust expressly:

Property held by the Corporation for the use of a Parish, Mission or Diocesan School belongs beneficially to such Parish, Mission or Diocesan School only. *No adverse claim* to such beneficial interest by the Corporation, by the Diocese, or *by The Episcopal Church* of the United States of America is acknowledged, but rather is *expressly denied*.<sup>188</sup>

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<sup>183</sup> See White & Dykman, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, 8 (Church Publishing Inc. 1991 Supp.); see also JA00386 (1979 TEC Const. Art. XI) (providing that amendments to TEC’s Constitution shall take effect on January 1 of the following year).

<sup>184</sup> See JA00063-65.

<sup>185</sup> See *id.*

<sup>186</sup> *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 722 (Tex. App.—Fort Worth 2008, pet. dismiss’d).

<sup>187</sup> *Grohman v. Kahlig*, 318 S.W.3d 882, 887 (Tex. 2010); see also *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 262 (Tex. 2002) (“Rules of constitutional interpretation dictate that all clauses must be given effect.”).

<sup>188</sup> See Iker Affid. ¶7 & Exhibit 1 (emphasis added); JA00213 (2006 FW Canon 18.4).

Plaintiffs' provisional bishop conceded at his deposition that the Diocese can amend its Constitution and Canons without any approval from TEC's General Convention or the Presiding Bishop.<sup>189</sup>

The Texas Supreme Court has held in this case that Texas law allows the Dennis Canon to be revoked, and the Diocese did so in 1989. No matter what kind of trust Plaintiffs allege, it was revoked in 1989. In addition, as Plaintiffs did not file suit until 20 years later, limitations bars their express trust claims.

**3. *The express trust for the parishes and Diocese are not for the Plaintiffs***

The Corporation holds real property in an express trust for the use and benefit of the congregations that use them, and all other property in an express trust for the use and benefit of the Diocese.<sup>190</sup> Because the Plaintiffs have withdrawn from those bodies,<sup>191</sup> and for the reasons stated in parts III and IV above, none of the Plaintiffs are beneficiaries of these express trusts.

**D. TEC's Charters**

Nothing in TEC's charters purport to impose any trust for TEC except for the Dennis Canon.<sup>192</sup> That clause does not impose a trust here for the reasons stated above: (1) neither the Canon itself nor the Diocese's accession were enough to create a trust under Texas law; and (2) in any event, the Diocese validly revoked any trust for TEC.<sup>193</sup>

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<sup>189</sup> See Sharpe Affid. Ex. 3 (Gulick depo, pp. 52-53: "Based on your understanding as Bishop, do you recall anything in the Constitution or Canons that required you to submit that prior to annual convention to the Episcopal Church or the Presiding Bishop for approval before annual convention could vote on it? A: No").

<sup>190</sup> See JA00186 (2006 FW Const. Art. XIV); JA00212-133 (2006 FW Canon 18.2, 18.4).

<sup>191</sup> See Iker Affid. ¶¶12-14.

<sup>192</sup> See *id.* ¶15.

<sup>193</sup> See Part III(C), *supra*.

### E. The Alleged “Contractual Trust”

Plaintiffs also allege something called a “contractual trust,” asserting that Defendants accepted benefits from affiliation with TEC so the Dennis Canon trust is “contractual, irrevocable, and subject to specific performance.”<sup>194</sup> There is no such thing as a “contractual trust” in Texas; there are only express trusts and trusts implied by law.<sup>195</sup>

Even if a court could judicially create such a trust, it could not make them irrevocable contrary to the Texas Property Code. That state law explicitly says that all trusts are revocable unless the express terms of a trust say it is irrevocable,<sup>196</sup> a law the Texas Supreme Court recognized as binding in this case.<sup>197</sup> *A private contract cannot change state laws or Supreme Court opinions.* Private contracts could *comply* with these state laws by stating that a trust is “irrevocable,” but absent express terms doing so a trust cannot become irrevocable merely because a plaintiff alleges there was consideration for it. People rarely bestow property on a total stranger, so most beneficiaries could allege they gave something—time, money, acts of kindness, or other good deeds—as consideration to make a trust irrevocable even though it doesn’t say so. If that were the law, the Texas statute making most trusts revocable would virtually never apply. Under Texas law, consideration does not make a revocable trust irrevocable when the Legislature has said that only the express terms of the trust can do so.

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<sup>194</sup> See Sharpe Affid. Ex. 2 (¶39 & ¶91)

<sup>195</sup> See *Pickelner v. Adler*, 229 S.W.3d 516, 525 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (“[T]rusts may be classed as ‘express trusts’ and ‘trusts by operation of law.’” (quoting *Mills v. Gray*, 210 S.W.2d 985, 987 (Tex. 1948) and 54 Am. Jr. 22, § 5)); see also *Brown v. Clark*, 116 S.W. 360, 364 (Tex. 1909) (“The property was purchased by the church and paid for in the ordinary way of business, and there is not attached to that property any trust either express or implied.”).

<sup>196</sup> See TEX. PROP. CODE § 112.051.

<sup>197</sup> *Fort Worth*, 422 S.W.3d at 653 (citing *Masterson*, 422 S.W.3d at 413).

Furthermore, even if courts could create irrevocable “contractual trusts” contrary to state law, the Dennis Canon would not support such a contract here for additional reasons. First, no contract with TEC was signed by the Corporation, and thus none would be binding on the entity that owns the property claimed.<sup>198</sup> Second, all parties are deemed to know Texas law,<sup>199</sup> so any contract the Dennis Canon created was made with the parties’ understanding that Texas law allowed it to be revoked. Third, any consideration stemming from affiliation with TEC was past consideration rather than new consideration (as required for a contract<sup>200</sup>) because the churches that formed the Diocese of Fort Worth were already affiliated with TEC at the time of the division of the Diocese of Dallas.

