No.

IN THE
Supreme Court of the United States

THE EPISCOPAL CHURCH, ET AL.,

Petitioners,

v.

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.,

Respondents.

THE DIOCESE OF NORTHWEST TEXAS, ET AL.,

Petitioners,

v.

ROBERT MASTERSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL*
DOMINIC F. PERELLA
AMANDA K. RICE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com
*Counsel of Record
Counsel for Petitioners

[additional counsel listed on inside cover]

Additional counsel:

MARY E. KOSTEL
THE EPISCOPAL CHURCH
c/o GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001

DAVID BOOTH BEERS
GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001

Counsel for The Episcopal Church

JAMES E. HUND
HUND, KRIER, WILKERSON & WRIGHT, P.C.
P.O. Box 54390
Lubbock, TX 79453

GUY D. CHOATE
WEBB, STOKES & SPARKS
314 W. Harris
P.O. Box 1271
San Angelo, TX 79502

Counsel for the Diocese of Northwest Texas

THOMAS S. LEATHERBURY
DANIEL L. TOBEY
VINSON & ELKINS LLP
2001 Ross Ave., Suite 3700
Dallas, TX 75201

JOHN P. ELWOOD
VINSON & ELKINS LLP
2200 Pennsylvania Ave.
N.W., Suite 500 West
Washington, D.C. 20037

KATHLEEN WELLS
EPISCOPAL DIOCESE OF FORT WORTH
4301 Meadowbrook Drive
Fort Worth, TX 76103

FRANK HILL
HILL GILSTRAP
1400 W. Abrams Street
Arlington, TX 76013

JONATHAN D.F. NELSON
JONATHAN D.F. NELSON, P.C.
1400 W. Abram Street
Arlington, TX 76013

Counsel for the Local Episcopal Parties and the Local Episcopal Congregations

QUESTIONS PRESENTED

For more than one hundred years, this Court respected the limitations the First Amendment imposes on courts' authority to resolve church-property disputes by mandating deference to the appropriate ecclesiastical body's resolution of those disputes. *See Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872). It changed course in *Jones* v. *Wolf*, 443 U.S. 595 (1979). There, by a five-to-four vote, the Court held that states may *either* defer *or* apply "neutral principles of law." *Id.* at 602-606. It emphasized, though, that a hierarchical church in a neutral-principles jurisdiction could protect its property by amending "the constitution of the general church * * * to recite an express trust." *Id.* at 606. And it reserved the question whether "retroactive application of a neutral-principles approach [would] infringe[ ] free-exercise rights." *Id.* at 606 n.4.

The questions presented are:

1. Whether the First Amendment or *Jones* v. *Wolf* requires courts to enforce express trusts recited in general-church governing documents (as some jurisdictions hold), or whether such a trust is enforceable only when it would otherwise comply with state law (as others hold).
2. Whether retroactive application of the neutral-principles approach infringes free-exercise rights.
3. Whether the neutral-principles approach endorsed in *Jones* remains a constitutionally viable means of resolving church-property disputes, especially in light of *Hosanna-Tabor* v. *EEOC*.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Texas Supreme Court:

1. The Episcopal Church, Petitioner on review, was appellee in *The Episcopal Diocese of Fort Worth, et al.* v. *The Episcopal Church, et al.*, No. 11-0265, below.

2. The Rt. Rev. C. Wallis Ohl; Robert Hicks; Floyd McKneely; Shannon Shipp; David Skelton; Whit Smith; Margaret Mieuli; Anne T. Bass; Walt Cabe; The Rev. Christopher Jambor; The Rev. Frederick Barber; The Rev. David Madison; Robert M. Bass; The Rev. James Hazel; Cherie Shipp; The Rev. John Stanley; Dr. Trace Worrell; The Rt. Rev. Edwin F. Gulick, Jr.; Kathleen Wells; The Rev. Christopher Jambor and Stephanie Burk, individually and as representatives of All Saints' Episcopal Church (Fort Worth); The Rev. ClayOla Gitane and Cynthia Eichenberger as representatives of All Saints' Episcopal Church (Weatherford); The Rev. ClayOla Gitane and Harold Parkey as representatives of Christ the King Episcopal Church (Fort Worth); Bill McKay and Ian Moore as representatives of Episcopal Church of the Good Shepherd (Granbury); Ann Coleman as a representative of Episcopal Church of the Good Shepherd (Wichita Falls); Constant Roberts Marks, IV and William Davis as representatives of St. Alban's Episcopal Church (Arlington); Vernon Gotcher and Ken Hood as representatives of St. Stephen's Episcopal Church (Hurst); Sandra Shockley as a representative of St. Mary's Episcopal Church (Hamilton); Sarah Walker as a representative of Episcopal Church of the Holy Apostles (Fort Worth); Linda Johnson as a representative of St. Anne's Episcopal Church (Fort Worth); the Rev. Susan Slaughter and Larry Hathaway individually

and as representatives of St. Luke-in-the-Meadow Episcopal Church (Fort Worth); David Skelton as a representative of St. Mary's Episcopal Church (Hillsboro); All Saints' Episcopal Church (Fort Worth); All Saints' Episcopal Church (Wichita Falls); All Saints' Episcopal Church (Weatherford); Christ the King Episcopal Church (Fort Worth); Episcopal Church of the Good Shepherd (Granbury); St. Alban's Episcopal Church (Arlington); St. Simon of Cyrene Episcopal Church (Fort Worth); St. Stephen's Episcopal Church (Hurst); St. Mary's Episcopal Church (Hamilton); St. Anne's Episcopal Church (Fort Worth); St. Luke-in-the-Meadow Episcopal Church (Fort Worth); St. Mary's Episcopal Church (Hillsboro); Episcopal Church of the Ascension & St. Mark (Bridgeport); Episcopal Church of the Good Shepherd (Brownwood); Holy Comforter Episcopal Church (Cleburne); St. Elisabeth's Episcopal Church (Fort Worth); Holy Spirit Episcopal Church (Graham); Holy Trinity Episcopal Church (Eastland); Our Lady of the Lake Episcopal Church (Laguna Park); Trinity Episcopal Church (Dublin); Trinity Episcopal Church (Henrietta); Iglesia San Juan Apostal (Fort Worth); Iglesia San Miguel (Fort Worth); St. Anthony of Padua Episcopal Church (Alvarado); St. Alban's Episcopal Church (Hubbard); St. Andrew's Episcopal Church (Fort Worth); St. Andrew's Episcopal Church (Breckenridge); St. Andrew's Episcopal Church (Grand Prairie); St. Barnabas the Apostle Episcopal Church (Keller); St. Gregory's Episcopal Church (Mansfield); St. John's Episcopal Church (Fort Worth); St. John's Episcopal Church (Brownwood); St. John the Divine Episcopal Church (Burkburnett); St. Joseph's Episcopal Church (Grand Prairie); St. Laurence's Episcopal Church (Southlake); St. Luke's Episcopal Church (Mineral Wells); St. Mark's Episcopal Church (Arlington); St. Matthew's Episcopal Church (Comanche); St. Michael's Episcopal Church (Richland Hills); St. Paul's Episcopal Church

(Gainesville); St. Patrick's Episcopal Church (Bowie); St. Peter-by-the-Lake Episcopal Church (Graford); St. Peter and St. Paul Episcopal Church (Arlington); St. Phillip the Apostle Episcopal Church (Arlington); St. Thomas the Apostle Episcopal Church (Jacksboro); St. Timothy's Episcopal Church (Fort Worth); and St. Vincent's Episcopal Church (Bedford); St. Stephen's Episcopal Church (Wichita Falls); Holy Apostles (Fort Worth); and Episcopal Church of the Good Shepherd (Wichita Falls), Petitioners on review, were appellees/cross-appellants in *The Episcopal Diocese of Fort Worth, et al.* v. *The Episcopal Church, et al.*, No. 11-0265, below.

3. The Diocese of Northwest Texas; The Rev. Celia Ellery; Don Griffis; and Michael Ryan, Petitioners on review, were appellees in *Masterson et al.* v. *The Diocese of Northwest Texas, et al.*, No. 11-0332, below.

4. The Episcopal Diocese of Fort Worth; The Corporation of The Episcopal Diocese of Fort Worth; Bishop Jack Leo Iker; Franklin Salazar; JoAnn Patton; Walter Virden, III; Rod Barber; Chad Bates; Judy Mayo; Julia Smead; Rev. Christopher Cantrell; Rev. Timothy Perkins; Rev. Ryan Reed; Rev. Thomas Hightower; St. Anthony of Padua Church (Alvarado); St. Alban's Church (Arlington); St. Mark's Church (Arlington); Church of St. Peter & St. Paul (Arlington); Church of St. Philip the Apostle (Arlington); St. Vincent's Cathedral (Bedford); St. Patrick's Church (Bowie); St. Andrew's Church (Breckenridge); Good Shepherd Church (Brownwood); St. John's Church (Brownwood); Church of St. John the Divine (Burkburnett); Holy Comforter Church (Cleburne); St. Matthew's Church (Comanche); Trinity Church (Dublin); Holy Trinity Church (Eastland); Christ the King Church (Fort Worth); Holy Apostles Church

(Fort Worth); Iglesia San Juan Apostol (Fort Worth); Iglesia San Miguel (Fort Worth); St. Andrew's Church (Fort Worth); St. Anne's Church (Fort Worth); Church of St. Barnabas the Apostle (Fort Worth); St. John's Church (Fort Worth); St. Michael's Church (Richland Hills); Church of St. Simon of Cyrene (Fort Worth); St. Timothy's Church (Fort Worth); St. Paul's Church (Gainesville); Good Shepherd Church (Granbury); Church of the Holy Spirit (Graham); St. Andrew's Church (Grand Prairie); St. Joseph's Church (Grand Prairie); St. Laurence's Church (Southlake); St. Mary's Church (Hamilton); Trinity Church (Henrietta).; St. Mary's Church (Hillsboro); St. Alban's Church (Hubbard); St. Stephen's Church (Hurst); Church of St. Thomas the Apostle (Jacksboro); Church of Our Lady of the Lake (Laguna Park); St. Gregory's Church (Mansfield); St. Luke's Church (Mineral Wells); Church of St. Peter by the Lake (Graford); All Saint's Church (Weatherford); All Saint's Church (Wichita Falls); Church of the Good Shepherd (Wichita Falls); Church of St. Francis of Assisi (Willow Park); Church of the Ascension & St. Mark (Bridgeport), Respondents on review, were appellants/cross-appellees in *The Episcopal Diocese of Fort Worth, et al.* v. *The Episcopal Church, et al.*, No. 11-0265, below.

5. Robert Masterson; Mark Brown; George Butler; Charles Westbrook; Richey Oliver; Craig Porter; Sharon Weber; June Smith; Rita Baker; Stephanie Peddy; Billie Ruth Hodges; Dallas Christian; and the Episcopal Church of the Good Shepherd, Respondents on review, were appellants in *Masterson et al.* v. *The Diocese of Northwest Texas, et al.*, No. 11-0332, below.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

THE EPISCOPAL CHURCH, ET AL.,

Petitioners,

v.

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.,

Respondents.

THE DIOCESE OF NORTHWEST TEXAS, ET AL.,

Petitioners,

v.

ROBERT MASTERSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgments of the Texas Supreme Court.

OPINIONS BELOW

Masterson v. *The Diocese of Northwest Texas*, is reported at 422 S.W.3d 594, Pet. App. 1a, and *The Episcopal Church* v. *The Episcopal Diocese of Fort Worth*, is reported at 422 S.W.3d 646, Pet. App. 65a. In *Masterson*, the district court's order is unreported, *id.* 126a, and the intermediate appellate court's opinion is reported at 335 S.W.3d 880, Pet. App. 98a. In *Episcopal Diocese*, the district court's order is unreported. Pet. App. 130a. The Texas Supreme

Court's orders denying rehearing in both cases are unreported. *Id.* 129a, 133a.

JURISDICTION

The Texas Supreme Court entered judgment in both cases on August 30, 2013, *id.* 42a, 79a, and denied timely rehearing motions on March 21, 2014, *id.* 129a, 133a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

INTRODUCTION

"[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 449 (1969). Thus for more than a century this Court resolved such disputes by deferring to the appropriate ecclesiastical body's determination regarding which faction of a church was entitled to disputed church property. In *Jones* v. *Wolf*, 443 U.S. 595 (1979), five members of the Court charted a different course. Over a vigorous dissent, they concluded that, instead of deferring, courts could apply "neutral principles" of state law to intra-church property disputes. It defended the constitutionality of this new approach largely on the strength of a single premise: Even under neutral principles, religious organizations can take simple steps to ensure their houses of worship end up in the right hands.

If only it had turned out to be so simple. This petition arises from two cases that—like so many cases before them—demonstrate the severe problems wrought by *Jones* nationwide. In both cases, dissenting factions left The Episcopal Church amidst doctrinal disputes and purported to take local church organizations, their buildings, and other Church assets with them. In both cases, the Church recognized the loyal groups as the true leaders of the local organization entitled to control its property. And in both cases, Texas trial courts, following the deference approach Texas had long endorsed, ruled that the Church's determination governed. But the Texas Supreme Court reversed. It held that Texas would now follow *Jones*'s neutral-principles approach. It applied that approach retroactively to commitments made decades earlier. And it held that a Church Canon confirming that local-church property is held in trust for the Church—a provision the Church had adopted at *Jones*'s suggestion—does not control the case. The result? The breakaway factions hold over $100 million of Episcopal Church property and claim to be the continuing Church entities, while the Church's chosen representatives and loyal congregants worship in exile.

This petition presents three questions: one about the meaning of *Jones*, one about an issue *Jones* expressly reserved, and one about whether *Jones* is consistent with the First Amendment. Each is worthy of this Court's attention.

First, when *Jones* endorsed "neutral principles," it told parties exactly how they could protect their property—and their free-exercise rights. If a hierarchical church wished property to remain with the loyal parishioners, the Court explained, "the consti-

tution of the general church [could] be made to recite an express trust in favor of the denominational church." 443 U.S. at 606. That seemingly clear-cut instruction has proven to be anything but. At least four states have taken *Jones* at its word, holding that express-trust canons are dispositive. But at least eight—now including Texas—have come out the other way, holding that an express-trust canon is valid only when it would otherwise be enforceable under state law. These outcomes do not reflect divergent state laws, but rather states' divergent views about *Jones*'s meaning. The split is entrenched and acknowledged. And its resolution is vital to thousands of religious organizations; their countless adherents; and numerous third parties who need to know to whom church property rightly belongs.

Second, *Jones*'s defense of "neutral principles" on the ground that parties could arrange their affairs in advance gave rise to a basic question: What about parties that arranged their affairs under a deference regime? This problem was so self-evident that, although not implicated by *Jones*'s facts, the Court raised it *sua sponte*: "[R]etroactive application of a neutral-principles approach" by a jurisdiction that had not "clearly enunciated its intent" to apply that methodology, the Court suggested, might "infringe free-exercise rights." *Id.* at 606 n.4. The time has come to resolve that question. For more than 100 years and until the day the decisions below issued, Texas was a deference state. When Texas turned the tables and applied neutral principles retroactively, it confounded Petitioners' reasonable expectations and long-settled intrachurch arrangements, imposing the free-exercise burden *Jones* anticipated.

These two questions point to fundamental failings of the neutral-principles approach. Unfortunately, they are only the tip of the iceberg. Across the country, there has been "massive inconsistency in the application of the [neutral-principles] doctrine." Jeffrey B. Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 Pepp. L. Rev. 399, 431 (2008). Worse, neutral-principles courts have taken it upon themselves to decide questions of church polity and frustrated free exercise. Respectfully, the *Jones* experiment has failed. Indeed, this Court implied as much in *Hosanna-Tabor* v. *EEOC*, 132 S. Ct. 694 (2012), when it reaffirmed a view of the Free Exercise Clause that is inconsistent with *Jones*. The time has come to reconsider whether the neutral-principles approach passes constitutional muster.

The groups recognized as the continuing Episcopal Church have been locked out of their houses of worship for more than a half-decade now. They are far from the only ones. Religious organizations nationwide are finding that the question of who will occupy their churches, cathedrals, temples, and mosques turns not on longstanding intrachurch agreements, but on the idiosyncratic application of the First Amendment in the jurisdiction where the dispute happens to erupt. The Court should grant the petition and set forth clear guidance about what the First Amendment requires.

STATEMENT

A. Legal Framework

This case implicates a 140-year-old debate about how to resolve intra-denominational disputes about

control of church property. *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872), was the Court's first foray into the issue. The case involved a Presbyterian congregation that divided into antislavery and proslavery factions. Both claimed the right to control the church property, and the Presbyterian General Assembly recognized the antislavery faction as the rightful possessors. Adopting a "broad and sound view of the relations of church and state," this Court deferred to the denominational church's judgment. *Id.* at 727. "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried," the Court held, "the legal tribunals must accept such decisions as final, and as binding on them." *Id.*

Watson "radiate[d] * * * a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952). And for more than a century, *Watson* was the rule. As the Court put it in 1976:

> [T]he First * * * Amendment[ ] permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government * * * . When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding on them. [*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 724-725 (1976).]

The Court, however, changed course in 1979, in the hotly disputed *Jones* decision. Writing for a 5-4 majority, Justice Blackmun acknowledged that deference remained one permissible means of resolving church-property disputes. But the majority held that states could also resolve such disputes by applying "neutral principles of law"—that is to say, by examining "the deeds to the properties," "state statutes dealing with implied trusts," state corporate law, and other state law, in addition to church documents. 443 U.S. at 600. The majority thought this approach would have the advantage of being "completely secular." *Id.* at 603. Although it would require courts to interpret religious bodies' documents, the majority reasoned that courts could avoid entanglement in religious questions simply by "tak[ing] special care to scrutinize the document[s] in purely secular terms[.]" *Id.* at 604. And the majority emphasized that, even under "neutral principles," "civil courts [must] defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Id.* at 602.

The majority insisted the neutral-principles approach would not "frustrate the free-exercise rights of the members of a religious association" because "[a]t any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property." *Id.* at 606. For instance, "the constitution of the general church can be made to recite an express trust in favor of the denominational church"—a "minimal[ly]" burdensome step. *Id.* The majority recognized that "neutral principles" would not be "wholly free of difficulty," but it predicted that "problems in application" would be rare. *Id.* at 604.

Four Justices—Justice Powell, joined by Chief Justice Burger and Justices Stewart and White—filed a sharp dissent. The dissenters argued that the new approach would "make the decision of these cases by civil courts more difficult" and "invite intrusion into church polity forbidden by the First Amendment." *Id.* at 610 (Powell, J., dissenting). They observed that deference makes sense—and "neutral principles" does not—because church-property disputes generally are not about ownership of property *per se*, but rather about which group constitutes the rightful church. That question, they emphasized, is doctrinal; and it must be resolved in a way that does not burden free exercise. *Id.* at 616-617. "The only course that achieves this constitutional requirement," they argued, "is acceptance by civil courts of the decisions reached within the polity chosen by the church members themselves." *Id.* at 617.

The dissenters also cast a disapproving eye on the neutral-principles *process* the majority had outlined, arguing that in practice it would entangle courts in religious questions. *Id.* at 611-613. "The constitutional documents of churches tend to be drawn in purely religious precepts," they wrote. *Id.* at 612. When that is the case, "[a]ttempting to read [such documents] 'in purely secular terms' is more likely to promote confusion than understanding." *Id.* The result, the dissenters feared, would be exclusion of evidence about the hierarchical church's position and, often, "revers[al of] [its] doctrinal decision[s]"—an "indirect interference by the civil courts with the resolution of religious disputes * * * [that] is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice." *Id.* at 613.

The dissenters proved prescient. In the years since *Jones*, the "problems" the majority recognized have not been "eliminated." *Id.* at 604. Instead, courts have ignored churches' expressed intentions and become increasingly entangled in doctrinal controversies. *See infra* 31-34. That is just what befell The Episcopal Church in the decisions below.

B. The Episcopal Church

Formed in the 1780s, The Episcopal Church ("Church") is a hierarchical religious denomination with thousands of worshipping congregations. Pet. App. 11a, 28a. It is organized in three tiers: the General Church on top; more than 100 regional dioceses in the middle; and more than 7,000 congregations at the base. As a condition of inclusion, a congregation or diocese must accede to the authority of the ecclesiastical bodies above it. *Id.* 66a.

The Church is governed by the General Convention, comprised of bishops, clergy, and lay diocesan representatives. The General Convention adopted and occasionally amends the Church Constitution and a body of Church Canons. The dioceses, in turn, are governed by diocesan conventions—representative bodies that adopt and amend the dioceses' own constitutions and canons, which cannot conflict with those of the Church. *See id.*

The Constitution and Canons have long included detailed requirements to ensure that dissenting church members may not unilaterally remove property from the denomination. *See, e.g.*, Canons I.7(3) & II.6(2), Pet. App. 134a-135a. In response to *Jones*, the Church shored up its already-clear property regime by adopting Canon I.7(4)—commonly known

as the "Dennis Canon." *Id.* 134a. The Dennis Canon provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. [*Id.*][1]

C. The Episcopal Diocese of Fort Worth

The Episcopal Diocese of Fort Worth was formed in 1982, years after the Church adopted the Dennis Canon. As a condition of formation, the new Diocese resolved to "fully * * * accede" to the Church's Constitution and Canons. 23 EDCR 5009.[2] And it adopted a diocesan Constitution that provided just that: "The Church in this Diocese accedes to the Constitution and Canons of the Episcopal Church in the United States of America, and recognizes the authority of the General Convention of said Church." *Id.* at 5024. In addition, the Diocese's founding Canons required that Church property be "opened only for the services, rites and ceremonies, or other purposes, either authorized or approved by this Church, and for no other use." *Id.* at 5030.

The diocesan Constitution provided for the formation of a diocesan corporation, which would be administered by elected board members, "all of

---

[1] The Dennis Canon equally forbids the removal of parish and diocesan property. By imposing a trust for both the Church and a "Diocese thereof," the Canon adopts the historical understanding that a Diocese can neither leave the Church nor remove property therefrom.

[2] This petition refers to the Clerk's Record in *Episcopal Diocese* as "EDCR" and to the Clerk's Record in *Masterson* as "MCR."

whom are either Lay persons in good standing of a parish or mission in the Diocese" or Clergy in the Diocese, with the bishop as chair. Pet. App. 67a. Title to all diocesan property, including property held for local congregations, would be held by the corporation "subject to control of the Church in the Episcopal Diocese of Fort Worth * * * ." 23 EDCR 5025. After representing to a court that it was duly organized under diocesan and Church rules, the diocesan corporation accepted transfer of property acquired by the Church over nearly 150 years.

In the mid-2000s, doctrinal disagreements led a faction of the Diocese's members to sever ties with the Church and join a different denomination. The dissenters included the bishop and a majority of the corporation's board, and they purported to amend the diocesan corporation's articles of incorporation and bylaws to remove references to the Church. On November 15, 2008, the diocesan Convention held a vote purporting to withdraw the Diocese and 47 of its 55 congregations from The Episcopal Church. Pet. App. 67a-68a.

The Church took immediate action. Its presiding bishop removed the breakaway bishop from all positions of Church authority. *Id.* 68a. And in 2009, she convened a meeting of the diocesan Convention for the Church's many still-loyal members. The Convention reversed the amendments purporting to distance the Diocese from the Church and filled the offices left vacant by the withdrawing faction. *Id.* The General Church has repeatedly recognized the leaders elected by the reorganized diocesan Convention and their successors as representatives of the continuing Episcopal Diocese of Fort Worth. *Id.*

But the breakaway faction continued to hold itself out as the "Episcopal Diocese of Fort Worth." Moreover, it retained control over substantially all of the diocesan property—47 parishes across 24 counties, and more than $100 million in real and personal property. The loyal parishioners recognized as the rightful Diocese were locked out of the houses of worship they had long called home.

D. The Episcopal Church of the Good Shepherd

Meanwhile, a similar story was unfolding in nearby San Angelo, Texas.

The Episcopal Church of the Good Shepherd is an Episcopal congregation in the Diocese of Northwest Texas. It began to take shape in 1961 when land was donated to the Diocese so a congregation could be formed. Pet. App. 3a. In 1965, the congregation petitioned for admittance as a mission. It "promise[d] conformity to [the Church's] Doctrine" and "to the Constitution and Canons of the General Convention and the Diocese." 1 MCR 122. The Diocese approved the petition, and it and the General Church helped fund construction of the church building. Pet. App. 3a.

In 1974, Good Shepherd successfully petitioned the Diocese to transition from a mission to a parish and, consistent with diocesan requirements, incorporated. *Id.* 4a. The articles of incorporation provided that the corporation would be run by elected leaders who would "hold office in accordance with the Church Canons." *Id.* 4a & n.1. And the bylaws declared that Good Shepherd "accedes to, recognizes, and adopts the [Church's] General Constitution and Canons." *Id.* 31a. In 1982, the Diocese deeded the church

property to the parish corporation for a nominal sum. *Id.* 5a; 1 MCR 220-222.

In 2006, as in Fort Worth, doctrinal disputes erupted between some Good Shepherd parishioners and the Church. Disgruntled parishioners purported to withdraw the parish from the Church, revoke any trusts on the parish property, and form a new church named the Anglican Church of the Good Shepherd. Pet. App. 5a-6a. The breakaway faction purported to file amended articles of incorporation changing the parish corporation's name accordingly. *Id.*

To ensure the parish's continuity, the diocesan bishop called a meeting of loyal Good Shepherd parishioners. He appointed a new priest-in-charge, and the loyal parishioners elected a new vestry. *Id.* 6a. The bishop recognized the loyal leadership as comprising the continuing Good Shepherd parish. *Id.* But what happened on a larger scale in the Fort Worth Diocese repeated itself in the Good Shepherd Parish: The breakaways refused to leave, and the loyal Good Shepherd parishioners were ousted from their house of worship.

E. Procedural History

The loyal groups did not stand idly by while the breakaways occupied their pews.

1. In Fort Worth, the Church, the Diocese's recognized leaders, and the loyal congregations and parishioners—Petitioners here—went to court to get their churches back. They sued the group masquer-

ading as the Diocese—Respondents here—seeking title to and possession of the diocesan property.[3]

The trial court granted the loyal parties' summary-judgment motions in relevant part. *Id.* 130a-132a. The court recognized that Texas courts had "consistently followed the deference rule in deciding hierarchical church property disputes." *Schismatic & Purported Casa Linda Presbyterian Church* v. *Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 705 (Tex. App.–Dallas 1986). Applying that approach, it concluded that the Church's determination that the loyal faction constitutes the Diocese governed. It issued a declaratory judgment ordering the breakaway faction "to surrender all Diocesan property" and "control of the Diocesan Corporation[ ] to the Diocesan plaintiffs." Pet. App. 132a.

