

No. 11-0265

In The
Supreme Court of Texas

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

vs.

THE EPISCOPAL CHURCH, ET AL., *Appellees.*

On Direct Appeal from the 141st District Court,
Tarrant County, Texas

No. 141-237105-09

MOTION FOR REHEARING

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POINTS FOR REHEARING

1. The Court's retroactive application of neutral principles to this dispute is unconstitutional because the Court did not "clearly enunciate" adoption of the neutral principles approach before this case.

2. This Court should, consistent with its resolution of the issue, amend its judgment to affirm the trial court's identity declaration and injunction as to the Diocese, so that these proper rulings will be applied as final and binding in the case on remand.

INTRODUCTION

Appellees respectfully move for rehearing on two grounds:

First, the Court’s application of neutral principles is unconstitutional under *Jones v. Wolf* because Texas did not “clearly enunciate” the adoption of neutral principles before this case.¹ Even if the 1909 *Brown v. Clark* case “substantively reflected” a neutral principles methodology,² “substantively reflected” is not “clearly enunciated.”

For more than 100 years, Texas courts of appeals, the Fifth Circuit applying Texas law, and even Appellants understood *Brown* to be a deference case. This Court twice denied petitions specifically urging Texas to switch from deference to neutral principles in hierarchical church property cases. Appellants argued that “Texas Should Adopt the Neutral Principles Approach”³ and told another court, after this Opinion issued: “The Supreme Court [of Texas] says that a trust is determined on neutral principles of Texas trust law. . . . [T]heir decision back in the early 1900s on deference, that is no longer the law in Texas.”⁴ And since this

¹ *Jones v. Wolf*, 443 U.S. 595, 606 n.4 (1979).

² *Masterson v. Diocese of Nw. Tex.*, --- S.W.3d ----, 2013 WL 4608632, at *26 n.7 (Tex. Aug. 30, 2013) (discussing *Brown v. Clark*, 116 S.W. 360 (Tex. 1909)).

³ Reply at 4.

⁴ Transcript of Hearing on Objection to Judgment at 21, lines 20-25, *In re Lillian M. Burns Trust*, No. 177,121-C (89th Dist. Ct.—Wichita Cnty., Sept. 16, 2013).

Opinion issued, other churches have acted to break away from their denominations, describing this Opinion as “a historic opportunity” rather than a continuation of past precedent.⁵

Thus, even if *Brown* “substantively reflected the neutral principles methodology,”⁶ Texas appellate courts, the Fifth Circuit, both parties in this case, and Texas churches understood *Brown* to be a deference case and perceive this Opinion to reflect a change from deference to neutral principles. Thus, neutral principles was not “clearly enunciated” as Texas law before this case, and churches did not have the required opportunity to arrange their affairs accordingly. This Court should affirm the trial court’s summary judgment, even as it adopts neutral principles going forward, to avoid unconstitutional, retroactive harm.

Second, if the Court does not affirm in whole, it should affirm in part the trial court’s declaratory judgment and injunction identifying Appellees, not Appellants, as the authorized leaders of the Episcopal Diocese of Fort Worth.⁷ This Court’s judgment should reflect its Opinion, which correctly found that only

⁵ See Ben Brown, *Letter from the Session of HPPC, Seizing an Opportunity*, HIGHLAND PARK PRESBYTERIAN CHURCH (Sept. 12, 2013), <http://www.hppc.org/default.aspx?p=89155&naid=15214> (last visited Oct. 17, 2013).

⁶ *Episcopal Diocese of Fort Worth v. Episcopal Church*, --- S.W.3d ----, 2013 WL 4608728, at *7 (Tex. Aug. 30, 2013) (“*EDFW*”).

⁷ 32CR6994, 7126-27.

The Episcopal Church can make the ecclesiastical determination of which party in this case is the continuing Episcopal Diocese of Fort Worth.

The trial court correctly held, as a matter of law, that civil courts must defer to The Episcopal Church's determination of who is the Episcopal Diocese of Fort Worth. This holding remains correct under the neutral principles methodology. And the identity issue will necessarily arise on remand under a neutral principles analysis. If the Court reverses and remands for a neutral principles analysis, it should affirm the trial court's identity holdings, so that this Court's rulings on ecclesiastical identity are given the proper effect on remand "as final, and as binding."⁸

Accordingly, the judgment below should be affirmed in whole or part.

