

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

DEFENDANTS’ RESPONSE TO PLAINTIFF THE EPISCOPAL CHURCH’S MOTION FOR SUMMARY JUDGMENT

Defendants (as defined in the Defendants’ Motion for Partial Summary Judgment filed on December 23, 2010) file this Response to the Motion for Summary Judgment of Plaintiff The Episcopal Church (“TEC”).

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I. Texas applies neutral principles, so hierarchy doesn't matter

(Response to TEC Argument I)

The most striking thing about TEC's motion is that it never mentions "neutral principles of law" — **not once**. Yet that is the only law in Texas that governs church property cases. As TEC's motion is not based on current Texas law, it must be denied.

A. Texas follows neutral principles of law.

In 1979 in *Jones v. Wolf*, the United States Supreme Court held that states could adopt either of two approaches to decide church property disputes: (1) neutral principles of law, or (2) deference to ecclesiastical authority. 443 U.S. 595, 603 (1979). Texas courts have adopted neutral principles, as the Fort Worth Court of Appeals expressly held in 1999 and again in 2006:

Notwithstanding the First Amendment's proscription, courts do have jurisdiction to review matters involving civil, contract, or property rights even though they stem from a church controversy. **Neutral principles of law must be applied** to decide such matters so that courts do not violate the constitutional prohibition against government established religion.¹

The Second Court of Appeals is not alone; the First, Fifth, Tenth, and Fourteenth Courts of Appeals have recognized that Texas law employs neutral principles.² While no property dispute has reached the Texas Supreme Court

¹ *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.); *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.) (“[C]ourts do have jurisdiction to review matters involving civil, contract, or property rights Neutral principles of law must be applied to decide such matters”).

² *See Chen v. Tseng*, No. 01-02-01005-CV, 2004 WL 35989, at *6 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.) (applying neutral principles to by-laws of religious nonprofit corporation); *Hawkins v. Friendship Missionary Baptist Church*, 69 S.W.3d 756, 759 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (recognizing neutral principles but deferring as church had no governing documents to construe); *Cherry Valley Church of Christ/Clemons v. Foster*, No. 05-00-10798-CV, 2002 WL 10545, at *3 (Tex. App.—Dallas Jan. 4, 2002, no pet.) (not designated for publication) (recognizing but not applying neutral principles because church's articles and by-laws provided for officer selection “according to the custom and practices of the church”); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (applying neutral principles to determine entitlement to proceeds from sale of church building).

since *Jones v. Wolf*, in 2007 the Court considered whether to “**expand** the neutral-principles approach” from property case to personal injury cases.³

Judging from TEC’s motion, none of this law exists. TEC’s motion is based on a 1909 case from the Texas Supreme Court, *Brown v. Clark*,⁴ which it cites 16 times. But what Texas courts did 100 years ago is not what they do today; today they apply neutral principles of law.

TEC’s motion is devoid of any evidence recognized by the Texas neutral-principles approach:

- it never refers to a single property deed;
- it never addresses the Diocese’s Constitution & Canons or the Corporation’s articles and by-laws that have governed this property since 1982, and give the individual Defendants control of it today;
- it concedes that its own Constitution and Canons allow a diocese to “adopt[] and amend[] its own Constitution and canons,”⁵ and cites no provision limiting such amendments;
- it cites no document granting authority to a presiding bishop or a handful of dissenting members to remove officers of the Diocese or Corporation, or call special meetings to replace them; and
- it cites a Texas statute only once (in a footnote), and it is wrong statute, as the Texas Business Organizations Code does not apply to this case.⁶

TEC assumes that all the legal documents and Texas statutes mean nothing since TEC is “hierarchical.”⁷ But that is not Texas law, so the motion must be denied.

³ *Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007) (emphasis added) (“But even if we were to expand the neutral-principles approach beyond the property-ownership context as Penley requests, we disagree that free-exercise concerns would not be implicated.”).

⁴ 116 S.W. 360 (1909).

⁵ TEC MSJ at 10 (“Each diocese is governed by a legislative body (its “Diocesan Convention”) composed of representatives from each of its parishes that adopts and amends its own Constitution and canons. Const. Art. V.I (discussing diocesan Constitution) (A130); Canon I.10(4) (same) (A172).”).

⁶ See Tex. Bus. Orgs. Code § 402.014 (stating that prior law applies to suits pending before mandatory application date); *id.* § 402.006 (stating that prior law applies to acts, contracts, or transactions occurring before mandatory application date); *id.* § 401.001 (defining mandatory application date as January 1, 2010 for non-electing entities).

⁷ TEC MSJ at 60-61.

B. Abandoning neutral principles means abandoning neutrality.

The reason Texas courts (along with those of most states) follow neutral principles is amply demonstrated by TEC's motion. If courts must determine the form of government of a religion (as the deference approach requires), they will have to pore over the kinds of things in the Plaintiffs' Appendix — the history of the church from inception, church journals over the centuries, and intricacies of church trials, conventions, and publications. In that regard, it is noteworthy that TEC's "history" starts only in 1789 — conveniently avoiding that TEC itself began after the original dioceses withdrew from affiliation with the Church of England.

The Supreme Court authorized neutral principles in *Jones v. Wolf* precisely for this reason — to get out of the business of deciding how churches are run:

Under [a compulsory deference] approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property.... In such cases, the suggested rule would appear to require a searching and therefore impermissible inquiry into church polity. The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.⁸

Wading into issues like which members are "loyal" (a term used 30 times in TEC's motion) is unavoidable with the deference approach.

It is true that under the deference approach used in Texas cases before *Jones v. Wolf*, the property of a hierarchical church went to the hierarchy. But that is partly why neutral principles was adopted — so churches could "specify what is to happen to church property in the event of a particular contingency" so that "the outcome of a church property dispute is not foreordained."⁹ Naturally, TEC wants the answer here to be foreordained, which can occur only if the relevant documents are disregarded. But that is not how Texas law works today.