Finally, the Diocese sought union on the basis of the Constitution and Canons it forwarded to TEC, which placed title in a Texas non-profit corporation and prohibited any encumbrance without the consent of the local parishioners.<sup>201</sup> TEC admitted the Diocese on that basis.<sup>202</sup> If TEC offered affiliation only on condition of acceptance of the Dennis Canon, then the material change proffered by the Diocese’s application for admission is regarded by Texas law as a counteroffer – which TEC accepted by admitting the Diocese into union on that basis.<sup>203</sup>

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<sup>198</sup> See Virden Affid. ¶7; part V(A)(1), *supra*.

<sup>199</sup> See *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 n.3 (Tex. 1990).

<sup>200</sup> See, e.g., *Powerhouse Prods., Inc. v. Scott*, 260 S.W.3d 693, 697 (Tex. App.—Dallas 2008, no pet.) (“[P]ast consideration is not competent consideration for contract formation.”).

<sup>201</sup> See JA00338–78 (1982 FW Primary Convention); JA00097–164 (1982 FW Const. & Canons).

<sup>202</sup> See JA00063–65.

<sup>203</sup> See *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 513-14 (Tex. 2014) (“Under the common law, an acceptance may not change or qualify the material terms of the offer, and an attempt to do so results in a counteroffer rather than acceptance.”).

## Conclusion: Plaintiffs Have No Express Trust Interest

Applying Neutral Principles of Texas law, (a) *state law* prohibits an express realty trust that was not signed by the owner, allows trusts to be revoked, and settles title by adverse possession and limitations; (b) the *deeds* create no express trust for Plaintiffs; (c) the *Diocese's charters* gave qualified accession to avoid any express trust in 1982, and revoked any trust for TEC in 1989; (d) *TEC's charters* do not impose an irrevocable trust; and (e) Texas courts cannot recognize a *contractual trust* in Texas contrary to the Texas Property Code.

## VI. THE PLAINTIFFS HAVE NO CONSTRUCTIVE TRUST CLAIM

***Summary: Plaintiffs' constructive trust claims are simply a disguised version of their failed deference claims: that the courts should award all property to TEC regardless of what the deeds and church charters say. Applying Neutral Principles of Texas law, Plaintiffs' are not entitled to a constructive trust because their alleged fiduciary duty to TEC conflicts with: (a) state laws imposing a duty of loyalty to the Corporation; (b) the Corporation's charters imposing the same duty; (c) the Diocese's charters imposing a duty to the local congregations; (d) TEC's charters imposing no such duty; and (e) equitable principles supporting those who actually pay for and use property. Plaintiffs' constructive trust would unjustly enrich TEC and a minority group that was too small to impose its will on the majority of their fellow parishioners.***

### A. State laws

#### 1. Texas law of constructive trusts

A constructive trust is a remedy, not a cause of action.<sup>204</sup> To be entitled to a constructive trust, Plaintiffs must “strictly prove”: (1) breach of a special trust, fiduciary relationship, or actual fraud; (2) unjust enrichment of the wrongdoer;

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<sup>204</sup> See *Bradshaw v. Steadfast Fin., L.L.C.*, 395 S.W.3d 348, 375 (Tex. App.—Fort Worth 2013, pet. granted); *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 859 (Tex. App.—Fort Worth 2005, no pet.); *Medford v. Medford*, 68 S.W.3d 242, 248 (Tex. App.—Fort Worth 2002), *disapproved on other grounds by Mansions in the Forest, L.P. v. Montgomery Cnty.*, 365 S.W.3d 314 (Tex. 2012).

and (3) tracing to an identifiable res.<sup>205</sup> Whether a constructive trust should be imposed must be determined by courts based on the equity of the circumstances.<sup>206</sup>

The Texas Supreme Court said constructive trusts are governed by “elusive principles” in 1980,<sup>207</sup> but in 2007 it established firmer boundaries. In *Holmes v. Kent*, a deceased teacher’s children asked the Court to impose a constructive trust for their benefit on her retirement benefits, though the only beneficiary-designation form on file listed her ex-husband as beneficiary.<sup>208</sup> The Court declined to impose a constructive trust for three reasons: (1) it was impossible to tell what the retiree really wanted; (2) it would violate a statute specifying what retirees must file to change a beneficiary; and (3) it would invite similar claims by many other relatives whom a retiree never designated as beneficiaries.<sup>209</sup>

The same concerns bar a constructive trust here: (1) it is impossible to tell whether the contributor of each dollar used to build and maintain these churches intended to benefit a local parish, the Diocese, or TEC; (2) it would violate the state’s trust, corporate, standing, and limitations laws specifying what TEC had to do to impose a trust on Texas property; and (3) it would invite similar claims by many other donors seeking a constructive trust to direct proceeds from the offering plate to different purposes. What the Supreme Court said in *Holmes v. Kent* applies here: “We see nothing equitable or just in this.”<sup>210</sup>

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<sup>205</sup> *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 859 (Tex. App.—Fort Worth 2005, no pet.) (citing *Ginther v. Taub*, 675 S.W.2d 724, 725 (Tex. 1984)).

<sup>206</sup> *Id.* (citing *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999))

<sup>207</sup> *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 851 (Tex. 1980)

<sup>208</sup> *See* 221 S.W.3d 622, 623 (Tex. 2007).

<sup>209</sup> *See id.* at 629.