ARGUMENT

I. The Court's application of neutral principles to this dispute is unconstitutionally retroactive because the Court did not "clearly enunciate" adoption of the neutral principles approach before this case.

Jones raises the possibility of unconstitutional application of neutral principles to churches that have arranged their affairs under deference. The *Jones* Court determined that retroactivity was not an issue in that case, because the

⁸ *Watson v. Jones*, 80 U.S. 679, 727 (1871).

Georgia Supreme Court had “clearly enunciated its intent to follow the neutral-principles analysis” nine years earlier and in two prior cases.⁹

The *Jones* Court reasoned that adoption of neutral principles would not “frustrate [] free-exercise rights” 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.”¹⁰ “The burden involved in taking such steps will be minimal.”¹¹

Noting the retroactivity concern, this Court found that its application of neutral principles in this case was not retroactive, because “over a century ago in *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909), our analysis and holding substantively reflected the neutral principles methodology.”¹²

But “substantively reflected” is not “clearly enunciated.” For more than 100 years – before, during, and even *after* this case – courts, litigants, and churches across Texas have consistently understood *Brown* to be a deference case. This includes Texas courts of appeal, the Fifth Circuit applying Texas law, *both* sides in this litigation, and congregations now acting to leave their denominations in the

⁹ *Jones*, 443 U.S. at 606 n.4.

¹⁰ *Id.* at 606.

¹¹ *Id.*

¹² *EDFW*, 2013 WL 4608728, at *7.

wake of this Opinion. An objective review of the case law shows that *Brown* did not clearly enunciate the adoption of neutral principles over deference. In fact, even the most recent case law across Texas leading up to this dispute reinforced churches’ justifiable reliance on the deference methodology.

Because *Brown* did not clearly enunciate Texas’s adoption of the neutral principles methodology over deference, churches in Texas did not have the opportunity required under the Constitution to reorganize their internal affairs under the new rules of the road “before the dispute erupts”¹³ The burden this has placed on several denominations in Texas is not minimal but maximal – switching doctrines in the middle of a dispute has led to protracted, expensive litigation and has unsettled decades-old commitments that were sacrosanct when made under deference. To avoid an unconstitutional, retroactive harm that infringes Appellees’ free exercise and due process rights, this Court should affirm the summary judgment below under deference, while adopting the neutral principles methodology going forward for disputes that have not yet erupted.

A. *Brown* did not substantively reflect neutral principles.

As this Court noted, states have generally applied one of two methods to hierarchical church property disputes: “deference” and “neutral principles of

¹³ *Jones*, 443 U.S. at 606.

law.”¹⁴ The deference approach was established by the U.S. Supreme Court in 1871 in *Watson v. Jones*.¹⁵ The neutral principles approach was first proposed “in passing” by the U.S. Supreme Court in 1968 in *Presbyterian Church* and was expressly permitted as an alternative to “compulsory deference” in 1979, in the 5-to-4 decision, *Jones v. Wolf*.¹⁶

In 1909, this Court in *Brown* applied the U.S. Supreme Court’s deference case, *Watson*, to the church property dispute before it. It specifically applied *Watson* not only to the ecclesiastical question of whether a merger between two denominations was effective,¹⁷ but also to the property dispute between two local congregations with distinct identities.¹⁸ In *Brown*, the local property was deeded expressly “to trustees for the Cumberland Presbyterian Church at Jefferson, Tex.”¹⁹ But the Court granted the property to the *other* local party, “the church session of the Presbyterian Church in the United States of America at Jefferson, Tex”²⁰ —

¹⁴ *EDFW*, 2013 WL 4608728, at *4.

¹⁵ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 704 (2012).

¹⁶ See *Jones*, 443 U.S. at 599, 605 (quoting *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969), *rev’g Presbyterian Church in U.S. v. E. Heights Presbyterian Church*, 159 S.E.2d 690 (Ga. 1968)).

¹⁷ *Brown*, 116 S.W. at 363.

¹⁸ *Id.* at 365.

¹⁹ *Id.* at 361.