⁸ *Jones v. Wolf*, 443 U.S. 595, 597, 605 (1979).

⁹ *Id.* at 603, 606.

C. Hierarchy doesn't matter under neutral principles.

Under neutral principles it doesn't matter whether a church is hierarchical (a word used 56 times in TEC's 62-page motion). Hierarchy doesn't matter in the neutral-principles approach; only neutral principles do. Neutral-principles and deference are two different approaches, as the U.S. Supreme Court said in 1979:

The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of "neutral principles of law," or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church. ... We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.¹⁰

The Supreme Court of South Carolina recently reiterated that hierarchy doesn't matter under neutral principles:

Church disputes that are resolved under the neutral principles of law approach do not turn on the single question of whether a church is congregational or hierarchical. Rather, the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes.¹¹

It is true that if a case cannot be resolved solely by neutral principles, courts will defer to a church's highest authority.¹² As the Fort Worth Court of Appeals said in 1999, "[i]f the conflict cannot be resolved solely by the application of neutral principles of law, we must defer to the decision made by the highest authority of the church." But this case *can* be decided solely by neutral principles, as shown in Defendants' Motion for Summary Judgment. Thus, this Court need not decide whether TEC is hierarchical, or if so who has the final authority in that hierarchy.

¹⁰ *Id.* at 597, 604.

¹¹ *All Saints Parish Waccamaw v. Protestant Epis. Church in Diocese of S.C.*, 685 S.E.2d 163, 172 (S.C. 2009).

¹² *See Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.).

D. If hierarchy mattered, the ultimate authority in the Episcopalian tradition is the Bishop.

It doesn't matter whether a church is hierarchical or congregational under the Texas neutral-principles approach. But even if the opposite were true — if this Court were to ignore Texas law and apply a deference-to-ecclesiastical-authority approach — TEC's motion would have to be denied because the bishop rather than TEC is the ecclesiastical authority on property issues.

Under the deference approach, courts “defer to the decision made by the highest authority of the church.”¹³ But the “highest” authority is not necessarily the one with the greatest geographical reach. In a congregational church, the “highest” authority is the local congregation.¹⁴ The question thus becomes which body has the “ultimate decision-making authority”¹⁵ on the issue before the court.

So how should a court decide which ecclesiastical body has ultimate authority? According to TEC's motion, that's easy: ask TEC.¹⁶ This is completely circular; asking TEC who has the final authority assumes that TEC *is* the final authority. TEC's “experts” say nothing more than that in their affidavits. Defendants have objected to these “expert opinions”;¹⁷ Texas courts do not allow experts as to what a document means, as that is a question of law for the judge.¹⁸ Nor does neutral principles consider expert opinions, as they are never “neutral.”

¹³ *Id.* at 395.

¹⁴ *See id.* at 395 n.1 (“In churches with a congregational form of government, ultimate decision-making authority vests in the members.”).

¹⁵ *See id.*

¹⁶ TEC MSJ at 51 (“This [deference] principle applies not only to determinations about the identity of a church's clergy, as we have seen above, *supra* Section I.C, but also to a church's determinations about its governmental structure.”).

¹⁷ *See* Defendants' Objections to Plaintiffs' Summary Judgment Motions and Evidence ¶¶ 2-3.

¹⁸ *See, e.g., Dickerson v. DeBarbieris*, 964 S.W.2d 680, 690 (Tex. App.—Houston [14th Dist.] 1998, no writ) (excluding expert from testifying about meaning of document); *United Gas Pipe Line Co. v. Mueller Eng'g Corp.*, 809 S.W.2d 597, 602 (Tex. App.—Corpus Christi 1991, writ denied) (excluding expert from testifying about meaning of contract).

As the affidavit of Dr. Jeremy Bonner filed with this Response shows, the opinions of TEC's "experts" are contested, so they cannot support a summary judgment.¹⁹

Instead, courts look to the neutral-principles evidence when deciding which church body has final authority.²⁰ For example, in *Patterson v. Southwestern Baptist Theological Seminary*, the Fort Worth Court of Appeals looked to the seminary's by-laws, which provided that its board of trustees was vested with final authority regarding the employment decision in that case.²¹

According to the evidence here, TEC has no authority to decide church property disputes. To the contrary, its own name, its own Constitution, and its own Canons establish that it is not vested with authority to decide this case:

- The word "Episcopal" means "bishop."²² Thus, the very name of the denomination points to regional rather than national control.
- TEC's Canons define the term "Ecclesiastical Authority" as "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."²³ TEC's Constitution and Canons use the term "Ecclesiastical Authority" in this sense more than 150 times.²⁴
- TEC's Constitution expressly provides that no bishop—not even a presiding bishop—can "perform episcopal acts" in an existing diocese

¹⁹ See Second Affidavit of Dr. Jeremy Bonner (attached); Defendants' Supplemental Appendix, Affidavit of Dr. Jeremy Bonner.

²⁰ See *Dean v. Alford*, 994 S.W.2d 392, 395 n.1 (Tex. App.—Fort Worth 1999, no pet.) ("The evidence shows that the church had a congregational form of church government as opposed to a hierarchical system.").

²¹ 858 S.W.2d 602, 605-06 (Tex. App.—Fort Worth 1993, no writ).

²² 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.).

²³ See Plaintiffs' Appendix, Duffy Affidavit Ex. 2 (A347) (TEC Canon IV.15).