2. In San Angelo, the loyal parties took similar steps to recover their church. The loyal Good Shepherd leadership and parishioners, together with the Northwest Diocese—Petitioners here—sued the breakaways—Respondents here—to recover the parish property. As in Fort Worth, the trial court granted summary judgment for the loyal parties. *Id.* 126a-128a. The breakaways appealed, and the intermediate appellate court affirmed. *Id.* 98a-125a.

---

[3] Because the identity of the "true" Diocese and diocesan corporation is hotly disputed, the parties disagree about which group can appear on those entities' behalf. Although the Church has determined that the breakaways do not represent the Diocese and its corporation, the breakaways appeared with those designations in the courts below.

F. The Decisions Below

The two cases caught up with each other at the Texas Supreme Court. In the Good Shepherd dispute—which bore the caption *Masterson* v. *The Diocese of Northwest Texas*—the breakaways petitioned for review of the intermediate court's decision. Meanwhile, the Fort Worth breakaways pursued a direct appeal from the trial court's order, unilaterally recaptioning the case *The Episcopal Diocese of Fort Worth* v. *The Episcopal Church*.

The Texas Supreme Court heard both cases on the same day. Its opinions issued on the same day, too. And with the same result: The court reversed the grants of summary judgment that had issued in the loyal groups' favor.

Both opinions begin with the same question: Which approach—deference or "neutral principles"—should Texas courts apply? The court acknowledged that Texas courts "generally [had] applied deference principles to hierarchical church property dispute cases." *Id.* 22a. But it nevertheless held that "Texas courts should use only the neutral principles methodology" going forward. *Id.* 73a; *see also id.* 24a-26a.

The court then went on in both cases to scrutinize the Dennis Canon under "neutral principles." In *Masterson*, the court acknowledged this "Court's pronouncement in *Jones* that a superior hierarchical church organization's amendment to its constitution to include a trust provision is sufficient to establish a trust in property held by its subordinate churches." *Id.* 35a. And it recognized that some state high courts interpret *Jones* to require enforcement of such provisions regardless of what state law might otherwise dictate. *See id.* 36a (collecting cases). But it

joined the other side of the split, concluding that *Jones* did not "establish substantive property and trust law that state courts must apply to church property disputes." *Id.* 38a. In other words, the Dennis Canon was not enough to establish a statutory express trust. Citing *Masterson*, the court came to the same conclusion in *Episcopal Diocese*. Pet. App. 79a. The trust canon the Church had adopted at *Jones*'s behest, the court wrote, was simply "not good enough under Texas law." *Id.* (quoting *Masterson*).

The Texas Supreme Court also rejected Petitioners' contention that retroactive application of neutral principles violated their free-exercise rights. *Id.* 79a, 30a n.7. It acknowledged *Jones*'s suggestion that "application of neutral principles may pose constitutional questions if they are retroactively applied." *Id.* 79a. But it concluded that no retroactive application had actually occurred because *Brown* v. *Clark*, 116 S.W. 360 (Tex. 1909)—a 100-year-old decision Texas courts and the Fifth Circuit had consistently interpreted as endorsing deference—had "substantively reflected" neutral principles. *Id.* 79a, 30a n.7.

After resolving these two legal questions, the court remanded both cases for further proceedings. Timely motions for rehearing were denied. *Id.* 129a, 133a.

REASONS FOR GRANTING THE PETITION

The decisions below give rise to three crucial questions about what happens to church property when a church fractures. First: Does *Jones* or the First Amendment require civil courts to enforce trusts enshrined in general-church governing documents? Second: Does retroactive application of "neutral principles" violate the Free Exercise Clause? Third:

Has "neutral principles" proven to be a constitutional means of resolving church-property disputes—or is it time to reconsider *Jones*?

These questions have divided the states, burdened free exercise, and entangled civil courts in matters of church polity. Each is worthy of certiorari standing alone. Together, they present an ideal opportunity for this Court to clean up the constitutional debris *Jones* left in its wake. The First Amendment rights of countless groups and individuals hang in the balance.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT, ENTRENCHED SPLIT ON THE EFFECT OF EXPRESS-TRUST PROVISIONS IN CHURCH GOVERNING DOCUMENTS.

In *Jones*, this Court made clear that a religious denomination "can ensure * * * that the faction loyal to the hierarchical church will retain the church property" even under a neutral-principles approach by amending its constitution "to recite an express trust in favor of the denominational church." 443 U.S. at 606. The burden of taking such action, the Court reasoned, would be "minimal." *Id.* But what if an express-trust canon would not otherwise be enforceable under generally applicable state law? Does *Jones*'s specific instruction about express trusts govern? Would requiring a church's express-trust canon to comply with the various trust laws of all fifty states transform a "minimal" free-exercise burden into a constitutionally impermissible one?

This question has produced a deep—and deepening—split among state courts.[4] Its resolution is crucial to ensuring that "neutral principles" conforms to the dictates of the First Amendment. And the decisions below put Texas on the wrong side of the split. This Court's review is urgently needed.

1. First, the split:

a. The high courts of at least four states—Georgia, California, New York, and Connecticut—"have * * * read *Jones* as an affirmative rule *requiring* the imposition of a trust whenever the denominational church organization enshrines such language in its constitution." *Presbytery of Ohio Valley* v. *OPC, Inc.*, 973 N.E.2d 1099, 1106 n.7 (Ind. 2012) (emphasis in original), *cert. denied*, 133 S. Ct. 2022 (2013). Following *Jones*'s instruction, these states "simply enforce the intent of the parties as reflected in their own governing documents," recognizing that "to do anything else would raise serious First Amendment concerns." *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 458 (Ga. 2011), *cert. denied*, 132 S. Ct. 2772 (2012). In these jurisdictions, an express-trust canon in a hierarchical church's governing documents is the end of the inquiry.

Take Georgia. *Jones*, the Georgia high court explained, said that "parties can ensure that local church property will be held in trust for the benefit of the general church" by amending "the general church's governing law" to recite an express trust.

[4] Although this issue—like the others raised in this petition—turns solely on the meaning of *Jones* and the First Amendment, it typically arises in state-court property disputes.

Rector, Wardens, Vestrymen of Christ Church v. *Bishop of Episcopal Diocese*, 718 S.E.2d 237, 244 (Ga. 2011). That is all the parties need to do. If hierarchical denominations had to "fully comply with [state law] to enable the general church to retain control of local church property in the event of a schism," the court reasoned, "[t]he burden on the * * * free exercise of religion would not be minimal but immense." *Id.* at 244-245.

California has reached the same conclusion. In *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009), the California Supreme Court interpreted *Jones* to mandate enforcement of the Dennis Canon. Asking anything more of a denominational church, the court suggested, "*would* infringe on the free exercise rights of religious associations to govern themselves as they see fit." *Id.* at 80 (emphasis in original).

New York and Connecticut, too, follow *Jones*'s admonition about trust canons. In *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920 (N.Y. 2008), the New York high court found the Dennis Canon "dispositive," *id.* at 924-925. The Connecticut high court reached the same result in *Episcopal Church in Diocese of Connecticut* v. *Gauss*, 28 A.3d 302 (Conn. 2011), *cert. denied*, 132 S. Ct. 2773 (2012). As the court saw it, "*Jones* * * * stated that civil courts would be *bound* by such a provision," and that is exactly what it meant. *Id.* at 325 (emphasis in original).

b. At least eight states have squarely disagreed. These jurisdictions hold that an "express trust provision in [a church] constitution cannot be dispositive * * * because *Jones* went on to state that the denominational church may ensure that church property

remains with the loyal faction by reciting an express trust, 'provided it is embodied in some legally cognizable form.'" *Hope Presbyterian* v. *PCUSA*, 291 P.3d 711, 722 (Ore. 2012) (quoting *Jones*, 442 U.S. at 606). According to these courts, "legally cognizable" means "otherwise legally enforceable under state law," *see, e.g.*, *Presbytery of Ohio Valley*, 973 N.E.2d at 1106 n.7, rather than simply that the trust is stated in secular, rather than religious, terms, *see, e.g.*, *Presbytery of Greater Atlanta*, 719 S.E.2d at 458. As a result, these jurisdictions refuse to enforce canonical "provisions governing the use or disposal of church property" unless state law otherwise allows it. *Berthiaume* v. *McCormack*, 891 A.2d 539, 547 (N.H. 2006). If there is a conflict between state law and the parties' agreement enshrined in church governing documents, these jurisdictions hold that state law controls.

The South Carolina high court joined this side of the split in a case about the Church's own Dennis Canon. Although it acknowledged that the Canon "was enacted in reaction to [*Jones*]," the court applied state law and held that "the Dennis Canon[ ] had no legal effect on the title to the congregation's property." *All Saints Parish Waccamaw* v. *Protestant Episcopal Church*, 685 S.E.2d 163, 168 n.4, 174 (S.C. 2009).

Arkansas, too, has declined to find church-governance provisions dispositive. *See Arkansas Presbytery of Cumberland Presbyterian Church* v. *Hudson*, 40 S.W.3d 301, 309-310 (Ark. 2001). And Alaska and Pennsylvania law are to the same effect. *See St. Paul Church, Inc.* v. *Board of Trustees*, 145 P.3d 541, 553, 557 (Alaska 2006); *In re Church of St. James the Less*, 888 A.2d 795, 807-808 (Pa. 2005);

accord Heartland Presbytery v. *Gashland Presbyterian Church*, 364 S.W.3d 575, 589 (Mo. Ct. App. 2012) (Missouri intermediate appellate court reaching same result); *Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522, 525-526 (8th Cir. 1995) (Eighth Circuit reaching same result under Missouri law).

In the decisions below, Texas became at least the eighth state to conclude that amending "the constitution of the general church * * * to recite an express trust in favor of the denominational church," *Jones*, 443 U.S. at 606, is insufficient to protect denominational property. The Texas Supreme Court concluded that the relevant passage from *Jones* "can only be read as illustrative." Pet. App. 37a (quoting *Heartland Presbytery*, 364 S.W.3d at 589). And it declined to "read *Jones* as purporting to establish substantive property and trust law that state courts must apply to church property disputes." *Id.* 38a. In other words, an express-trust canon like the Dennis Canon is enforceable in Texas only if state law would otherwise so provide.

c. The split is entrenched. Courts have acknowledged it time and again. *See, e.g.*, Pet. App. 36a-38a; *Hope Presbyterian*, 291 P.3d at 721 (noting that "[c]ourts have disagreed * * * over the legal implications of an express trust provision in a denominational church's constitution" and collecting cases); *Presbytery of Ohio Valley*, 973 N.E.2d at 1106 n.7 (expressly rejecting other states' view that *Jones* renders express trusts dispositive). And the competing lines of precedent are flatly inconsistent, hinging not on variations in state property law but on different interpretations of the First Amendment's requirements as explained in *Jones*. Indeed, courts have addressed the very same Dennis Canon at issue

in this case and, reading *Jones*, have come to opposite conclusions about whether it controls. *Compare, e.g.*, *Episcopal Diocese of Rochester*, 899 N.E.2d at 924-925 (Dennis Canon is "dispositive"), *with All Saints Parish*, 685 S.E.2d at 174 ("[T]he Dennis Canon[] had no legal effect.").

2. This petition is the ideal vehicle for resolving whether a hierarchical church's express-trust canon carries the day under *Jones* and the First Amendment. In the decisions below, the court confronted just such a canon, adopted by a church it recognized as hierarchical. Pet. App. 28a. And it threw Texas's lot in with those states declining to recognize express-trust canons as dispositive. Had Texas joined the other side of the split, Petitioners would be back in their house of worship. Indeed, courts on the other side of the split have enforced *the very same canon* to resolve church-property disputes, notwithstanding otherwise-applicable principles of state law. *See, e.g.*, *Rector, Wardens, Vestrymen of Christ Church*, 718 S.E.2d at 245.

3. This issue is exceedingly important. It affects properties collectively worth billions of dollars—more than $100 million here alone—and the properties' dollar value is far eclipsed by their religious significance. Indeed, to those parishioners exiled from their houses of worship, little could matter more. Their constitutional right to freely exercise religion—and to affiliate as a hierarchical church—has been infringed in the most fundamental of ways. And the uncertainty the split has engendered has even broader effects. Buyers, sellers, lenders, and even contract and tort claimants need to know who owns property belonging to a religious organization. In four jurisdictions they can rely on express-trust

canons; in eight others they cannot; and in the rest, it is anyone's guess.

The question, moreover, promises to keep recurring. Indeed, if it sounds familiar, that is because this Court has seen petitions raising this issue before. *See, e.g.*, Petition for a Writ of Certiorari, *The Falls Church* v. *The Protestant Episcopal Church in the United States of America*, No 13-449, 2013 WL 5587932 (Oct. 9, 2013); Petition for Writ of Certiorari, *Gauss* v. *The Protestant Episcopal Church in the United States of America*, No. 11-1139, 2012 WL 900636 (Mar. 14, 2012); Petition for a Writ of Certiorari, *Timberridge Presbyterian Church, Inc.* v. *Presbytery of Greater Atlanta, Inc.*, No. 11-1101, 2012 WL 755072 (Mar. 6, 2012). Each garnered significant support from *amici* who explained the devastating effects—spiritual, organizational, and financial—of the lower courts' disarray. But this Court's restraint was understandable: Many of the prior petitions had fundamental vehicle flaws, and most were from decisions on the other side of the split.

4. The side of the split Texas has chosen is the wrong one. *Jones*, after all, hung its analysis on a crucial premise: Neutral principles would not "frustrate the free-exercise rights of the members of a religious association" *because* "the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property." 443 U.S. at 606. How? Among other "minimal[ly]" burdensome options, "the constitution of the general church can be made to recite an express trust in favor of the denominational church." *Id.*

The Episcopal Church followed the Court's instructions when, just months after *Jones*, it adopted the Dennis Canon. Texas and the jurisdictions it sided with, however, have failed to do the same. By refusing to enforce parties' pre-dispute commitments, these jurisdictions have eradicated the very mechanism that, per the *Jones* majority, made "neutral principles" constitutionally acceptable. The result could hardly be further from the "minimal burden" and avoidance of church-state entanglement the *Jones* majority envisioned. And Petitioners' free-exercise rights have paid the price.

This issue is important, and, in a time of increasing denominational strife, it is not going away. The Court should step in.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE RETROACTIVITY QUESTION *JONES* LEFT OPEN.

The Court likewise should resolve a question expressly reserved by *Jones*: Does retroactive application of "neutral principles" violate the Free Exercise Clause?

1. *Jones* reasoned that "[t]he neutral-principles approach cannot be said to 'inhibit' the free exercise of religion" because religious organizations can embody their intentions "in some legally cognizable form" "before the dispute erupts." 443 U.S. at 606. But as the Court recognized, that logic suggested a constitutional problem with applying neutral principles retroactively. If the approach comports with the Free Exercise Clause because religious organizations can structure their affairs in advance, what about organizations that had no such chance, because they

arranged their affairs under a deference regime? *See id.* at 606 n.4.

Jones did not have to answer that question. "Given that the Georgia Supreme Court [had] clearly enunciated its intent to follow the neutral-principles analysis" in earlier cases, the Court explained, there was no need to address whether "retroactive application of a neutral-principles approach infringes free-exercise rights." *Id.* The Court left the problem for another day.

2. That day has come. From 1909 until 2013, Texas was a deference jurisdiction. In *Brown*, the Texas Supreme Court applied this Court's seminal deference case, *Watson*, to a church-property dispute. 116 S.W. at 365. Consistent with the deference approach, the court ruled that the breakaway faction was not entitled to the property because it "was but a member of and under control of the larger and more important Christian organization." *Id.* Although the court did not expressly state that it was following the deference approach (and why would it? Deference, at the time, was the *only* approach), its analysis and its reliance on *Watson* made that much clear.

For 100 years, Texas appellate courts relying on *Brown* "consistently followed the deference rule in deciding hierarchical church property disputes." *Schismatic & Purported Casa Linda Presbyterian Church*, 710 S.W.2d at 705, 707; *see, e.g.*, *Green* v. *Westgate Apostolic Church*, 808 S.W.2d 547, 551-552 (Tex. App.–Austin 1991); *Presbytery of the Covenant* v. *First Presbyterian Church of Paris*, 552 S.W.2d 865, 870-871 (Tex. Civ. App.–Texarkana 1977); *Norton* v. *Green*, 304 S.W.2d 420, 424-425 (Tex. Civ. App.–Waco 1957); *Cussen* v. *Lynch*, 245 S.W. 932,

937-938 (Tex. Civ. App.–Amarillo 1922). The Fifth Circuit understood and applied Texas law the same way. *See Church of God in Christ, Inc.* v. *Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975).

In the decisions below, Texas abruptly changed course. It recognized that Texas "[c]ourts of appeals ha[d] read *Brown* as applying a deference approach and generally have applied deference principles to hierarchical church property dispute cases." Pet. App. 22a. But it nevertheless held that "Texas courts should use only the neutral principles methodology." *Id.* 73a, 24a-26a. And it applied that approach to disputes that had erupted years earlier and in which the relevant affairs had been settled decades before that.

The about-face left Petitioners in the lurch. Decades ago, when the parties to this case arranged their affairs, Petitioners had every reason to believe deference would apply. And, as the trial courts in both cases determined, Petitioners are plainly entitled to the church property under the deference rule they reasonably believed to govern. Pet. App. 126a-128a, 130a-132a. But Petitioners are now told that the arrangements they made long ago—enforceable under deference—are subject to new rules and secular attack. Because the decisions below turned the tables, Petitioners stand to lose their religious homes.

3. Retroactive application of neutral principles violates the First Amendment, and this Court should grant the writ and so hold. Neutral principles can be a constitutionally permissible approach to church-property disputes, *Jones* explained, because religious organizations that are forewarned can ensure they

are prepared. 443 U.S. at 606. A jurisdiction that has not "clearly enunciated" that it will apply neutral principles, *id.* at 606 n.4—and particularly a jurisdiction that has continually made clear that deference applies—has not given religious organizations the notice necessary to protect their free-exercise rights. Although *Jones* itself did not purport to decide this question, it effectively answered it. The unavoidable conclusion of *Jones*'s own logic is that the neutral-principles approach conforms to the First Amendment only when applied prospectively.

4. The Texas Supreme Court shrugged off the retroactivity question *Jones* posed, but its reasoning does not withstand scrutiny. It wrote that it did not need to address the concern "that application of neutral principles may pose constitutional questions if they are retroactively applied" because they were *not* being retroactively applied. Instead, the court simply "note[d] that [its] analysis in *Brown* substantively reflected the neutral principles methodology." Pet. App. 30a n.7; *see also id.* 79a.

That observation does not dispose of the anti-retroactivity argument, for three reasons. First, *Brown* relied on *Watson* and clearly applied the deference approach, as Texas courts and the Fifth Circuit consistently recognized. *See supra* 25-26. State courts have leeway to interpret their own opinions, but they cannot convert black into white by *ipse dixit*. *See generally Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938). Second, *Watson* was the law when *Brown* was decided, and it would be 70 more years before the neutral-principles approach received this Court's blessing in *Jones*. The Texas Supreme Court hardly could have applied a methodology that did not yet exist and that was inconsistent

with the very case it was applying, *Watson*. Finally—and most importantly—to say that *Brown* "substantively reflected" neutral principles does not answer the question. A jurisdiction must "*clearly enunciate*[ ] its intent to follow" that approach to avoid the free-exercise problem *Jones* flagged. 443 U.S. at 606 n.4 (emphasis added). The judgment that a 100-year-old decision "substantively reflected" neutral principles—particularly when it had consistently been interpreted otherwise—comes nowhere near clearing that bar.

In light of the free-exercise rights at stake, the "clearly enunciated" standard *Jones* suggested makes perfect sense. As *Jones* explained, the neutral-principles approach does not inhibit free exercise *because* churches can take steps to effectuate their wishes regarding their church property. *See id.* at 606. The important thing is that religious organizations know neutral principles will apply. Without that knowledge, religious groups cannot avoid unconstitutional intrusions into their religious exercise. *See* Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 St. Thomas L. Rev. 109, 135 (1998) ("[I]f religious institutions cannot predict the outcomes of potential disputes their ability to organize church polity is significantly curtailed."). The Court should grant certiorari to close the door *Jones* left open.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NEUTRAL-PRINCIPLES APPROACH IS CONSISTENT WITH THE FIRST AMENDMENT.

The *Jones* majority endorsed neutral principles on the basis of optimistic assumptions that the ap-

proach would be "objective," "secular," and "flexible." 443 U.S. at 603. Respectfully, those assumptions were wrong. The neutral-principles approach has proven confusing and difficult to apply. And that confusion has produced deeply divergent outcomes, with some courts awarding church property to breakaway factions and others to the loyal church on the same facts. Even more disturbing, the neutral-principles approach has inspired courts to intrude into matters of church governance and effectively overrule religious organizations on an issue that cuts right to the heart of free religious exercise: Who is the true church? That outcome, an inevitable consequence of *Jones*, cannot be countenanced. The Court should grant certiorari, hold that *Jones* is no longer good law, and reaffirm the deference approach from which *Jones* deviated.

1. The *Jones* dissent warned that neutral principles would prove "difficult" to apply. *Id.* at 610, 616 (Powell, J., dissenting). That turned out to be an understatement. Outcomes in neutral-principles courts have been irreconcilable and impossible to predict, even in cases involving the very same religious organization and texts. *See, e.g.*, Cameron W. Ellis, *Church Factionalism and Judicial Resolution: A Reconsideration of the Neutral-Principles Approach*, 60 Ala. L. Rev. 1001, 1007 (2009) (citing neutral-principles cases with disparate results). As scholars put it, neutral principles has produced "massive inconsistency," Hassler, 35 Pepp. L. Rev. at 431, and "a welter of contradictory and confusing case law largely devoid of certainty," Hon. John E. Fennelly, *Property Disputes and Religious Schisms: Who Is the Church?*, 9 St. Thomas L. Rev. 319, 353 (1997). Such gross disparity has resulted not from

differences in state law, but from differences in states' interpretation of *Jones* and the First Amendment.

The inconsistent judicial treatment of The Episcopal Church's Dennis Canon is a particularly striking example, *see supra* 21-22, but there are myriad others. To take just two: Some courts have interpreted the Presbyterian Church's Book of Order as establishing a trust in favor of the national church, *see, e.g.*, *Hope Presbyterian Church,* 291 P.3d at 727, while others have deemed its trust provision ineffective, *see, e.g.*, *Heartland Presbytery*, 364 S.W.3d at 592. And some courts have held that breakaways' efforts to amend a local church's corporate bylaws to sever ties with the denominational church are ineffective, *see, e.g.*, *New* v. *Kroeger*, 84 Cal. Rptr. 3d 464, 480 (Cal. Ct. App. 2008), while others have held on identical facts that such efforts succeeded, *see, e.g.*, *All Saints Parish Waccamaw*, 685 S.E.2d at 174-175.

Needless to say, such disparate results make it difficult for religious organizations to structure their affairs, particularly across multiple states. And where the exercise of religion is concerned, that difficulty cannot be dismissed as a mere casualty of federalism. To put it plainly: Religious organizations and their members cannot freely exercise their religion without control over the place where that exercise occurs. Even the *Jones* majority recognized as much. *See* 443 U.S. at 606 (rejecting free-exercise concerns on ground that religious organizations could still control their property). And religious organizations cannot control their houses of worship—and thus cannot protect their free-exercise rights—if courts cannot resolve church-property

disputes with some measure of predictability. "Predictability in the resolution of intrachurch disputes is essential to the First Amendment's guarantee of Free Exercise, because only with predictability will churches be truly free to exercise their *ecclesiastical* choices regarding polity and organization." Belzer, 11 St. Thomas L. Rev. at 135 (emphasis in original). Yet church-property disputes could hardly be less predictable than neutral principles has rendered them.

The tremendous free-exercise burden imposed by divergent interpretations of *Jones* should not be countenanced. This Court has not hesitated to overrule opinions that "produced confusion." *United States* v. *Dixon*, 509 U.S. 688, 711 (1993). That such confusion impedes the free exercise of religion is all the more reason to do so here.

2. While insoluble confusion is reason enough to reconsider *Jones*, it is not that decision's most pernicious progeny. Even worse: The neutral-principles approach has "entangle[d] the civil courts in matters of religious controversy," with courts regularly going so far as to *overrule churches on who constitutes the true church*—the very outcome Jones sought to avoid. 443 U.S. at 608.

a. Entanglement in religion has been a regular byproduct of the neutral-principles approach. In the name of neutral principles, courts have given their own interpretations to deeply religious texts. *See, e.g.*, *Fonken* v. *Community Church of Kamrar*, 339 N.W.2d 810, 818 (Iowa 1983) (interpreting Presbyterian Book of Order). And they have reached their own conclusions about questions of church doctrine. *See, e.g.*, *General Convention of New Jerusalem* v. *Mac-*

Kenzie, 874 N.E. 2d 1084, 1086-88 (Mass. 2007) (deciding whether a congregation's disaffiliation constituted a church dissolution). The result has been "an end-run around the First Amendment's prohibition against inquiry into and resolution of religious issues," Pet. App. 52a—precisely the constitutional precipice the *Jones* dissenters predicted.

And yet that result was unavoidable. After all, *Jones* itself invited courts to interpret religious documents. The majority cautioned that courts should read such documents in "purely secular terms" and refrain from deciding religious questions. 443 U.S. at 604. But the fact is that many church documents are "drawn in terms of religious precepts. When they are, attempting to read them 'in purely secular terms' is more likely to promote confusion than understanding." *Id.* at 612 (Powell, J., dissenting). And it is more likely to invite decision of religious questions than discourage it.

b. Neutral-principles courts also have interfered with church polity in an even more fundamental respect: Time and again, they have thwarted churches' doctrinal determinations about who represents the rightful church. *See*, *Trinity Presbyterian Church* v. *Tankersley*, 374 So.2d 861, 865 (Ala. 1979) (ruling for breakaway faction notwithstanding that the denominational church had "officially recognized" the loyal group "as the true congregation"); *see also supra* 19-21 (collecting cases).