²⁰ *Id.*

despite the fact that the “property was purchased by the [Cumberland] church and paid for in the ordinary way of business.”²¹

Applying only *Watson*, this Court ruled that the breakaway group could not remove property from the higher church because it “was but a member of and under the control of the larger and more important Christian organization.”²² The *Brown* court makes no reference to the neutral principles doctrine (first mentioned by the U.S. Supreme Court fifty-nine years later), nor does it cite Texas corporations or associations law, or any other statutes or common law principles. That the court looked at the deeds or noted they “expressed no trust nor limitation upon the title”²³ does not distinguish *Brown* from the U.S. Supreme Court’s seminal deference case, *Watson*, when that Court also looked at the deeds and made the same observation: “In *Watson v. Jones* the Supreme Court of the United States stated that the property in question was not charged with any special trust, but was purchased in the ordinary way for the use of a local church”²⁴ And the *Watson* Court, like the *Brown* Court, found for the party identified by and with the higher church.

²¹ *Id.* at 364.

²² *Id.* at 365.

²³ *Id.* at 364.

²⁴ *Id.* at 363 (citing *Watson*, 80 U.S. at 726-27).

Nothing in *Brown* suggests that, per *Jones*, churches must “modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church” or make “the constitution of the general church . . . recite an express trust” under Texas law in order to ensure the loyal faction retains the property.²⁵ To the contrary, in *Brown* and *Watson*, the courts employed deference in the *absence* of a trust and without any substantive analysis of secular property law, giving force instead to the parties’ plain intra-church commitments.

Thus, the *Brown* Court *deferred*, both as to identity and property, just as the trial court did in this case, applying *Brown*. *Brown* was a deference case. It did not substantively reflect the neutral principles doctrine.

B. *Brown* did not “clearly enunciate” the neutral principles doctrine as Texas law because Texas trial and appellate courts, the Fifth Circuit applying Texas law, the parties in this case, and churches since have read *Brown* as a deference case.

Even if *Brown* substantively reflected the neutral principles methodology, it did not “clearly enunciate” Texas’s adoption of the method, allowing churches to re-arrange their internal affairs “before the dispute erupts.”²⁶

For 100 years, Texas courts understood *Brown* to be a deference case, not a neutral principles case. And courts have understood deference to be the law of

²⁵ *Jones*, 443 U.S. at 606.

²⁶ *Id.*

Texas for hierarchical church property disputes before now.²⁷ In 1954, the Austin Court of Civil Appeals applied *Brown* in *Browning*, a deference case stopping a local congregation’s pastor and trustees from taking locally-titled property out of the hierarchical African Methodist Episcopal Church contrary to its Book of Discipline.²⁸

In 1975, the Fifth Circuit, applying Texas law, employed the deference approach in a hierarchical church property dispute, relying on *Browning*, which in turn relied upon *Brown*.²⁹

In 1986, seven years after *Jones v. Wolf* announced the neutral principles approach, the Dallas court of appeals held in *Casa Linda*: “Our intermediate appellate courts have consistently followed the deference rule in deciding hierarchical church property disputes since the Texas Supreme Court ruling in *Brown v. Clark*. . . . Our state law requires deference to the Presbytery’s identity of

²⁷ See, e.g., *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 551-52 (Tex. App.—Austin 1991, writ denied); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 705, 707 (Tex. App.—Dallas 1986, writ ref’d n.r.e.), cert. denied, 484 U.S. 823 (1987); *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865 (Tex. Civ. App.—Texarkana 1977, no writ); *Norton v. Green*, 304 S.W.2d 420 (Tex. Civ. App.—Waco 1957, writ ref’d n.r.e.); *Browning v. Burton*, 273 S.W.2d 131, 134 (Tex. Civ. App.—Austin 1954, writ ref’d n.r.e.); *Cussen v. Lynch*, 245 S.W. 932 (Tex. Civ. App.—Amarillo 1922, writ ref’d).

²⁸ *Browning*, 273 S.W.2d at 135.

²⁹ *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975).

appellees, the loyal group, as the representative of the local church; consequently, it follows that appellees are entitled to possession and use of all church property.”³⁰

The Dallas court continued: “Appellants . . . urge us to depart from prior Texas law, which we have shown has consistently followed the deference rule, and to adopt the neutral principles of law rule approved by the United States Supreme Court in *Jones*. . . . Even though . . . *Jones* . . . now gives the states a choice of methods to resolve hierarchical church property disputes, our supreme court has nevertheless spoken on this issue.”³¹

Those appellants urged this Court to switch from deference to neutral principles. *See* App. for Writ of Error at 2, *Casa Linda*, No. C-5503 (July 11, 1986) (arguing that the court of appeals erred “in failing to apply the ‘neutral principles of law’ doctrine” and in “applying the ‘deference rule’ to determine the ownership of the church property”). This Court declined to take the case, finding no reversible error.