²⁴ See, e.g. Plaintiffs' Appendix, Duffy Affidavit Ex. 1 (A128) (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 . . ."); *id.* at A137 (TEC Canon I.1.1(e): "It shall be the duty of the Secretary of the House of Deputies, whenever any alteration of the Book of Common Prayer or of the Constitution is proposed . . . to give notice thereof to the Ecclesiastical Authority of the Church in every Diocese . . .").

except by invitation of the local “Ecclesiastical Authority” (i.e., the Bishop).²⁵

- Indeed, TEC itself was formed by the dioceses,²⁶ and could be dissolved by majority vote of the dioceses and their bishops.²⁷

If the Plaintiffs wanted TEC to own all the property in the Diocese, they had the burden to arrange the documents to say so. As the Supreme Court stated in *Jones v. Wolf*, there is an “obligation of States, religious organizations, and individuals to structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”²⁸ TEC did not do that.

By contrast, the Diocese and Corporation structured their relationships and rules so that title could be determined entirely by neutral principles of Texas law:

- Legal title to all property was placed in a Texas nonprofit corporation.²⁹
- A Constitution was adopted (and accepted by TEC) governing how the bishop was selected and who could call special meetings.³⁰
- Articles of incorporation and by-laws were adopted to govern the election and removal of Trustees.³¹
- Constitutional provisions repeatedly made clear that TEC had no trust interest in diocesan property.³²

²⁵ See *id.* at A1289 (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”); see also TEC Canon III.12, § 3(e) (“No Bishop shall perform episcopal acts . . . 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.”).

²⁶ See WHITE & DYKMAN, ANNOTATED CONSTITUTION AND CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, 90 (Church Publishing Inc. 1981) (noting that TEC was formed “through the federation of the separate Churches in the several states.”).

²⁷ TEC Constitution, Art. XII (providing that TEC Constitution can be altered or amended “by a majority of all Bishops . . . and by an affirmative vote . . . by a majority of the Dioceses . . .”).

²⁸ 443 U.S. 595, 604 (1979).

²⁹ Defendants’ MSJ at 7.

³⁰ *Id.* at 15-19.

³¹ *Id.* at 12-15.

³² *Id.* at 7-12.

Over the years, TEC stood by and raised no objection to any of these provisions. Having acquiesced in this state of affairs, TEC cannot now demand that the courts disregard them all under deference principles.

TEC's motion also assumes there are only two categories of churches: hierarchical and congregational. But in fact "[t]he terms hierarchical and congregational are poles on a continuum along which church organizations fall."³³ Secular courts cannot force churches into one of two extreme forms of government without violating the First Amendment. Churches have a constitutional right to set up a structure that is federal: bestowing authority on the national affiliate for some purposes (Book of Common Prayer), on the local diocese for others (calling a diocesan convention, buying or selling property), and to a hybrid of local and non-local dioceses for still others (a diocese elects a bishop and other dioceses consent). According to its own Constitution and Canons, TEC is such a federal organization.

Churches may believe what they want and structure their affairs as they wish, but once entities are created under Texas law and governing documents are filed with the Secretary of State as required by Texas law,³⁴ the First Amendment is not offended by applying secular rules to secular matters. This dispute has already been decided by the highest ecclesiastical authority on the issue of property — the Diocese.

E. Hidden tricks in TEC's "undisputed evidence" of hierarchy.

TEC's claims it has "undisputed evidence" that it alone sits atop a hierarchy with final authority over the issues here. But it is all sleight of hand. This "evidence" involves several standard tricks of the art of legerdemain.

Misdirecting. TEC's "undisputed evidence" consistently misdirects attention away from matters actually before the Court. Over and over, TEC cites

³³ *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 551 (Tex. App.—Austin 1991, writ denied).

³⁴ *See, e.g.*, Tex. Rev. Civ. Stat. art. 1396-3.03, -4.04 (requiring Texas non-profit corporations to file articles of incorporation and amendments with Secretary of State).

evidence that it has authority to receive annual audits,³⁵ prescribe insurance coverage,³⁶ and change the Book of Common Prayer³⁷ — but not control a diocese’s real property. Evidence that TEC has final authority over a few specified matters is not evidence it has final authority over everything else. Indeed the general rule is the opposite — the express mention of one thing suggests the exclusion of all others (“*expressio unius est exclusio alterius*”).³⁸ As shown in Defendants’ motion, TEC does not have authority to select a diocese’s bishop, call it into convention, remove its officers, or control its property.

Switching. Throughout its entire case, TEC performs a quick switch between itself and the dioceses. For example, TEC claims that a diocese’s choice for bishop must receive the consent of “the larger Church,”³⁹ when in fact consent must come from a majority of *the dioceses*.⁴⁰ Similarly, TEC says the Trustees of the Corporation must be “individuals who are members of The Episcopal Church,” citing a canon listed 22 pages earlier in its brief.⁴¹ But anyone who actually turns back to that page will see that the canon says Trustees must be “Lay persons in good standing of a parish or mission *in the Diocese*, or members of the Clergy canonically resident *in the Diocese*.”⁴² And the “undisputed evidence” that none of

³⁵ See TEC MSJ at 13, 21, & 40.

³⁶ See *id.* at 13, 21.

³⁷ See, e.g., *id.* at 12, 21, & 40.

³⁸ BLACK’S LAW DICTIONARY 661 (9th ed. 2009); see *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 493 n.7 (Tex. 1993) (holding that express provision of instances in which governments could regulate location of alcohol-related businesses excluded regulation in all other circumstances).

³⁹ TEC MSJ at 28.

⁴⁰ Plaintiffs’ Appendix, Duffy Affidavit Ex. 1 (A128) (TEC Constitution Art. II, § 2) (“No one shall be ordained and consecrated Bishop until the attainment of thirty years of age; nor without the consent of a majority of the Standing Committees of all the Dioceses, and the consent of a majority of the Bishops of this Church exercising jurisdiction.”).

⁴¹ TEC MSJ at 56.

⁴² TEC MSJ at 24 (citing current Diocese Canon 17.2) (emphasis added).

the property here can be sold without the Bishop's consent⁴³ is no evidence that the Bishop needs TEC's consent — indeed, it proves precisely the opposite.