<sup>210</sup> *See id.*

## 2. *Texas trust law*

State law declares the Dennis Canon revocable,<sup>211</sup> and the Diocese revoked it in 1989.<sup>212</sup> Yet Plaintiffs ask that a “court of equity” impose a trust that state law declares invalid. It is not the courts’ role to impose trusts that conflict with state statutes: “‘Equity follows the law,’ which requires equitable doctrines to conform to contractual and statutory mandates, not the other way around.”<sup>213</sup> Equity cannot be used to make unenforceable contracts enforceable,<sup>214</sup> or to make an invalid trust valid. The Court should not impose a trust that Texas property law declares invalid.

## 3. *Texas corporate law*

Under Texas corporate law, the directors of a Texas nonprofit corporation must act in the best interests of the corporation:

A director shall discharge the director’s duties, including the director’s duties as a member of a committee, in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation.<sup>215</sup>

The Texas Supreme Court has said this requires directors to act for the *sole benefit* to the corporation: “Directors, or those acting as directors, owe a fiduciary duty to the corporation in their directorial actions, and this duty includes the dedication of their uncorrupted business judgment for the sole benefit of the corporation.”<sup>216</sup>

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<sup>211</sup> See Part V, *supra*; TEX. PROP. CODE § 112.051.

<sup>212</sup> See Iker Affid. ¶7.

<sup>213</sup> *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 648 (Tex. 2007).

<sup>214</sup> See Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1285 (1989) (“In cases of near tort and of unenforceable contract, restitution should not undermine policies of tort or contract law that are served by denying recovery.”).

<sup>215</sup> TEX. REV. CIV. STAT. art. 1396–2.28(A) (currently codified as TEX. BUS. ORGS. CODE § 22.221).

<sup>216</sup> *Ritchie v. Rupe*, 443 S.W. 3d 856, 868 (Tex. 2014) (internal punctuation omitted) (quoting *Int’l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963)).

Plaintiffs allege the Trustees had a fiduciary duty to TEC.<sup>217</sup> Under the facts here, that would directly conflict with the duty they owe to the Corporation. The Corporation owns legal title to more than 50 church properties with an insured value exceeding \$100 million.<sup>218</sup> These properties require substantial funds and volunteer services to maintain them.<sup>219</sup> The best interests of the Corporation require the Trustees to preserve the financial and membership resources needed to protect these properties and keep them from depreciating in value.<sup>220</sup>

By contrast, turning these properties over to the Plaintiffs would sap those resources. At the last two conventions attended by all parties, the group loyal to TEC represented no more than 20% of local clergy or laity.<sup>221</sup> TEC has purported to fire the priests and rectors who have led most of these congregations for years,<sup>222</sup> and at many churches the Plaintiffs have been unable to list a single parishioner willing to appear as a representative of TEC.<sup>223</sup> Imposing a fiduciary duty requiring these churches to be operated for TEC's benefit would deplete the congregations and resources necessary to maintain them.

Texas courts do not judicially impose a fiduciary duty that would conflict with duties imposed by the Legislature.<sup>224</sup> As the Texas Supreme Court held

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<sup>217</sup> See Sharpe Affid. Ex. 2 (¶¶96-99).

<sup>218</sup> See Virden Affid. ¶11.

<sup>219</sup> See *id.*

<sup>220</sup> See *id.*

<sup>221</sup> See Iker Affid. ¶9.

<sup>222</sup> See *id.* ¶17; Sharpe Affid. Ex. 2 (¶70).

<sup>223</sup> See Sharpe Affid. Ex. 2, Table A (listing representative plaintiffs for 12 churches and 38 others without any).

<sup>224</sup> See *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 701 (Tex. 2007) (refusing to impose fiduciary duty on third-party insurance administrators because "the Legislature clearly and specifically addressed certain fiduciary duties in the Code, yet it did not

earlier this year, Texas courts should not impose legal duties on corporate officers when the Legislature chose not to:

The Legislature has crafted a statutory scheme governing domestic corporations. The statutes are detailed and extensive, reflecting legislative policy judgments about when the government should step in to impose rights and obligations on the parties and when the parties should be free to dictate their own rights and obligations vis-à-vis each other and the business. . . . [W]hen the Legislature has enacted a comprehensive statutory scheme, we will refrain from imposing additional claims or procedures that may upset the Legislature’s careful balance of policies and interests.<sup>225</sup>

The Court should not impose a fiduciary duty on the Trustees contrary to the statutory duty imposed on them by Texas corporate law.

#### 4. *Standing*

Under Texas corporate law, a lawsuit claiming the actions or property transfers of a Texas nonprofit corporation violate its corporate purposes can only be filed by (1) a member, or (2) the Attorney General.<sup>226</sup> The Plaintiffs are neither; the Corporation has no “members,”<sup>227</sup> and the Attorney General is not a party. As they have no standing, Plaintiffs’ claims against the Corporation and its Trustees must be dismissed.

Nor can Plaintiffs assert claims for breach of fiduciary duty owed to the Corporation or the Diocese. Standing to sue for breach of fiduciary duty belongs to the entity to which those duties are owed.<sup>228</sup> The Second Court of Appeals has

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impose a general fiduciary duty”).

<sup>225</sup> *Ritchie v. Rupe*, 443 S.W. 3d 856, 880, 891 (Tex. 2014); see also *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 193 (Tex. 2004) (“The existence of a comprehensive regulatory scheme to protect against harm weighs against imposing a common law duty to accomplish the same result if the scheme affords significant protections.”)

<sup>226</sup> See TEX. REV. CIV. STAT. art. 1396-2.03(B).

<sup>227</sup> See *Viriden Affid.* ¶6; see also TEX. REV. CIV. STAT. art. 1396-2.08(A) (“A corporation ... may have no members.”).