In a leading article, Professor Laycock surveyed the cases and concluded that "neutral principles [has] greatly encouraged * * * judicial disruption of church governance." Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 257-258

(2009). He explained that state courts "have often applied 'neutral' principles with a strong congregational bias, allowing local churches to secede (and take the property with them) from churches that were clearly hierarchical or presbyterial." *Id.* And such decisions, he found, contradict principles at the heart of the religious orders in question:

> Differences in church governance reflect deep theological disagreements; the wars of religion were fought in part over these choices of whether to have a Pope, whether to have bishops, whether to have elected assemblies, or whether to have no authority at all higher than the local congregation. Religious liberty includes the right to choose from among these forms of church organization, but that right is sharply eroded if secular courts are free to act on Congregationalist principles every time a dispute arises between a local congregation and a larger religious organization. [*Id.*]

Neutral-principles courts have run roughshod over these religious freedoms, allowing breakaway factions who had consented to hierarchical church governance to take property from the Episcopal, Presbyterian, and Roman Catholic Churches, just to name a few. *See, e.g.*, *Krauze* v. *Polish Roman Catholic St. Stanislaus Parish*, No. 0822-CC07847 (Mo. Cir. Ct. 22d Jud. Cir. Mar. 15, 2012) (excommunicated faction permitted to abscond with parish property under "neutral principles").

c. Neutral-principles courts, however, are not necessarily to blame. Their mistakes are manifestations of *Jones*'s fundamental constitutional error. As the *Jones* dissent recognized, so-called "church property" disputes "arise almost invariably out of disagree-

ments regarding doctrine and practice," with courts asked to decide, effectively, which faction constitutes the "true" church and may claim its identity and cathedrals. *See* 443 U.S. at 616 (Powell, J., dissenting). Thus, "[w]hen civil courts step in to resolve intrachurch disputes over church property, they will either support or overturn the authoritative resolution" of that question "within the church itself." *Id.* at 614. *Watson* told courts to support the church's determination. The neutral-principles approach "actually invites civil courts" to reject it. *Id.*

That is what happened here. Church factions divided by doctrinal disputes each claimed the right to represent the continuing church and possess its property. The property was held expressly in trust for the Church under the Church's governing rules—rules to which all parties agreed—by corporations formed to facilitate the Church's mission and ministry. The question is which group rightfully represents those entities, and the Church has given a definitive answer: Petitioners. Yet under neutral principles, a court can substitute its own judgment. Such profound judicial incursion into church polity is deeply problematic from the perspective of the Free Exercise Clause, the Establishment Clause, and the First Amendment right to associate in a manner that facilitates religious activity. *Cf. Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984).

3. Respect for these constitutional precepts led this Court to hold for a century that deference is the way to resolve property disputes within hierarchical churches. *See, e.g.*, *Watson*, 80 U.S. at 733-734; *Kedroff*, 344 U.S. at 116; *Milivojevich*, 426 U.S. at 704-705. *Watson* and its progeny recognized that "[a]ll who united themselves to [a hierarchical

church] do so with an implied consent to" church governance. *Watson*, 80 U.S. at 729. "[A]ppeal[s] to the secular courts" to challenge intrachurch agreements, the Court feared, would "lead to the total subversion of such religious bodies." *Id.* Unlike *Jones*, these earlier decisions exude respect for—instead of inviting intrusion into and rejection of—religious choices.

The same respect animates this Court's recent decision in *Hosanna-Tabor*. Relying on the *Watson* line—and conspicuously omitting any mention of *Jones* and neutral principles—*Hosanna-Tabor* held that courts must defer to "a church's determination of who can act as its ministers." 132 S. Ct. at 704-705. That holding reflects *Watson*'s teaching that protecting the free exercise of religion and preventing the establishment thereof requires deference to religious organizations. *See* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 853 (2012) ("*Hosanna-Tabor* is a sweeping and unanimous reaffirmation of the earlier cases, particularly *Watson*."). And it is irreconcilable with *Jones*. In particular, *Hosanna-Tabor* is flatly inconsistent with *Jones*'s statement that courts could apply "neutral provisions of state law governing the manner in which churches * * * hire employees." 443 U.S. at 606. More generally, whereas *Jones* "explicitly rejected blanket deference to religious institutions," *Hosanna-Tabor* held that such deference was necessary in the ministerial context to avoid unconstitutional entanglement with church polity. Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 Nw. U. L. Rev. 951, 957-958 (2012). And if the "Religion Clauses bar the govern-

ment from interfering with the decision of a religious group to fire one of its ministers," *Hosanna-Tabor*, 132 S. Ct. at 702, they likewise bar interference with the equally fundamental decision as to the identity of the rightful church.

Jones was an aberration—a departure from the well-trodden path into "totally uncharted" waters. *Jones*, 443 U.S. at 616 (Powell, J., dissenting). But 35 years of rough seas have made clear that the Court had it right from the beginning. And the decisions below prove the point: Respondents swore allegiance to a historic denomination as a condition of association, were entrusted with historic Church property as the Church's custodians, and then asked the secular courts to bless their efforts to break away from the Church and take its property with them. In the name of "neutral principles," the breakaways "invited intrusion into church polity forbidden by the First Amendment," *id.* at 610, asking the state to overturn the Church's judgment about who may preach and pray on its property. And the state accepted the invitation.

Hosanna-Tabor was a course correction that should have marked a return to deference and the end of the neutral-principles experiment. In the wake of *Hosanna-Tabor*, the Court should grant certiorari and clarify that deference is the only constitutionally permissible approach to church-property disputes. Such a holding would ensure that courts steer clear of the free-exercise and establishment problems inherent in "neutral principles." And it would give the church keys back to Petitioners and countless others who have been wrongfully shut out of their religious homes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS S. LEATHERBURY
DANIEL L. TOBEY
VINSON & ELKINS LLP
2001 Ross Ave., Suite 3700
Dallas, TX 75201

JOHN P. ELWOOD
VINSON & ELKINS LLP
2200 Pennsylvania Ave. N.W., Suite 500 West
Washington, D.C. 20037

KATHLEEN WELLS
EPISCOPAL DIOCESE OF FORT WORTH
4301 Meadowbrook Drive
Fort Worth, TX 76103

FRANK HILL
HILL GILSTRAP
1400 W. Abrams Street
Arlington, TX 76013

JONATHAN D.F. NELSON
JONATHAN D.F. NELSON, P.C.
1400 W. Abram Street
Arlington, TX 76013

NEAL KUMAR KATYAL
Counsel of Record
DOMINIC F. PERELLA
AMANDA K. RICE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

MARY E. KOSTEL
THE EPISCOPAL CHURCH
c/o GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001

DAVID BOOTH BEERS
GOODWIN | PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001

JAMES E. HUND
HUND, KRIER, WILKERSON & WRIGHT, P.C.
P.O. Box 54390
Lubbock, TX 79453

GUY D. CHOATE
WEBB, STOKES & SPARKS
314 W. Harris, P.O. Box 1271
San Angelo, TX 79502

Counsel for Petitioners

June 2014

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 11-0332

ROBERT MASTERSON, MARK BROWN, GEORGE BUTLER, CHARLES WESTBROOK, RICHEY OLIVER, CRAIG PORTER, SHARON WEBER, JUNE SMITH, RITA BAKER, STEPHANIE PEDDY, BILLIE RUTH HODGES, DALLAS CHRISTIAN, AND THE EPISCOPAL CHURCH OF THE GOOD SHEPHERD

Petitioners,

v.

THE DIOCESE OF NORTHWEST TEXAS, THE REV. CELIA ELLERY, DON GRIFFIS, AND MICHAEL RYAN,

Respondents.

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued October 16, 2012

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE DEVINE joined, and in parts I, II, III-A, and V of which JUSTICE WILLETT and JUSTICE BOYD joined.

JUSTICE BOYD filed a concurring opinion, in which JUSTICE WILLETT joined.

JUSTICE LEHRMANN filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON joined.

The question before us is what happens to the property when a majority of the membership of a local church votes to withdraw from the larger religious body of which it has been a part. In this case, title to property of the local church is held by a Texas non-profit corporation originally named The Episcopal Church of the Good Shepherd (corporation or Good Shepherd). The corporation was formed as a condition of Good Shepherd's congregation being accepted into union with the Episcopal Diocese of Northwest Texas (Diocese). When members of the congregation became divided over doctrinal positions adopted by The Episcopal Church of the United States (TEC), a majority of the parishioners voted to amend Good Shepherd's articles of incorporation and bylaws to withdraw Good Shepherd from communion with TEC and the Diocese and revoke any trusts on the corporation's property in favor of those entities. The corporation and the withdrawing faction of parishioners maintained possession of the property.

The Diocese and leaders of the faction of parishioners loyal to the Diocese and TEC filed suit seeking title to and possession of the property. The trial court eventually granted summary judgment in favor of the loyal faction. The court of appeals affirmed.

The first issue we confront is the legal methodology to be applied. At least two are permissible under the First Amendment to the United States Constitution:

"deference" and "neutral principles of law" (neutral principles). The court of appeals held that Texas courts may use either. We conclude that greater predictability in this area of the law will result if Texas courts apply only one methodology. We also conclude that the neutral principles methodology should be applied because it better conforms to Texas courts' constitutional duty to decide disputes within their jurisdiction while still respecting limitations the First Amendment places on that jurisdiction. Under the neutral principles methodology, courts decide non-ecclesiastical issues such as property ownership based on the same neutral principles of law applicable to other entities, *Jones v. Wolf*, 443 U.S. 595, 603-04 (1979), while deferring to religious entities' decisions on ecclesiastical and church polity questions. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 (1976).

Applying neutral principles of law to the record before us, we conclude that the trial court erred by granting summary judgment and the court of appeals erred by affirming. We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I. Background

A. Episcopal Good Shepherd

In 1961 individuals purchased a tract of land in San Angelo (1961 tract) and donated it to the Northwest Texas Episcopal Board of Trustees (Trustees). The donation was for the purpose of establishing a mission church. In 1965 a group of worshipers filed an application with the Diocese to organize a mission to be named "The Episcopal

Church of the Good Shepherd" (the Church). The Diocese eventually approved the application and TEC made loans and grants to the Church to assist its growth. The bishop of the Diocese ultimately approved plans for a building, presided over the groundbreaking ceremony, then formally dedicated the building. In 1969 individuals purchased another tract of land (1969 tract) that was adjacent to the 1961 tract and donated it to the Trustees.

In March 1974 the Church applied to the Diocese for parish status. It was formally accepted into union with the Diocese at the Diocese's annual convention in April 1974. That same year, in conformance with canons of the Diocese which required parishes to be corporations, the Church incorporated under the Texas Non-Profit Corporations Act. *See* TEX. REV. CIV. STAT. art. 1396. The corporation's bylaws provided that the corporation would be managed by a Vestry elected by members of the parish.[1] The bylaws prescribed

---

[1] Article VI of the Articles of Incorporation addressed election of the Vestry:

Article VI

The number of vestrymen constituting the initial vestry of the corporation is nine . . . .

The vestrymen named in these Articles of Incorporation as the first vestry of the Episcopal Church of the Good Shepherd shall hold office in accordance with the Church Canons until the expiration of their duly elected terms of office. At the expiration of the term of office of each member of the vestry, successors will be elected at the annual meeting of the members of the

qualifications for voting at parish meetings[2] and specified that amendments to the bylaws would be by majority vote.[3]

In 1982 the Trustees conveyed the 1961 and 1969 tracts to the corporation by warranty deed. In 2005 two individuals sold a tract of land (the 2005 tract) to Good Shepherd. The tract was conveyed to the corporation by warranty deed with a vendors lien to secure a purchase-money note executed by the corporation. Neither the 1982 deed from the Trustees nor the 2005 deed provided for or referenced a trust in favor of TEC or the Diocese.

B. Schism

Due to doctrinal differences with TEC, some members of the parish proposed disassociating from TEC and organizing as an independent church under the name "Anglican Church of the Good Shepherd"

---

parish with the duly elected vestry-men serving in staggered terms of three years each.

[2] Those qualified to vote at Parish meetings were "communicants of the Parish, as shown on the Parish register, who are at least sixteen (16) years of age and are baptized members of the congregation who are regular contributors as shown by the Treasurer's records."

[3] Provisions for amending the bylaws were as follows:

These By-Laws may be amended at an Annual Parish Meeting or at a special meeting called for that purpose by a majority vote of the duly qualified voters of the Parish. Notice of the proposed amendments shall be given to all qualified voters in writing at least thirty (30) days before such meeting. A majority vote of the duly qualified voters of the Parish will be necessary to approve an amendment to these By-Laws.

(withdrawing faction). The parish held a called meeting on November 12, 2006, during which four resolutions were presented. The resolutions were to (1) amend the corporate bylaws to, among other changes, remove all references to TEC and the Diocese; (2) withdraw the local congregation's membership in and dissolve its union with TEC and the Diocese; (3) revoke any trusts that may have been imposed on any of its property by TEC, the Diocese, or the Trustees; and (4) form a new church named Anglican Church of the Good Shepherd and change the name of the corporation to that name. The resolutions passed by a vote of 53 to 30. The stated effective date of the vote was January 5, 2007. Amended articles of incorporation changing the corporate name to Anglican Church of the Good Shepherd were then filed. *See* TEX. BUS. ORGS. CODE §§ 3.052—.053, 22.106 (providing procedures for amending certificate of formation of a non-profit corporation).

After the parish vote, but before the effective date, the Diocese's Bishop, Rev. Wallis Ohl, took the position that Good Shepherd could not unilaterally disassociate from the Diocese and that the vote did not have any effect on Good Shepherd's relationship with the Diocese or TEC. He held a meeting with the faction of the parish loyal to TEC and the Diocese and appointed Rev. Celia Ellery as Priest-in-Charge of the Parish. Under the leadership of Rev. Ellery, the loyal faction elected a vestry and was recognized by Bishop Ohl as the "continuing Episcopal Parish operating Good Shepherd."

The withdrawing faction continued to use the parish property, so two vestry members of the loyal

faction together with Rev. Ellery and the Diocese (collectively, Episcopal Leaders) filed suit against leaders of the withdrawing faction and the Good Shepherd corporation (collectively, Anglican Leaders). The Episcopal Leaders sought a declaratory judgment that (1) Good Shepherd's property could not be alienated or used by the Anglican Leaders for any purpose other than the mission of TEC; (2) the continuing Parish of the Good Shepherd was represented by those persons recognized by the Bishop as the loyal faction; (3) the actions of the Anglican Leaders in seeking to sever ties between Good Shepherd, the Diocese, and TEC were void; and (4) all the parish property was held in trust for TEC and the Diocese and the Episcopal Leaders were entitled to possess and control it.[4] In their pleadings the Episcopal Leaders based their claim to the property on the allegation that: "According deference to the Bishop, Plaintiffs assert that they are entitled to title, possession and use of all real and personal property belonging to the GOOD SHEPHERD, including the CHURCH PREMISES."

The Anglican Leaders answered and filed a counterclaim seeking judgment quieting title to the property in the Anglican Church of the Good Shepherd, a Texas non-profit corporation, and removing any cloud to the title created by the Episcopal Leaders' claims. The Anglican Leaders

---

[4] The Episcopal Leaders also sought an accounting for funds and personal property of the Parish being held by defendants and damages for conversion of Parish personal property and funds. Those claims were non-suited before summary judgment was granted.

asserted that under Texas law the non-profit corporation held unencumbered title to the property; the individual Anglican Leaders had been elected as the corporation's vestry in accordance with the corporate Articles of Incorporation and bylaws; the Episcopal Leaders had no right or authority to act on behalf of the corporation; and the Episcopal Leaders' claims were barred by statutes of frauds. *See* TEX. BUS. & COM. CODE § 26.01; TEX. PROP. CODE § 112.004.

The Episcopal Leaders moved for summary judgment. They asserted that TEC is a hierarchical church; its Canons and rules provide that all property of a Parish is held in trust for use of TEC and the respective Diocese; when congregations of hierarchical churches split, Texas courts defer to the decisions of the church's superior hierarchical authority as to which faction comprises the true church; the members loyal to TEC have been recognized by the Diocese's Bishop as the true church; and the parish property is held in trust for TEC and the Diocese. In both their motion and reply to the Anglican Leaders' response, the Episcopal Leaders maintained that "[t]he sole legal issue is whether or not the Episcopal Church is hierarchical." They did not plead or assert as grounds for summary judgment that they were entitled to the property on the grounds that application of neutral principles of law mandated summary judgment in their favor, although in reply to the Anglican Leaders' response to their motion for summary judgment, the Episcopal Leaders argued that they were entitled to the property under both deference and neutral principles analyses.

The trial court granted the Episcopal Leaders' motion. It made several findings in its order, including a finding that TEC is a hierarchical church. The court declared and ordered that (1) "the continuing Parish of the Good Shepherd is identified as and represented by those persons recognized by the Bishop of the [Diocese]"; (2) the actions of the Anglican Leaders in seeking to withdraw Good Shepherd as a Parish of the Diocese and from TEC were void; (3) the Anglican Leaders could not "divert, alienate, or use" Parish property except for the mission of TEC; and (4) all the property of Good Shepherd is held in trust for TEC and the Diocese. The court ordered the Anglican Leaders to relinquish control of the property to the Vestry of the faction recognized by Bishop Ohl as The Episcopal Church of the Good Shepherd.

The Anglican Leaders appealed and the court of appeals affirmed. 335 S.W.3d 880. It held that Texas courts may analyze disputes such as these under either the deference or neutral principles methodologies. It analyzed the case under both and reached the same conclusion: the summary judgment should be affirmed. *Id.* at 892. The appeals court concluded that when the withdrawing faction voted to disaffiliate from TEC, the vote was only effective as to those parishioners who withdrew and who were free to join the Anglican community; the vote did not withdraw Good Shepherd itself from TEC, and therefore, the church property remained under the authority and control of TEC. *Id.* at 892-93.

In this Court the Anglican Leaders primarily argue that the proper approach to dealing with church property disputes in Texas is the neutral principles

methodology because that methodology, at bottom, simply allocates decisions to the proper forum: ecclesiastical decisions are made by the church and secular decisions are made by courts. They urge that the court of appeals' classification of this dispute as an inherently ecclesiastical question of identity—*i.e.*, which parishioners comprise the continuing Episcopal parish—ignores the fact that there is a Good Shepherd non-profit corporation controlled by its members; the Bishop of the Diocese has no authority to determine affairs of the corporation, including who its members are and who comprises its Vestry; a majority of those qualified to vote in corporate matters voted to amend the corporate governing documents and disassociate the corporation from the Diocese and TEC; and under Texas law and the corporate bylaws the majority vote prevails. Not wanting to put all their eggs in the neutral principles basket, the Anglican Leaders also argue that even if the case is analyzed under the deference approach, the judgment of the court of appeals must be reversed. They assert that the deference approach is predicated on a church organization having superior ecclesiastical tribunals with control over the specific dispute, and because neither TEC nor the Diocese have such tribunals, there is no basis to afford deference to decisions of either of those entities. Finally, the Anglican Leaders contend that the effect of the court of appeals' decision is to deny the right of a non-profit corporation to withdraw from an association with another entity when the corporate documents do not preclude its doing so, a majority of its voting members desire to do so, and its elected leadership

desires to do so. That, they argue, violates its rights under the First Amendment to the United States Constitution.

The Episcopal Leaders respond that Good Shepherd is bound by the Canons and Constitution of TEC because Episcopal Good Shepherd is and always has been part of TEC's hierarchical structure. They argue that the only question to be decided by civil courts is the identity of the body of believers comprising the true faction continuing Episcopal Good Shepherd, and that question must be answered by deferring to the decision of TEC and the Diocese because it is a matter of church polity and administration. They urge that in the past Texas has embraced the "identity" approach to church property disputes involving hierarchical churches and should continue to do so. As do the Anglican Leaders, the Episcopal Leaders offer an alternative argument. They say that even under a neutral principles analysis, the judgment of the court of appeals should be affirmed because the Constitution, Canons, and other rules of TEC and the Diocese provide that the property is held in trust for TEC and the Diocese.

Because arguments of the parties reference the organizational structure of TEC, we briefly review it.

C. Organizational Structure

TEC is a religious denomination founded in 1789. It has three tiers. The first and highest is the General Convention. The General Convention consists of representatives from each diocese and most of TEC's bishops. It adopts and amends TEC's Constitution and Canons, which establish the

structure of the denomination and rules for how it operates. Each subordinate Episcopal affiliate must accede to and agree to be subject to the TEC Constitution and Canons.

The second tier is comprised of regional, geographically defined dioceses. Dioceses have bishops and are governed by their own conventions. Diocesan conventions adopt and amend a constitution and canons for each particular diocese.

The third tier is comprised of local congregations. Local congregations are classified as parishes, missions, or congregations. To be accepted into union with TEC they must accede to and agree to be subject to the constitutions and canons of both TEC and the diocese in which the congregation is located.

This case involves a parish. A parish is governed by a rector or priest-in-charge and a vestry comprised of lay persons elected by the parish members. Members of the vestry must meet certain qualifications, including committing to "conform to the doctrine, discipline and worship of The Episcopal Church."

II. Who Decides What

Good Shepherd corporation's bylaws prescribe who can vote when vestry members are elected, how the corporation's vestry is elected, who can vote on proposed amendments to the bylaws, and how the bylaws and articles of incorporation are amended. The essential issue presented is whether either (1) the decision by Bishop Ohl to recognize the Episcopal Leaders and the loyal faction as the vestry and members of the continuing Good Shepherd Parish served to establish those vestry members as the

vestry of the corporation and the loyal faction as the voters entitled to vote on corporate matters when neither the articles of incorporation nor the bylaws afforded him that authority; or (2) his decision determined who was entitled to the corporation's property regardless of the decisions of elected leaders of the corporation and persons specified by the corporate bylaws as qualified to vote on corporate affairs. In addressing the issue we are guided by two principles. The first is that a court has no authority to decide a dispute unless it has jurisdiction to do so. *See*, *e.g.*, *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 309 (Tex. 2010). The second is that Texas courts are bound by the Texas Constitution to decide disputes over which they have jurisdiction, and absent a lawful directive otherwise they cannot delegate or cede their judicial prerogative to another entity. *See Morrow v. Corbin*, 62 S.W.2d 641, 645 (1933) ("We are equally clear that the power thus confided to our trial courts [by the Constitution] must be exercised by them as a matter of nondelegable duty, that they can neither with nor without the consent of parties litigant delegate the decision of any question within their jurisdiction, once that jurisdiction has been lawfully invoked, to another agency or tribunal.") (citations omitted).

A. Jurisdiction In Church Property Disputes

The Free Exercise clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The clause "severely circumscribes the role that civil courts may play in resolving church property disputes,"

Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969), by prohibiting civil courts from inquiring into matters concerning "'theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.'" *Milivojevich*, 426 U.S. at 713-14 (quoting *Watson v. Jones*, 80 U.S. 679, 733 (1872)). The First Amendment is applicable to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Attempts by courts to resolve church property disputes while balancing the competing interests of property rights and the First Amendment's Free Exercise provision have resulted in two general approaches to the issue. They are typically referred to as the "neutral principles of law" approach and the "deference" or "identity" approach. *See*, *e.g.*, *Jones v. Wolf*, 443 U.S. 595, 602-10 (1979) (discussing both approaches to church property disputes). The First Amendment does not require states to follow a particular method of resolving church property disputes; rather, "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* at 602 (citing *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)) (emphasis in original).

1. Deference

The Supreme Court recently elaborated on its decision in Watson, which is often cited as the

seminal case regarding the "deference" or "identity" approach in church property dispute cases:

> In [*Watson*], the Court considered a dispute between antislavery and proslavery factions over who controlled the property of the Walnut Street Presbyterian Church in Louisville, Kentucky. The General Assembly of the Presbyterian Church had recognized the antislavery faction, and this Court—applying not the Constitution but a "broad and sound view of the relations of church and state under our system of laws"—declined to question that determination. *Id.* at 727. [The Court] explained that "*whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." Ibid.* As [the Court] would put it later, [the] opinion in *Watson* "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

Hosana-Tabor Evangelical Lutheran Church and School v. Equal Emp't Opportunity Comm'n, ____ U.S. ____, 132 S.Ct. 694, 704 (2012) (emphasis added); *see also Jones*, 443 U.S. at 602. The

deference approach embodies this general principle. A court applying the deference approach defers to and enforces the decision of the highest authority of the ecclesiastical body to which the matter has been carried. *See Jones*, 443 U.S. at 604-05.

While the deference approach is based on principles set forth in Watson, Watson itself clarified that the First Amendment does not require a court to forego application of secular legal principles when resolving church property disputes:

> Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, . . . we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.

80 U.S. at 714. As the Court elaborated in *Presbyterian Church v. Blue Hull Memorial Church*, 393 U.S. 440, 449 (1969) and in *Jones*, "deference" is not a choice where ecclesiastical questions are at issue; as to such questions, deference is compulsory because courts lack jurisdiction to decide ecclesiastical questions. 443 U.S. at 602-03, 605. But when the question to be decided is not ecclesiastical, courts are not deprived of jurisdiction

by the First Amendment and they may apply another Constitutionally acceptable approach. *Id.*

2. Neutral Principles

In *Jones v. Wolf* the Supreme Court approved the neutral principles methodology as constitutionally permissible. 443 U.S. at 604. *Jones* concerned the Vineville Presbyterian Church, which was incorporated under Georgia law and was a member church of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS). The PCUS maintained a hierarchical form of government. *Id.* at 597-98. Under the PCUS polity, the actions of local churches were subject to review and control by higher church courts. *Id.* at 598. The powers and duties of each level of the church hierarchy were set out in the PCUS constitution, the Book of Church Order. *Id.*

At a 1973 meeting, the Vineville Church's pastor and a majority of its members voted to separate from the PCUS and unite with the Presbyterian Church in America. *Id.* The Augusta-Macon Presbytery of the PCUS concluded that the minority faction remaining loyal to the PCUS constituted "the true congregation of Vineville Presbyterian Church." *Id.* The Presbytery then withdrew "all authority to exercise office derived from the PCUS" from the majority faction and the minority sued in state court to establish their right to exclusive possession of the church property. *Id.* at 598-99. The trial court granted judgment for the majority. The Georgia Supreme Court affirmed, rejecting the minority faction's First Amendment challenge and holding that the trial court had correctly applied neutral principles of law. *Id.* at 599.