Materializing. Many of TEC's arguments are created out of thin air. For example, a TEC Canon says church officers must "well and faithfully" perform their duties, but as it grants no power to remove them if they don't, the assertion that this grants any kind of authority to TEC is merely an illusion.⁴⁴ TEC says that its Presiding Bishop had authority to remove Bishop Iker; but the canon cited applies only when a bishop sends a written renunciation of the ordained ministry directly to a presiding bishop with a request to be removed;⁴⁵ there is no such thing anywhere in TEC's 1,264 page Appendix. TEC says its Executive Council declared the Diocese's 2006 constitutional amendments void, but again nothing in TEC's charters allows TEC to veto a diocese's constitutional amendments; in fact the opposite is true: TEC's constitutional amendments must be sent to the *dioceses* so they can instruct their delegates whether to approve them.⁴⁶

Disappearing. TEC attempts to prove several points by "undisputed evidence" that something is not there. But silence is not evidence. For example, TEC says that its Constitution does not "reserve[e] rights of dioceses as against the General Convention," or "provide for the withdrawal of U.S. dioceses."⁴⁷ But it does not say the opposite either. There is no "supremacy clause" in TEC's charters

⁴³ TEC MSJ at 14, 22, 26, 28, & 55.

⁴⁴ See Defendants' MSJ at 14.

⁴⁵ See TEC MSJ, at 16 n.10 (citing TEC Canon III.12.7(a) ("If any Bishop of this Church shall declare, in writing, to the Presiding Bishop a renunciation of the ordained Ministry of this Church, and a desire to be removed therefrom, it shall be the duty of the Presiding Bishop to record the declaration and request so made.")).

⁴⁶ See, e.g., Plaintiffs' Appendix, Duffy Affidavit Ex. 1 (A134-35 (TEC Const. Art. XII: "No alteration or amendment of this Constitution shall be made unless the same shall be first proposed at one regular meeting of the General Convention and be sent to the Secretary of the Convention of every Diocese, to be made known to the Diocesan Convention at its next meeting, and be adopted by the General Convention at its next succeeding regular meeting ...").

⁴⁷ TEC MSJ at 13, 21.

by which its regulations could preempt those of a diocese. Nor is there any prohibition against withdrawal by a diocese.

Palming. TEC says that all dioceses must submit an “unqualified accession” to TEC’s Constitution and Canons. But buried in a footnote,⁴⁸ it concedes that this requirement did not go into effect until January 1, 1983 — the day *after* the Diocese was admitted into union.⁴⁹

Impersonating. Three tiers is no proof that the “top” one has authority over the others. There are three tiers in Baptist organizations too,⁵⁰ but that does not make them hierarchical. The question is not whether dioceses are affiliated with a larger organization — almost all churches have affiliations of some kind. The question is which affiliate has ultimate authority to decide property disputes. On that issue, TEC has presented nothing but smoke and mirrors.

F. Cases declaring TEC hierarchical all have the diocese at the top.

In its motion, TEC claims that “every court in the nation ... has found the Church to be hierarchical.”⁵¹ True as to episcopal **dioceses**; false as to **TEC**. All of the cases cited by TEC found a hierarchical church at the diocese level; none of them declared a hierarchical relationship between a diocese and TEC.

The interesting thing about Episcopalian property suits is that TEC historically has never been a player. As shown by the following table, lawsuits involving church property have almost always been filed by or against a *bishop* or a *diocese*; until the last year or two, TEC has never been a party. Neither the courts nor TEC have ever regarded it as having any interest in the proceedings, and TEC has never had to pay the legal bills that come with protecting church property.

⁴⁸ TEC MSJ at 20 n.11.

⁴⁹ See Defendants MSJ at 9.

⁵⁰ See, e.g., *Central Coast Baptist Ass'n v. First Baptist Church of Las Lomas*, 65 Cal.Rptr.3d 100, 122-23 (Cal. Ct. App. 2007); see also Southern Baptist Convention website, <http://www.sbc.net/aboutus/clstateconv.asp> (last visited December 31, 2010).

⁵¹ TEC MSJ at 42.