<sup>228</sup> See *Somers ex rel. EGL, Inc. v. Crane*, 295 S.W.3d 5, 11 (Tex. App.—Houston [1st Dist.]

held Plaintiffs' counsel do not represent the Corporation or the Diocese, so they have no authority to bring such a claim on their behalf.<sup>229</sup>

### 5. *Limitations*

Equity “aids the diligent and not those who slumber on their rights.”<sup>230</sup> A claim for a constructive trust accrues when the underlying claim on which it is based accrues.<sup>231</sup> All the Texas Plaintiffs knew or should have known since 1989 that the Diocese expressly denied and revoked any trust in favor of TEC.<sup>232</sup> TEC received actual and constructive notice that the Diocese had done so at the same time.<sup>233</sup> Yet no one complained until this suit was filed 20 years later. Texas law bars the equitable claims for a constructive trust asserted here.<sup>234</sup>

### B. **The 1984 Judgment**

For the same reasons the 1984 judgment did not create an express trust,<sup>235</sup> it cannot form the basis for an implied constructive trust.

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2009, pet. denied) (*disapproved of on other grounds by* *Richie v. Rupe*, 443 S.W. 3d 856 (Tex. 2014); *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 698 (Tex. App.—Fort Worth 2006, pet. denied); *Grinnell v. Munson*, 137 S.W.3d 706, 718 (Tex. App.—San Antonio 2004, no pet.).

<sup>229</sup> See *In re Salazar*, 315 S.W.3d 279, 287 (Tex. App.—Fort Worth 2010, orig. proceeding).

<sup>230</sup> *In re Laibe Corp.*, 307 S.W.3d 314, 318 (Tex. 2010) (internal quotation omitted).

<sup>231</sup> See *Sherer v. Sherer*, 393 S.W.3d 480, 491 (Tex. App.—Texarkana 2013, pet. denied).

<sup>232</sup> See *Iker Affid.* ¶7.

<sup>233</sup> See *id.* ¶7; *Koehler Affid.* ¶3 (noting that TEC Canon 1.6.5 requires dioceses to forward to TEC journals showing changes to diocesan charters, and stating that it was the Diocese's regular practice in 1987 to 1991 to do so).

<sup>234</sup> See TEX. CIV. PRAC. & REM. CODE § 16.024 (requiring suit against adverse possessor under title or color of title within three years); §16.025(a) (requiring suit against adverse possessor under continuous use, tax payments, and recorded deed within five years); § 16.026(a) (requiring suit against adverse possessor under continuous use within ten years); § 16.028 (requiring suit against one in adverse possession in good faith under recorded deed within 25 years).

<sup>235</sup> See Part V(B), *supra*.

First, the 1984 judgment does not say it was conditioned on any benefit for TEC. TEC was not a party to the 1984 Judgment, and did not transfer title to any properties.<sup>236</sup> The judgment simply divided properties bought by and held for local parishes into two new corporations.<sup>237</sup> The Judgment stated in detail the conditions for the transfer, but said nothing about TEC.<sup>238</sup>

Second, the only mention of TEC in the 1984 judgment is a statement that the Diocese was duly organized under TEC's Constitution and Canons.<sup>239</sup> But a statement about how the Diocese was *organized* was not a statement about *ownership*, any more than a statement that a corporation is duly organized under Texas law means the state has a trust interest in its assets. Furthermore, no realty was conveyed to the Diocese; it all went to the Corporation without any stated conditions.

Third, even if TEC had been the transferor (which it wasn't), it had no fiduciary relationship with the Corporation, the transferee. The Corporation was entirely created and controlled by the Trustees and the Diocese, and had no confidential or fiduciary duty to TEC,<sup>240</sup> so there is no basis for equity to impose one.

Fourth, even if the Dennis Canon were an implied condition in the 1984 judgment to which TEC was not a party, all parties are deemed to know the Dennis Canon was revocable under Texas law.<sup>241</sup> So any transfer conditioned on

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<sup>236</sup> See JA00001-015.

<sup>237</sup> See Virden Affid. ¶5 & ¶7.

<sup>238</sup> See *id.*

<sup>239</sup> See JA00002, JA00005.

<sup>240</sup> See Virden Affid. ¶7.

<sup>241</sup> See *Greater Houston Transp. Co.*, 801 S.W.2d at 525 n.3.

the Dennis Canon simply implied a trust that could be revoked under Texas law, as it was.

Finally, the 1984 judgment says nothing about future property to be acquired. Accordingly, it cannot form the basis for implying a condition supporting a constructive trust in favor of TEC to any property acquired thereafter.

### C. The Corporation's Articles & Bylaws

The Corporation has never had any affiliation or relationship to TEC.<sup>242</sup> TEC did not create the Corporation, does not own or control it, and cannot elect or remove its officers.<sup>243</sup> The Corporation has no confidential relationship with TEC, and has made no fiduciary commitments to hold property for TEC's benefit.<sup>244</sup>

Nor do the Corporation's Trustees. Since 1991, the Corporation's Articles and bylaws have recognized that the Trustees owe a duty of loyalty to the Corporation similar to the one imposed by state law.<sup>245</sup> Imposing a fiduciary duty to hold these churches for TEC's benefit would require the Trustees to violate their duty of loyalty to the Corporation by depleting resources available to maintain them.<sup>246</sup>

Until 2006, the Corporation's articles required Trustees to administer property "in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth as they now exist or as they may hereafter be amended."<sup>247</sup> Lest there be any dispute as to what that meant or which organization was the

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<sup>242</sup> See Virden Affid. ¶7.

<sup>243</sup> See *id.*

<sup>244</sup> See *id.*

<sup>245</sup> See *id.* ¶6 & Ex. 1.

<sup>246</sup> See Part VI(A)(3), *supra*.

