THE EPISCOPAL CHURCH

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Hon. Blake A. Hawthorne
Clerk of the Court
Supreme Court Building
201 West 14th, Rm. 104
Austin, TX 78701

Re: No. 11-0265: *The Episcopal Diocese of Fort Worth et al. v. The Episcopal Church et al.*; In the Supreme Court of Texas

Dear Mr. Hawthorne:

Appellee The Episcopal Church (the "Church") respectfully submits this letter brief in order to respond to questions raised by the Justices and not fully answered at oral argument in this case. (Similar questions were raised in the *Masterson* case argued the same day).

The Justices questioned what role Texas' generally-applicable legal principles governing property interests have in resolving the present dispute. Specifically, two Justices asked how the State's interest in ensuring the clarity of title to property should impact this case. Chief Justice Jefferson asked:

> "[I]f a bank or a business were interested in purchasing the property that we're talking about today, where would they go? If they looked in the title records and looked at deeds, where would the ownership lie and how is the transaction to be conducted without relying on what is, you know, in the public record?" Archived Webcasts, The Supreme Court of Texas, *The Episcopal Diocese of Fort Worth et al. v. The Episcopal Church et al.*, No. 11-0265 ("Oral Arg. Video"), at 23:03.

Similarly, Justice Johnson asked:

> "Say you have someone on, out in one part of Ft. Worth that has a piece of property they want to trade for an existing church that the Ft. Worth Diocese holds under the declaratory judgment action and they want to swap properties ... could the Ft. Worth Diocese then have simply executed and exchanged deeds with the property and everything would have been just fine? ... So people would have to go no further than the corporate entity to determine whether they had good title from the diocese?" *Id.* at 35:37.

Relatedly, in the *Masterson* case, Justice Hecht asked about the impact of Texas principles governing private trusts on that dispute:

> "[A church] can't make a trust under state law that state law doesn't recognize, can it?" Archived Webcasts, The Supreme Court of Texas, *Robert Masterson et al. v. Diocese of Northwest Texas et al.*, No. 11-0332, at 19:24.

This case is not about title. All parties agree that title to the property at issue in this case is held by the Episcopal Diocese of Fort Worth through its corporation. Nor is this about the enforcement of a trust created under Texas law governing private trusts. It is undisputed that if a third party were to claim an interest in the Diocese's property the validity of those claims would be governed by generally-applicable principles of Texas law. Thus, if a third party were to purchase a parcel of property titled in the name of the Diocese, and the Diocese were to transfer title to that person or entity, then that third party would take clear title to the property. By the same token, in a dispute between the Church or the Diocese and a third party regarding a claim of interest in the property – a contractor enforcing a lien, a neighbor enforcing an easement, a third party claiming to have been given a trust interest in church property, or a church claiming to be the beneficiary of a trust controlled by a third party – all of Texas' rules that generally govern such matters would apply.

Rather, this case involves a dispute between parties whose sole basis for claiming an interest in the property at issue arises out of their relationship to the Diocese and The Episcopal Church. Neither Mr. Brister's nor Mr. Leatherbury's clients would have standing to claim the right to control the church property at issue here if it were not for their relationship – current or former – to the Diocese and the Church. Accordingly, this case presents what Justice Rehnquist has characterized as an "intrachurch" dispute. In *General Council on Finance & Administration of the United Methodist Church v. Superior Court of California, County of San Diego*, 439 U.S. 1355, 1372-73 (1978), Justice Rehnquist, in a solo decision considering the United Methodist Church's application for a stay of state court proceedings, rejected that Church's claim that the First Amendment should protect it from claims of fraud and breach of contract brought by third parties. In so doing, the Justice drew a clear distinction between courts'

treatment of "intrachurch" disputes, on the one hand, and disputes between churches and independent third parties, on the other:

> "There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating *intrachurch disputes*. See *Serbian Eastern Orthodox Diocese v. Milivojevich*. But this Court never has suggested that those constraints similarly apply outside the context of such *intraorganization disputes*. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by [the United Methodist Church] are not in point. Those cases are premised on a perceived danger that in resolving *intrachurch disputes* the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. 426 U.S., at 709-710, 96 S.Ct., at 2380-2381. Such considerations are not applicable to *purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization*, in which fraud, breach of contract, and statutory violations are alleged. As the Court stated in another context: 'Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.' *Cantwell v. Connecticut*, 310 U.S. 296, 306, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940)." 439 U.S. at 1372-73 (emphasis added).