In 1991, the Austin court of appeals held in *Green*: “Appellate courts have consistently followed the deference rule in deciding hierarchical church property

³⁰ *Casa Linda*, 710 S.W.2d at 705, 707.

³¹ *Id.* at 707.

disputes since the Texas Supreme Court adopted the rule in *Brown*.”³² *Green* again put the issue before this Court. *See* App. for Writ of Error at 4, 12, *Green*, No. 1319 (July 19, 1991) (arguing that the “neutral principles of law approach is the only workable solution”). This Court again declined the case.

In 2010, the 210th Judicial District Court of El Paso County held, citing *Brown*, “the Court follows the long-established Texas precedent governing hierarchical church property disputes. . . . [I]n 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 the Texas courts, those are the individuals who remain entitled to the use and control of the church property.”³³

After this Episcopal dispute erupted, two courts of appeals have interpreted *Brown* somewhat differently, noting that its reasoning was consistent with *both* deference and neutral principles.³⁴ But even that recent, minority view does not

³² *Green*, 808 S.W.2d at 551.

³³ *St. Francis on the Hill Church*, No. 2008-4075, Final Summ. J. at 1-2 (citing *Brown*, 116 S.W. 360; *Presbytery*, 552 S.W.2d 865).

³⁴ *Windwood Presbyterian Church, Inc. v. Presbyterian Church (U.S.A.)*, No. 01-10-00861-CV, --- S.W.3d ----, 2012 WL 3771459, at *8-9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet. h.); *Masterson v. Diocese of Nw. Tex.*, 335 S.W.3d 880, 888 (Tex. App.—Austin 2011), *rev'd on other grounds*, 2013 WL 4608632 (Tex. Aug. 30, 2013).

hold that *Brown* “clearly enunciated” adoption of the neutral principles approach.³⁵

And in August 2013, the four dissenting justices in this case reflected that *Brown* did not “clearly enunciate” adoption of the neutral principles method, referencing “the common-law deference principle that we declared in *Brown*.”³⁶

Even Appellants have demonstrated that *Brown* did not “clearly enunciate” neutral principles over deference. In 1993, Appellant Iker, when still an Episcopal bishop, filed suit and used deference successfully under Texas law when a departing congregation attempted to take church property.³⁷ And in 2012, after leaving The Episcopal Church themselves, Appellants argued to this Court: “Texas Should **Adopt** the Neutral Principles Approach”³⁸ – reflecting that Texas had not already clearly enunciated neutral principles as Texas law.

Even after this Court’s Opinion, Appellants confirmed the widespread understanding that *Brown* was a deference case. They told another court, in a related proceeding: “The [Texas] Supreme Court says that a trust is determined on neutral principles of Texas trust law. Period. It’s not an ecclesiastical deference.

³⁵ Appellants have noted that some Texas cases since *Jones* made passing reference to the phrase neutral principles, but none of those cases involved hierarchical church property disputes, and Texas courts resolving hierarchical church property disputes have consistently applied the deference approach. *See* Local Episcopal Parties’ Resp. at 12 n.18.

³⁶ *EDFW*, 2013 WL 4608728, *11 (Willett, J., dissenting).

³⁷ *See* 25CR5544 (Aff. of Appellant Iker).

³⁸ Reply at 4 (emphasis added).

In fact, they said that their decision back in the early 1900s on deference, that is no longer the law in Texas.”³⁹

Nor was neutral principles “clearly enunciated” to other Texas churches before August 30, 2013. The Methodist, Presbyterian, Greek Orthodox, and Lutheran churches all urged this Court to *continue* the deference approach they understood had been announced in *Brown*.⁴⁰ And on September 10, 2013, ten days after this Opinion, the largest Presbyterian congregation in Texas obtained an *ex parte* TRO against its denomination, calling the new law announced in this case “a historic opportunity”⁴¹ and explaining that it had filed suit “to secure the benefits of a recent Texas Supreme Court case.”⁴²

Unlike the Georgia Supreme Court in *Jones*, the Texas Supreme Court did not “clearly enunciate[] its intent to follow the neutral-principles analysis” before this case, denying a historic denomination the chance to arrange its affairs not under deference but under neutral principles of Texas law before the dispute.⁴³

³⁹ Hearing Tr., *supra* note 4, at 21, lines 20-25 (emphasis added).