<sup>247</sup> See JA00066 (1983 Articles, Art. 4(2)); JA000076 (1983 Bylaws, Art. 1, § 1).

Diocese (the dispute Plaintiffs created here), the Corporation's articles and bylaws were amended in 2006 to specify that the Trustees were to conduct affairs in conjunction with the unincorporated entity that was known as the Diocese in 2006:

- "The affairs of the Corporation . . . shall be conducted in conformity with the body *now known as* the Episcopal Diocese of Fort Worth's acknowledgment of and allegiance to the One, Holy, Catholic and Apostolic Church of Christ";<sup>248</sup>
- "The bishop recognized by the body *now known as* the Episcopal Diocese of Fort Worth (the 'Bishop') shall be a trustee and a member of the Board";<sup>249</sup>
- "Elected Trustees may be either lay persons in good standing of a parish or mission in the body *now known as* the Episcopal Diocese of Fort Worth, or members of the clergy canonically resident within the geographical region of the body *now known as* the Episcopal Diocese of Fort Worth."<sup>250</sup>

The Plaintiffs claim that since their "special convention" in early 2009, their organization is the one "known as" the Diocese.<sup>251</sup> But Plaintiffs concede their special convention was not called in compliance with the Diocese's rules;<sup>252</sup> they simply called their own meeting of their own group by their own rules. The Plaintiffs were entitled to form their own association and call conventions of it, but those acts are not the acts of the entity that was known as the Diocese in the years 2006 and before.

The Corporation's articles and bylaws imposed on the Defendant Trustees a duty of loyalty to the Corporation, and of conformity with the charters of the Diocese entity that existed in 2006. "Where a valid contract prescribes particular

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<sup>248</sup> See Virden Affid. ¶8; JA00090 (2006 Bylaws, Art. I, § 1).

<sup>249</sup> See *id.* ¶10; JA00073 (2006 Articles, Art. VI); JA00090 (2006 Bylaws, Art. II, § 2).

<sup>250</sup> See *id.* ¶6; JA00091 (2006 Bylaws, Art. II, § 3).

<sup>251</sup> See Sharpe Affid. Ex. 2 (¶¶66-67).

<sup>252</sup> See Part III(C), *supra*.

remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy.”<sup>253</sup> The Court should not disregard the duties imposed by the Corporation’s charters by imposing a higher duty to TEC.

#### **D. The Diocese’s charters**

The Diocese’s charters expressly impose on the Corporation and the Trustees a duty of loyalty to the Defendant Congregations. Since inception in 1982, the Diocese’s Constitution and Canons have provided that the Corporation “shall hold real property acquired for the use of a particular parish or mission in trust for the use and benefit of such parish or mission.”<sup>254</sup> As each parish normally pays for the property it uses,<sup>255</sup> this duty coincides with the implied trust that equity generally recognizes in favor of those who pay for property.<sup>256</sup> Implying a trust for TEC would violate not only the Diocese’s charters but the general rules of equity itself.

The Trustees’ duty to the individual congregations is illustrated by their actions after this dispute arose. In a small handful of churches, a significant majority of the members wanted to remain affiliated with TEC, so the Diocese adopted procedures for an amicable separation.<sup>257</sup> Three parishes took advantage of the offer, and in February 2009 the Corporation transferred their church

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<sup>253</sup> *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649-50 (Tex. 2007).

<sup>254</sup> See JA00113 (1982 FW Const. Art. 13); JA00186 (2006 FW Const. Art. 14); JA00265 (2008 FW Const. Art. 14).

<sup>255</sup> See *Virden Affid.* ¶5.

<sup>256</sup> See, e.g., *Tricentrol Oil Trading, Inc. v. Annesley*, 809 S.W.2d 218, 220 (Tex. 1991) (“When title to property is taken in the name of someone other than the person who advances the purchase price, a resulting trust is created in favor of the payor.”).

<sup>257</sup> See *Iker Affid.* Ex. 3, pp. 42, 73 (amendment to Canon 32).

properties to them.<sup>258</sup> Rather than the Plaintiffs' winner-take-all approach that would doom some parishes, the Trustees have served both the parishes and the Corporation by transferring property when that was in everyone's best interests.<sup>259</sup>

But at the vast majority of the parishes here, the Plaintiffs represent few or none of the parishioners.<sup>260</sup> In such circumstances, turning the property over to the Plaintiffs who do *not* use these churches would violate the express trust in the Diocese's charters for the benefit of those who *do* actually use them.<sup>261</sup>

Whatever duties the Diocese may have owed to TEC during its affiliation, they did not survive disaffiliation in 2008.<sup>262</sup> And they never included any fiduciary or confidential duty to hold property in trust for TEC's benefit. The Diocese's qualified accession in 1982 was accompanied by a set of church charters that expressly prohibited local properties from being "encumbered in any way" without the written consent of the parishes using them,<sup>263</sup> and was followed by an express rejection of any trust for TEC's benefit in 1989.<sup>264</sup>

The Defendant Congregations also have never had any confidential or fiduciary relationship with TEC.<sup>265</sup> Only dioceses enter into union with TEC.<sup>266</sup>

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<sup>258</sup> See Virden Affid. ¶13 & Ex. 4.

<sup>259</sup> See Iker Affid. Ex. 3, p. 42 (discussing proposed amendment to Canon 32); *id.* at 73 (Convention's approval of amendment); Virden Affid. ¶13 & Ex. 4.

<sup>260</sup> See Sharpe Affid. Ex. 2, Table A (listing representative plaintiffs for 12 churches and 38 others without any).

<sup>261</sup> See Virden Affid. ¶11.

<sup>262</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

<sup>263</sup> See JA00113 (1982 FW Const. Art. 13); JA00131 (1982 FW Canon 12.4).