The United States Supreme Court affirmed. It held that the methodology employed by the Georgia courts was not constitutionally infirm. *Id.* at 600 (*citing Carnes v. Smith*, 222 S.E.2d 322 (Ga. 1976), *cert. denied*, 429 U.S. 868; *Presbyterian Church v. E. Heights*, 167 S.E.2d 658, 658-60 (Ga. 1969) (*Presbyterian II*), *cert. denied*, 429 U.S. 868). Under the neutral principles methodology, ownership of disputed property is determined by applying generally applicable law and legal principles. That application will usually include considering evidence such as deeds to the properties, terms of the local church charter (including articles of incorporation and by laws, if any), and relevant provisions of governing documents of the general church. *E.g., Jones*, 443 U.S. at 602-03; *see Presbyterian II*, 167 S.E.2d at 659-60. The Court held that the First Amendment precluded neither application of neutral principles of law nor a state's adopting a presumptive rule of majority rule. *Jones*, 443 U.S. at 604, 607. It noted that "any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way . . . [such as] by providing that the church property is held in trust for the general church and those who remain loyal to it[,]" or any other method that "does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* at 607-08.

Since the identity of the local Vineville congregation was a matter of state law, the Supreme Court remanded the case to the Georgia Supreme

Court. On remand the Georgia Supreme Court held that Georgia applies the presumptive majority rule to church identity and nothing in Georgia's statutes or the relevant corporate charters, deeds, and organizational constitutions of the denomination rebutted that presumption "as to the right to control the actions of the titleholder." *Jones v. Wolf*, 260 S.E.2d 84, 85 (Ga. 1979).

B. Texas

In *Brown v. Clark*, this Court addressed a dispute similar to both the one the Supreme Court addressed in *Jones* and the one now before us. 116 S.W. 360 (Tex. 1909). In that case, property had been conveyed by general warranty deed to "trustees named for the Cumberland Presbyterian Church [of Jefferson, Texas]." *Id.* at 361. The dispute in the local church arose following a vote by the majority of the presbyteries of the General Assembly of the Cumberland Presbyterian Church and the General Assembly of the Presbyterian Church of the United States of America to reunite as one church. *Id.* at 362. This Court described the schism in the Jefferson church and resulting lawsuit as follows:

> There was at all times a strong minority which opposed the reunion, and, when the General Assembly of the Cumberland Presbyterian Church adopted the report and declared the union completed, the dissenting commissioners in attendance upon that General Assembly held a meeting, and organized another General Assembly of the Cumberland Presbyterian Church. Much dissatisfaction prevailed in the churches of the Cumberland Presbyterian, and in the church

> at the city of Jefferson, Tex., there was a difference of opinion upon the subject of reunion among its members. Those who opposed the reunion instituted this action, claiming that they constituted the session of the Cumberland Presbyterian Church at Jefferson. The defendants in the action claimed to be the session of the Presbyterian Church of the United States of America, and were in possession of the property, and claimed that by the union the property had been transferred to the Presbyterian Church of the United States of America. The case was tried before the judge without a jury, and a judgment was rendered in favor of the defendants-those who claimed under the Presbyterian Church of the United States of America. The Court of Civil Appeals of the Sixth Supreme Judicial District reversed that judgment, and rendered judgment in favor of the plaintiffs below.

Id.

The principal issues presented were whether the General Assembly of the Cumberland Church had authority to reunite the Cumberland Church with the Presbyterian Church, and if so, how did the reunion affect the church property in Jefferson? *Id.* at 363-64. The Court held that the first issue was within the exclusive jurisdiction of the General Assembly because it was the highest court of the church, it had decided the question, and thus "there is no ground for action by this court." *Id.* at 364. As to the second issue, the Court noted that the question of how the reunion affected the property

was "perhaps the only question in the case" over which it had jurisdiction. *Id.* As opposed to the first issue, which presented no basis on which the Court could consider the merits or take action, the Court addressed the merits of the second:

> The deed for the property was made to the trustees of the Cumberland Presbyterian Church at Jefferson, Tex. It expressed no trust nor limitation upon the title. 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. *It follows, we think, as a natural and proper conclusion, that the church to which the deed was made still owns the property, and that whatever body is identified as being the church to which the deed was made must still hold the title.* The Cumberland Presbyterian Church at Jefferson was but a member of and under the control of the larger and more important Christian organization, known as the Cumberland Presbyterian Church, and the local church was bound by the orders and judgments of the courts of the church. *Watson v. Jones*, 13 Wall. 727, 20 L. Ed. 666. The Jefferson church was not disorganized by the act of union. It remained intact as a church, losing nothing but the word 'Cumberland' from its name. Being a part of the Cumberland Presbyterian Church, the church at Jefferson was by the union incorporated into the Presbyterian Church of the United States of America. The plaintiffs in error and those members who

> recognize the authority of the Presbyterian Church of the United States of America are entitled to the possession and use of the property sued for.

Id. at 364-65 (emphasis added). *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012) (noting that the opinion of a court without jurisdiction is advisory to the extent it addresses issues other than the jurisdictional issue because the Texas Constitution does not authorize courts to make advisory decisions or issue advisory opinions); *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions."); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517 n.15 (Tex. 1995).

Courts of appeals have read *Brown* as applying a deference approach, and generally have applied deference principles to hierarchical church property dispute cases.[5] It is true that in Brown the Court

---

[5] *See Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App.—Austin 1991, writ denied) ("Where a congregation of a hierarchical church has split, those members who renounce their allegiance to the church lose any rights in the property involved and the property belongs to the members who remain loyal to the church. It is a simple question of identity."); *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197, 198 (Tex. App.—Amarillo 1988, no writ); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 706-07 (Tex. App.—Dallas 1986, writ ref d n.r.e.) (applying the deference rule); *Presbytery of the Covenant v. First Presbyterian*

determined it lacked jurisdiction over the ecclesiastical questions of whether the doctrines of the two general churches were dissimilar and whether their merger was proper. But it did not simply defer to the ecclesiastical authorities with regard to the property dispute. Instead, the Court addressed the merits of the title question by examining the deed using principles of Texas law. It concluded that the deed transferred the property to trustees of the local church that was a subordinate part of the merged Presbyterian Church of the United States of America, thus the believers recognizing the authority of that body were entitled to possession and use of the property. *Brown*, 116 S.W. at 365.

The method by which this Court addressed the issues in *Brown* remains the appropriate method for Texas courts to address such issues. Courts do not have jurisdiction to decide questions of an

---

Church, 552 S.W.2d 865, 871-72 (Tex. Civ. App.—Texarkana 1977, no writ) (determining that the question of which faction of a congregation that is part of a hierarchical religious body is entitled to church property is a question of identity answered by which faction is recognized by the higher, more important religious body); *Browning v. Burton*, 273 S.W.2d 131, 135 (Tex. Civ. App.—Austin 1954, writ ref d n.r.e) ("[T]he right to sell the property must come from the members of the religious organization in whom the beneficial title is vested or as the laws of that group may direct."); *see also Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975) (discussing Texas law) ("Here the national church is a party and, as a church of the hierarchical polity, has established its right to possession and control.").

ecclesiastical or inherently religious nature, so as to those questions they must defer to decisions of appropriate ecclesiastical decision makers. But Texas courts are bound to exercise jurisdiction vested in them by the Texas Constitution and cannot delegate their judicial prerogative where jurisdiction exists. Properly exercising jurisdiction requires courts to apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues. Thus, courts are to apply neutral principles of law to issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved.

We recognize that differences between ecclesiastical and non-ecclesiastical issues will not always be distinct, and that many disputes of the type before us will require courts to analyze church documents and organizational structures to some degree. Further, deferring to decisions of ecclesiastical bodies in matters reserved to them by the First Amendment may, in some instances, effectively determine the property rights in question. *See Milivojevich*, 426 U.S. at 709-10; *Brown*, 116 S.W. at 364-65. Nevertheless, in our view the neutral principles methodology simply requires courts to conform to fundamental principles: they fulfill their constitutional obligation to exercise jurisdiction where it exists, yet refrain from exercising jurisdiction where it does not exist. The neutral principles methodology also respects and enforces the manner in which religious entities and their adherents choose to structure their organizations and their property rights in the same manner as

those structures and rights are respected and enforced for other persons and entities.

We join the majority of states[6] that have considered the matter. We hold that Texas courts should use

---

[6] The parties differ on exactly which states have adopted neutral principles, and which have not. We interpret the decisions of the following state supreme courts to have adopted the basic concepts of neutral principles: *African Meth. Epis. Zion Church v. Zion Hill Meth. Church, Inc.*, 534 So.2d 224, 225 (Ala. 1988); *St. Paul Church, Inc. v. Bd. of Trs.*, 145 P.3d 541, 553 (Alaska 2006); *Ark. Presbytery v. Hudson*, 40 S.W.3d 301, 306 (Ark. 2001); *In re Episcopal Church Cases*, 198 P.3d 66, 70 (Cal. 2009); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 96 (Colo. 1986); *Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302, 316 (Conn. 2011); *E. Lake Meth. Epis. Church, Inc. v. Trs.*, 731 A.2d 798, 810 (Del. 1999); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. 2005); *Rector, Wardens, Vestrymen of Christ Church in Savannah v. Bishop of Epis. Diocese*, 718 S.E.2d 237, 241 (Ga. 2011); *Gospel Tabernacle Body of Christ Church v. Peace Publishers & Co.*, 506 P.2d 1135, 1138 (Kan. 1973); *Fluker Cmty. Church v. Hitchens*, 419 So.2d 445, 447 (La. 1982); *Attorney Gen. v. First United Bapt. Church of Lee*, 601 A.2d 96, 99 (Me. 1992); *From the Heart Church Ministries, Inc. v. African Meth. Epis. Zion Church*, 803 A.2d 548, 565 (Md. 2002); *Maffei v. Roman Catholic Archbishop*, 867 N.E.2d 300, 310 (Mass. 2007); *Piletich v. Deretich*, 328 N.W.2d 696, 701 (Minn. 1982); *Schmidt v. Catholic Diocese*, 18 So.3d 814, 824 (Miss. 2009); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 467 (Mo. 1984); *Hofer v. Mont. Dep't of Pub. Health*, 124 P.3d 1098, 1103 (Mont. 2005); *Medlock v. Medlock*, 642 N.W.2d 113, 128-29 (Neb. 2002); *Berthiaume v. McCormack*, 891 A.2d 539,547 (N.H. 2006); *Blaudziunas v.*

the neutral principles methodology to determine property interests when religious organizations are involved. Further, to reduce confusion and increase predictability in this area of the law where the issues are difficult to begin with, Texas courts must use only the neutral principles construct.

III. Discussion

A. Summary Judgment

The Episcopal Leaders filed a traditional motion for summary judgment on the basis that (1) TEC is a hierarchical church; (2) when hierarchical churches split, Texas courts defer to the decisions of the superior organization in the church hierarchy as to which faction comprises the true church; (3) the members loyal to TEC have been recognized by the Diocese's Bishop as the "true and proper representatives of the Episcopal Church of the Good Shepard"; and (4) the Canons and rules of TEC and the Diocese provide that property of a parish is to be held in trust for use of TEC and the respective Diocese, thus the parish property is held in trust for TEC, the Diocese, and through them, the loyal

---

Egan, 961 N.E.2d 1107, 1110 (N.Y. 2011); *Harris v. Matthews*, 643 S.E.2d 566, 570 (N.C. 2007); *Serbian Orthodox Church Congregation v. Kelemen*, 256 N.E.2d 212, 216 (Ohio 1970); *In re Church of St. James the Less*, 888 A.2d 795, 805-06 (Pa. 2005); *All Saints Parish Waccamaw v. Protestant Epis. Church in Diocese of S.C.*, 685 S.E.2d 163, 171 (S.C. 2009); *Foss v. Dykstra*, 342 N.W.2d 220, 222 (S.D. 1983); *Jeffs v. Stubbs*, 970 P.2d 1234, 1250-51 (Utah 1998); *Reid v. Gholson*, 327 S.E.2d 107, 112 (Va. 1985); *Wis. Conf. Bd. of Trs. v. Culver*, 627 N.W.2d 469, 475-76 (Wis. 2001).

faction. In both their motion and reply to the defendant's response, the Episcopal Leaders maintained that the Episcopal Church is heirarchical as a matter of law and the Anglican Leaders did not have authority to dissolve the relationship between Good Shepard and TEC and the Diocese.

We review the trial court's grant of summary judgment de novo. *Exxon Corp. v. Emerald Oil & Gas Co.*, 331 S.W.3d 419, 422 (Tex. 2010). To prevail on their motion, the Episcopal Leaders must have proved that, as a matter of law, they were entitled to judgment on the issues they pleaded and set out in their motion for summary judgment. *See* TEX. R. CIV. P. 166a(c).

Civil courts are constitutionally required to accept as binding the decision of the highest authority of a hierarchical religious organization to which a dispute regarding internal government has been submitted. *See Hosanna-Tabor*, ___U.S. ___, 132 S. Ct. at 705 (*citing Milivojevich*, 426 U.S. at 708). So what happens to the relationship between a local congregation that is part of a hierarchical religious organization and the higher organization when members of the local congregation vote to disassociate is an ecclesiastical matter over which civil courts generally do not have jurisdiction. *Milivojevich*, 426 U.S. at 713-14. But what happens to the property is not, unless the congregation's affairs have been ordered so that ecclesiastical decisions effectively determine the property issue.

The Anglican Church Leaders contend that even if TEC is hierarchical, not all decisions by hierarchical religious organizations are entitled to deference regarding ecclesiastical governmental matters. They

argue that in order to determine whether to defer to a church tribunal's decision, civil courts should examine the church's organizational documents and evaluate whether those documents expressly vest a church tribunal with authority to decide the specific issue in question. Citing *Milivojevich*, the Anglican Church Leaders urge that the Episcopal Church has not created hierarchical tribunals with authority to remove the vestry, exclude people from membership in the local church, or to adjudicate this property dispute. But nothing in *Milivojevich* requires a hierarchical religious entity to expressly establish which powers its religious tribunals may properly exercise. To the contrary, *Milivojevich* suggests that the First Amendment limits the jurisdiction of secular courts regarding the extent to which they may inquire into the form or type of decision-making authority a religious entity chooses to utilize, the specific powers of that authority, or whether the entity has followed its own procedures regarding controversies within the exclusive jurisdiction of the ecclesiastical authorities. *See Milivojevich*, 426 U.S. at 720. Further, courts are precluded from exercising jurisdiction over matters the First Amendment commits exclusively to the church, even where a hierarchical religious organization fails to establish tribunals or specify how its own rules and regulations will be enforced. *See Hosanna-Tabor*, ___ U.S. at ___, 132 S.Ct. at 704 (*citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N Am.*, 344 U.S. 94, 116 (1952)); *Watson*, 80 U.S. at 728-30.

We agree with the court of appeals that the record conclusively shows TEC is a hierarchical

organization. The Anglican Leaders do not dispute that Bishop Ohl is the highest ecclesiastical authority in the Diocese nor that he has recognized the new vestry aligned with the Episcopal Church Leaders as "the true and proper representatives of the Episcopal Church of the Good Shepherd." Whether Bishop Ohl was authorized to form a parish and recognize its membership, whether he could or did authorize that parish to establish a vestry, and whether he could or did properly recognize members of the vestry are ecclesiastical matters of church governance. The trial court lacked jurisdiction over and properly deferred to Bishop Ohl's exercise of ecclesiastical authority on those questions. *See Hosanna-Tabor*, ___ U.S. at ____, 132 S.Ct. at 704; *Brown*, 116 S.W. at 363.

But although we agree with the court of appeals as to these conclusions, we disagree with its determination that the question of who owns the property is inextricably linked to or determined by them. There is a difference between (1) the Bishop's determining which worshipers are loyal to the Diocese and TEC, whether those worshipers constituted a parish, and whether a parish properly established a vestry, and (2) whether the corporation's bylaws were complied with when the vote occurred to disassociate the corporation from the Diocese and TEC. After all, the Diocese required the Church to incorporate, and the corporation has a secular existence derived from applicable Texas law and the corporation's articles of incorporation and bylaws. The Diocese did not urge as grounds for summary judgment that amendment of the bylaws and articles of incorporation was ceded to the Diocese

so that whether to amend them was an ecclesiastical decision and not a secular one. Rather, the Episcopal Leaders alleged that they are entitled to the property because Bishop Ohl—after the vote to change the corporation's status took place in 2006 decided the loyal faction was the true membership of Good Shepherd, and "[a]ccording deference to the Bishop, [the Episcopal Leaders] assert that they are entitled to title, possession and use of [the property]."

The Episcopal Leaders neither pleaded nor urged as grounds for summary judgment that they are entitled to the property on the basis of neutral principles. Because the deference methodology is not to be used to determine this type dispute, the Episcopal Leaders' pleadings and motion will not support summary judgment.

The same result is mandated as to Good Shepherd's personal property for the reasons expressed as to the real property.

The judgment of the court of appeals must be reversed and the case remanded to the trial court.[7]

---

[7] Several amici supporting the deference approach contend that if the neutral principles of law approach is adopted, fairness precludes its retroactive application and that retroactive application of that approach will violate the First Amendment's Free-Exercise clause. These amici cite a footnote in *Jones* wherein the Supreme Court noted that "a claim that retroactive application of a neutral-principles approach infringes free-exercise rights" was not involved in that case since the Georgia Supreme Court "clearly enunciated its intent to follow the neutral-principles analysis" in two prior cases. *Jones*, 443 U.S. at 606 n.4. The parties do not raise the issue except for the

B. Remand

The parties advance arguments that may be presented to the trial court upon remand. To assist the trial court in the event they are, we address some of them. *See MCI Sales & Serv. v. Hinton*, 329 S.W.3d 475, 495 n.19 (Tex. 2010) (addressing an issue that would "feature prominently on retrial" in order to "provide guidance to the trial court" even though the issue was not necessary to the ultimate resolution of the case); *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997) ("Although resolution of this issue is not essential to our disposition of this case, we address it to provide the trial court with guidance in the retrial . . . .").

1. Control of the Corporation

We first address the Episcopal Leaders' argument that Good Shepherd's corporate powers were restricted by its affiliation with TEC. The Episcopal Leaders assert that TEC's structure, constitution, canons, and rules required parish corporations to remain part of and subject to TEC's authority. They point to the Good Shepherd corporate bylaws

---

Anglican Leaders including it in their reply brief and asking that it be considered if we decide the case on the Episcopal Leaders' proposed legal theory that churches are public charitable trusts or that under the "identity" approach, those who remain part of the hierarchical church of which the congregation was a part before the dispute arose are entitled to possess and control the property. Based on our disposition of the appeal, we need not and do not address it. However, we note that our analysis in *Brown* substantively reflected the neutral principles methodology.

confirming that Good Shepherd "is a constituent part of the Diocese of Northwest Texas and of the Protestant Episcopal Church . . . [and Good Shepherd] accedes to, recognizes, and adopts the General Constitution and Canons of that Church." But the vote at the called meeting was in favor of amending the bylaws to delete or change provisions referring to and adopting the canons and constitutions of TEC and the Diocese, and revoking any trusts in the corporate property in favor of them.[8] Absent specific, lawful provisions in a corporation's articles of incorporation or bylaws otherwise, whether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws are secular, not ecclesiastical, matters.

The Episcopal Leaders cite Texas Business Organizations Code § 3.009 and argue that Good Shepherd's articles of incorporation were required to expressly state that the corporation is a member-managed corporation in order for the corporation to be governed by its local members. This argument is unpersuasive to the extent it relates to whether an outside entity has authority to control the corporation. First, even if the corporation were not member managed, that would not mean that its

[8] The Episcopal Leaders argued in their reply to the Anglican Leaders' response to the motion for summary judgment that the votes on the resolutions to amend the corporation's bylaws and articles of incorporation failed because the resolutions passed by only a majority and not a two-thirds vote. Because neither party addresses the argument in this Court and the court of appeals did not address it, we do not.

management could be appointed by or was under the control of TEC, the Diocese, or Bishop Ohl, absent corporate documents and law so providing. Second, when Good Shepherd incorporated in 1974 the Non-Profit Corporations Act provided that "[t]he power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members, if any, but such power may be delegated by the members to the board of directors." *See* TEX. REV. CIV. STAT. art. 1396-2.09. The current statutory scheme changes the default rule on who is authorized to amend the bylaws, but under neither the former nor the current statute is an external entity empowered to amend them absent specific, lawful provision in the corporate documents. *See* TEX. BUS. ORGS. CODE § 3.009; TEX. REV. CIV. STAT. art. 1396-2.09 (current version at TEX. BUS. ORGS. CODE § 22.102) ("The power to alter, amend, or repeal the by-laws or to adopt new by-laws shall be vested in the members . . . .").

2. Control of the Property

It is undisputed that title to the real property is in the name of the corporation. It is further undisputed that the language of the deeds does not provide for an express trust in favor of TEC or the Diocese. Three reasons are suggested for the proposition that TEC should have possession of the property. The first is that under deference principles Bishop Ohl's decision identifying the loyal faction as the continuing Parish of Good Shepherd settled the question of who was entitled to the property and the corporation had no rights in the property other than holding title as trustee for the loyal faction, the Diocese, and TEC. The second is that under neutral

principles of law the initial adoption of the constitutions and canons of TEC and the Diocese by the corporation in its bylaws was irrevocable, so any action to revoke that part of the bylaws was void. The third is that because the corporation accepted donations of property and money based on its having subscribed and acceded to the Constitutions and canons of the Diocese and TEC, it cannot obtain the right to own and possess the property by unilaterally changing its articles of incorporation and bylaws.

In regard to the first question, we have held that Texas courts cannot simply use the deference or identity methodology principles to resolve this type of issue. Under neutral principles of law, the deeds conveying the property to Good Shepherd corporation "expressed no trust nor limitation upon the title," and therefore the corporation owns the property. *See Brown*, 116 S.W. at 364. Bishop Ohl could, as an ecclesiastical matter, determine which faction of believers was recognized by and was the "true" church loyal to the Diocese and TEC. Courts must defer to such ecclesiastical decisions. But under neutral principles, any decisions he made about the 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. Nor does his decision identifying the loyal faction as the continuing Episcopal Parish operating Good Shepherd church determine the property ownership issue under this record, as it might under the deference or identity methodology.

As to the second and third reasons, the Episcopal Leaders and several *amici* argue that Good Shepherd's articles of incorporation and bylaws evidence the fact that the corporation is subordinate to TEC and the Diocese. They do not argue, however, that the articles of incorporation, bylaws, or statutory law precluded amendments revoking any relationship with TEC and the Diocese. A religious organization may choose to organize as a domestic non-profit organization and acquire, own, hold, mortgage, and dispose of or invest its funds in property for the use and benefit of and in trust for a higher or other organization. *See*, e.g., TEX. BUS. ORGS. CODE § 2.102. But whether a religious organization *can* acquire and hold property in trust for another person or entity is a different question from whether it *has done* so, and is also a different question from whether such a choice is irrevocable.

The Episcopal Leaders argue that the Supreme Court's pronouncement in *Jones* that a superior heirarchical church organization's amendment to its constitution to include a trust provision is sufficient to establish a trust in property held by its subordinate churches. The gravamen of this argument is that in *Jones* the Supreme Court established substantive property and trust law to be applied in church property disputes, and under such law a subordinate organization cannot revoke a trust on its property once the superior body imposes it. In support of their argument the Episcopal Church leaders point to the following passage in *Jones*:

> At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will

> retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church*. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Jones, 443 U.S. at 606 (emphasis added) (footnote omitted). The Episcopal Leaders argue that TEC adopted canon 1.7.4 in 1979[9] in accordance with the *Jones* decision and thereby established a trust as to the property. Canon 1.7.4 provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission, or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission, or Congregation otherwise existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

The Episcopal Leaders cite other state courts for the proposition that an express trust canon like canon

---

[9] The Diocese incorporated this provision into its canons in 1982.

1.7.4 precludes the disassociating majority of a local congregation from retaining local parish property after voting to disaffiliate from the Church. *See The Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302 (Conn. 2011); *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); *In re Church of St. James the Less*, 888 A.2d 795 (Penn. 2005); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85 (Colo. 1986) (en banc).

The Missouri Court of Appeals recently addressed this issue in *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575 (Mo. Ct. App. 2012). There the court explained that:

> The intent of the . . . passage [in *Jones*] was to explain that, contrary to the dissent's characterization, a "neutral-principles" approach would not impose a particular property-rights regime on the parties, or infringe upon the rights of a denomination's adherents to order their affairs as they saw fit. Instead, like the discussion earlier in the Court's opinion, the quoted passage simply makes clear that, like "private-law systems in general," the application of neutral principles of state property and trust law would afford "flexibility in ordering private rights and obligations to reflect the intentions of the parties." [*Jones*, 443 U.S.] at 604, 99 S.Ct. 3020 (emphasis added). The recitation of the particular documents which might be employed to accomplish the parties' intentions can only be read as illustrative. We will not read the quoted passage as itself establishing

> the substantive property and trust law to be applied to church-property disputes, particularly where the very same passage contemplates (in its reference to "other neutral principles of state law") that the applicable law—like American property and trust law in general—would be state, rather than federal, law. Further, the statement that "the civil courts will be bound to give effect to" the parties' expressed intentions was explicitly conditioned on those intentions being "embodied in some legally cognizable form"—precisely the issue we address in this opinion.

Id. at 589.

Our view coincides with that of the Missouri court. We do not read Jones as purporting to establish substantive property and trust law that state courts must apply to church property disputes. *See Am. Elec. Power Co. v. Conn.*, ___ U.S. ____, 131 S. Ct. 2527, 2535 (2011) ("*Erie* 'le[ft] to the states what ought to be left to them,' and thus required 'federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states.'" (citations omitted)); *Jones*, 443 U.S. at 609 ("This Court, of course, does not declare what the law of Georgia is."). The Episcopal Leaders do not cite Texas law to support their argument that under the record before us Good Shepherd corporation was precluded from revoking any trusts actually or allegedly placed on its property.

IV. Response to the Dissent

The dissent agrees that neutral principles is the proper methodology to apply in this type of case, but

argues that summary judgment was properly granted for the Episcopal Leaders because (1) whether Good Shepherd can amend its articles of incorporation and bylaws to delete references to TEC and the Diocese and to revoke any trusts on the property, is at bottom an ecclesiastical matter that courts do not have jurisdiction to address; (2) Good Shepherd's bylaws agreeing to be bound by the Canons of TEC and the Diocese imposed a trust on the property that became irrevocable when Good Shepherd withdrew from TEC; and (3) Good Shepherd is estopped from revoking the trust in favor of TEC and the Diocese. The arguments do not persuade us.