⁴⁰ See Amicus Brief of historic denominations, *Masterson*, 2013 WL 4608632 (No. 11-0332).

⁴¹ See *Frequently Asked Legal Questions*, HIGHLAND PARK PRESBYTERIAN CHURCH, 1 (Sept. 25, 2013), <http://www.hppc.org/assets/1711/legalfaq-925-b.pdf> (last visited Oct. 17, 2013).

⁴² *Id.* at 1.

⁴³ *Jones*, 443 U.S. at 606 n.4.

C. The Court’s retroactive application of neutral principles is not harmless.

The Court suggested: “Because neutral principles have yet to be applied in this case, we cannot determine the constitutionality of their application.”⁴⁴ But retroactive application has already harmed Appellees. After prevailing on summary judgment under settled Texas law, they must now re-litigate the case under a new doctrine, having been shut out of their churches and having incurred legal fees for over four years. And, had the Court articulated its adoption of neutral principles in advance, the parties could have taken additional steps, before the dispute erupted, to document their arrangements in ways that were unnecessary under deference.

This Court should grant rehearing and affirm under deference, even as it applies neutral principles to future disputes.

II. This Court should affirm the trial court’s identity declaration and injunction.

If this Court does not affirm the judgment in whole, it should affirm the trial court’s proper identity rulings. As this Court recognized, the identity of the Episcopal Diocese of Fort Worth is an ecclesiastical question that can only be

⁴⁴ *EDFW*, 2013 WL 4608728, at *4.

determined by The Episcopal Church.⁴⁵ This is true under any constitutional approach to church property disputes. Consistent with its Opinion, the Court’s Judgment should affirm the identity declaration and injunction below, so that on remand, the trial court can apply these rulings as final and binding.

The identity of The Episcopal Diocese of Fort Worth is an ecclesiastical question. According to the 1984 Declaratory Judgment that transferred much of the disputed property from The Episcopal Diocese of Dallas to the newly-formed Episcopal Diocese of Fort Worth, signed by Chief Justice Hecht (then Judge), the Episcopal Diocese of Fort Worth is “a duly constituted religious organization, organized pursuant to the Constitution and Canons of the Protestant Episcopal Church in the United States of America”⁴⁶ As this Court held, “the record conclusively shows TEC is a hierarchical organization,”⁴⁷ and “determination of who is or can be a member in good standing of TEC or a diocese is an ecclesiastical decision”⁴⁸ Every Diocesan Bishop must vow in writing to “conform to the Doctrine, Discipline, and Worship of the Episcopal Church.”⁴⁹ Every Diocesan officer must act “in accordance with the Constitution and Canons

⁴⁵ *EDFW*, 2013 WL 4608728, at *6; *Masterson*, 2013 WL 4608632, at *12.

⁴⁶ 26CR5673a, 5685.

⁴⁷ *Masterson*, 2013 WL 4608632, at *12.

⁴⁸ *EDFW*, 2013 WL 4608728, at *6.

⁴⁹ 24CR5134; 23CR5038.

of this Church and of the Diocese in which the office is being exercised.”⁵⁰ It is undisputed that The Episcopal Church recognizes only Appellees as the duly constituted leadership and congregations of the Diocese.⁵¹

Courts must defer to, and apply, these ecclesiastical determinations. As this Court held: “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, while deferring to religious entities’ decisions on ecclesiastical and church polity questions.”⁵²

Consistent with this Court’s Opinion, the trial court held: “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

⁵⁰ 24CR5182-83.

⁵¹ 22CR4475-77, 4495-97, 4504-05; 23CR4846, 4848-49; 24CR5113, 5120-21; 25CR5380-81, 5383-85, 5390, 5422.

⁵² *Masterson*, 2013 WL 4608632, at *1.

hierarchical church consists of those individuals remaining loyal to the hierarchical church body.”⁵³

This ruling is required under deference or neutral principles. As a matter of law, the trial court must apply this determination “as final, and as binding on [it], in [its] application to the case before [it].”⁵⁴

The identity issue will necessarily arise on remand. Appellants themselves raised the issue, appearing as “The Episcopal Diocese of Fort Worth” and moving under Texas Rule of Civil Procedure 12 to strike Appellees’ pleadings for the Diocese and barring Appellees’ counsel from appearing on its behalf.⁵⁵ In that interlocutory proceeding, the Fort Worth court of appeals held: “The question of ‘identity’ remains to be determined in the course of the litigation.”⁵⁶ It has been, as to the Diocese, on summary judgment. That ruling should be affirmed, so the trial court can properly apply it to the remaining issues.