Case	Year	Diocese A Party?	Bishop A Party?	TEC A Party?
<i>Diocese of Sw. Va. of Protestant Epis. Church v. Buhrman</i> , 1977 WL 191134 (Va.Cir.Ct. 1977)	1977	Yes	No	No
<i>Tea v. Protestant Epis. Church in the Diocese of Nev.</i> , 610 P.2d 182 (Nev.)	1980	Yes	Yes	No
<i>Protestant Epis. Church in the Diocese of N.J. v. Graves</i> , 417 A.2d 19 (N.J.)	1980	Yes	Yes	No
<i>Protestant Epis. Church v. Barker</i> , 171 Cal.Rptr. 541 (Cal. Ct. App.)	1981	Yes	No	Yes
<i>Bennison v. Sharp</i> , 329 N.W.2d 466 (Mich. Ct. App.)	1982	No	Yes	No
<i>Bishop and Diocese of Colorado v. Mote</i> , 716 P.2d 85 (Colo.)	1986	Yes	Yes	No
<i>Bjorkman v. Protestant Episcopal Church in U.S. of America of Diocese of Lexington</i> , 759 S.W.2d 583 (Ky.)	1988	Yes	Yes	No
<i>Rector, et al. of Trinity-St. Michael's Parish, Inc. v. Epis. Church in the Diocese of Conn.</i> , 620 A.2d 1280 (Conn.)	1993	Yes	Yes	No
<i>Bd. of Managers of Diocesan Missionary v. Church of Holy Comforter</i> , 628 N.Y.S.2d 471 (N.Y. Sup. Ct.)	1993	Yes	No	No
<i>Parish of the Advent v. Protestant Epis. Diocese of Mass.</i> , 688 N.E.2d 923 (Mass.)	1997	Yes	Yes	No
<i>Trustees of Diocese of Albany v. Trinity Epis. Church of Gloversville</i> , 684 N.Y.S.2d 76 (N.Y. App. Div.)	1999	Yes	Yes	No
<i>Dixon v. Edwards</i> , 290 F.3d 699 (4th Cir.)	2002	No	Yes	No
<i>Epis. Diocese of Mass. v. DeVine</i> , 797 N.E.2d 916 (Mass. App. Ct.)	2003	Yes	Yes	No
<i>Daniel v. Wray</i> , 580 S.E.2d 711 (N.C. Ct. App.)	2003	Yes	Yes	No
<i>In re Church of St. James the Less</i> , 888 A.2d 795 (Pa.)	2005	Yes	Yes	No
<i>New v. Kroeger</i> , 84 Cal. Rptr. 3d 464 (Cal. Ct. App.)	2008	Yes	Yes	No
<i>Epis. Diocese of Rochester v. Harnish</i> , 899 N.E.2d 920 (N.Y.)	2008	Yes	No	No
<i>In re Multi-Circuit Epis. Church Property Litig.</i> , 76 Va. Cir. 786, WL 7390539 (Va.Cir.Ct.)	2008	Yes	No	Yes
<i>In re Epis. Church Cases</i> , 198 P.3d 66 (Cal.)	2009	Yes	Yes	Intervenor
<i>All Saints Parish Waccamaw v. Protestant Epis. Church in Diocese of S.C.</i> , 685 S.E.2d 163 (S.C.)	2009	Yes	Yes	Yes
<i>Schofield v. Superior Court</i> , 118 Cal.Rptr.3d 160 (Cal. Ct. App.)	2010	Yes	Yes	Yes
<i>Rector, et al. of Christ Church in Savannah v. Bishop of Epis. Diocese of Ga., Inc.</i> , 699 S.E.2d 45 (Ga. Ct. App.)	2010	No	Yes	Yes

Acknowledging that it was missing-in-action in most of these suits, TEC claims it would be nonsensical to hold that *parish* property must remain with TEC but *diocese* property need not. But these cases never held that parish property had to remain with TEC because TEC was not a party. These cases held that parish property had to remain with the local bishop and diocese. So the same outcome should occur here even if Texas courts did not follow neutral principles.

G. Whether dioceses can withdraw cannot be decided by courts.

TEC asks the Court to enter judgment that dioceses cannot withdraw from TEC or change affiliation. But for the reasons stated in part I.A of the Defendants' Motion for Summary Judgment, Texas courts cannot intervene in the affairs of voluntary associations except to settle a property dispute.⁵²

It is tempting to ask the Court to answer this question because constitutional law makes it an easy one. The "freedom of association plainly presupposes a freedom not to associate."⁵³ "[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."⁵⁴ But the Texas cases make clear that this Court should not intervene in this dispute other than to decide title to property. Accordingly, while this Court can decide who owns the property, it cannot decide whether a diocese can withdraw from TEC.

⁵² Those arguments are incorporated here by reference. *See* Tex. R. Civ. P. 58.

⁵³ *Id.* at 623; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

⁵⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

II. The Plaintiffs have no trust interest under Texas law

(Response to TEC Argument II)

A. TEC admits: an association's rules prevail over deference rules

Suddenly, on page 53 of its motion, TEC abruptly admits that “the rules of a voluntary association constitute a binding contract between an association and its members,” *and* that those rule constitute “an implied consent that intrachurch disputes ... will be decided by the church's own rules,” *and* that “Texas law requires courts to enforce” those rules.⁵⁵ Defendants could not agree more, which is why this rule of Texas law appears on page 1 of the Defendants’ Motion for Summary Judgment rather than page 53.⁵⁶

By admitting this rule of Texas law, TEC concedes that Texas follows neutral principles rather than ecclesiastical deference. When deference is the rule, it doesn’t matter what an association’s rules say; the courts will abide by what the ecclesiastical authority says even if it is an obvious lie. But under Texas law, **a rule is a rule**; so long as the rules are not doctrinal, Texas courts enforce the rules of voluntary associations — as TEC concedes.

So why for 52 pages does TEC’s motion ignore the rules that govern the parties that apply here — the Constitution of the Diocese and the articles and by-laws of the Corporation? The answer is because there are no provisions in **anybody’s** charters that support the Plaintiffs’ claim to ownership and control of the properties at issue. Hoping in the end to salvage at least some kind of interest, TEC finally points to three provisions in the charters that purportedly establish a trust in TEC’s favor. None of them does.

One is TEC’s so-called Dennis Canon, a short canon that (according to TEC) imposes a trust on all Episcopalian property in the world.⁵⁷ No matter what

⁵⁵ TEC MSJ at 53-54.

⁵⁶ See Defendants’ MSJ at 1-2.

⁵⁷ See TEC MSJ at 56.

courts in other states have said, such a trust is invalid under neutral principles of Texas law. As shown in the Defendants' motions, no such trust exists under Texas law because: (1) the trust declaration is from a purported beneficiary rather than the owner; (2) the trust involves realty but does not meet the statute of frauds; (3) the trust was repudiated when the Diocese qualified its accession in 1982; and (4) the trust was repudiated again in 1989 (well before Bishop Iker came to Fort Worth) to make doubly sure.⁵⁸

Second, TEC points to a canon providing that no one can "encumber or alienate" church property "without the written consent of the Bishop and Standing Committee of the Diocese."⁵⁹ There could be no stronger proof that the *Diocese* has full ownership and control of the property than this. TEC's consent is not required by this canon because TEC has no property or trust interest.