As we have previously noted, the Episcopal Leaders' pleadings do not support summary judgment on the basis of neutral principles because they allege only that they are entitled to the property based on application of the deference methodology. Further, their only ground for summary judgment was that deference principles apply and the property goes to those members of the congregation recognized by Bishop Ohl as the true membership of Good Shepherd. But the deference methodology is inapplicable under our holding in this case. Moreover, going beyond the procedural issue, the dissent's arguments are not supported by the record.

The dissent's first argument, that Good Shepherd corporation could not amend its articles of incorporation and bylaws to omit references to TEC and the Diocese because doing so would circumvent "an ecclesiastical decision made by a higher authority within a hierarchical church structure," is in substance application of the deference

methodology. That position, if applied in this case, would subject the corporation's decision makers and the parish members who were qualified to vote under the bylaws to the dictates of persons not identified in corporate governing documents as having the right to make, control, or override corporate decisions. Despite agreeing that the neutral principles methodology applies, the dissent's argument ignores the fact that Good Shepherd was incorporated pursuant to secular Texas corporation law and Texas law dictates how the corporation can be operated, including how and when corporate articles and bylaws can be amended and the effect of the amendments. The dissent points to neither a requirement in the corporate documents that amendments are subject to approval by the Diocese or TEC, nor to any Texas law precluding the corporation from amending its articles and bylaws to exclude references to the Diocese and TEC. To the contrary, the articles of incorporation and bylaws specified that qualified parish members were entitled to elect the vestry and amend the bylaws.

Second, the dissent concludes that despite there being no trust language in either the deeds transferring property to Good Shepherd or in Good Shepherd's articles of incorporation or bylaws, the Dennis Canon, which provides in part that "all real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for TEC," and Good Shepherd's actions before the split conclusively establish Good Shepherd's intent to hold its property in trust for the benefit of TEC and the Diocese. The dissent then concludes that the trust is irrevocable because the Dennis Canon limits

Good Shepherd's authority over its property to the period of time for which it remains a part of and subject to TEC. But the Episcopal Leaders did not move for summary judgment on this basis. *See* TEX. R. CIV. P. 166a(c); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) ("Summary judgments, however, may only be granted upon grounds expressly asserted in the summary judgment motion."). Further, even assuming a trust was created by the Dennis Canon and Good Shepherd's bylaws and actions, we disagree that the Canon's terms make the trust expressly irrevocable as Texas law requires. The dissent interprets the Dennis Canon as limiting Good Shepherd's authority over the property to the time Good Shepherd remained affiliated with TEC and the Diocese. Assuming the Dennis Canon imposed a trust on Good Shepherd's property and limited Good Shepherd's authority over the property as the dissent argues, and we expressly do not decide whether it did, the Canon simply does not contain language making the trust *expressly* irrevocable. *See* TEX. PROP. CODE § 112.051 ("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."). Even if the Canon could be read to *imply* the trust was irrevocable, that is not good enough under Texas law. The Texas statute requires *express* terms making it irrevocable. *See Vela v. GRC Land Holdings, Ltd.*, 383 S.W.3d 248, 252-53 (Tex. App.—San Antonio 2012, no pet.) ("Because section 112.051(a) requires express language of irrevocability, we conclude that the use of the term

'forever' in the special warranty deed did not cause the Trust to become irrevocable.").

Under its third argument, the dissent would hold that the doctrine of estoppel applies and requires that the judgment of the court of appeals be affirmed. But summary judgment may only be granted based on grounds pleaded and expressly presented in a motion for summary judgment. TEX. R. CIV. P. 166a(c); *G & H Towing Co.*, 347 S.W.3d at 297. The Episcopal Leaders neither pleaded estoppel nor urged it as a ground for summary judgment.

V. Conclusion

The judgment of the court of appeals is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

Phil Johnson
Justice

OPINION DELIVERED: August 30, 2013

JUSTICE BOYD, joined by JUSTICE WILLETT, concurring.

I join in the Court's adoption of the neutral-principles approach to deciding non-ecclesiastical issues, and in its disposition reversing and remanding this case for the trial court to decide under that approach. I do not, however, join in Part III.B. ("Remand") or Part IV ("Response to the Dissent") of the Court's opinion, addressing issues that I believe the Court decides prematurely.

As the Court explains, "[t]he Episcopal Leaders neither pleaded nor urged as grounds for summary judgment that they are entitled to the property on the basis of neutral-principles," *ante* at ___, which we hold today is the only basis on which they could be entitled to the property. Moreover, as the Court acknowledges, even under the neutral-principles approach, courts must still defer "to religious entities' decisions on ecclesiastical and church polity questions," *ante* at ___, and "[t]he Diocese did not urge as grounds for summary judgment that amendment of the bylaws and articles of incorporation was ceded to the Diocese so that whether to do so was an ecclesiastical decision and not a secular one." *Ante* at ___.

Despite the lack of pleadings and evidence addressing the standards we adopt today, the Court decides that the amendment of the bylaws and articles did not involve ecclesiastical decisions entitled to deference and that the local parish either did not place the property in a trust or, if it did, did not make that trust irrevocable. The Dissent disagrees, concluding that the Episcopal Church and the Diocese should prevail under the neutral-

principles approach, either because the amendment of the bylaws and articles remains an ecclesiastical decision to which the courts must defer, or because, under neutral-principles, the parish placed the property in an irrevocable trust.

Both the Court and the Dissent make good arguments, but they are premature. Before we decide these fact-intensive issues, we should afford the parties an opportunity to fully develop their pleadings and the record under the neutral-principles approach that we have adopted today; and we would benefit by affording the courts below an opportunity to consider and decide these matters first. *See Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000) ("On an appeal from summary judgment, we cannot consider issues that the movant did not present to the trial court.") (citing *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex.1996) and *Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex.1992)).

For these reasons, I join in the Court's disposition, reversing and remanding the case for further proceedings in the trial court, but not in its discussion and resolution of issues that the parties have not yet fully litigated.

Jeffrey S. Boyd
Justice

OPINION DELIVERED: August 30, 2013

JUSTICE LEHRMANN, joined by CHIEF JUSTICE JEFFERSON, dissenting.

Today the Court applies state law governing corporations to bar summary judgment for TEC[1] on an ecclesiastical matter over which the Court has no jurisdiction. While I wholeheartedly agree with the Court that church property disputes should be resolved under the neutral-principles approach approved by the Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979), in my view, the Court has misapplied those principles in this case. In deciding that the secular law governing corporations controls the outcome of this matter, the Court places undue emphasis on the local church's incorporated status. Although a corporation is a separate entity with authority to amend its bylaws and articles of incorporation, it cannot do so when such an action results in the circumvention of an ecclesiastical decision made by a higher authority within a hierarchical church structure. In this case, the Court determines that Good Shepherd's incorporation allows it to disregard TEC's governing documents by withdrawing from TEC and taking church property with it—actions that go beyond the parish's authority. All the while, Good Shepherd has sought, agreed to, and received the benefits of association with TEC. Because the decision about whether a subordinate church entity can withdraw involves a matter of church polity, which is clearly an ecclesiastical issue, we have no jurisdiction over the

[1]Unless otherwise noted, abbreviated terms shall have the meaning specified in the Court's opinion.

subject under the First Amendment of the U.S. Constitution.

Moreover, even if this dispute could be resolved by conducting a purely secular analysis, summary judgment in favor of the Episcopal Leaders remains appropriate. Considering all the relevant statutes and documents, I would hold that a trust on the church property was created in favor of TEC and the Diocese, which became irrevocable upon Good Shepherd's vote to withdraw. Alternatively, I would hold that Good Shepherd was estopped from revoking the trust. Good Shepherd freely and eagerly chose to accept the use and benefit of the property at issue, paying nothing for the privilege. It cannot now unilaterally escape its part of the arrangement. Accordingly, I respectfully dissent.

I. Background

A. Good Shepherd Sought the Benefit of TEC Structure

As the Court notes, TEC is structured in three tiers, from the General Convention (at the highest level) to the regional dioceses (at the intermediate level) to the local congregations, divided into parishes, missions, and congregations (at the lower level). *See* ___ S.W.3d at ___. In turn, each subordinate Episcopal affiliate must accede and be subject to the Constitution and Canons of the higher entity or entities. *See id.* Good Shepherd expressed this agreement to be bound by the higher entities repeatedly and consistently until its vote to withdraw in 2006.

When the original members of Good Shepherd first applied to TEC to organize a mission in 1965, the

applicants stated that they were "desirous of obtaining the services of the Church, and ready, according to our several abilities, to sustain the same." In accordance with diocesan Canon, the applicants further "promise[d] conformity to [TEC's] Doctrine, Discipline, and Worship" and "to the Constitution and Canons of the General Convention and the Diocese of Northwest Texas." In the 1972 Instrument of Donation declaring the church building and grounds free from debt or lien, Good Shepherd's Vicar and Bishop's Committee further stated "that the building and grounds are secured from the danger of alienation, either in whole or in part, from those who profess and practice the Doctrine, Discipline, and Worship of this Church." Good Shepherd applied for and was granted parish status in 1974, reaffirming in its petition that the signatories thereto were "conscientiously attached to the Doctrine, Discipline and Worship of the Protestant Episcopal Church in the United States of America."

Upon being granted parish status, Good Shepherd incorporated in accordance with diocesan Canon. The Articles of Incorporation provided that "[t]he corporation is organized for religious purposes in order to provide a location for religious worship, education, and the furtherance of the Christian religion." The initial Bylaws, adopted in January 1975, state in Article I:

> The Church of the Good Shepherd is situated in San Angelo, Tom Green County, Texas. It is a constituent part of the Diocese of Northwest Texas and of the Protestant Episcopal Church in the United States of America. The Parish

> accedes to, recognizes, and adopts the General Constitution and Canons of that Church, and the Constitution and Canons of the Diocese of Northwest Texas and acknowledges the authority of the same.

Before the underlying dispute arose, Good Shepherd amended its Bylaws twice (once in 1994 and once in 1998), with no material changes made to Article I.

B. Church Property Placed in Trust

As discussed by the Court, in 1979 TEC amended its Canons, adding Canon I.7.4 (often referred to as the "Dennis Canon") and I.7.5 for the purpose of placing church property in trust:

> **Sec. 4.** All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property *so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitutions and Canons.*
>
> **Sec. 5.** The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, *but no such action shall be necessary for the existence and validity of the trust.*

(Emphasis added).

In 1982, after TEC enacted the Dennis Canon, the Diocese conveyed the relevant property to Good Shepherd. As the Court notes, the deed itself contained no trust language or other limitation on the conveyance. Finally, in 2006, Good Shepherd's members passed several resolutions by majority vote, with full knowledge of the Dennis Canon to which Good Shepherd had agreed to be bound. Pursuant to these resolutions, Good Shepherd voted to "withdraw[] from, end its membership in, and dissolve[] its union with" TEC and the Diocese. It further voted to amend its Bylaws to remove any reference to TEC, as well as to revoke any trust placed on church property for the benefit of TEC or the Diocese.

II. Analysis of Neutral-Principles Approach

In *Jones v. Wolf*, the United States Supreme Court recognized as constitutional the neutralprinciples approach to resolving church property disputes. 443 U.S. at 602. While courts remain prohibited under this approach "from resolving [such] disputes on the basis of religious doctrine or practice," they may apply "objective, well-established concepts of trust and property law" so long as it involves "no consideration of doctrinal matters." *Id.* at 602–03. This approach, the Supreme Court concluded, "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." Id. at 603. Further,

> the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary

> clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy.

Id. The Supreme Court cautioned, however, that in examining any religious documents to discern the intent of the parties, "a civil court must take care to [do so] in purely secular terms." *Id.* at 604. Thus, if the interpretation of such documents "would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.* The Supreme Court stressed that "the outcome of a church property dispute is not foreordained" under a neutral-principles approach. *Id.* at 606. Instead,

> [a]t any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Id. (emphasis added).

Today, this Court adopts the neutral-principles approach for resolution of disputes involving religious organizations. *See* ___ S.W.3d at ___. I fully support this adoption and agree that this approach is the preferable method of resolving such controversies. However, the neutral-principles approach only allows courts to become involved in non-ecclesiastical decisions; it does not confer jurisdiction upon courts to decide matters over which they have no constitutional authority. In my view, the Court oversteps this boundary and ignores its constitutional mandate.

A. Improper Resolution of Ecclesiastical Issues

In adopting the neutral-principles approach, the Court recognizes that "differences between ecclesiastical and non-ecclesiastical issues will not always be distinct" and that "deferring to decisions of ecclesiastical bodies in matters reserved to them by the First Amendment may, in some instances, effectively determine the property rights in question." *Id.* at ___. Unlike the Court, however, I believe proper deference with respect to such matters determines the property rights at issue in this case. When deciding whether a matter invokes constitutional protection, I believe that we should err on the side of caution, upholding constitutional mandates when in doubt.

The Court divides the questions of Good Shepherd *parish's* authority to withdraw from TEC and Good Shepherd *corporation's* authority to withdraw by amending its bylaws and articles of incorporation. *Id.* at ___. In my view, however, the two inquiries are inextricably linked. The Court goes on to conclude that, because the parish at issue was incorporated

and because there was no specific TEC or diocesan restriction on the corporation's authority to amend its bylaws and articles of incorporation, the validity of Good Shepherd's withdrawal by amendment of those documents was not an ecclesiastical question. *See id.* I am unconvinced that the incorporated status of the parish removes the issue from the realm of church polity. If Bishop Ohl's determination that the parish could not withdraw from TEC is a binding ecclesiastical decision,[2] it does not cease to be so because of the corporate form taken by the parish. Such a determination permits civil courts to conduct an end-run around the First Amendment's prohibition against inquiry into and resolution of religious issues by effectively allowing the lower church entity's unilateral decision to trump the higher entity's authority over matters of church polity.

Notably, the Court recognizes that "what happens to the relationship between a local congregation that is part of a hierarchical religious organization and the higher organization when members of the local congregation vote to disassociate is an ecclesiastical matter over which civil courts generally do not have jurisdiction." *Id.* at ___ (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713–14 (1976)). "But what happens to the property is not," the Court continues, "unless the congregation's affairs have been ordered so that ecclesiastical decisions

[2] This determination is unrelated to the undisputed right of the individual members of any religious organization to withdraw their affiliation should they choose to do so.

effectively determine the property issue." *Id.* It follows that Bishop Ohl's determination regarding the parish's authority (or, more accurately, lack of authority) to withdraw from TEC is a binding ecclesiastical decision, irrespective of the corporate form taken by the parish. In turn, since Good Shepherd did not validly withdraw from TEC, Good Shepherd remained a constituent thereof and consequently remained subject to TEC's and the Diocese's Constitutions and Canons.

There appears to be no dispute that, as a TEC parish, Good Shepherd could not pick and choose those portions of the governing documents by which it wished to be bound. And the Dennis Cannon and its diocesan counterpart expressly state that the church property is held in trust for TEC and the Diocese. Thus, if Good Shepherd had no authority to withdraw, it had no authority to revoke its adherence to the Canons or to revoke the trust placed on the property by virtue thereof. Moreover, the Canons condition Good Shepherd's authority over the church property on its "remain[ing] a part of, and subject to, this Church and its Constitutions and Canons." By purporting to withdraw from TEC, then, Good Shepherd took the very action that would strip it of its rights in the property. Good Shepherd may not avoid the consequences of its actions—consequences to which it had freely agreed—simply by voting to no longer be subject to those consequences.

B. Application of Secular Law

1. Intent of Parties to Create Trust

Even if this dispute could be resolved in a purely secular manner and without interference with TEC's ecclesiastical determinations, I would still hold that the Episcopal Leaders met their summary judgment burden. The Anglican Leaders argue that no valid trust exists on the property and that, to the extent one did exist, it was revoked upon Good Shepherd's 2006 amendment of its Bylaws. I disagree.

Under the Texas Trust Code, "[a] trust is created only if the settlor manifests an intention to create a trust." TEX. PROP. CODE § 112.002. Further, the intent to create a trust must be expressed in writing. *Id.* § 112.004. As discussed above, neither the deed conveying the property at issue to Good Shepherd nor Good Shepherd's Articles of Incorporation and Bylaws reference the creation of a trust. Courts in other states with similar trust statutes have struggled to determine the issue of whether the Dennis Canon, or similarly worded provisions in the governing documents of other hierarchical churches, creates a trust under such circumstances. *See Jones*, 443 U.S. at 606 (endorsing the means utilized by TEC to create a trust by noting that, as an alternative means of ensuring retention of the property by the higher entity, "the constitution of the general church can be made to recite an express trust in favor of the denominational church").

In *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.* (*Timberridge*), the Georgia Supreme Court held that a local church (Timberridge) affiliated with the hierarchical Presbyterian Church (U.S.A.) (PCUSA) held property in trust for the national church based in part on an explicit trust provision in PCUSA's governing Book

of Order, as well as on language in the local church's charter documents. 719 S.E.2d 446 (Ga. 2011). Following a 1982 amendment to the Book of Order by PCUSA's predecessor to add the property trust provision, [3] Timberridge "functioned as a regular member of the national church" until a property dispute arose in 2007, leading to Timberridge's withdrawal from PCUSA. *Id.* at 449–50. In applying the neutral principles doctrine to the dispute, the court aptly noted:

> We review all of these materials [deeds, state statutes, and governing documents of the local and national churches], keeping in mind that the outcome of these church property disputes usually turns on the specific facts presented in the record, that the neutral principle factors are interrelated, and that our ultimate goal is to determine "the intentions of the parties" at the local and national level regarding beneficial ownership of the property at issue as expressed "before the dispute erupt[ed]" in a "legally cognizable form."

Id. at 450 (quoting *Jones*, 443 U.S. at 603). The court found persuasive that Timberridge's Articles of Incorporation "proclaimed [its] allegiance to the PCUSA Book of Order" containing the trust provision and noted that "at no time during the more than two decades before this dispute erupted and the eight years after it was deeded the property at issue

---

[3] The northern and southern branches of the Presbyterian Church formally reunited as 3 PCUSA in 1983, with the Book of Order retaining the trust provision. 719 S.E.2d at 448.

did [Timberridge] even *seek* to amend its Articles to demonstrate any different intent." *Id.* at 455.

By contrast, in *From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zionist Church*, the Maryland Court of Appeals held the evidence established that the local incorporated church "did not, in fact, consent to the trust provisions" in the national church's Book of Discipline. 803 A.2d 548, 569 (Md. 2002). Key to the court's holding was the local church's deletion, many years before the property dispute arose, of a requirement in its charter documents to act in accordance with the Book of Discipline. The court also noted the church's addition of a provision in those documents addressing the disposition of church property upon dissolution of the corporation, as well as the absence of trust language in the deed. This omission was significant, the court noted, because the Book of Discipline required such language, but the national church had nevertheless acquiesced in the "deeding irregularity." *Id.*

Like the local church in *Timberridge*, Good Shepherd's corporate documents "proclaimed allegiance" to TEC's and the Diocese's Constitutions and Canons. 719 S.E.2d at 455. The property trust provision was added to the TEC Canons in 1979, before the church property was conveyed to Good Shepherd. Further, like the church in *Timberridge*, and notably in contrast to the church in *From the Heart Church Ministries*, "at no time during the more than two decades before this dispute erupted and the [twenty-four] years after it was deeded the property at issue did [Good Shepherd] even seek to amend its [corporate documents] to demonstrate any

different intent." *Id.* In fact, Good Shepherd amended its Bylaws twice before the underlying dispute arose, leaving untouched the provision agreeing to be bound by the TEC and Diocesan Canons.[4] Moreover, the absence of trust language from the deed to the property at issue is not a departure from the requirements in the Canons and thus does not, in and of itself, raise suspicion about Good Shepherd's intent to hold the property in trust. *See From the Heart Church Ministries, Inc.*, 803 A.2d at 569.

The Court cites with approval the Missouri Court of Appeals' opinion in *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575 (Mo. Ct. App. 2012), which further supports the conclusion that a trust was imposed on the church property in this case. In *Heartland Presbytery*, the court held that a local church corporation's Articles of Agreement, which stated that the local church was "connected with and ecclesiastically subject to" PCUSA's predecessor, "[did] not establish its agreement to be bound by the property provisions of the PCUSA's Constitution; instead, it suggests the opposite." *Id.* at 585, 587. Noting that "[t]he 'connected with' language . . . cannot alone establish PCUSA's trust interest," the court went on to examine the statement that the local church "would be '*ecclesiastically* subject to' the denomination." *Id.*

---

[4] Bishop Ohl also testified by affidavit that Good Shepherd participated in the annual Diocese Conventions each year from 1966 through 2006. This includes 1984, the year the Diocese added the property trust provision to its Canons.

at 586. The latter statement, the court concluded, implied that the local church "would *not* be subject to the denomination's authority in *non*-ecclesiastical matters." *Id.* The Articles also provided that title to any property acquired "vests, without qualification, in [the local church] itself, in its corporate capacity," and that such property "can only be conveyed to others pursuant to specific authorization of its members . . . and of its Board of Trustees." *Id.* at 587. These provisions, the court held, lent further credence to the conclusion that the local church did not consent to the PCUSA trust provision. *Id.*

In this case, Good Shepherd's corporate documents contained the kind of language that was conspicuously absent from the Articles of Agreement at issue in *Heartland Presbytery*. Prior to the split with TEC and the Diocese, Good Shepherd's Bylaws stated not only that the church "is a constituent part of the Diocese of Northwest Texas and of the Protestant Episcopal Church in the United States of America," but also that it "accedes to, recognizes, and adopts the General Constitution and Canons of that Church, and the Constitution and Canons of the Diocese of Northwest Texas and acknowledges the authority of the same."[5] This is consistent with Good

[5] The local church's Bylaws in *Heartland Presbytery* did state that PCUSA's Constitution was "obligatory upon it and its members" and that the Bylaws "shall be construed only in conformity" with the Constitution. 364 S.W.3d at 587. However, the court held that these provisions conflicted with the local church's Articles of Agreement and that, under state law, the Articles controlled. Id. Here, there is no conflict between Good Shepherd's Articles of Incorporation and its Bylaws; that

Shepherd's promise of "conformity to" TEC Doctrine when it originally applied for mission status and the declaration in its parish application that it was "conscientiously attached" to that Doctrine. Thus, unlike in *Heartland Presbytery*, Good Shepherd's corporate documents constitute an "effective expression of [Good Shepherd's] intent to be bound by [TEC's and the Diocese's Canons]," which have included the property trust provisions since 1979 and 1984, respectively.[6] *Id.* at 591.

In sum, under a neutral analysis of the relevant documents, I would hold that the EpiscopalLeaders met their summary judgment burden with respect to the creation of a trust. In light of the property trust provisions in TEC's and the Diocese's Canons, Good Shepherd's corporate documents agreeing to be bound by those Canons, Good Shepherd's periodic amendment of its corporate documents without altering its allegiance to the Canons, and Good Shepherd's continued participation in Diocesan Conventions prior to the dispute, the Episcopal Leaders conclusively established an expression of intent by Good Shepherd to hold its property in trust for the benefit of TEC and the Diocese.

2. The Trust Is Expressly Irrevocable

---

is, nothing in the Articles of Incorporation is negated, or even affected, by the statement in the Bylaws that Good Shepherd acceded to TEC's and the Diocese's Constitutions and Canons.

[6] This is consistent with the Texas Trust Code, which provides for creation of a trust by "a property owner's declaration that the owner holds the property as trustee for another person." TEX. PROP. CODE § 112.001(1).

The Court holds that, regardless of whether Good Shepherd agreed to hold the church property in trust, the trust was revocable under Texas law. ___ S.W.3d at ___. I disagree.

The Court correctly notes that, under Texas law, a trust is revocable unless expressly made irrevocable. TEX. PROP. CODE § 112.051. However, "[n]o specific words of art are required to create an irrevocable trust" so long as the instrument "reflect[s] the trustor's intent to make the trust irrevocable." *Vela v. GRC Land Holdings, Ltd.*, 383 S.W.3d 248, 250–51 (Tex. App.—San Antonio 2012, no pet.) (mem. op.) (citing *McCauley v. Simmer*, 336 S.W.2d 872, 881 (Tex. Civ. App.—Houston 1960, writ dism'd), and *Austin Lake Estates Recreation Club, Inc. v. Gilliam*, 493 S.W.2d 343, 347 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.)). I would hold that the terms of the property trust provision in the Dennis Canon, to which Good Shepherd agreed to be bound, expressly rendered the trust irrevocable upon Good Shepherd's withdrawal from TEC.

As noted above, the property trust provision in TEC's Canons (with a substantially similar provision in the diocesan Canons) states:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property *so long as the particular Parish, Mission or Congregation*

> *remains a part of, and subject to, this Church and its Constitutions and Canons*.

(Emphasis added). This provision clearly limits a parish's authority over church property by requiring that the parish be "a part of, and subject to," TEC. Thus, if a parish withdraws from TEC, it necessarily loses such authority to the extent it is inconsistent with holding the property in trust for TEC and the Diocese. While the Dennis Canon does not use the term "irrevocable," it nevertheless reflects Good Shepherd's intent to make the trust irrevocable upon its withdrawal from TEC and was thus sufficient to create an irrevocable trust under Texas law.

The Dennis Canon's language distinguishes the property trust provision here from the national church's trust provision at issue in *From the Heart Church Ministries*, which did not address the situation in which "a local church disaffiliates from the denomination." 803 A.2d at 571. Without such language, the Maryland Court of Appeals declined to find that the trust was irrevocable, concluding that "[c]onsent to holding property in trust during the course of affiliation does not automatically constitute consent to relinquishing that property once the affiliation terminates." *Id.* Here, Good Shepherd did more than consent to holding the property in trust during the course of its affiliation with TEC; it also consented to its authority over the property being contingent on that affiliation. As a result, even if Good Shepherd had the authority to disaffiliate from TEC and the Diocese by proper vote under its Articles and Bylaws, I cannot agree with the Court that Good Shepherd could revoke the trust and maintain control of the property upon its withdrawal.

See Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 108 (Colo. 1986) (holding that a local church's articles of incorporation and bylaws that were similar to Good Shepherd's, along with the relevant provisions of TEC's Canons, "foreclose the possibility of the withdrawal of property from the parish simply because a majority of the members of the parish decide to end their association with [TEC]").

The Supreme Court confirmed in *Jones v. Wolf* that "before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property." 443 U.S. at 606. That is exactly what the parties did in this case. Good Shepherd agreed to hold the church property in trust for TEC and the Diocese, and any authority it otherwise had over the property terminated when it withdrew from TEC.