Identity will also arise under the neutral principles analysis ordered by this Court. As the Court instructed: “Under the neutral principles methodology,

⁵³ 32CR7126-27 (citing *Brown*, 116 S.W. 360; *Presbytery*, 552 S.W.2d 865).

⁵⁴ *Brown*, 116 S.W. at 363 (quoting *Watson*, 80 U.S. at 727) (internal quotation marks omitted), cited with approval in *Westbrook v. Penley*, 231 S.W.3d 389, 398 (Tex. 2007).

⁵⁵ *In re Salazar*, 315 S.W.3d 279 (Tex. App.—Fort Worth 2010, orig. proceeding); see also 20CR4015-33.

⁵⁶ *Salazar*, 315 S.W.3d at 286.

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.”⁵⁷

The trial court must examine those deeds because “fact questions exist under neutral principles of law, at a minimum, about who holds title to each property and in what capacity.”⁵⁸ Determining which party is the “Episcopal Diocese of Fort Worth” named on certain deeds at issue will require the trial court to apply its identity ruling, which properly deferred to The Episcopal Church’s determination of that question for civil law purposes.⁵⁹

Under trust law and other neutral principles, the issue of identity will again arise. This Court held: “Upon remand the parties will have the opportunity to develop the record as necessary and present [] arguments for the trial court,” including that “the history, organization, and governing documents of the Church, the Diocese, and the parish support implication of a trust” under equitable trust doctrines.⁶⁰ For example, Article 13 of the Diocese’s Constitution required that all

⁵⁷ *EDFW*, 2013 WL 4608728, at *5.

⁵⁸ *Id.*

⁵⁹ *See, e.g.*, 15CR3131-33, 3116-19, 3138-41.

⁶⁰ *EDFW*, 2013 WL 4608728, at *6.

real estate acquired “for the use of the Church in this Diocese, including the real property of all parishes and missions, as well as Diocesan Institutions, shall be held subject to control of the Church in the Episcopal Diocese of Fort Worth acting by and through a corporation known as ‘Corporation of the Episcopal Diocese of Fort Worth.’”⁶¹ This and other commitments support the imposition of a constructive or other trust. Appellants dispute this by arguing that restrictions like “subject to control of the Church in the Episcopal Diocese of Fort Worth” refer to the Diocese, not The Episcopal Church.⁶² Appellants’ position begs the question of which party is the Episcopal Diocese of Fort Worth, and the trial court’s identity declaration will necessarily come into play.

Similarly, this Court noted that another issue on remand will be corporate qualifications, analyzed under the Texas Business Organizations Code.⁶³ Appellants have argued: “The Diocese’s Canons require that Trustees be ‘Lay persons in good standing of a parish or mission *in the Diocese* or members of the Clergy canonically resident *in the Diocese.*’ So it is standing in the Diocese that counts, not in TEC.”⁶⁴ This again raises the issue of who is the Episcopal Diocese

⁶¹ 23CR5025.

⁶² Reply at 29.

⁶³ *EDFW*, 2013 WL 4608728, at *5-6.

⁶⁴ Reply at 13 (emphasis in original) (footnote omitted).

of Fort Worth and who is canonically resident or in good standing within it. To ensure proper resolution on remand, the Court's Judgment should conform to its Opinion in affirming the identity declaration.

This Court should also affirm the trial court's identity injunction. Appellants urged this Court to adopt neutral principles. One such neutral principle of law, generally applicable to all parties under Texas Civil Practice & Remedies Code Section 37.011, is an injunction enforcing a declaration.⁶⁵ Another neutral principle of law is the right to one's identity, name, and marks, free from misappropriation or dilution.⁶⁶ The trial court properly ordered Appellants to "desist from holding themselves out as leaders of the Diocese when this Order becomes final and appealable."⁶⁷ Under deference or neutral principles, that determination is final and binding for civil purposes.⁶⁸

The trial court held, as a matter of law, that civil courts must defer to The Episcopal Church's determination of the identity and authorized leaders of the Episcopal Diocese of Fort Worth. Consistent with its Opinion, this Court should affirm those identity rulings for proper application on remand.