<sup>264</sup> See Iker Affid. ¶7.

<sup>265</sup> See *id.* ¶16.

<sup>266</sup> See *id.*; JA00490.

Individual congregations are formed solely by the Diocese, and enter into union solely with the Diocese.<sup>267</sup> As the Corporation holds title to the property used by the Defendant Congregations, the latter make no fiduciary commitments to hold property for TEC's benefit.<sup>268</sup>

#### E. TEC's Charters

TEC's charters do not mention a local property-holding corporation, much less impose a fiduciary duty on it or its directors.<sup>269</sup> Plaintiffs allege such a duty is imposed by the following Canon: "Any 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 office is being exercised."<sup>270</sup>

First, this Canon applies to officers of "this Church," not officers of a local corporation. TEC did not create the Corporation, does not elect or remove its officers, and has never exercised any ownership or control over it or its officers.<sup>271</sup> Indeed, one of the primary reasons churches use nonprofit corporations is to separate the officers of the corporation from the officers of the church, so that creditors can be sure they are dealing with the legitimate business agents.

Second, this Canon imposes a duty to perform the duties of "that office" faithfully. Since TEC's charters impose *no* duties on the directors of a local-property corporation, the duties imposed on "that office" are those contained in the Corporation's and the Diocese's charters—precisely the ones the Plaintiffs insist must be subordinated to a higher duty to TEC.

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<sup>267</sup> See *id.*

<sup>268</sup> See *id.*

<sup>269</sup> See *id.* ¶15.

<sup>270</sup> See Sharpe Affid. Ex. 2 (¶86, ¶103); JA0000500-01 (2006 TEC Canon I.17.8).

<sup>271</sup> See Virden Affid. ¶7.

Third, any duty to “well and faithfully” fulfill an office is not a fiduciary duty.<sup>272</sup> Although the commentary in the margin of TEC’s Canons labels this as a “fiduciary duty” canon, TEC’s chancellor conceded in his affidavit that the General Convention has never adopted that title—it was added by an editor.<sup>273</sup> For the reasons noted above, the Trustees well and faithfully performed the duties imposed on them, and nothing in this Canon requires the Trustees to place the interests of TEC above those of the Diocese that elected them, the Corporation on whose board they serve, or the parishes for whom they hold the property in trust.

As one of the Corporation’s Trustees, the Bishop has the same duties to the Corporation, the Diocese, and the Defendant Congregations as the other Trustees. Unlike the Elected Trustees, bishops in TEC are required to sign a “declaration” that they “solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church.”<sup>274</sup> A bishop in TEC may be subject to presentment and trial for violating that declaration,<sup>275</sup> but that did not occur here,<sup>276</sup> and nothing in TEC’s charters suggest that a diocese or parish forfeits its property to TEC in that event.<sup>277</sup> The declaration of conformity addresses spiritual duties rather than property rights, as it predates the Dennis Canon by 190 years.<sup>278</sup> For example, the

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<sup>272</sup> See *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (superseded by statute on other grounds) (“The duty of good faith and fair dealing merely requires the parties to ‘deal fairly’ with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty.”).

<sup>273</sup> See Sharpe Affid. Ex. 5 (Beers Affid., p. 3 (Q12)).

<sup>274</sup> See JA00452 (2006 TEC Const., Art. VIII).

<sup>275</sup> See JA00564–65 (2006 TEC Canon IV.1).

<sup>276</sup> See Sharpe Affid. Ex. 4 (Schori depo, p. 80-81: “Q. Was an ecclesiastical trial set to determine whether [Bishop Iker] had abandoned the communion? A. No.”).

<sup>277</sup> See Iker Affid. ¶15.

<sup>278</sup> See White & Dykman, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, 111-12 (Church Pub. Inc. 1981).

founders of TEC said they intended to follow the “doctrine, discipline, or worship” of the Church of England,<sup>279</sup> but that obviously did not mean they intended to forfeit church property to the entity from which they had just separated.<sup>280</sup>

Plaintiffs’ constructive trust claims are simply a repackaging of their failed deference claims, asserting that all property impliedly belongs to TEC. But TEC’s charters provide no basis for this claim, and none can be implied simply from the church’s structure because the highest and final authority on property issues is not TEC but the local bishop:

- the word “Episcopal” means “bishop”;<sup>281</sup>
- TEC’s Constitution and Canons define the term “Ecclesiastical Authority” as “the Bishop of the Diocese”;<sup>282</sup>
- no one can perform “episcopal acts” in a diocese without the bishop’s consent;<sup>283</sup>
- property lawsuits have invariably been brought by bishops and dioceses, not TEC;<sup>284</sup> and
- TEC was formed by the dioceses,<sup>285</sup> and can be dissolved by majority vote of the dioceses and their bishops.<sup>286</sup>

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<sup>279</sup> *Id.* at 97.

<sup>280</sup> See *Protestant Episcopal Church v. Barker*, 171 Cal. Rptr. 541, 544 (Cal. App. 1981) (noting that TEC churches retained their property through prior schisms with the Church of Rome and the Church of England).

<sup>281</sup> See BLACK’S LAW DICTIONARY 615 (9th ed. 2009) (“**episcopacy** . . . 1. The office of a bishop”); see also WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 764 (2002) (“fr. *episcopus* **bishop** . . . 1: of, being, or suited to a bishop.”).

<sup>282</sup> See JA00616 (TEC Canon IV.15).

<sup>283</sup> See JA00552 (2006 TEC Canon III.12.3(e)); JA00448 (2006 TEC Const. Art. II, § 3) (“A Bishop shall confine the exercise of such office to the Diocese in which elected, unless requested to perform episcopal acts in another Diocese by the Ecclesiastical Authority thereof . . . .”); JA00383 (1979 TEC Constitution, Art. II, § 3) (same).