3. Good Shepherd Is Estopped from Revoking the Trust

Alternatively, I believe the Episcopal Leaders prevail under the doctrine of quasi-estoppel. The Episcopal Leaders did not formally plead quasi-estoppel as an affirmative defense, though they did allege facts to support it.[7] The summary judgment evidence establishes the applicability of the doctrine and precludes Good Shepherd from claiming that it may revoke the trust in conjunction with its

---

[7] The Anglican Leaders counterclaimed for a declaratory judgment regarding ownership and possession of the church property. In their First Amended Petition, the Episcopal Leaders argued that they "relied on the promises and statements" of Good Shepherd in "provid[ing] financial support" thereto.

withdrawal from TEC. "Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000) (citation omitted).

Prior to the 2006 dispute, Good Shepherd: had promised conformity to TEC Doctrine and to TEC's and the Diocese's Constitutions and Canons; had accepted grants as well as no-interest and low-interest loans from TEC and the Diocese to assist in building the church; had declared that the church property was "secured from the danger of alienation . . . from those who profess and practice the Doctrine, Discipline, and Worship of this [Episcopal] Church"; and had accepted the conveyance of the property from the Diocese after the property trust provisions were added to TEC's Canons. Having made these promises and accepted these benefits, Good Shepherd may not now contend it is free to disregard these positions because a majority of its members have voted to do so.

III. Conclusion

In denying summary judgment, the Court oversteps its constitutional bounds to resolve ecclesiastical matters over which it has no authority. Further, the Court ignores language in the relevant documents clarifying that Good Shepherd's authority over the church property is contingent upon its affiliation with TEC and the Diocese. Finally, Good Shepherd is barred from revoking the trust on the

property in conjunction with its withdrawal from TEC.

For these reasons, I am compelled to respectfully express my dissent.

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 30, 2013

APPENDIX B

IN THE SUPREME COURT OF TEXAS

No. 11-0265

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.,

Petitioners,

v.

THE EPISCOPAL CHURCH, ET AL.,

Respondents.

ON DIRECT APPEAL FROM THE 141ST DISTRICT COURT, TARRANT COUNTY, TEXAS

Argued October 16, 2012

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE GREEN, and JUSTICE GUZMAN joined, and in Parts I, II, III, and IV-A of which CHIEF JUSTICE JEFFERSON joined.

JUSTICE WILLETT filed a dissenting opinion, in which JUSTICE LEHRMANN, JUSTICE BOYD, and JUSTICE DEVINE joined.

This direct appeal involves the same principal issue we addressed in *Masterson v. Diocese of Northwest Texas*, ___ S.W.3d ___ (Tex. 2013): what methodology is to be used when Texas courts decide which faction is entitled to a religious organization's property following a split or schism? In *Masterson* we held that the methodology referred to as "neutral principles of law" must be used. But, in this case the

trial court granted summary judgment on the basis of the "deference" or "identity" methodology, and the record does not warrant rendition of judgment to either party based on neutral principles of law.

We reverse and remand to the trial court for further proceedings.

I. Background

The Episcopal Church (TEC) is a religious organization founded in 1789. It has three structural tiers. The first and highest is the General Convention. The General Convention consists of representatives from each diocese and most of TEC's bishops. It adopts and amends TEC's constitution and canons. The second tier is comprised of regional, geographically defined dioceses. Dioceses are governed by their own conventions. Each diocese's convention adopts and amends its own constitution and canons, but must accede to TEC's constitution and canons. The third tier is comprised of local congregations. Local congregations are classified as parishes, missions, or congregations. In order to be accepted into union with TEC, missions and congregations must subscribe to and accede to the constitutions and canons of both TEC and the Diocese in which they are located.

In 1982 the Episcopal Diocese of Fort Worth (the Diocese or Fort Worth Diocese) was formed after the Episcopal Diocese of Dallas voted to divide into two parts. The Fort Worth Diocese was organized "pursuant to the Constitution and Canons of the Episcopal Church" and its convention adopted a constitution and canons. The Diocese's constitution provided that all property acquired for the Church

and the Diocese "shall be vested in [the] Corporation of the Episcopal Diocese of Fort Worth." The canons of the Diocese provided that management of the affairs of the corporation "shall be conducted and administered by a Board of Trustees of five (5) elected members, all of whom are either Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese." The Bishop of the Diocese was designated to serve as chair of the board of the corporation. After adopting its constitution and canons the Diocese was admitted into union with TEC at TEC's December 1982 General Convention.

In February 1983, the Fort Worth Diocese filed articles of incorporation for the Fort Worth Corporation. That same year the Dallas and Fort Worth Dioceses filed suit in Dallas County and obtained a judgment transferring part of the Dallas Diocese's real and personal property to the Fort Worth Diocese. The 1984 judgment vested legal title of the transferred property in the Fort Worth Corporation, except for certain assets for which the presiding Bishop of the Dallas Diocese and his successors in office had been designated as trustee. The judgment transferred the latter assets to the Bishop of the Fort Worth Diocese and his successor in office as trustee.

Doctrinal controversy arose within TEC, leading the Fort Worth Corporation to file amendments to its articles of incorporation in 2006 to, in part, remove all references to TEC. The corporate bylaws were similarly amended. The 2007 and 2008 conventions of the Fort Worth Diocese voted to withdraw from TEC, enter into membership with the Anglican

Province of the Southern Cone, and adopt amendments to the Diocese's constitution removing references to TEC.[1]

TEC responded. It accepted the renunciation of Jack Iker, Bishop of the Fort Worth Diocese, and TEC's Presiding Bishop removed Iker from all positions of authority within TEC. In February 2009, TEC's Presiding Bishop convened a "special meeting of Convention" for members of the Fort Worth Diocese who remained loyal to TEC. Those present at the meeting elected Edwin Gulick as Provisional Bishop of the Diocese and Chair of the Board of Trustees for the Fort Worth Corporation. The 2009 Convention also voted to reverse the constitutional amendments adopted at the 2007 and 2008 Conventions and declared all relevant offices of the Diocese to be vacant. Bishop Gulick then appointed replacements to the offices declared vacant, including the offices of the Trustees of the Corporation. TEC recognized the persons elected at the 2009 Convention as the duly constituted leadership of the Diocese.

TEC, Rev. C. Wallis Ohls, who succeeded Bishop Gulick as Provisional Bishop of the Episcopal Diocese of Fort Worth, and clergy and lay individuals loyal to TEC (collectively, TEC) filed suit against The Episcopal Diocese of Fort Worth, the Fort Worth Corporation, Bishop Iker, the 2006 trustees of the corporation, and former TEC members (collectively,

---

[1] Three parishes in the Diocese did not agree with the actions and withdrew from the Diocese. The Fort Worth Corporation transferred property used by the withdrawing parishes to them.

the Diocese), seeking title to and possession of the property held in the name of the Diocese and the Fort Worth Corporation.[2] Both TEC and the Diocese moved for summary judgment. A significant disagreement between the parties was whether the "deference" (also sometimes referred to as the "identity") or "neutral principles of law" methodology should be applied to resolve the property issue. TEC contended that pursuant to this Court's decision in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), the deference methodology has been applied in Texas for over a century and should continue to be applied. Under that methodology, it argued, TEC was entitled to summary judgment because it recognized Bishops Gulick and Ohls, the leaders elected at the 2009 convention, and the appointees of the Bishops as the true and continuing Episcopal Diocese. TEC also contended that even if the neutral principles methodology were applied, it would be entitled to summary judgment. The Diocese, on the other hand, contended that in *Brown* this Court effectively applied the neutral principles methodology without specifically calling it by that name, and Texas courts have continued to substantively apply that methodology to resolve property issues arising when churches split. Under the neutral principles methodology, the Diocese argued, it was entitled to

---

[2] The defendants sought mandamus in the court of appeals regarding whether the attorneys for TEC had authority to file suit on behalf of the Corporation and the Diocese. *See In re Salazar*, 315 S.W.3d 279 (Tex. App.—Fort Worth 2010, orig. proceeding). The court of appeals conditionally granted mandamus relief, holding they did not. *Id.* at 285-86.

summary judgment affirming its right to the property. The Diocese also maintained that even if the deference methodology were applied, it would still be entitled to summary judgment.[3]

The trial court agreed with TEC that deference principles should apply, applied them, and granted summary judgment for TEC. The Diocese sought direct appeal to this Court and we noted probable jurisdiction. We had previously granted the petition for review in Masterson, and we heard oral arguments for both cases on the same day.

II. Jurisdiction

The Government Code provides that "[a]n appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state." TEX. GOV'T CODE § 22.001(c). The trial court granted summary judgment and issued injunctions ordering the defendants to surrender all Diocesan property and control of the Diocesan Corporation to the Episcopal Diocese of Fort Worth, and ordering the defendants to desist from holding themselves out as leaders of the Diocese. While the trial court order

---

[3] The Diocese also asserts that we should dismiss certain tort claims TEC brought against individual defendants. The Diocese moved for summary judgment to dismiss these claims and argues that if we conclude the trial court erred in determining who was entitled to the property at issue, we should render the judgment the trial court should have rendered and dismiss the tort claims. Because of our disposition of the issue regarding who is entitled to the property, we do not address those claims.

did not explicitly address the constitutionality of a statute, "[t]he effect of the trial court's order . . . is what determines this Court's direct appeal jurisdiction." *Tex. Workers' Compensation Comm'n v. Garcia*, 817 S.W.2d 60, 61 (Tex. 1991).

In its motion for summary judgment TEC argued, in part, that the actions of the Board of Trustees in amending the Fort Worth Corporation's articles of incorporation were void because the actions went beyond the authority of the corporation, which was created and existed as an entity subordinate to a Diocese of TEC. TEC argued that "[t]he secular act of incorporation does not alter the relationship between a hierarchical church and one of its subordinate units" and that finding otherwise "would risk First Amendment implications." The Diocese, on the other hand, argued that the case was governed by the Texas Non-Profit Corporation Act[4] and the Texas Uniform Unincorporated Nonprofit Association Ace[5]; under those statutes a corporation may amend its articles of incorporation and bylaws; and TEC had no power to limit or disregard amendments to the Corporation's articles and bylaws.

In its summary judgment order the trial court cited cases it said recognized "that a local faction of a hierarchical church may not avoid the local church's obligations to the larger church by amending corporate documents or otherwise invoking nonprofit corporations law." The trial court substantively ruled that because the First Amendment to the

---

[4] TEX. REV. CIV. STAT. arts. 1396-1.01 to 1396-11.02

[5] TEX. REV. CIV. STAT. art. 1396-70.01

United States Constitution deprived it of jurisdiction to apply Texas nonprofit corporation statutes, applying them to determine the parties' rights would violate Constitutional provisions. The court's injunction requiring defendants to surrender control of the Fort Worth Corporation to the Episcopal Diocese of Fort Worth was based on that determination. The effect of the trial court's order and injunction was a ruling that the Non-Profit Corporation Act would violate the First Amendment if it were applied in this case. Accordingly, we have jurisdiction to address the merits of the appeal.

III. "Deference" and "Neutral Principles"

In *Masterson* we addressed the deference and neutral principles methodologies for deciding property issues when religious organizations split. ___ S.W.3d at ___. Without repeating that discussion in full, suffice it to say that generally courts applying the deference approach to church property disputes utilize neutral principles of law to determine where the religious organization has placed authority to make decisions about church property. *See Jones v. Wolf*, 443 U.S. 595, 603-04 (1979). Once a court has made this determination, it defers to and enforces the decision of the religious authority if the dispute has been decided within that authority structure. *Id.* But courts applying the neutral principles methodology defer to religious entities' decisions on ecclesiastical and church polity issues such as who may be members of the entities and whether to remove a bishop or pastor, while they 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.

See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09 (1976). We concluded in *Masterson* that the neutral principles methodology was the substantive basis of our decision in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), and that Texas courts should utilize that methodology in determining which faction of a religious organization is entitled to the property when the organization splits. ___ S.W.3d at ___. We also concluded that even though both the deference and neutral principles methodologies are constitutionally permissible, Texas courts should use only the neutral principles methodology in order to avoid confusion in deciding this type of controversy. *Id.*

IV. Application

A. Summary Judgment—Deference

Based on our decision in *Masterson*, we hold that the trial court erred by granting summary judgment to TEC on the basis of deference principles. ___ S.W.3d at ___.

B. Summary Judgment—Neutral Principles

TEC asserts that application of neutral principles may violate free-exercise protections if, for example, the Diocese is permitted to void its commitments to church laws because the specific formalities of Texas law governing trusts were not followed or if they are applied retroactively. *See Jones*, 443 U.S. at 606 (noting that the case did not "involve a claim that retroactive application of a neutral-principles approach infringes free exercise rights"). But TEC recognizes that whether application of the neutral principles approach is unconstitutional depends on how it is applied. *See id.* at 606 ("It remains to be

determined whether the Georgia neutral-principles analysis was constitutionally applied on the facts of this case."). Because neutral principles have yet to be applied in this case, we cannot determine the constitutionality of their application. Further, TEC does not argue that application of procedural matters such as summary judgment procedures and burdens of proof are unconstitutional. Thus, we address the arguments of the parties regarding who is entitled to summary judgment pursuant to neutral principles and conclude that neither TEC nor the Diocese is. *See Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) (noting that when both parties move for summary judgment and the trial court grants one motion and denies the other, appellate courts consider the summary-judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered).

Under the neutral principles methodology, ownership of disputed property is to be determined by considering evidence such as deeds to the properties, terms of the local church charter (including articles of incorporation and bylaws, if any), and relevant provisions of governing documents of the general church. *E.g.*, *Jones*, 443 U.S. at 602-03; *see Presbyterian Church v. E. Heights*, 167 S.E.2d 658, 659-60 (Ga. 1969). TEC points out that deeds to the properties involved were not part of the summary judgment record when the trial court ruled. Thus, TEC argues, if we do not sustain the summary judgment in its favor, we should remand the case so the trial court may consider the record on the basis of neutral principles and the four factors

referenced in *Jones*: (1) governing documents of the general church, (2) governing documents of the local church entities, (3) deeds, and (4) state statutes governing church property. *See Jones*, 443 U.S. at 602-03. We agree that the case must be remanded for further proceedings under neutral principles.

Although deeds to the numerous properties involved were not before the trial court when it granted summary judgment, the Diocese asserts that there is no dispute about its holding title to and having control of the properties. But TEC disagrees with that position. And absent agreement or conclusive proof of title to the individual properties and the capacities in which the titles were taken, fact questions exist under neutral principles of law, at a minimum, about who holds title to each property and in what capacity.[6] Accordingly, we cannot render judgment on the basis of neutral principles.

C. Remand

Because the trial court must apply neutral principles on remand, for its guidance we address certain arguments made by the parties relating to that methodology. *See Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997) ("Although resolution of this issue is not essential to our

---

[6] Deeds filed after the trial court granted summary judgment were dated both before and after the 1984 judgment transferring properties from the Dallas Diocese. The deeds dated after the judgment reflect various grantees. Some properties were deeded to the Fort Worth Corporation or local entities, while others were deeded in trust to the Corporation, local entities, or various other persons and entities.

disposition of this case, we address it to provide the trial court with guidance in the retrial . . . .").

We first note that on remand the trial court is not limited to considering only the four factors listed in *Jones*. As we said in *Masterson*, *Jones* did not purport to establish a federal common law of neutral principles to be applied in this type of case. ___ S.W.3d at ___. Rather, the elements listed in *Jones* are illustrative. If it were otherwise and courts were limited to applying some, but not all, of a state's neutral principles of law in resolving non-ecclesiastical questions, religious entities would not receive equal treatment with secular entities. We do not believe the Supreme Court intended to say or imply that should be the case.

Next we address the Diocese's argument that under neutral principles courts do not defer to TEC's decisions about non-ecclesiastical matters such as the identity of the trustees of the Fort Worth Corporation. The Diocese argues that under the Non-Profit Corporation Act the trustees are the 2006 trustees who are named as defendants in this suit. TEC responds that the trustees are required by the corporate bylaws to be lay persons in "good standing," the Diocese rules require them to be loyal Episcopalians, and the bylaws provide that trustees do not serve once they become disqualified. Those determinations, TEC argues, were made by Bishops Gulick and Ohls and the 2009 convention, and courts must defer to those determinations because they are ecclesiastical decisions.

While we agree that determination of who is or can be a member in good standing of TEC or a diocese is an ecclesiastical decision, the decisions by Bishops

Gulick and Ohls and the 2009 convention do not necessarily determine whether the earlier actions of the corporate trustees were invalid under Texas law. The corporation 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, the circumstances under which articles and bylaws can be amended, and the effect of the amendments. *See* TEX. BUS. ORG. CODE §§ 22.001—.409. We conclude that this record fails to show that, as a matter of law, the trustees had been disqualified from serving as corporate trustees at the relevant times. Nor does the record conclusively show whether the 2009 appointments to the corporation board by Bishop Ohl were valid or invalid under Texas law, or whether, under Texas law, the actions taken by the trustees appointed by Bishop Ohl in 2009 were valid or invalid.

Third, the Diocese argues that TEC has no trust interest in the property. TEC Canon 1.7.4, also known as the Dennis Canon, provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject this Church and its Constitution and Canons.

The Diocese asserts that this canon does not create a trust under Texas law, but that even if it does, it was revocable and the Diocese revoked it when the Diocesan canons were amended to state:

> 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.

TEC counters that the Dennis Canon creates a trust because the corporation acceded to it and the Diocese could not have adopted a canon revoking the trust. TEC also asserts that the statutes applicable to charitable trusts apply, but if they do not, a resulting trust or other trust may be applied here because the history, organization, and governing documents of the Church, the Diocese, and the parish support implication of a trust. The Diocese responds to TEC's arguments by referencing Texas statutory law requiring a trust to be in writing and providing that trusts are revocable unless they are expressly made irrevocable. *See* TEX. PROP. CODE § 112.004, .051. These issues were not addressed by the trial court because it granted summary judgment based on deference principles. Upon remand the parties will have the opportunity to develop the record as necessary and present these arguments for the trial court to consider in determining the rights of the parties according to neutral principles of law. 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." *Masterson*, ___ S.W.3d at ____.

Finally, as to the argument that application of neutral principles may pose constitutional questions if they are retroactively applied, we note that over a century ago in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), our analysis and holding substantively reflected the neutral principles methodology.

V. Conclusion

We reverse the judgment of the trial court and remand the case to that court for further proceedings consistent with this opinion.

Phil Johnson
Justice

OPINION DELIVERED: August 30, 2013

JUSTICE WILLETT, joined by JUSTICE LEHRMANN, JUSTICE BOYD and JUSTICE DEVINE, dissenting.

Until 1940, when Texans amended their constitution, the Supreme Court of Texas lacked any authority to decide direct appeals (i.e., appeals that leapfrog the court of appeals and pass directly to this Court). Four years later, the Legislature first exercised its new power to permit direct appeals, and in the sixty-nine years since, this Court has exercised that jurisdiction sparingly, only forty-three times. The reason is simply stated: Our direct-appeal jurisdiction is exceedingly narrow and only proper if the trial court granted or denied an injunction "on the ground of the constitutionality of a statute of this state."[1]

Today's direct appeal is directly unappealable. The trial court's order nowhere mentions any constitution or statute, much less the constitutionality of a statute. Indeed, the trial court stated verbally that it was not pivoting on the constitutionality of state law. This dispute undoubtedly has a First Amendment overlay, but for a direct appeal, constitutionality must exist not just in the ether, but in the order.

As the trial court did not determine "the constitutionality of a statute of this state," its injunction could hardly be issued "on the ground of the constitutionality of a statute of this state." Accordingly, we lack jurisdiction. As I have underscored before (albeit, like today, in a dissent):

---

[1] Tex. Gov't Code § 22.001(c).

> Ultimately, it falls to us, the courts, to police our own jurisdiction. It is a responsibility rooted in renunciation, a refusal to exert power over disputes not properly before us. Rare is a government official who disclaims power, but liberties are often secured best by studied inaction rather than hurried action.[2]

The merits in this case are unquestionably important—and thankfully they are resolved today in a companion case[3]—but here the Court can only reach them by overreaching. We have no jurisdictionto decide this case as a direct appeal. I would dismiss for want of jurisdiction, and because the Court does otherwise, I respectfully dissent.

I. Background

The trial court in this case issued two injunctions, requiring the defendants (now styling themselves as the Episcopal Diocese of Fort Worth):

1. "to surrender all Diocesan property, as well as control of the Diocesan Corporation" to the Episcopal Church and other plaintiffs; and

2. "to desist from holding themselves out as leaders of the Diocese."

The court's reasons for granting the injunctions are laid out in paragraphs one through three of its order:

---

[2] *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 474 (Tex. 2011) (Willett, J., concurring in part and dissenting in part).

[3] *Masterson v. Diocese of N.W. Tex.*, __ S.W.3d __ (Tex. 2013).

1. The Episcopal Church (the "Church") is a hierarchical church as a matter of law, and since its formation in 1983 the Episcopal Diocese of Fort Worth (the "Diocese") has been a constituent part of the Church. Because the Church is hierarchical, the Court follows Texas precedent governing hierarchical church property disputes, which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. Under the law articulated by Texas courts, those are the individuals who remain entitled to the use and control of the church property.

2. As a further result of the principles set out by the Supreme Court in *Brown* and applied in Texas to hierarchical church property disputes since 1909, the Court also declares that, because The Episcopal Church is hierarchical, all property held by or for the Diocese may be used only for the mission of the Church, subject to the Church's Constitution and canons.

3. Applying those same cases and their recognition that a local faction of a hierarchical church may not avoid the local church's obligations to the larger church by amending corporate documents or otherwise invoking nonprofit corporations law, the Court further declares that the

> changes made by the Defendants to the articles and bylaws of the Diocesan Corporation are *ultra vires* and void.

(citations omitted).

There are no findings of fact or conclusions of law attached. The order does not mention the United States Constitution, the Texas Constitution, or any particular state statute. The only possible allusion to a statute is to "nonprofit corporations law," which the trial court found the defendants could not "invok[e]" to "avoid [their] obligations to the larger church." The trial court's legal support for this conclusion was a string citation to a number of cases, not a citation to any constitutional provision.

What is more, the defendants asked the trial court to amend the order to specify that the court had held a statute unconstitutional. The court declined to do so, orally stating that its ruling was based not on constitutionality, but rather on its application of *Brown v. Clark*[4]:

> I still can't just craft something to make it go to the Supreme Court. I mean, it – my understanding was that the – the trust laws that you were talking about don't apply in this situation because of *Brown*, not because they're not constitutional.

Our decision in *Brown* relied heavily on *Watson v. Jones*. [5] *Watson*, in turn, "appl[ied] not the Constitution but a 'broad and sound view of the

---

[4] 116 S.W. 360 (Tex. 1909).

[5] 80 U.S. 679 (1871).

relations of church and state under our system of laws.'"[6]

Nonetheless, the defendants filed a direct appeal. We noted probable jurisdiction and heard oral argument. But jurisdictional defects do not heal with age, no matter how novel, pressing, or consequential the issues at stake or how many judicial and party resources have been expended. The most fundamental restraint on judicial power is jurisdiction—our very authority to decide cases in the first place—and if we lack it, we lack it.

II. Discussion

A. History of Direct Appellate Jurisdiction

A 1940 constitutional amendment gave the Legislature power to grant direct appeals to this Court.[7] Not until 1944, though, 7 did the Legislature do so.[8] The original conferral allowed direct appeals from injunctions based on two grounds, either (1) the constitutionality or unconstitutionality of a state statute, or (2) the validity or invalidity of certain state administrative orders.[9] Today, the statutory grant of direct-appeal jurisdiction covers just one situation: "[A]n order of a trial court granting or denying an interlocutory or permanent injunction on

---

[6] *Hosana-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, __U.S.__, 132 S. Ct. 694, 704 (2012) (quoting *Watson*, 80 U.S. at 727).

[7] *See R.R. Comm'n of Tex. v. Shell Oil Co.*, 206 S.W.2d 235, 238 (Tex. 1947).

[8] *Id.*

[9] *Id.*

the ground of the constitutionality of a statute of this state."[10]

I have found only forty-three cases where we have exercised direct-appeal jurisdiction. That is, while such jurisdiction has existed for nearly seventy years, we have exercised it stintingly. In twenty-four of the forty-three cases, our opinion made clear that the trial court either made a direct holding about a statute's constitutionality or issued declaratory relief that a statute was or was not constitutional.[11] In

---

[10] TEX. GOV'T CODE § 22.001(c). The Constitution still allows the Legislature to provide for direct appeal from injunctions based on the validity of administrative orders, however. TEX. CONST. art. V, § 3-b. But the express constitutional grant of direct-appeal jurisdiction in Article 5, Section 3-b of the Constitution is arguably now unnecessary given the broadened wording of the general jurisdictional provision in Article 5, Section 3. *See Perry v. Del Rio*, 67 S.W.3d 85, 98 n.4 (Tex. 2001) (Phillips, C.J., dissenting) ("Since 1981, the Court's appellate jurisdiction has extended to all civil cases 'as . . . provided . . . by law,' TEX. CONST. art. V, § 3, so that the Legislature could now provide for direct appeals without a specific constitutional grant of authority."). Accordingly, the Legislature has now provided for direct appeal from certain trial court rulings that involve Public Utility Commission financing orders. TEX. UTIL. CODE § 39.303(f).

[11] *See Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 753–54 (Tex. 2005); *State v. Hodges*, 92 S.W.3d 489, 493 (Tex. 2002); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000); *Owens Corning v. Carter*, 997 S.W.2d 560, 567–68 (Tex. 1999); *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*,

eleven other cases, the trial court's order clearly must have been based on constitutional grounds, either because the opinion implies that only constitutional issues were raised to the trial court[12]

---

925 S.W.2d 618, 623, 625 (Tex. 1996); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 727 (Tex. 1995); *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 308 (Tex. 1993); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 442 (Tex. 1993); *Orange Cnty. v. Ware*, 819 S.W.2d 472, 473 (Tex. 1991); *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 398 (Tex. 1988); *LeCroy v. Hanlon*, 713 S.W.2d 335, 336 (Tex. 1986); *Wilson v. Galveston Cnty. Cent. Appraisal Dist.*, 713 S.W.2d 98, 99 (Tex. 1986); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985); *Shaw v. Phillips Crane & Rigging of San Antonio, Inc.*, 636 S.W.2d 186, 187 (Tex. 1982); *Gibson Distrib. Co. v. Downtown Dev. Ass'n of El Paso, Inc.*, 572 S.W.2d 334, 334 (Tex. 1978); *Tex. Antiquities Comm. v. Dallas Cnty. Cmty. Coll. Dist.*, 554 S.W.2d 924, 925–27 (Tex. 1977) (plurality opinion); *Smith v. Craddick*, 471 S.W.2d 375, 375–76 (Tex. 1971); *State v. Scott*, 460 S.W.2d 103, 105 (Tex. 1970); *State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 409 (Tex. 1969); *Jordan v. State Bd. of Ins.*, 334 S.W.2d 278, 278–80 (Tex. 1960); *Smith v. Decker*, 312 S.W.2d 632, 633 (Tex. 1958); *Rodriguez v. Gonzales*, 227 S.W.2d 791, 792–93 (Tex. 1950); *Dodgen v. Depuglio*, 209 S.W.2d 588, 591–92 (Tex. 1948).