Finally, TEC relies on two references in the Diocese's Constitution to "the Church in this Diocese,"⁶⁰ and implies that this means TEC. It can't. The qualified accession in Article 1 of the same Constitution states that "The Church in this Diocese accedes to the Constitution and Canons of the Episcopal Church in the United States of America."⁶¹ If the term "Church in this Diocese" means TEC, then TEC acceded to itself. TEC's accession argument concedes that "the Church in this Diocese" means the Diocese.

B. There is no changed use — unless TEC takes the property.

It is unclear what claim TEC is making in Argument part II.B of its motion. TEC has not pleaded an implied trust, and Defendants object to summary

⁵⁸ See Defendants' MSJ at 7-12.

⁵⁹ Plaintiffs' Appendix, Duffy Affidavit Ex. 1 (A165-66) (Canon I.7.3).

⁶⁰ See Defendants' Appendix, Affidavit of Charles A. Hough, III ("1st Hough Affidavit") Ex. 1 (Article 13) (referring to "real estate acquired for the use of the Church in this Diocese"); *id.* (Article 15) (describing Endowment's Board of Trustees as "members of the Church in this Diocese").

⁶¹ See Defendants' Appendix, 1st Hough Affidavit Ex. 1 (Article 1).

judgment on any ground not pleaded.⁶² Moreover, Texas courts would not imply a trust here because: (1) TEC contributed none of the funds to buy or build these properties;⁶³ and (2) it is already subject to an express trust in favor of the parishes.⁶⁴ Whatever the claim is, this Court cannot to rewrite the existing trust to replace the local parishes with TEC as beneficiary for several reasons.

First, TEC has no standing to complain that the purposes of the trust have changed, as it has no trust interest.⁶⁵ None of this property was donated to TEC, and none of the funds used to buy or build these properties came from TEC.⁶⁶ As it has no interest in this trust, it has no standing.

Second, TEC cannot ask this Court to impose a trust against property without suing its owner. TEC has sued only individuals; it has not sued the Diocese or Corporation.⁶⁷ When a suit affects title to property, the owner is a necessary party.⁶⁸ Moreover, the Declaratory Judgment Act requires that “all persons who have or claim any interest that would be affected by the declaration must be made parties.”⁶⁹

Third, there is no evidence that the use of any of the property has changed. Plaintiffs present no evidence that the church buildings aren’t being used for church services, that the fellowship halls aren’t being used for fellowship, or that the playgrounds aren’t being used for play. Since 1982, all property in each parish

⁶² See Defendants’ Objections to Plaintiffs’ Summary Judgment Motions and Evidence ¶ 8.

⁶³ See Defendants’ Appendix, 1st Hough Affidavit, ¶ 21.

⁶⁴ See Defendants’ Appendix, 1st Hough Affidavit Ex. 1 (Article 13) & Ex. 2 (Canon 12.4).

⁶⁵ See Tex. Prop. Code § 115.011; see also id. § 111.004(7).

⁶⁶ See Defendants’ Appendix, 1st Hough Affidavit ¶ 21.

⁶⁷ See Plaintiff The Episcopal Church’s Third Amended Original Petition at 1.

⁶⁸ See Tex. R. Civ. P. 39(a); Longoria v. Exxon Mobil Corp., 255 S.W.3d 174, 182-83 (Tex. App.—San Antonio 2008, pet. denied).

⁶⁹ Tex. Civ. Prac. & Rem. Code § 37.006(a); see, e.g., *Smith v. Shar-Alan Oil Co.*, 799 S.W.2d 368, 374 (Tex. App.—Waco 1990, writ denied) (assignee and contingent future assignee were necessary parties in action for declaratory judgment concerning validity of oil leases).

of the Diocese has been held “in trust for the use and benefit of such parish.”⁷⁰ Each church property is still being used by each parish — the only valid beneficiaries of the only valid trust. In a spirit of good faith, the Corporation has even transferred legal title (though it was under no obligation to do so) to three parishes that are no longer affiliated with the Diocese.⁷¹

As the court noted in *Protestant Episcopal Church v. Barker*, the cases on which TEC relies involve trusts that changed to completely noncharitable purposes:

The cases relied on by respondents either refer to instances where the charitable trust is no longer operating as such but has sought to make itself a proprietary venture, where the organization's status as a tax-exempt charity has been questioned, where the charitable trust has abandoned operations and voted to dissolve, where removal of the trustees for mismanagement has been sought by the Attorney General, or where a charitable corporation seeks to devote part of its assets to enterprises adopted for profit. None of these factors is relevant here.⁷²

Change in religious affiliation is no basis for implying a new trust.⁷³

Purporting to speak for the “expectations of generations of individual donors,” TEC asserts that all donations to the Diocese were conditioned on its affiliation with TEC. There is no evidence that any contributions were so conditioned. Nor could they be, as such conditions would violate the Diocese’s Constitution. The Constitution provides that all parish property is held by the Corporation, “in trust for the use and benefit of such parish.”⁷⁴ People giving money or other property to a parish are thus on notice that legal title will be held by the Corporation, and beneficial title by that parish. That is the only way the

⁷⁰ See Defendants’ Appendix, 1st Hough Affidavit Ex. 1 (Article 13) & Ex. 2 (Canon 12.4).

⁷¹ See Second Affidavit of Walter Virden, III.

⁷² 171 Cal.Rptr. 541, 552 (Cal. Ct. App. 1981).

⁷³ *Id.* (rejecting argument that disaffiliation from TEC created an implied trust for TEC).

⁷⁴ See Defendants’ Appendix, 1st Hough Affidavit Ex. 1 (Article 13) & Ex. 2 (Canon 12.4).

Diocese and its parishes receive property; if contributors want money to benefit TEC instead, they must give it directly to TEC.