⁶⁵ See 21CR4307 (Episcopal Church's Mot. for Summ. J. at 3); see also *Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, 433 (Tex. App.—Austin 2004, pet. denied).

⁶⁶ See 27CR5896-97 (Local Episcopal Parties' Amended Mot. for Summ. J. at 75-76).

⁶⁷ See 32CR7127.

⁶⁸ *Watson*, 80 U.S. at 727.

CONCLUSION AND PRAYER

Appellees respectfully ask this Court to grant rehearing and (1) affirm the trial court's summary judgment order in its entirety under deference, or, alternatively, (2) affirm the trial court's identity declaration and injunction. Appellees request any further relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Tex. R. App. P. 9.4(i)(3), the undersigned hereby certifies that this Motion for Rehearing complies with the applicable word count limitation because it contains 4,416 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1). In making this certification, the undersigned has relied on the word-count function in Microsoft Word 2010, which was used to prepare the Motion for Rehearing.

s/ *Thomas S. Leatherbury*

Thomas S. Leatherbury

APPENDIX

- Tab 1 Opinion of the Court and Dissenting Opinion
- Tab 2 Transcript of Hearing on Objection to Judgment, *In re Lillian M. Burns Trust*, No. 177,121-C (89th Dist. Ct.—Wichita Cnty., Sept. 16, 2013)

TAB 1

2013 WL 4608728

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Texas.

The EPISCOPAL DIOCESE OF FORT WORTH, et al, Petitioners,

v.

The EPISCOPAL CHURCH, et al., Respondents.

No. 11–0265. | Argued Oct. 16, 2012. | Decided Aug. 30, 2013.

Synopsis

Background: Episcopal church filed suit against diocese that had left the church over doctrinal differences and others, seeking title and possession to property held in name of diocese and non-profit corporation. The 141st District Court, Tarrant County, John Parrish Chupp, J., granted summary judgment to church. Diocese appealed.

Holdings: The Supreme Court, Johnson, J., held that:

[1] Supreme Court had direct appeal jurisdiction over the case, and

[2] courts should use the “neutral principles of law” methodology for deciding property issues when religious organizations split.

Reversed and remanded.

Willett, J., dissented, with opinion, in which Lehrmann, Boyd, and Devine, JJ., joined.

West Headnotes (3)

[1] Courts

Appellate jurisdiction of Supreme Court in general

The effect of the trial court's order is what determines the Supreme Court's direct appeal jurisdiction.

[2] Courts

Appellate jurisdiction of cases involving Constitution or statutes

Trial court's injunction requiring church diocese to surrender to the church the control of non-profit corporation that held church property was a ruling that the Non-Profit Corporation Act would violate the First Amendment if it were applied in the case, and, thus, Supreme Court had jurisdiction to consider diocese's direct appeal of injunction, pursuant to statute permitting a direct appeal to Supreme Court from trial court order granting or denying an interlocutory or permanent injunction on ground of constitutionality of a statute. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Civ.St. art. 1396–1.01 et seq. (Repealed); V.T.C.A., Government Code § 22.001(c).

[3] Religious Societies

Judicial supervision in general

Religious Societies

Jurisdiction of courts to determine rights of property

State courts should use the “neutral principles of law” methodology for deciding property issues when religious organizations split, pursuant to which, once courts determine where the religious organization has placed authority to make decisions about church property, courts defer to religious organizations' decisions on ecclesiastical and church polity issues, such as who may be members of the organizations and whether to remove a bishop or pastor, while courts 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 organizations.

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Opinion

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.

*1 This direct appeal involves the same principal issue we addressed in *Masterson v. Diocese of Northwest Texas*, — S.W.3d —, 2013 WL 4608632 (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.

*2 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, 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*, 102 Tex. 323, 116 S.W. 360 (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 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

*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

[1] [2] 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 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 Act⁴ and the Texas Uniform Unincorporated Nonprofit Association Act⁵; 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 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”

*4 [3] 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, 99 S.Ct. 3020, 61 L.Ed.2d 775 (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, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). We concluded in *Masterson* that the neutral principles methodology was the substantive basis of our decision in *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (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, 99 S.Ct. 3020 (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, 99 S.Ct. 3020 (“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).