[12] *See Conlen Grain & Mercantile, Inc. v. Tex. Grain Sorghum Producers Bd.*, 519 S.W.2d 620, 621–22 (Tex. 1975); *Robinson v. Hill*, 507 S.W.2d 521, 523 (Tex. 1974); *Itz v. Penick*, 493 S.W.2d 506, 508 (Tex. 1973); *Smith v. Davis*, 426 S.W.2d 827, 829 (Tex. 1968); *Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742, 742–43 (Tex. 1962); *King v. Carlton Indep. School Dist.*, 295 S.W.2d 408, 409 (Tex. 1956); *Dallas Cnty. Water Control &*

or because the trial court granted an injunction enforcing a statute over constitutional objection, thus implicitly upholding the statute against constitutional attack.[13] In two other cases, we summarily stated that the trial court granted or denied the injunction on the ground of a statute's constitutionality.[14] But in at least six direct-appeal cases, we did not make it clear why we thought the trial court's injunction was based on constitutional grounds.[15] These cases address jurisdiction rather cursorily, and only one of the opinions garnered a

---

Improvement Dist. No. 3 v. City of Dallas, 233 S.W.2d 291, 292 (Tex. 1950).

[13] *See Gibson Prods. Co. v. State*, 545 S.W.2d 128, 129 (Tex. 1976); *Dancetown, U.S.A., Inc. v. State*, 439 S.W.2d 333, 334 (Tex. 1969); *Schlichting v. Tex. State Bd. of Med. Exam'rs*, 310 S.W.2d 557, 558–59 (Tex. 1958); *H. Rouw Co. v. Tex. Citrus Comm'n*, 247 S.W.2d 231, 231–32 (Tex. 1952).

[14] *See State v. Project Principle, Inc.*, 724 S.W.2d 387, 389 (Tex. 1987); *Duncan v. Gabler*, 215 S.W.2d 155, 156–57 (Tex. 1948).

[15] *See Del Rio*, 67 S.W.3d 85 (majority opinion); *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Ass'n of Tex. Prof'l Educators v. Kirby*, 788 S.W.2d 827 (Tex. 1990); *Parker v. Nobles*, 496 S.W.2d 921 (Tex. 1973); *Dobard v. State*, 233 S.W.2d 435 (Tex. 1950).

dissent on the jurisdictional issue,[16] to which the majority opinion declined to respond.[17]

But in the vast majority of cases where we have exercised direct-appeal jurisdiction, it has been abundantly clear that the trial court issued or denied an injunction on the ground of a statute's constitutionality.

We have also issued at least eleven opinions in which we dismissed attempted direct appeals for want of jurisdiction because the statutory test was not met.[18] We have variously explained that our direct-appeal jurisdiction "is a limited one,"[19] that we have been "strict in applying" or have "strictly applied" direct-appeal jurisdictional requirements,[20] and that "[w]e have strictly construed our direct

---

[16] *Del Rio*, 67 S.W.3d at 98–100 (Phillips, C.J., dissenting).

[17] *Id.* at 89, 95 (majority opinion).

[18] *See Tex. Workers' Comp. Comm'n v. Garcia*, 817 S.W.2d 60 (Tex. 1991); *Querner Truck Lines, Inc. v. State*, 652 S.W.2d 367, 368 (Tex. 1983); *Mitchell v. Purolator Sec., Inc.*, 515 S.W.2d 101 (Tex. 1974); *Holmes v. Steger*, 339 S.W.2d 663 (Tex. 1960); *Standard Sec. Serv. Corp. v. King*, 341 S.W.2d 423 (Tex. 1960); *Gardner v. R.R. Comm'n of Tex.*, 333 S.W.2d 585 (Tex. 1960); *Bryson v. High Plains Underground Water Conservation Dist. No. 1*, 297 S.W.2d 117 (Tex. 1956); *Corona v. Garrison*, 274 S.W.2d 541 (Tex. 1955); *Lipscomb v. Flaherty*, 264 S.W.2d 691 (Tex. 1954); *Boston v. Garrison*, 256 S.W.2d 67 (Tex. 1953); *McGraw v. Teichman*, 214 S.W.2d 282 (Tex. 1948).

[19] *Gardner*, 333 S.W.2d at 588.

[20] *Querner Truck*, 652 S.W.2d at 368; *Mitchell*, 515 S.W.2d at 103.

appeal jurisdiction."[21] Therefore, we have held that to meet the jurisdictional prerequisites, a trial court must actually "pass upon the constitutionality of [a] statute,"[22]"determin[e]" a statute's constitutionality,[23] or "base its decision" on constitutional grounds.[24] Indeed, "[i]t is not enough that a question of the constitutionality of a statute may have been raised in order for our direct appeal jurisdiction to attach in injunction cases; in addition the trial court must have made a holding on the question based *on the grounds* of the constitutionality or unconstitutionality of the statute."[25]

A close examination of the eleven cases where we dismissed for want of jurisdiction reveals strict adherence to the Legislature's restricted framework. For example, we held "no jurisdiction" where the trial court made the injunction decision based on res judicata[26] or where the trial court was directed to do so by a writ of prohibition by the court of civil appeals.[27] That is, because the trial court did not decide the merits of the constitutional issue, we lacked direct-appeal jurisdiction.[28] Similarly, we held that we did not have such jurisdiction where the

---

[21] *Garcia*, 817 S.W.2d at 61.

[22] *Corona*, 274 S.W.2d at 541–42.

[23] *King*, 341 S.W.2d at 425; *Bryson*, 297 S.W.2d at 406.

[24] *Holmes*, 339 S.W.2d at 663–64.

[25] *Mitchell*, 515 S.W.2d at 103 (emphasis in original).

[26] *Lipscomb*, 264 S.W.2d at 691–92.

[27] *Gardner*, 333 S.W.2d at 589.

[28] *Corona*, 274 S.W.2d at 541–42.

trial court denied an injunction because the plaintiffs lacked "the necessary justiciable interest" to sue.[29] We even held that we lacked jurisdiction over a direct appeal of a temporary injunction involving a "serious question" of the constitutionality of a statute, because the real purpose of the temporary injunction was merely to preserve the status quo, and the trial court did not make any holdings finally determining the constitutional issue.[30]

B. Application

Given our long, consistent history of cautiously and narrowly construing our direct-appeal jurisdiction, the outcome of this case seems essentially predetermined: We lack jurisdiction. The Legislature allows parties to skip the court of appeals in one extraordinarily limited circumstance: where the trial court's injunction turned "on the ground of the constitutionality of a [state] statute."[31] The crux and rationale of the trial court's order is dispositive. Here, the trial court did not "pass upon the constitutionality of a statute,"[32] "determin[e]" a statute's constitutionality,[33] or "base its decision" on constitutional grounds.[34] While the constitutional

---

[29] *Holmes*, 339 S.W.2d at 664.

[30] *Mitchell*, 515 S.W.2d at 103–04.

[31] TEX. GOV'T CODE § 22.001(c).

[32] *Corona*, 274 S.W.2d at 541–42.

[33] *King*, 341 S.W.2d at 425; *Bryson*, 297 S.W.2d at 119.

[34] *Holmes*, 339 S.W.2d at 663–64.

issues may have been raised in the trial court, that alone is "not enough."[35]

At most, the trial court's order only vaguely alludes to nonprofit-related statutes, and there is certainly no indication in the order that the trial court was making a constitutional determination. The trial court order refers generally to nonprofit law and says the defendants cannot rely on this law to escape the deference principle, providing a string citation as support. But only one of the cases in the string citation even refers to constitutional principles, and that case does not hold that only the deference approach is constitutional.[36] Moreover, that case was decided two years before the United States Supreme Court clarified in *Jones v. Wolf* that the "deference" rule is not mandated by the First Amendment.37[37]

A diaphanous hint that a statute was viewed through a constitutional prism is not enough to justify exercising our "limited" [38] and "strictly construed"[39] direct-appeal jurisdiction. And here, the trial judge orally eschewed such a ruling, making it doubly clear that its order was not based on constitutional grounds. In light of *Jones* (that the deference approach is *not* constitutionally required) and the trial court's comments (that it was holding

---

[35] *Mitchell*, 515 S.W.2d at 103.

[36] *See Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865, 870–71 (Tex. Civ. App.—Texarkana 1977, no writ).

[37] 443 U.S. 595, 605 (1979).

[38] *Gardner*, 333 S.W.2d at 588.

[39] *Garcia*, 817 S.W.2d at 61.

the statutes inapplicable but not unconstitutional), it seems an impressive stretch to transform the trial court's citation to an ambiguous pre-*Jones* case into a constitutional holding striking down state law.

Perhaps the order's silence and the judge's disavowal are beside the point if unconstitutionality was the inescapable basis for the trial court's ruling, as the majority concludes. Indeed, the defendants contend the order makes no sense unless it turned on a constitutional holding. As the defendants interpret the order, the trial court effectively held certain statutes unconstitutional if applied to local churches of hierarchical religions. In their Statement of Jurisdiction, the defendants argue that a court can only reject statutes like this on "constitutional grounds." This assertion rests on the faulty premise that any time a court deems a statute inapplicable, it's because the statute would be unconstitutional if applied. Not true.

A court can refuse to apply a statute for various non-constitutional reasons. For example, if a statute purports to change long-standing common law, a court closely examines whether the Legislature truly intended to supplant the settled rule.[40] The trial court in this case may have applied (or misapplied) this kind of analysis, finding that pertinent statutes did not indicate legislative intent to abandon the common-law deference principle that we declared in

---

[40] *See Energy Serv. Co. of Bowie v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 (Tex. 2007) ("Of course, statutes can modify common law rules, but before we construe one to do so, we must look carefully to be sure that was what the Legislature intended.").

Brown. Perhaps the trial court looked at a century of legislative inaction after *Brown* and took it as legislative acquiescence. There are other non-constitutional reasons to deem a statute ineffective, like the absurdity doctrine.[41] So even if a trial court implicitly invalidates a statute or finds it inapplicable, its reason for doing so is not necessarily because the Constitution demands it.

Thus, it cannot be true that by following *Brown v. Clark*, the trial court implicitly held that any statute that might apply under neutral principles is necessarily unconstitutional if applied to a church-property dispute in a hierarchical setting. This argument is foreclosed by *Jones v. Wolf*. If states are free, consistent with the First Amendment, to choose either approach, then choosing the deference test cannot equate to an implicit holding that applying statutes relevant under neutral principles would be unconstitutional. Nobody can argue that Texas courts are *required* to adopt neutral principles—*Jones* precludes that argument.

Tellingly, the defendants do not attempt to analogize this case to any other in which the Court has exercised direct-appeal jurisdiction. None is comparable. No constitutional question was presented (or decided) in the trial court, and none is presented (or decided) here.[42]

---

[41] *See, e.g., TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

[42] The Rules of Civil Procedure previously specified that we could not accept such jurisdiction unless the case presented a constitutional question to this Court.

Undoubtedly, we have already noted probable jurisdiction, heard argument on the merits, and committed substantial judicial resources to resolving the issues—to say nothing of the effort and cost expended by the parties. But to assert jurisdiction simply because it would be inconvenient to do otherwise betrays the deeply rooted constitutional principle that our jurisdiction is conferred ultimately from the People, directly through our Constitution and indirectly through our elected representatives.

Lipscomb, 264 S.W.2d at 691–92, quotes the former rule (TEX. R. CIV. P. 499a(b)) as providing (emphasis added):

> An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State, *when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.*

Accordingly, we said that one of the prerequisites for direct-appeal jurisdiction was that a constitutional "question is presented to this Court for decision." *Bryson*, 297 S.W.2d at 119. Admittedly, our Rules (which have since migrated to the Rules of Appellate Procedure) no longer specify that a direct appeal must present an actual constitutional question to this Court. TEX. R. APP. P. 57; *see also Del Rio*, 67 S.W.3d at 98–99 (Phillips, C.J., dissenting). But the Legislature's limited grant of such jurisdiction has not wavered, and we simply cannot accept a direct appeal unless a statute has been declared constitutional or unconstitutional. That did not happen here.

Dismissing this case for want of jurisdiction would be sure to furrow brows, but there is no more principled reason to dismiss a case than to decide, even belatedly, that you lack the power to decide. Besides, and this is some consolation, the core merits issue presented—deciding which legal test should govern church-property disputes—is squarely resolved in today's companion case,[43] so a dismissal here would not unduly delay authoritative resolution or work any irreparable harm.

III. Conclusion

Our characterizations of direct-appeal jurisdiction, something we have "strictly construed," are not ambiguous:

- "rare"
- "restricted"
- "very limited"

In light of this consistent clarity, the Court's exercise of jurisdiction has an unfortunate *ipse dixit* quality to it. The statutory test for direct-appeal jurisdiction is whether the trial court made its decision "on the ground of the constitutionality of a [state] statute." A statute, for example, must be invalidated, not just implicated. Direct-appeal jurisdiction is a rare (as it should be) short-circuiting of the usual rules, and I respectfully take exception to broadening the exception.

The power of judicial review—the authority to declare laws unconstitutional—is a genuinely stunning one, and one that judges exercise with

---

[43] *Masterson*, __ S.W.3d __.

surpassing trepidation. Given the stakes, it is difficult to imagine a judge striking down a legislative enactment stealthily, using gauzy language that requires reading between the lines. This judge certainly didn't believe he had declared anything unconstitutional, and he said as much—on the record and unequivocally.

Today marks the second time this Court has stretched our direct-appeal jurisdiction beyond its statutory bounds.[44] The objective in both cases has apparently been to let the Court fast-forwar to the merits of an important case. But an issue's importance and our commendable desire to resolve it swiftly does not give us license to enlarge our jurisdictional powers by fiat. In language that could have been written with today's case in mind, Chief Justice Phillips wrote in dissent over a decade ago:

> Dismissing a case on jurisdictional grounds may be frustrating to judges and litigants alike, particularly when issues of statewide import are involved . . . . However, the Legislature has chosen to make direct appeal an uncommon remedy, available only in rare and specific situations. Regardless of the day's exigencies, our highest and only duty is to respect the appropriate limits of our power . . . . I fear that our Court has allowed a hard case to make bad law today.[45]

The Court may come to rue its decision to assert direct-appeal jurisdiction in this case. Our rules

---

[44] *See Del Rio*, 67 S.W.3d at 89 (majority opinion).

[45] *Id.* at 100 (Phillips, C.J., dissenting).

seem to mandate our exercise of such jurisdiction in cases where a permanent injunction is based on the constitutionality of a statute (because our rules make direct-appeal jurisdiction discretionary only in temporary injunction cases).[46] Therefore, in addition to encroaching on the Legislature's constitutional prerogative to define our direct-appeal jurisdiction, the Court's decision may perversely require this Court to immediately hear all direct appeals of permanent injunctions that even vaguely implicate a statute's constitutionality.

I would dismiss this case for want of jurisdiction, and because the Court does otherwise, I respectfully dissent.

Don R. Willett
Justice

OPINION DELIVERED: August 30, 2013

[46] *See* Tex. R. App. P. 57.2.

APPENDIX C

IN THE TEXAS COURT OF APPEALS
THIRD DISTRICT, AT AUSTIN

No. 03-10-00015-CV

ROBERT MASTERSON, MARK BROWN,
GEORGE BUTLER, CHARLES WESTBROOK,
RICHEY OLIVER, CRAIG PORTER, SHARON WEBER,
JUNE SMITH, RITA BAKER, STEPHANIE PEDDY,
BILLIE RUTH HODGES, DALLAS CHRISTIAN,
AND THE EPISCOPAL CHURCH OF THE GOOD SHEPHERD,

Appellants,

v.

THE DIOCESE OF NORTHWEST TEXAS,
THE REV. CELIA ELLERY, DON GRIFFIS, AND
MICHAEL RYAN,

Appellees

FROM THE DISTRICT COURT OF
TOM GREEN COUNTY, 51ST JUDICIAL DISTRICT
NO. A-07-0237-C

HONORABLE J. BLAIR CHERRY, JUDGE PRESIDING

OPINION

This appeal arises from a property dispute among parishioners from the Episcopal Church of the Good Shepherd ("Good Shepherd") in San Angelo, Texas. In 2006, a majority of the Good Shepherd

parishioners voted to withdraw Good Shepherd from the Episcopal Church of the United States and the Diocese of Northwest Texas and to reorganize as the Anglican Church of the Good Shepherd affiliated with the Diocese of Uganda, Africa; a minority voted to continue Good Shepherd's affiliation with the Episcopal Church and the Diocese of Northwest Texas (the "Diocese"). The Diocese and the individual appellees, The Rev. Celia Ellery, Don Griffis, and Michael Ryan (collectively, the "Continuing Parish Leaders"), filed suit for declaratory judgment to establish their rights to continued possession and control over the church property, which was claimed by appellants, who are members of the withdrawing group (collectively, the "Former Parish Leaders").[1] The Former Parish Leaders counterclaimed with a suit to quiet title and request for declaratory judgment that they were entitled to possession and use of the church property. The Diocese and Continuing Parish Leaders moved for summary judgment, which the trial court granted. The Former Parish Leaders appeal, arguing primarily that the trial court erred in failing to properly apply "neutral principles" of law to resolve the dispute. We will affirm the trial court's judgment.

---

[1] The individual appellants include Robert Masterson, Mark Brown, George Butler, Charles Westbrook, Richey Oliver, Craig Porter, Sharon Weber, June Smith, Rita Baker, Stephanie Peddy, Billy Ruth Hodges, and Dallas Christian. Good Shepherd was named as a nominal defendant, as it was under the control of the Former Parish Leaders at the time the suit was filed. It is now a nominal appellant.

FACTUAL AND PROCEDURAL BACKGROUND

The Diocese is one of 111 regional dioceses of the Episcopal Church, responsible for carrying out the Episcopal Church's ministry and mission within a geographical area that includes Good Shepherd. In 1961, three members of the Episcopal Church purchased a tract of land in San Angelo on which Good Shepherd was later built. The following year, they donated the property to the Trustees of the Diocese for the purpose of establishing a mission church. In September 1965, Good Shepherd submitted an "Application for Organization of Mission," in which it promised to "establish and sustain the regular worship of the [Episcopal] Church, to promote its purpose and influence" and to "conform[] to the Constitution and Canons of the General Convention and the Diocese of Northwest Texas." Thereafter, Good Shepherd participated in the annual Conventions for the Episcopal Diocese of Northwest Texas each year from its formation until the present dispute arose.

In 1974, after the Good Shepherd mission was incorporated, it achieved parish status and was accepted into union with the Diocese.[2] The same

[2] Under the Diocesan Canons, title to any property acquired by or for a mission congregation shall be held by the Diocese "until such time as the Mission becomes a Parish." On achieving parish status, a congregation must incorporate under the laws of Texas in order to facilitate and conduct its affairs; "such incorporated parish shall hold title of and administer the real property and trust funds of the Parish." If a parish is dissolved by the Diocese, "such property as it may own shall be delivered and conveyed to the [Diocese]."

year, the first vestry of Good Shepherd filed articles of incorporation as the "Episcopal Church of the Good Shepherd," pledging to hold office in accordance with the Episcopal Church Canons. Thereafter, Good Shepherd enacted Bylaws, which provide that Good Shepherd is

> a constituent part of the Diocese of Northwest Texas and of the Protestant Episcopal Church in the United States of America. The parish accedes to, recognizes, and adopts the General Constitution and Canons of that Church, and the Constitution and Canons of the Diocese of Northwest Texas and acknowledges the authority of the same.[3]

The Bylaws further state that

> [t]he Rector, Wardens and Vestry of the Church of the Good Shepherd are hereby constituted Trustees Corporate and Politic. If the Parish be without a Rector, all rights respecting title to properties of the Parish shall be vested in the Wardens and Vestry

---

[3] A number of the Canons of the Episcopal Church and the Diocese contain provisions relating to possession and use of church property, chiefly Canon 1.7.4, which recites an express trust in favor of the denominational church: "All real and personal property held by or for the benefit of any congregation is held in trust for this Church and the Diocese thereof in which such congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the congregation otherwise existing over such property so long as the particular congregation remains a part of, and subject to, this Church and its Constitution and Canons."

> with the condition that any change thereof be made with the knowledge and written consent of the then ecclesiastical authority of the Diocese.

In 1982, the Board of Trustees for the Diocese conveyed the property and improvements thereon to Good Shepherd by general warranty deed for ten dollars. Title to the land was taken in the name of the "Good Shepherd Episcopal Church." The land conveyed by the 1982 deed, along with an additional tract acquired in 2005 and the personal property of Good Shepherd, constitute the church property subject to the instant dispute.

In November 2006, the vestry of Good Shepherd recommended certain resolutions that sought to withdraw Good Shepherd from the Episcopal Church and the Diocese and to begin worship as a new, distinct, and independent church. The resolutions purported to change the name of Good Shepherd to the "Anglican Church of the Good Shepherd," to dissolve its union with the Episcopal Church and with the Diocese, and to revoke any trusts previously imposed on any property of Good Shepherd in favor of the Episcopal Church, the Diocese, or the Northwest Episcopal Board of Trustees. A majority of Good Shepherd's members voted to adopt the resolutions by a margin of 53 to 30. In response, Wallace Ohl, Bishop of the Episcopal Church in the Diocese of Northwest Texas, reached out to the parishioners who wished to remain with the Episcopal Church. Bishop Ohl requested that those parishioners who wished to leave the Episcopal Church depart the premises by January 5, 2007, and informed the Former Parish Leaders that Good

Shepherd's real and personal property was held in trust for the Diocese for the benefit of the Episcopal Church and those members of Good Shepherd who remained faithful. Since then, the continuing parishioners of Good Shepherd have elected a new vestry, which has been recognized by Bishop Ohl and the Diocese as the true and proper representative of Good Shepherd. The Reverend Celia Ellery was appointed priest-in-charge, effective January 6, 2007.

When the Former Parish Leaders and the parishioners aligned with them refused to vacate the premises in accordance with Bishop Ohl's order, the Diocese and Continuing Parish Leaders filed this suit for declaratory judgment. The Former Parish Leaders filed an answer and counterclaims, seeking to quiet title and have the trial court declare that they, the Anglican Church of the Good Shepherd, were entitled to retain control over the property. The Diocese and Continuing Parish Leaders moved for summary judgment on the grounds that the church property is, as a matter of law, held in trust for the Episcopal Church and the Diocese for those members of Good Shepherd who remain loyal and that, pursuant to Texas law and Episcopal Church Canons, the dissenting members could not unilaterally dissolve the relationship between Good Shepherd and the Diocese and still retain control and use of the property.

The trial court granted the Diocese and Continuing Parish Leaders' motion for summary judgment, declaring that the Former Parish Leaders may not divert, alienate, or use the real or personal property of Good Shepherd, except in furtherance of the mission of the Episcopal Church as provided by and

in accordance with the Constitutions and Canons of the Episcopal Church and the Diocese. The court further declared that:

> the continuing Parish of the Good Shepherd is identified as and represented by those persons recognized by the Bishop of the Episcopal Diocese of Northwest Texas;
>
> the actions of the Defendants in seeking to withdraw Good Shepherd as a Parish of the Diocese and from the Episcopal Church are void and without effect; and
>
> all real and personal property of the Good Shepherd is held in trust for the Episcopal Church and the Diocese.

The Former Parish Leaders perfected this appeal.

STANDARD OF REVIEW

We review a trial court's grant of summary judgment de novo. *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 622 (Tex. 2007). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The party moving for a traditional summary judgment bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Id.* at 216.

DISCUSSION

In their first issue, the Former Parish Leaders argue that the trial court erred by failing to resolve

the property dispute through the application of "neutral principles of law." In their second issue, they assert that the trial court erred in rendering summary judgment "that deferred the dispute to a ruling by the Bishop." Specifically, the Former Parish Leaders contend that this dispute can be resolved simply by interpreting the 1982 general warranty deed in conjunction with constitutional and common law principles. These neutral principles of law, they argue, conclusively establish that control of Good Shepherd vests in its members, that the majority's vote to withdraw was effective and did not require the consent of the Episcopal Church, and that any claim to the property of Good Shepherd by the Diocese on behalf of the Episcopal Church contradicts the terms of the general warranty deed held by Good Shepherd. In order to adequately address these complaints, we will first briefly outline the law governing these types of church-property disputes.

The First Amendment

The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. Government action can burden the free exercise of religion in one of two ways: by interfering with an individual's observance or practice of a particular faith, *see, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), or by encroaching on the church's ability to manage its internal affairs, *see,*

e.g., Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).[4] Following this constitutional mandate, civil courts may not intrude into inherently "religious" or "ecclesiastical" matters. *See Westbrook v. Penley*, 231 S.W.3d 389, 398-99 (Tex. 2006). In Texas, this doctrine has been referred to as one of "ecclesiastical abstention" or "ecclesiastical exemption." *See Lacy v. Bassett*, 132 S.W.3d 119, 123 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also Patton v. Jones*, 212 S.W.3d 541, 555 n.13 (Tex. App.—Austin 2007, pet. denied); *Schismatic & Purported Casa Linda Presbyterian Church v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 703 (Tex. App.—Dallas 1986, writ ref d n.r.e.). The ecclesiastical-abstention doctrine stands for the proposition that the First Amendment prohibits civil courts from exercising jurisdiction over matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the

---

[4] The dangers posed by civil courts probing too deeply into church affairs have been well articulated by the Supreme Court:

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.

Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709-10 (1976); see also Watson v. Jones, 80 U.S. 679, 728-29 (1872).

standard of morals required of them." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976).

> [T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.

Jones v. Wolf, 443 U.S. 595, 602 (1979) (citations omitted).