<sup>284</sup> See Sharpe Affid. ¶9 & Table A.

<sup>285</sup> See WHITE & DYKMAN, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, 90 (Church Publishing

## F. No unjust enrichment

Texas courts will not impose a constructive trust without strict proof of some unjust enrichment to the wrongdoer.<sup>287</sup> Plaintiffs allege the Trustees have unjustly enriched themselves at the Church's expense.<sup>288</sup> That is completely untrue. The Trustees serve without compensation or financial benefit, and have in no way enriched themselves at the expense of the Corporation or the congregations for whom they hold property.<sup>289</sup>

To the contrary, it is the Plaintiffs who seek unjust enrichment by this lawsuit. TEC did not pay for any of the properties at issue here; they were paid for by the parishioners who attend them.<sup>290</sup> The Individual Plaintiffs use only a handful of the church buildings they want to control.<sup>291</sup> As a result, imposing a constructive trust to benefit the Plaintiffs *would unjustly enrich them* by awarding them control of properties they never paid for, maintained, or used. "Equity abhors forfeiture,"<sup>292</sup> which is precisely what Plaintiffs request.

Courts do not impose a constructive trust that is contrary to what a donor wanted.<sup>293</sup> Since 1989, the Diocese's charters have given notice to contributors that

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Inc. 1981) (TEC was formed "through the federation of the separate Churches in the several states.").

<sup>286</sup> See JA00454 (TEC Const., Art. XII) (allowing TEC Constitution to be altered or amended "by a majority of all Bishops . . . and by an affirmative vote . . . by a majority of the Dioceses . . .").

<sup>287</sup> *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 859 (Tex. App.—Fort Worth 2005, no pet.) (citing *Ginther v. Taub*, 675 S.W.2d 724, 725 (Tex. 1984)).

<sup>288</sup> See Sharpe Affid. Ex. 2 (¶104).

<sup>289</sup> See Virden Affid. ¶12.

<sup>290</sup> See *id.* ¶5.

<sup>291</sup> See Sharpe Affid. Ex. 2, Table A (listing 38 churches with no Plaintiffs as a representative).

<sup>292</sup> *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 429 (Tex. 2008).

<sup>293</sup> See *Holmes v. Kent*, 221 S.W.3d 622, 628-29 (Tex. 2007) ("To impose a constructive trust

any property interest or trust in favor of TEC was “expressly denied.”<sup>294</sup> Had contributors wanted to benefit TEC, they could have given funds to TEC directly. It is neither equitable nor just for the Court to impose a trust for TEC that the Diocese and parishioners did not want and expressly rejected decades ago.

From the outset of this litigation, the Plaintiffs’ lawsuit has been based not on equity but on wishful thinking and unfounded claims. The Plaintiffs filed suit claiming that a diocese cannot disaffiliate from TEC<sup>295</sup>—even though not a single provision in TEC’s charters says so.<sup>296</sup> The Plaintiffs insisted they represented the Corporation and the Diocese—but the Second Court of Appeals held they did not.<sup>297</sup> The Plaintiffs insisted that Texas courts follow the deference approach—but the Texas Supreme Court held they do not.<sup>298</sup> The Plaintiffs insisted that the Dennis Canon was irrevocable—but the Texas Supreme Court held it was not.<sup>299</sup> Despite these repeated judicial rebukes, *the Plaintiffs still assert every one of these claims to this day.*<sup>300</sup>

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on optional annuity payments to a designated beneficiary in this situation, we must first attempt to ascertain if that is what the retiree really wanted, then effectively alter the statutory scheme for benefits provided when a beneficiary has been changed, and finally open TRS’s retirement system to similar claims by others. We see nothing equitable or just in this.”).

<sup>294</sup> See JA00213 (2006 FW Canon 18.4); Iker Affid. ¶7.

<sup>295</sup> See Sharpe Affid. Ex. 2 (¶76).

<sup>296</sup> See Iker Affid. ¶15.

<sup>297</sup> See *In re Salazar*, 315 S.W.3d 279, 287 (Tex. App.—Fort Worth 2010, orig. proceeding).

<sup>298</sup> See *Fort Worth*, 422 S.W.3d at 651.

<sup>299</sup> *Id.* at 653 (citing *Masterson*, 422 S.W.3d at 413).

<sup>300</sup> See Sharpe Affid. Ex. 2, ¶76 (no disaffiliation); Table A, ¶2-3 (claiming to represent the Diocese and Corporation); ¶152 (asserting deference applies); ¶79 (asserting Dennis Canon).

One who seeks equity must do equity.<sup>301</sup> There is nothing inequitable or unjust in requiring the Plaintiffs to comply with neutral principles of Texas law like everyone else.

### **Conclusion: The Plaintiffs Have No Constructive Trust Claim**

The Plaintiffs' constructive trust claims are simply their failed deference claims in disguise: that the courts should award all property to TEC regardless of what the deeds and church charters say. But applying Neutral Principles of Texas law, the Plaintiffs are not entitled to a constructive trust because their alleged fiduciary duty to TEC conflicts with: (a) *state laws* imposing a duty of loyalty to the Corporation; (b) the *Corporation's charters* imposing the same duty; (c) the *Diocese's charters* imposing a duty to the local congregations; and (d) *TEC's charters* imposing no such duty; and (e) *equitable principles* supporting those who actually pay for and use each property. Plaintiffs' constructive trust would unjustly enrich TEC and the minority group that was too small to impose its will on their fellow parishioners.