The case at bar does not involve a "purely secular dispute between third parties and a [church]." Rather, the dispute here is an "intrachurch" dispute. "Intrachurch" disputes implicate the First Amendment in ways that disputes between churches and independent third parties simply do not – even when the disputes involve property. *Jones v. Wolf*, 443 U.S. 595, 602 (1979) ("the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes") (internal quotations omitted). Mr. Brister's suggestion at argument that this case should be treated the same as a dispute between a Burger King franchisor and franchisee ignores the First Amendment and should be rejected.

Accordingly, rather than being about title, or the existence of a trust as against a third party, the "intrachurch" dispute in this case is over which group of persons before this Court – continuing Episcopalians or former Episcopalians – are entitled to control the Diocese, its corporation, and its property. As the U.S. Supreme Court held under similar facts, "the Mother Church decisions defrocking [the diocesan bishop] and reorganizing the Diocese in no way change formal title to all Diocesan property, which continues to be in the respondent property-holding corporations. . .; only the identity of the trustees is altered by the Mother Church's ecclesiastical determinations." *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevich*, 426 U.S. 696, 723 n.15 (1976). To be clear: Although Mr. Brister claims to represent the diocesan

corporation, that is only because his clients have seized and are exercising *de facto* control over that corporation – an exercise of control that, in The Episcopal Church's view and in the view of the trial court, is unlawful. Indeed, the question of which persons are entitled to control that corporation – Mr. Brister's clients or Mr. Leatherbury's – is the precise issue at bar here. And the U.S. Supreme Court has indicated that, consistent with the First Amendment, that question may be resolved under either the "Deference" approach or the "Neutral Principles" approach.

Deference. Under the "Deference" approach, this Court need only look to the governing documents of the Church and the Diocese to determine whether The Episcopal Church is hierarchical. As the trial court here concluded, as we have shown in our papers, and as every court in the country to address the issue has found, the Church is indeed hierarchical, with the General Convention at the top of the hierarchy. *See* Brief of Appellee The Episcopal Church ("Church's Brief") at 25-26 & n.9 (citing cases).

Mr. Brister's remarks to the contrary at oral argument do not change the undisputed facts in the record. For example, Mr. Brister suggested, without evidence, that dioceses elect their bishops without input or approval from the larger Church. Oral Arg. Video at 41:42 ("[N]either the presiding bishop nor the General Convention they can't appoint a bishop"). As the record shows on its face:

- "No one shall be ordained and consecrated Bishop . . . without the consent of a majority of the Standing Committees of all the Dioceses, and the consent of a majority of Bishops of this Church exercising jurisdiction." *See* App. Ex. A-1 (24CR5131) (Constitution of The Episcopal Church, Article II, Sec. 2).

- Every diocesan bishop must be ordained "either by the Presiding Bishop or the President of the House of Bishops of the Province of which the Diocese for which the Bishop was elected is part, and two other Bishops of this Church, or by any three Bishops to whom the Presiding Bishop may communicate the testimonials." *See* 24CR5227 (Episcopal Church Canon III.11.6).

Indeed, the critical facts here are simple, powerful, and undisputed:

- The Diocese was created only after the Church gave its permission, 23CR4929-30;

- The Diocese made multiple pledges to conform to the Church's governance *as a condition* of its formation as an Episcopal Diocese, and those pledges were made *after* the Church had adopted clear rules ensuring that church property remain in the control of Episcopalians, 23CR4937, 4950, 4961-62, 5008-15, 5024, 5027;

- No bishop elected by the Diocese could take, or has taken, that office until the larger Church gave its consent, *supra*; and

- Every bishop and priest in the Diocese has been and is required to promise to obey the Church's rules as a condition of being ordained, and may lose his or her status as ordained persons in the Church if he or she violates those rules, 24CR5134, 5204, 5227, 5243, 5281.

These facts do not describe a church structured with independently sovereign dioceses associating and disassociating at will with a loosely organized larger church. These facts describe a hierarchical church. *See, e.g., Watson v. Jones*, 80 U.S. 679, 674 (1872) (comparing "a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority" – *i.e.*, a "congregational" church – with a "religious congregation or ecclesiastical body [that] is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization" – *i.e.*, a "hierarchical" church).

Having determined that the Church is hierarchical, under the "Deference" approach the Court would defer to the Church's determination of the "identity" of the rightful leaders of the Diocese, and would award the property to that group – in this case, Appellees, the continuing Episcopalians.