Finally, a little reflection shows why TEC's claim cannot be Texas law. Suppose for a moment that everyone placing money in the offering plate could get their money back on the ground that doctrinal differences have changed the church's charitable purposes. That would certainly keep the courts busy. Moreover, implying a trust based on doctrinal issues "returns us once again to the forbidden field of evaluation of church doctrine."⁷⁵ Doctrinal differences do not revoke a church's 501(c)(3) status or its charitable nature, and do not revoke all the gifts ever made to it in the past.

TEC's complaint is not that these properties aren't being used for charitable purposes, but that they aren't being used for charitable purposes *affiliated with TEC*. But there is no trust in favor of TEC, so no charitable gifts were impressed with that condition. The only way the trust here will be frustrated is if the Plaintiffs win this lawsuit — taking parish property away from the 80% majority of parishes that have always used it, and are still doing so today.

III. Changes to articles cannot be *ultra vires*

(Response to TEC Argument III)

TEC asks the Court to enter judgment revoking certain amendments to the Corporation's articles of incorporation. Texas courts do not generally intervene in such disputes.⁷⁶ But if necessary to resolve a property dispute: (1) TEC has no standing to bring an *ultra vires* claim; (2) amendments to a corporation's articles cannot be substantively *ultra vires*; (3) the articles were validly amended; and (4) the amendments make no difference in this case.⁷⁷

⁷⁵ *Protestant Epis. Church v. Barker*, 171 Cal.Rptr. 541, 552 (Cal. Ct. App. 1981).

⁷⁶ *See Combs v. Tex. State Teachers Ass'n*, 533 S.W.2d 911, 912 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (declining jurisdiction of whether association's rules prohibited reconsideration of recently defeated amendment to its constitution).

⁷⁷ *See Defendants MSJ* at 19-23.

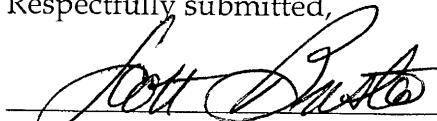
In effect, TEC is alleging that the Corporation is a sham corporation – that TEC can pierce its corporate veil to replace Trustees and veto changes in its articles of incorporation without following any corporate formalities whatsoever. TEC presents no evidence to meet the kinds of proof needed to allow such a finding.⁷⁸

Conclusion

For the reasons set forth above, the TEC Motion for Summary Judgment should be denied, and the Defendants' Motion for Partial Summary Judgment be granted.

⁷⁸ Cf. Tex. Bus. Corp. Act, art. 2.21.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANTS THE
EPISCOPAL DIOCESE OF FORT
WORTH, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 2011, a true and correct copy of the foregoing Defendants' Response to Plaintiff The Episcopal Church's Motion for Summary Judgment was forwarded to all counsel of record via certified mail return receipt requested.



Scott A. Brister

**SECOND AFFIDAVIT OF
JEREMY BONNER, Ph.D.**

THE EPISCOPAL CHURCH, ET AL	§	IN THE DISTRICT COURT
	§	
Plaintiffs	§	
	§	
VS.	§	TARRANT COUNTY, TEXAS
	§	
FRANKLIN SALAZAR, ET AL	§	
	§	
Defendants	§	141 ST JUDICIAL DISTRICT

SECOND AFFIDAVIT OF JEREMY BONNER, PH.D.

BEFORE ME, the undersigned authority, personally appeared Jeremy Bonner, Ph.D., who being duly sworn by me according to law, on his oath deposed and stated the following:

“My name is Jeremy Bonner, Ph.D. My education, background and qualifications, including a list of my published scholarly works, are set forth on my *curriculum vitae*, attached hereto as Exhibit A and incorporated by reference for all purposes. I have personal knowledge of the facts and opinions hereinafter set forth by virtue of my extensive research with respect to the matters to which such facts and opinions relate.

“In or about November 2010, I was engaged by attorneys representing the Episcopal Diocese of Fort Worth and its co-Defendants in the above-styled lawsuit as an expert consultant on the subject of the establishment and subsequent historical development of the Protestant Episcopal Church in the United States of America [hereinafter “TEC”]. In that connection, I was furnished with two (2) lengthy documents authored by Dr. Robert Bruce Mullin in which Dr. Mullin states that TEC is a hierarchical Church organization with ultimate supreme authority over the several dioceses and congregations with which it is associated.

I researched the citations and references provided by Dr. Mullin in his essays, and I further reviewed the following historical documents and learned treatises:

1. The Constitution and Canons of TEC, from pre-adopted versions through the various amendments and additions made thereto throughout the past approximately 225 years.
2. Journals of meetings of TEC's General Convention and of meetings of the Annual Conventions of the Episcopal Diocese of Fort Worth.
3. The articles written by Dr. Mullin that have been submitted to the Court in the above-styled lawsuit.
4. All of the authorities and citations referenced by Dr. Mullin in his articles.
5. All of the additional authorities and citations referenced by me in my analysis, which is to be included in the Appendix of the Response to the Motions for Summary Judgment filed by TEC and its local minority faction.

“Based upon my exhaustive research, TEC does not have a final decision making body to decide if a diocese may withdraw from TEC.

“First, Dr. Mullin's assertion that church historians and commentators are nearly unanimous in their opinions that TEC is a hierarchical church organization is irrelevant. None of these historians and commentators points out any language in a governing document giving any body the express power to deny a diocese that has associated, the right to disassociate.

“Second, the historical record pertaining to the establishment of the General Convention of TEC, even the records referred to by Dr. Mullin, clearly reflect that there never was any intention by the founders of TEC to establish a central church government to which the original state Churches and, later, dioceses would be subject. To the contrary, the historical record reveals that association by the several state Churches and dioceses with the General Convention and accession to TEC's Constitution and Canons were voluntary actions undertaken on the part of both the local diocese and the General Convention, and although the historical record

indicates a strong desire by the founders that the union be perpetual, nothing in the historical record reflects or suggests that a diocese would be prohibited from rescinding its association with General Convention and withdrawing and/or qualifying its accession to TEC's Constitution and Canons.