## **VII. ENDOWMENT FUNDS**

***Summary: Applying Neutral Principles of Texas law, the 1984 judgment allocated to the Defendants control of the funds, trusts, and endowments that the Plaintiffs seek to divest.***

The Plaintiffs seek a declaration that they are the proper representatives to control the Endowment for the Episcopate and other funds long-administered by the Corporation or Bishop Iker.<sup>302</sup> This claim fails for the same reasons their claims to real property fail.<sup>303</sup> The 1984 judgment dividing the Diocese of Dallas

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<sup>301</sup> *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988) (“It is well settled that a party seeking an equitable remedy must do equity.”).

<sup>302</sup> See Sharpe Affid. Ex. 2 (¶176(k)).

<sup>303</sup> See Parts III-VI, *supra*.

vested control in the Corporation or the Bishop of the following funds, trusts, and endowments:<sup>304</sup>

**Corporation as trustee**

The Endowment for the Episcopate  
The Diocesan Fund  
The Memorial Scholarship Fund  
The Thomas Meek Scholarship Fund

**Bishop Iker as trustee or administrator**

The E.D. Farmer Foundation  
The E.D. Farmer Trust  
The Betty Ann Montgomery Farley Fund  
The Eugenia Turner Fund  
The Efrain Huerta Fund  
The Anne S. and John S. Brown Trust

**Bishop Iker, Chancellor, and Treasurer of the Defendant Diocese**

The St. Paul's Trust

No other individual has qualified as a trustee of these funds, and none have resigned or been removed pursuant to the governing instruments.<sup>305</sup>

The 1984 Judgment also allocated to the Diocese or its representatives an account known as the Operating Fund.<sup>306</sup> Expenditures from this fund in the regular course of operations since 2008 exceed the cash standing in the account at the time Plaintiffs withdrew from the Diocese.<sup>307</sup> Accordingly, the current cash balance reflects funds received after disaffiliation, and Plaintiffs have no direct or constructive trust claim for unidentifiable cash.<sup>308</sup>

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<sup>304</sup> See Virden Affid. ¶14; JA00001-062

<sup>305</sup> See *id.*

<sup>306</sup> See *id.* ¶15.

<sup>307</sup> See *id.*

<sup>308</sup> See *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008) (“[M]oney can be converted only if it is specifically identified and held in trust”); *Meadows v. Bierschwale*, 516 S.W.2d 125, 129 (Tex. 1974)

Finally, the following funds assigned to the Corporation by the 1984 judgment were no longer in existence at the time this controversy arose in 2007: Diocesan Discretionary Fund, Ada S. Price Estate, and Hispanic Ministries Fund.<sup>309</sup>

## VIII. ESTOPPEL

***Summary: Estoppel is not a cause of action. It is a defense asserting that it would be unconscionable for a plaintiff to recover in the present suit after benefitting from taking a contrary position in an earlier transaction. It does not apply here because the Defendants are the defendants in this case; they seek nothing from the Plaintiffs except a declaration to be left alone.***

The Plaintiffs cannot assert estoppel because they are plaintiffs. Estoppel serves “to preserve rights, not to create independent causes of action.”<sup>310</sup> It is “defensive in nature and operate[s] to prevent the loss of existing rights”; it does not “operate to create liability where it does not otherwise exist.”<sup>311</sup> Since the Plaintiffs have no property or trust interest for the reasons noted throughout this motion, they are improperly attempting to use estoppel to create a right where they have none.

In addition, the facts in no way support estoppel here. The Plaintiffs assert that the Diocese’s 1982 accession and the 1984 court judgment validate the Dennis Canon.<sup>312</sup> Those events do not create a trust by estoppel for the same reasons they

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(“We agree that a constructive trust on unidentifiable cash proceeds is inappropriate.”).

<sup>309</sup> See Virden Affid. ¶16.

<sup>310</sup> *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988).

<sup>311</sup> *Id.*; see also *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 133 (Tex. 2005) (“Promissory estoppel does not create liability where none otherwise exists, but ‘prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them.’” (quoting *Wheeler v. White*, 398 S.W. 2d 93, 96 (Tex. 1965))).

<sup>312</sup> See Sharpe Affid. Ex. 2 (¶¶105-110, 128-131).

do not create a trust directly.<sup>313</sup> Even if they did, any “trust” would be a revocable; Plaintiffs never allege that Defendants have ever declared the Dennis Canon to be irrevocable, so no estoppel applies on that point.

The Plaintiffs also assert something called “quasi-estoppel.”<sup>314</sup> But that again is a defensive theory by one who claims it would be unconscionable for a plaintiff to recover in the present suit after accepting a benefit in an earlier transaction by taking a contrary position.<sup>315</sup> The Defendants are the defendants in this case; they seek nothing from the Plaintiffs except a declaration to be left alone. There is nothing unconscionable about leaving the property here in the possession of those who pay for, maintain, and occupy it.

## CONCLUSION

For the reasons set forth above, the Defendants’ Motion for Partial Summary Judgment should be granted.

Respectfully submitted,

/s/ J. Shelby Sharpe

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<sup>313</sup> See Part V, *supra*.

<sup>314</sup> See Sharpe Affid. Ex. 2 (¶107).

<sup>315</sup> See *BMG Direct Marketing, Inc. v. Peake*, 178 S.W.3d 763, 780 (Tex. 2005); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000).

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### NOTICE OF HEARING

The foregoing Defendants' Motion for Partial Summary Judgment is set for hearing on February 20, 2015, at 9:30 a.m. in the 141st District Court courtroom.

/s/ Scott A. Brister  
Scott A. Brister

### CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2014, a true and correct copy of the foregoing Defendants' Motion for Partial Summary Judgment was forwarded to all counsel of record via electronic transmission.

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