Neutral Principles: Ecclesiastical Determinations. If this Court were to adopt the "Neutral Principles" approach, it would still be required by the First Amendment to acknowledge and defer to ecclesiastical determinations made by the Church if those determinations impact the outcome of the case. For example, in *Milivojevich*, 426 U.S. 696, where the hierarchical church had identified the true Bishop of the Diocese at issue – a determination to which the U.S. Supreme Court said it must defer, *id.* at 713 – the Court found that that determination also resolved the underlying property dispute "because the Diocesan Bishop controls [the Monastery property at issue] and is the principal officer of [the diocese's] property-holding corporations." *Id.* at 709. *See also Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007) (*Milivojevich* "mandated judicial deference to the church if ownership determinations involve underlying questions of religious doctrine").

Likewise, here the Bishop "is the principal officer of [the diocese's] property-holding corporation[]." *Milivojevich*, 426 U.S. at 709. It is undisputed that the Diocesan canons provide that "the Bishop of the Diocese ... shall serve as Chairman of the Board" of the "Corporation of the Episcopal Diocese of Fort Worth." Unnumbered page between 23CR5027 and 23CR5028 (A537). Futher, it is undisputed that the Church has removed Appellant Iker from authority within the Church, and has recognized as vacant the Diocesan positions held by the unqualified breakaway Appellants. App Ex. B-10 (24CR5113); App. Ex. B-12 (25CR5422). It is also undisputed that the Church recognizes Mr. Leatherbury's clients, led first by Bishop Gulick and now by Bishop Ohl,

as the duly constituted leadership of the Diocese and its Corporation and institutions. App. Ex. B-7 (22CR4475-77); App. Ex. B-15 (22CR4495-97); 22CR4504-05; App. Ex. A-12 (23CR4846); 23CR4848-49; App. Ex. A-11 (24CR5120-21); 25CR5380-81; 25CR5383-85; 25CR5390. Those are precisely the types of ecclesiastical determinations that command deference from secular courts. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012). Under *Milivojevich*, those facts – the Church's identification of the true Bishop, and the governing documents making the Bishop chair of the property-holding corporation – resolve this matter entirely.

But the present case is even stronger factually than *Milivojevich*. Here the Diocesan canons also require the other Board members of the property-holding corporation to be "either Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese." Unnumbered page between 23CR5027 and 23CR5028 (A537). And the Church has made ecclesiastical determinations about the identity of these persons, too, that this Court must honor. First, those Clergy persons represented by Mr. Brister who claim to be members of the Board of the Diocesan Corporation were deposed from the priesthood by Bishop Ohl. 23CR4499-4500. As a result, they are unqualified under the above-cited canon to serve as members of the corporation's Board. Second, only those Lay and Clergy persons represented by Mr. Leatherbury who claim to be members of the Board of the Diocesan corporation have been recognized as such by the Church – and, indeed, only they, and not Mr. Brister's clients, claim to be Episcopalians. 25CR5385. These determinations, read together with the Diocese's own governing documents, confirm the conclusion that it is Mr. Leatherbury's clients who are the persons entitled to control the Diocese's property-holding corporation.

Appellants try to avoid this conclusion by asserting that they have removed the Diocese from the Episcopal Church. But this is the tail wagging the dog: as the U.S. Supreme Court held, "disputes over the government and direction of subordinate [church] bodies" implicate core ecclesiastical issues of internal church governance, discipline, and polity. *Milivojevich*, 426 U.S. at 724-25; *accord Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952); *Watson*, 80 U.S. at 727. Simply put, asking whether an Episcopal Diocese has left The Episcopal Church is just another way of asking *who* are the true Bishop and leaders of the Diocese: "The continuity of the diocese as an entity within the Episcopal Church is ... a matter of ecclesiastical law, finally resolved, for civil law purposes, by the Episcopal church's recognition of ... the bishop of that continuing entity." *Schofield v. Superior Court*, 118 Cal. Rptr. 3d 160, 166 (Cal. Ct. App. 2010). Appellants' argument should be rejected.