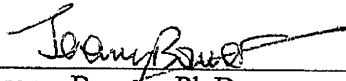
“Third, Dr. Mullin’s assertion that the General Convention has supremacy over the dioceses that comprise it can be inferred as some kind of “inherent” power, is not supported by any supremacy language in TEC’s governing documents or the establishment of any institutions or processes that are characteristic of a central governing authority. While specific “supremacy” language in TEC’s governing documents may not be required for concluding that the General Convention holds the power claimed by Dr. Mullin, in the absence of such language, such as the establishment of an ecclesiastical judicial system empowered with the highest adjudicatory authority within the organization or the power to tax and/or levy assessments against subordinate units is required to make the General Convention or some constitutional body the final decision maker on withdrawal of a diocese for TEC to be hierarchical at the national level. Interestingly, as early as 1862, proposals were made by certain TEC leaders to amend the governing documents to add supremacy language, but those proposals were flatly rejected. In addition, proposals have been made to establish a judiciary to serve as the highest tribunal in the organization, and those proposals likewise have been rejected. Finally, the historical record reveals that what Dr. Mullin has characterized as a “conservative” approach to its “inherent power” is, in fact, a reluctance on the part of TEC to interfere with diocesan affairs, usually accompanied by a clear statement that such interference is beyond the Constitutional scope of TEC’s powers.

“Fourth, and interestingly, Dr. Mullin claims that a diocese is not permitted to withdraw from its union with the General Convention, because there is no specific provision in TEC’s governing documents authorizing such a withdrawal. Leaving aside the fact that there likewise is no provision in TEC’s governing documents *prohibiting* a diocese to withdraw, it is odd that Dr. Mullin would insist upon specific Constitutional or Canonical language to authorize a diocese to withdraw from its affiliation with the General Convention, but that he would, at the same time, dismiss the need for specific Constitutional or Canonical language that would confer supremacy upon TEC over the diocesan units that created it and comprise it.

“Fifth, it appears from a survey of the writings of church historians and commentators, together with the contents of records and journals that were made at various convocations and meetings during the more than two centuries since TEC was founded, that what has been relied upon by Dr. Mullin in support of his position that TEC has supreme and hierarchical authority over the dioceses comprising it consists of statements and opinions by the authors of cited references setting forth what those authors consider to be the ideal, rather than the reality, of church governance in American Anglicanism based on the actual language of the governing documents. To state a wish for an ideal does not transform the wish into reality of the actual language. And as I indicate above, the several dioceses that make up the General Convention have had more than one opportunity over the past 225 years to convert the wish for supreme TEC authority into a reality, but they consistently have failed and refused to do so.

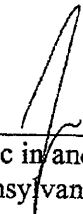
“Finally, in light of the selective use of the sources referenced by Dr. Mullin, and his failure to address the testimony of authorities opposed to his position, he has failed to identify any language in the governing documents of TEC that can reasonably be interpreted to prevent a diocese from withdrawing from TEC.

“Further, the Affiant sayeth not.”

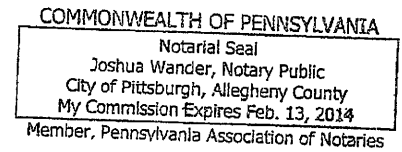


Jeremy Bonner, Ph.D.

SUBSCRIBED and SWORN to before me by Jeremy Bonner, Ph.D., this 3 day of
January, 2011, to certify which witness my hand and official seal.



Notary Public in and for the
State of Pennsylvania



Jeremy Bonner

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- Vision Statement:** So to teach and write that the student and reader will more deeply appreciate the influence of faith and religious tradition on industrial and post-industrial society in all its diversity.
- Education:** Ph.D., The Catholic University of America, Washington D.C. (American History), 2001.
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- Current Project:** Co-editor with Mary Beth Fraser Connolly of *Rediscovering the Community of Faith: Catholic Action and the Impact of the Second Vatican Council on U.S. Catholic Life, 1929-1979*. Authoring chapter provisionally entitled "'Who Will Guard the Guardians?' Church Government, Lay Initiative and the Paradox of Catholic Democracy." In discussion with Fordham University Press.
- Teaching Experience:** History 172: The American Religious Experience, Duquesne University, Pittsburgh, Pennsylvania, Spring 2009.
History 1100: United States History I, Robert Morris University, Moon Township, Pennsylvania, Fall 2008.
Political Science 1020: American National Government, Robert Morris University, Moon Township, Pennsylvania, Fall 2008.
Political Science 3430: American Political Parties, Robert Morris University, Moon Township, Pennsylvania, Fall 2008.
America's New Deal: State and Society during the 1930s, Arlington Learning in Retirement Institute, Arlington, Virginia, Spring 2003.
History 370 - The Changing American Frontier: The American West, 1850-1970, The Catholic University of America, Washington DC, Spring 1999.



History 101 - World Civilization (Teaching Assistant),
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"National Denomination or Worldwide Communion? Ecclesial Authority, Anglican Identity and the American Episcopal Church, 1953-2003." Organization of American Historians, Minneapolis, March 30, 2007.

"A Priest In Spite of Himself: Mercer Green Johnston, the Episcopal Church and the Changing Face of American Progressivism." Library of Congress, February 21, 2002.

"Saving the West for the Democracy: Attitudes to the State and New Deal Political Development Beyond the Mississippi, 1924-1940." Cincinnati Symposium on Computers and History, University of Cincinnati, May 2, 1997.

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Member of Chapter, Trinity Episcopal Cathedral, Pittsburgh, 2005-

Homeless Ministry, Trinity Episcopal Cathedral, Pittsburgh, 2004-

Homeless Ministry, St. Paul's Episcopal Church, Washington DC, 1997-2003