The Neutral-Principles Approach

The neutral-principles approach on which the Former Parish Leaders rely can be seen as an exception to the ecclesiastical-abstention doctrine. *See Westbrook*, 231 S.W.3d at 398; *see also Wolf*, 443 U.S. at 602-05 (states may adopt neutral principles of law without running afoul of First Amendment so long as resolution of ownership entails no inquiry into religious doctrine). In the context of property-rights litigation, the neutral-principles approach confers jurisdiction on civil courts to apply neutral principles of law "developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded" in violation of the First Amendment. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). In practice, this means that a court employing a neutral-principles approach may itself interpret the governing documents of the church, deeds of

conveyance, canons, rules, and relevant statutes, so long as it does so without relying on religious precepts to resolve the underlying dispute. *See Wolf*, 443 U.S. at 604.

The neutral-principles approach was approved by the United States Supreme Court in *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970), an appeal from a state court judgment settling a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the constitution of the general church, and state statutes. Reflecting on the advantages inherent in the neutral-principles approach, the Supreme Court in *Jones v. Wolf* noted that it "is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity," as it relies exclusively on "objective, well-established concepts of trust and property law familiar to lawyers and judges." 443 U.S. at 603.

> Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church

> property will be resolved in accord with the desires of the members.

Id. at 603-04.

But even the neutral-principles approach is not "wholly free of difficulty," as "there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property." *Id.* at 604. "If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.* (citing *Milivojevich*, 426 U.S. at 709). Therefore, even when a court is properly applying the neutral-principles approach, it will have to defer to decision makers within the church to the extent that resolution of the property dispute overlaps with ecclesiastical matters. *See id.*; *Westbrook*, 231 S.W.3d at 399 ("[I]f interpretation of the instruments of ownership would require the court's resolution of a religious controversy, the court must defer to ecclesiastical resolution of the doctrinal issue.").

An alternative to neutral principles is the approach the Supreme Court first articulated in *Watson v. Jones*, 80 U.S. 679 (1872). Under *Watson*, civil courts simply enforce the property decisions made by the relevant governing body within the church without inquiring whether that body has power under religious law to control the property in question. 80 U.S. at 722-24; *see Maryland & Va. Eldership of the Churches of God*, 396 U.S. at 368-69 (Brennan, J., concurring). The gist of this approach

is that people who unite themselves to a church organization are seen to do so with an implied consent that intrachurch conflicts, including property disputes, will be decided by the church. *See Watson*, 80 U.S. at 722. Under the *Watson* "principle of government" or "compulsory deference" approach,

> civil courts review ecclesiastical doctrine and polity to determine where the church has placed ultimate authority over the use of the church property. After answering this question, the courts would be required to determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made. They would then be required to enforce that decision.

Wolf, 443 U.S. at 605 (internal quotation marks and citations omitted). Such a rule of compulsory deference does not necessarily involve less entanglement of civil courts in matters of religious doctrine, however, because "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." *Id.* at 605. In some cases, "the locus of control would be ambiguous," requiring "a careful examination of the constitutions of the general and local church" and resulting in "a searching and therefore impermissible inquiry into church polity." *Id.* Nevertheless, as *Jones v. Wolf* makes clear, it remains the rule that under any approach, civil courts must accept as binding a church adjudication regarding "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 595 (citing *Watson*, 80 U.S. at 727).

Neutral Principles v. Compulsory Deference: A Question of State Law

Much of the Former Parish Leaders' briefing is devoted to their position that the trial court was required to apply the neutral-principles approach, rather than the *Watson* rule of compulsory deference, and that it failed to do so. The United States Supreme Court, however, has expressly approved both of these methods for deciding questions of title to church property, leaving it to the states to decide which approach to adopt. *See id.* at 602 ("[T]he First Amendment does not dictate that a State must follow a particular method of resolving church disputes. Indeed, a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters . . . ." (internal quotation marks omitted)). In other words, "how state courts resolve church property disputes is a matter of state law," so long as the method a state chooses does not violate the First Amendment. *Episcopal Church Cases*, 198 P.3d 66, 74 (Cal. 2009).

The Texas Supreme Court has not expressly approved a particular method to adjudicate church-property disputes, although it has "long recognized a structural restraint on the constitutional power of civil courts to regulate matters of religion in general." *Westbrook*, 231 S.W.3d at 397-98 (citing *Brown v. Clark*, 116 S.W. 360, 363 (Tex. 1909)). In *Brown*, the only church-property dispute it has yet decided, the court was careful to sidestep any issues that fell within the exclusive jurisdiction of the ecclesiastical judicatories, including the case-determinative question of whether the local church possessed the

authority to determine that it could enter into union with the denominational Presbyterian Church. *See* 116 S.W. at 364. Having deferred to the affirmative answer of the local church's General Assembly on that issue, the court then turned to what was "perhaps the only question in the case of which this court has jurisdiction": how the resulting union between the two churches affected possession and control of the church property. *Id.* The court answered that question by construing the general warranty deed for the property, which was made to the trustees of the local church, while considering the fact that the local church "was but a member of and under the control of the larger and more important Christian organization." *Id.* In light of that union, the court held that the local church had been incorporated into the Presbyterian Church and therefore "those members who recognize the authority of the Presbyterian Church in the United States of America are entitled to possession and use of the property." *Id.*

As the Former Parish Leaders correctly point out, the analysis that the court conducted in *Brown* is consistent with the neutral-principles approach. That does not mean, however, that a Texas court is required to follow the same approach. Because the trial court was not required to adopt any particular approach in resolving the instant dispute, *see Wolf*, 443 U.S. at 602, we overrule the Former Parish Leaders' first issue asserting that the trial court erred by failing to apply neutral principles of law.[5]

---

[5] In support of their first issue, the Former Parish Leaders make a number of assertions that they label as

In their second issue, the Former Parish Leaders complain that the trial court "erred in granting summary judgment that deferred the dispute to a ruling by the Bishop." They argue that this is error because the Episcopal Church lacks the necessary tribunals and rules to (1) adjudicate the property dispute, (2) remove the vestry of Good Shepherd, or (3) exclude people from membership in Good Shepherd. The deference that the trial court allegedly afforded the Diocese would only be appropriate, they assert, if the record conclusively established that the Episcopal Church is a "hierarchical" organization that had established the necessary institutions to govern disputes over the government and direction of subordinate bodies. *See Milivojevich*, 426 U.S. at 724. According to the Former Parish Leaders, the record actually supports the conclusion that Good Shepherd is an independent organization free from control by the Episcopal Church hierarchy, and that the only decisions entitled to any deference are those made by a majority of its membership to disaffiliate from the Diocese and the Episcopal Church. Before addressing the merits of these arguments, we will first examine the context from which they arise.

---

sub-issues, including "Texas District Courts have subject matter jurisdiction to apply 'neutral principles' of law" and "application of 'neutral-principles' [sic] to determine property disputes is not restricted to congregational churches." Because these statements concern matters that are not in dispute, we need not address them.

Hierarchical and Congregational Churches

In discussing the proper role for civil courts to play in adjudicating these cases, the United States Supreme Court has analyzed two different scenarios that predominate in church-property disputes. The first involves property held by a "religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government." *See Watson*, 80 U.S. at 726. Such bodies are referred to as "hierarchical" churches. *Kedroff*, 344 U.S. at 110 (defining "hierarchical churches" as "those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head"). In those cases, "we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments." *Watson*, 80 U.S. at 726-27. "The second is when the property is held by 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." *Id.* at 722. These are classified as "congregational churches," and, being independent and self-governing, are analyzed in accordance with "the ordinary principles which govern voluntary associations." *See id.* at 724-25.

Under the rule announced in *Watson*, the distinction between the two church classifications is important when courts must identify the entity to

which it shall defer on matters protected from judicial scrutiny. When a dispute arises in a hierarchical church, the authority entitled to deference on ecclesiastical matters is "the highest of the[] church judicatories to which the matter has been carried." *See id.* at 727. If, however, a dispute arises in a congregational church, the "principle of government" adopted by the church dictates who can determine the right of control—e.g., "[i]f the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property." *Id.* at 725. Or, if a congregational church vests power in a governing board or vestry, "then those who adhere to the acknowledged organism by which the body is governed are entitled to use of the property." *Id.*

A court applying the *Watson* rule of "compulsory deference" need only consider which type of organizational model a church conforms to; once that decision is made, the court defers to, and thereby enforces, the decision of the proper ecclesiastical authority. By arguing that the trial court was required to give effect to the majority's vote to withdraw Good Shepherd from the Episcopal Church and the Diocese and to reorganize as the Good Shepherd Anglican Church, the Former Parish Leaders are implicitly invoking the deference rule in combination with the assertion that Good Shepherd is a congregational church under the sole control of a majority of its members. Thus, by complaining that the trial court erred in paying deference to the Diocese and Bishop Ohl's determination that the faction aligned with the Former Parish Leaders does not, in fact, represent Good Shepherd, they are really

arguing that the court misapplied the deference rule by characterizing Good Shepherd as a hierarchical church rather than a congregational one. In response, the Diocese and Continuing Parish Leaders argue that the trial court correctly determined that the Episcopal Church is hierarchical and that the parishes within the hierarchy, including Good Shepherd, are subject to governance by the ecclesiastical head of the general church.

Several factors are to be weighed in determining whether a church is hierarchical, including (1) the affiliation of the local church with a parent church, (2) an ascending order of ecclesiastical judicatories in which the government of the local church is subject to review and control by higher authorities, (3) subjugation of the local church to the jurisdiction of a parent church or to a constitution and canons promulgated by the parent church, (4) a charter from the parent church governing the affairs of the local church and specifying ownership of local church property, (5) the repository of legal title, and (6) the licensing or ordination of local ministers by the parent church. *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197, 198-99 (Tex. App.—Amarillo 1988, no writ); *see Schismatic & Purported Casa Linda Presbyterian Church*, 710 S.W.2d at 702; *Browning v. Burton*, 273 S.W.2d 131, 133-34 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.).

In the present case, the summary-judgment record establishes conclusively that the Episcopal Church is hierarchical and that Good Shepherd is, in accordance with its bylaws and other governing documents, a constituent part of the Episcopal

Church and the Diocese. [6] Accordingly, the *Watson* rule would require that the trial court and this Court defer to ecclesiastical decisions made within the Episcopal Church hierarchy that bear on the property-ownership dispute, rather than be bound by the views of the defecting parishioners,

---

[6] Briefly, the summary-judgment record details that the Episcopal Church is made up of nearly 7,700 congregations, primarily parishes, that are organized into 111 regional dioceses. It is governed by a General Convention and a presiding bishop, while each diocese is governed by a diocesan convention and a bishop. The Constitutions and Canons of the Episcopal Church and each diocese are binding on all congregations within the diocese. The Constitution of the Diocese requires all congregations to accede in writing to the rules of the Episcopal Church as a condition of acceptance as a parish of the Diocese. The bylaws and articles of incorporation of Good Shepherd affirm these commitments, establishing that Good Shepherd agreed from its inception to be part of the greater denominational church and to be bound by that church's governing instruments. The Former Parish Leaders cite no competent summary-judgment evidence to the contrary, relying instead on statements in one former vestry member's affidavit that "[t]he Episcopal Church does not have control of the local parishes like other hierarchical churches appear to," that "[t]hey [sic] have no power to assume original jurisdiction over Good Shepherd," and that "they [sic] have no power to decide who is a voting member of Good Shepherd." Such statements, however, are legal conclusions that are insufficient to raise a fact issue within the context of a summary-judgment motion. *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991); *Ellis v. Jansing*, 620 S.W.2d 569, 571 (Tex. 1981); *Gaines v. Hamman*, 358 S.W.3d 557, 563 n.4 (Tex. 1962).

notwithstanding that they constituted a majority of the members of the parish. *See Milivojevich*, 426 U.S. at 709. Because the trial court did not err in deferring to decisions of the Bishop or the Diocese in light of the hierarchical nature of the Episcopal Church, we overrule the Former Parish Leaders' second issue.

In their third, fourth, and fifth issues, the Former Parish Leaders challenge the trial court's declaration that their actions seeking to withdraw Good Shepherd from the Episcopal Church are void and without effect, its finding that Good Shepherd's property is held in trust for the Episcopal Church and the Diocese, and its alleged failure to give effect to the 1982 deed. Each of these complaints stems from the Former Parish Leaders' initial premise that proper application of the neutral-principles approach would necessarily have resulted in a judgment in their favor. Accordingly, we will address these related points together.

The Trial Court's Judgment Comports With the Neutral-Principles Approach

Although the trial court made no findings of fact or conclusions of law that conclusively establish which approach it adopted, it appears that the trial court did apply neutral principles in rendering the judgment under review. The judgment itself indicates that the court considered and interpreted a number of the documents contained in the record, as it would have done if it were employing the neutral-principles approach. Specifically, the trial court's declaration that "all real and personal property of the Good Shepherd is held in trust for the Episcopal Church and the Diocese" is evidence that the trial

court looked to the deed conveying the real property to Good Shepherd, the trust provisions contained in the various Canons of the Episcopal Church and the Diocese, and the governing documents of Good Shepherd.

On this record, we likewise conclude that neutral principles of law mandate that the Episcopal Church and the Diocese, not the Good Shepherd parish, have control of the property in question. Though the deed to the property is held in Good Shepherd's name, the parish agreed from its inception to be a part of the greater Episcopal Church and to be bound by its governing documents. These governing documents make clear that church property is held in trust for the Episcopal Church and may be subject to Good Shepherd's authority only so long as Good Shepherd remains a part of and subject to the Episcopal Church and its Constitution and Canons.

Alternatively, the Trial Court Properly Applied Watson Deference

Viewed differently, this case can be decided not on the basis of neutral principles of real property or trust law, but by deciding which faction represents the divided local parish. There is no question that the "Good Shepherd Episcopal Church" holds record title to the church property. That is the fact on which the Former Parish Leaders rely most heavily in claiming the right to control and use the property for the new Good Shepherd Anglican church. It does not, however, resolve the ownership dispute, as both the Former Parish Leaders and the Continuing Parish Leaders purport to represent "Good Shepherd." And the Former Parish Leaders' contention that the congregation's vote transformed

Good Shepherd into an Anglican parish overlooks the fact that Good Shepherd remains an entity that is recognized by the Episcopal Church and that it continues to assert ownership of the church property held in its name.

Thus, the essence of the dispute before us can be seen as an inherently ecclesiastical question: which parishioners—the loyal Episcopalian minority or the breakaway Anglican majority—represent Good Shepherd, in whose name the disputed property is held? It is not within the jurisdiction of this Court to decide such an issue, which is inextricably linked with matters of church discipline, membership, and faith. Instead, we are bound by the decisions of the highest church judicatories within the Episcopal Church hierarchy to which the matter has been carried. *See Brown*, 116 S.W. at 363 (citing *Watson*, 80 U.S. at 727). Bishop Ohl, who serves as the "chief executive officer" in charge of both "ecclesiastical and temporal issues" and who is therefore the highest ecclesiastical authority within the Episcopal Church hierarchy that governs the Diocese, has determined that the Former Parish Leaders are not entitled to consider themselves members of Good Shepherd or to control property held in Good Shepherd's name. *See Patton v. Jones*, 212 S.W.3d 541, 548 (Tex. App.—Austin 2006, pet. denied) (review of ecclesiastical decisions, "*particularly those pertaining to the membership*[,] are in themselves an 'extensive inquiry' into religious law and practice, and therefore, forbidden by the First Amendment" (quoting *Abrams v. Watchtower Bible & Tract Society*, 715 N.E.2d 798, 803 (Ill. App. 1999) (emphasis added))). According to Bishop Ohl's

affidavit, he has, in his capacity as "Bishop and highest Ecclesiastical authority in the Episcopal Diocese of Northwest Texas, . . . recognize[d] the new vestry as the true and proper representatives of the Episcopal Church of the Good Shepherd." Because we are bound by this pronouncement, we hold that the summary-judgment evidence conclusively establishes that the church property at issue is subject to possession and control by the Continuing Parish Leaders of Good Shepherd and the parishioners aligned with them.[7]

---

[7] We note that this holding is consistent with earlier decisions of this Court and other Texas courts, wherein possession of church property is awarded to the members of a divided hierarchical congregation who remain loyal to the church, while "those members who renounce their allegiance to the church lose any rights in the property involved." *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App.—Austin 1991, writ denied); *see Brown v. Clark*, 116 S.W. 360, 365 (Tex. 1909) (property belonged to congregation that remained loyal to merged, general church); *Schismatic & Purported Casa Linda Presbyterian Church v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 706-07 (Tex. App.—Dallas 1986, writ ref d n.r.e.) (Texas law recognizes denominational church's decision that loyal group is true representative of church; therefore, loyal group is entitled to possession and use of all church property); *Browning v. Burton*, 273 S.W.2d 131, 134 (Tex. Civ. App.—Austin 1954, writ ref d n.r.e.) ("Appellants of course had the right to withdraw from the local church but in so doing they relinquished their rights in the abandoned church."). These courts have viewed the matter as "a simple question of identity" determined by identifying which faction is the successor to the general church as it existed

Partial Conclusion

As demonstrated by the foregoing, the trial court's judgment can be affirmed whether we decide this appeal by applying neutral principles of law or by deferring resolution of the determinative question of identity to the proper authorities within the Episcopal Church hierarchy. *See Milivojevich*, 426 U.S. at 709; *Westbrook*, 231 S.W.3d at 398. Under either methodology, giving due deference to the Diocese's resolution of the ecclesiastical questions bearing on this appeal, we conclude that when the Former Parish Leaders and the other parishioners aligned with them disaffiliated from the Episcopal Church, the church property remained under the authority and control of the Episcopal Church. Accordingly, the vote to disaffiliate was effective only as to those members who sought to withdraw from the Episcopal Church; it did not have the effect of withdrawing Good Shepherd itself from its union with the Episcopal Church, as the Former Parish Leaders presume.[8] Further, having found

---

prior to the division. *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865, 871 (Tex. Civ. App.—Texarkana 1977, no writ) (collecting cases). The Former Parish Leaders maintain that the "question of identity rule" is not applicable to this case because the Episcopal Church is not sufficiently hierarchical and lacks the tribunals necessary to decide identity. Having already determined that the record conclusively establishes the hierarchical nature of the Episcopal Church and the Diocese, we reject these arguments.

[8] Contrary to the Former Parish Leaders' assertions, the trial court's judgment imposes no violation of the First Amendment's right of free association. The question to be

that the Continuing Parish Leaders are entitled to possession and use of the property, the trial court did not err in declaring that property owned by the local Episcopal parish is held in trust for the Episcopal Church, pursuant to the Episcopal Church Constitution and Canons. We overrule the Former Parish Leaders' third, fourth, and fifth issues.

The Former Parish Leaders' Remaining Issues

In their sixth issue, the Former Parish Leaders argue that the trial court's judgment declaring that the church property may be used only for the mission of the Episcopal Church violates the First Amendment of the U.S. Constitution by entangling the court in determining the religious question of the mission of the Episcopal Church. Because it is unsupported by any authorities or citations to the record, this issue is waived. *See* Tex. R. App. P. 38.1(i); *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010). Even if it were not, however, the trial court's judgment passes constitutional muster by deferring to ecclesiastical authorities within the Episcopal Church to define the Church's mission. The Former Parish Leaders also contend that the judgment violates the Texas Constitution by ordering that they may not use, divert, or alienate the real property of Good Shepherd, which constitutes a taking of private

---

resolved is not whether the defecting parishioners have a right to withdraw from the Episcopal Church and instead join the Anglican Communion—they clearly do—but whether they can claim title to property belonging to the Good Shepherd parish, which, as the trial court properly determined, they cannot.

property. Given both the failure of any governmental appropriation of the property and the fact that the property is owned by Good Shepherd—not the parishioners who disaffiliated from it—this argument lacks merit. We overrule the Former Parish Leaders' sixth issue.

In their seventh issue, the Former Parish Leaders argue that the order granting summary judgment in favor of the Diocese and the Continuing Parish Leaders is defective because it fails to identify the property and awards the property to persons not named as parties to the suit (namely, the vestry of the Episcopal Church of the Good Shepherd). Again, because they have failed to adequately brief this issue by including authorities or citations to the record, it is waived. *See id.* Moreover, there is no serious question that the subject property is sufficiently identified in the Diocese and Continuing Parish Leaders' motion for summary judgment, which was granted in its entirety as to those claims. In addition, because it is not necessary that all members of the current vestry of Good Shepherd be identified, those who are, including the priest-in-charge and the wardens, can appropriately take possession of the property in accordance with the trial court's order. We overrule the Former Parish Leaders' seventh issue.

CONCLUSION

Having overruled the Former Parish Leaders' issues on appeal, we affirm the trial court's judgment.

J. Woodfin Jones, Chief Justice

Before Chief Justice Jones, Justices Henson and Goodwin

Affirmed

Filed: Mach 16, 2011

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE 51ST DISTRICT OF TEXAS
TOM GREEN COUNTY DIVISION

No. A-07-0237-C

THE DIOCESE OF NORTHWEST TEXAS,
THE REV. CELIA ELLERY, DON GRIFFIS, AND
MICHAEL RYAN

v.

ROBERT MASTERSON, MARK BROWN,
GEORGE BUTLER, CHARLES WESTBROOK,
RICHEY OLIVER, CRAIG PORTER, SHARON WEBER,
JUNE SMITH, RITA BAKER, STEPHANIE PEDDY,
BILLIE RUTH HODGES, DALLAS CHRISTIAN,
AND THE EPISCOPAL CHURCH OF THE GOOD SHEPHERD

MODIFIED FINAL SUMMARY JUDGMENT

On September 16, 2009, the court heard Plaintiffs' Motion for Summary Judgment. The parties appeared before the court for the hearing on the motion. After considering the pleadings, motion, response, evidence on file, and arguments of counsel, the court GRANTS the motion.

The court hereby RENDERS judgment for the Plaintiffs. The court finds from the undisputed summary judgment evidence and prevailing Texas Law that the Plaintiffs are entitled to Judgment.

The court hereby issues a DECLARATORY JUDGMENT pursuant to Texas Civil Practice and Remedies Code §§ 37.001, et seq. declaring that Defendants may not divert, alienate, or use the real or personal property of Good Shepherd, including the Church Property, except for the mission of the Episcopal Church, as provided by and in accordance with the Constitutions and Canons of the Episcopal Church and the Diocese;

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

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

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

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

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

The court orders execution to issue for this judgment.

SIGNED on December 16, 2009

/s/

PRESIDING JUDGE

APPENDIX E

IN THE SUPREME COURT OF TEXAS

No. 11-0332
03-10-00015-CV
A-07-0237-C

ROBERT MASTERSON, MARK BROWN, GEORGE BUTLER, CHARLES WESTBROOK, RICHEY OLIVER, CRAIG PORTER, SHARON WEBER, JUNE SMITH, RITA BAKER, STEPHANIE PEDDY, BILLIE RUTH HODGES, DALLAS CHRISTIAN, AND THE EPISCOPAL CHURCH OF THE GOOD SHEPHERD

Petitioners,

v.

THE DIOCESE OF NORTHWEST TEXAS, THE REV. CELIA ELLERY, DON GRIFFIS, AND MICHAEL RYAN,

Respondents.

ORDER

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.

DATED: March 21, 2014

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE 141ST DISTRICT OF TEXAS
TARRANT COUNTY DIVISION

Cause No. 141-237105-09

THE EPOSCOPAL CHURCH, ET AL.

vs.

FRANKLIN SALAZAR, ET AL.

AMENDED ORDER ON SUMMARY JUDGMENT

This Amended Order on Summary Judgment supersedes the Orders on Summary Judgment signed by the Court on January 21, 2011.

On January 14, 2011, came on for consideration (1) The Episcopal Church's Motion for Summary Judgment, (2) The Local Episcopal Parties' Amended Motion for Partial Summary Judgment; and (3) Defendants' Motion for Partial Summary Judgment. Having considered the pleadings, motions, any responses and replies, evidence on file subject to the Court's rulings on the objections to that evidence, the governing law, and arguments of counsel, the Court orders as follows:

The Episcopal Church's Motion for Summary Judgment is GRANTED in part.

The Local Episcopal Parties' Amended Motion for Partial Summary Judgment is GRANTED in part.

Defendants' Motion for Partial Summary Judgment is DENIED.

The Court hereby issues a DECLARATORY JUDGMENT pursuant to Texas Civil Practice and Remedies Code §§ 37.001, et seq., declaring that:

1. The Episcopal Church (the "Church") is a hierarchical church as a matter of law, and since its formation in 1983 the Episcopal Diocese of Fort Worth (the "Diocese") has been a constituent part of the Church. Because the Church is hierarchical, the Court follows Texas precedent governing hierarchical church property disputes, which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. *See*, *e.g. Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909); *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865 (Tex.Civ.App. - Texarkana 1977, no writ). Under the law articulated by Texas courts, those are the individuals who remain entitled to the use and control of the church property. *Id.*

2. As a further result of the principles set out by the Supreme Court in Brown and applied in Texas to hierarchical church property disputes since 1909, the Court also declares that, because The Episcopal Church is hierarchical, all property held by or for the Diocese may be used only for the mission of the Church, subject to the Church's Constitution and canons.

3. Applying those same cases and their recognition that a local faction of a hierarchical church may not avoid the local church's obligations to the larger church by amending corporate documents or otherwise invoking nonprofit corporations law, *see Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App. — Austin 1991, writ denied); *Presbytery of the Covenant*, 552 S.W.2d at 870, 872; *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 600-02 (5th Cir. 1975); *Norton v. Green*, 304 S. W.2d 420, 423-24 (Tex. Civ. App. — Waco 1957, writ ref'd n.r,e.), the Court further declares that the changes made by Defendants to the articles and bylaws of the Diocesan Corporation are ultra vires and void.

The Court hereby ORDERS the Defendants to surrender all Diocesan property, as well as control of the Diocesan Corporation, to the Diocesan plaintiffs 30 days after Judgment becomes final.

The Court hereby ORDERS the Defendants to desist from holding themselves out as leaders of the Diocese when this Order becomes final and appealable.

Signed this 8th day of February, 2011.

/s/
JUDGE PRESIDING

APPENDIX G

IN THE SUPREME COURT OF TEXAS

No. 11-0265
141-252083-11

THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.

v.

THE EPISCOPAL CHURCH, ET AL.

ORDER

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.

DATED: March 21, 2014

APPENDIX H

CANONS OF THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, 2012

Title I, Canon 7

Sec. 3. No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.

Sec. 4. All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Title 2, Canon 6

Sec. 2. It shall not be lawful for any Vestry, Trustees, or other body authorized by laws of any State or Territory to hold property for any Diocese, Parish or Congregation, to encumber or alienate any dedicated and consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish or

Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.