Neutral Principles: Four Factors. Even if there were no dispositive ecclesiastical determinations at the center of this case, the four "Neutral Principles" factors – "the deeds, the terms of the local church charters, the state statutes governing the holding of

church property, and the provisions in the constitution of the general church concerning the ownership and control of church property," *Jones*, 443 U.S. at 603 – would nevertheless require a finding in favor of the Church here. We have already set out a detailed analysis of the four factors, *see* Church's Brief at 35-41, which we will not repeat here. But, in short, the "basis for a trust in favor of the general church," *Jones*, 443 U.S. at 600, in the present case is the collection of commitments made by the Diocese and its leaders upon the Diocese's formation and acceptance into the Church to adhere to the Church's governance, which included at that time several provisions in the Church's governing documents clearly requiring that local church property be held and used in connection with this Church and no other denomination. Courts across the country have almost unanimously found those same intrachurch commitments to be binding. *See* Church's Brief at 30 & n.10 (citing cases).

As to the other two "Neutral Principles" factors, we have already explained that the relevant Texas statutes recognize that an incorporated Diocese may have obligations to a larger denomination, notwithstanding its incorporated status. *See* Church's Brief at 40-41. And the deeds at issue here favor the Church and the Local Episcopalians. The principal deed at issue, the declaratory judgment, transferred property from another Episcopal Diocese within the Church to the Episcopal Diocese of Fort Worth expressly as "a duly constituted religious organization, organized pursuant to the Constitution and Canons of the Protestant Episcopal Church in the United States of America," App. Ex. C-3 (26CR5673a), and other deeds in the summary judgment record, for example, convey property "in trust for the use and benefit of the Protestant Episcopal Church." 30CR6631-33. There are no deeds conveying property to "the Diocese, which property shall remain dedicated to the use of former members of the Diocese even if a majority of them shall determine to withdraw from the Episcopal Church," or the like.

Accordingly, the Church's and the Diocese's governing documents, setting forth commitments made "before the [present] dispute erupt[ed]," *Jones*, 443 U.S. at 606, are the dispositive factors in this case. They are not "unwritten rules" as Mr. Brister claimed at argument, but were, and are, right there in black and white for all to see. Further, Mr. Brister's suggestion that the founding commitments made by the Diocese – commitments which wove the Diocese into a hierarchical Church at the middle, not the top, of the hierarchy, and which were required by the Church as a condition of the Diocese's formation – could be repealed at any time, must be rejected. Such a position would render those original commitments meaningless, a result the law does not allow. This Court should enforce the Diocese's commitment to obey the Church's rules, including the Church's trust canons.

Justice Hecht's query in the *Masterson* case about whether courts can enforce a "trust" obligation between church members without applying state trust law is answered by *Jones* itself. That case acknowledged that a state court might find "a trust in favor of [a] general church" under neutral principles *even where the requirements of state*

property and trust law were not satisfied. In reviewing Georgia's "Neutral Principles" method, the *Jones* Court considered a case in which the Supreme Court of Georgia had earlier applied that method:

> "[I]n *Carnes v. Smith*, 236 Ga. 30, 222 S.E.2d 322, cert. denied, 429 U.S. 868, 97 S.Ct. 180, 50 L.Ed.2d 148 (1976), * * * the court found no basis for a trust in favor of the general church in the deeds, the corporate charter, or the state statutes dealing with implied trusts. The court observed, however, that the constitution of The United Methodist Church, its Book of Discipline, contained an express trust provision in favor of the general church. On this basis, the church property was awarded to the denominational church. 236 Ga., at 39, 222 S.E.2d, at 328." *Jones*, 443 U.S. at 600–01.

The U.S. Supreme Court then went on to approve Georgia's "Neutral Principles" approach, aware that Georgia had previously found a trust to exist under that approach even where the trust did not arise under state trust law.

Thus, as the Supreme Court of Georgia noted in two recent decisions, "the fact that a trust was not created under our state's generic express (or implied) trust statutes does not preclude the implication of a trust on church property under the neutral principles of law doctrine." *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 454 (Ga. 2011), *cert. denied*, 132 S.Ct. 2772 (2012) (*"Timberridge"*); *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237, 245 (Ga. 2011), *cert. dismissed*, 132 S. Ct. 2439 (2012) (*"Christ Church"*) (same). This is not a federal common law of trusts, but rather a First Amendment bar on the application of a "litany" of generally-applicable state laws, including state trust law, to frustrate clearly documented intrachurch commitments made prior to a dispute. *Christ Church*, 718 S.E.2d at 245 n.7. "Applying the neutral principles with an even hand, [courts] simply enforce the intent of the parties as reflected in their own governing documents; to do anything else would raise serious First Amendment concerns." *Timberridge*, 719 S.E.2d at 458.

The Church appreciates any consideration the Court may give to this letter brief.

Respectfully submitted,