*5 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, 99 S.Ct. 3020; see *Presbyterian Church v. E. Heights*, 225 Ga. 259, 167 S.E.2d 658, 659–60 (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, 99 S.Ct. 3020. 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

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.

*6 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 I.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 —.

*7 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*, 102 Tex. 323, 116 S.W. 360 (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.

Justice [WILLETT](#) filed a dissenting opinion, in which Justice [LEHRMANN](#), Justice [BOYD](#), and Justice [DEVINE](#) joined.

Justice [WILLETT](#), joined by Justice [LEHRMANN](#), Justice [BOYD](#) and Justice [DEVINE](#), dissenting.

*7 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):

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 case³—but here the Court can only reach them by overreaching. We have no jurisdiction to 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
- *8 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:

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[ie]d not the Constitution but a ‘broad and sound view of the 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

*9 A 1940 constitutional amendment gave the Legislature power to grant direct appeals to this Court.⁷ Not until 1944, though, 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 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 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 court¹² 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 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 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

*10 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 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 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

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 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.

*11 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 *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

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.

*12 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 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-forward 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 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.

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

Parallel Citations

56 Tex. Sup. Ct. J. 1034

Footnotes

- 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.
- 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.
- 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.
- 4 TEX.REV.CIV. STAT. arts. 1396–1.01 to 1396–11.02
- 5 TEX.REV.CIV. STAT. art. 1396–70.01
- 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.
- 1 TEX. GOV'T CODE § 22.001(c).
- 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 —, 2013 WL 4608632 (Tex.2013).
- 4 116 S.W. 360 (Tex.1909).
- 5 80 U.S. 679, 13 Wall. 679, 20 L.Ed. 666 (1871).
- 6 *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, — U.S. —, 132 S.Ct. 694, 704, 181 L.Ed.2d 650 (2012) (quoting *Watson*, 80 U.S. at 727).
- 7 *See R.R. Comm'n of Tex. v. Shell Oil Co.*, 146 Tex. 286, 206 S.W.2d 235, 238 (1947).
- 8 *Id.*
- 9 *Id.*
- 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.*, 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.*, 160 Tex. 506, 334 S.W.2d 278, 278–80 (1960); *Smith v. Decker*, 158 Tex. 416, 312 S.W.2d 632, 633 (1958); *Rodriguez v. Gonzales*, 148 Tex. 537, 227 S.W.2d 791, 792–93 (1950); *Dodgen v. Depuglio*, 146 Tex. 538, 209 S.W.2d 588, 591–92 (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.*, 156 Tex. 365, 295 S.W.2d 408, 409 (1956); *Dallas Cnty. Water Control & Improvement Dist. No. 3 v. City of Dallas*, 149 Tex. 362, 233 S.W.2d 291, 292 (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*, 158 Tex. 279, 310 S.W.2d 557, 558–59 (1958); *H. Rouw Co. v. Tex. Citrus Comm'n*, 151 Tex. 182, 247 S.W.2d 231, 231–32 (1952).
- 14 See *State v. Project Principle, Inc.*, 724 S.W.2d 387, 389 (Tex.1987); *Duncan v. Gabler*, 147 Tex. 229, 215 S.W.2d 155, 156–57 (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*, 149 Tex. 332, 233 S.W.2d 435 (1950).
- 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*, 161 Tex. 242, 339 S.W.2d 663 (1960); *Standard Sec. Serv. Corp. v. King*, 161 Tex. 448, 341 S.W.2d 423 (1960); *Gardner v. R.R. Comm'n of Tex.*, 160 Tex. 467, 333 S.W.2d 585 (1960); *Bryson v. High Plains Underground Water Conservation Dist. No. 1*, 156 Tex. 405, 297 S.W.2d 117 (1956); *Corona v. Garrison*, 154 Tex. 124, 274 S.W.2d 541 (1955); *Lipscomb v. Flaherty*, 153 Tex. 151, 264 S.W.2d 691 (1954); *Boston v. Garrison*, 152 Tex. 253, 256 S.W.2d 67 (1953); *McGraw v. Teichman*, 147 Tex. 142, 214 S.W.2d 282 (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.
- 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 119.
- 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.
- 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.
- 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, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979).
- 38 *Gardner*, 333 S.W.2d at 588.
- 39 *Garcia*, 817 S.W.2d at 61.
- 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.”).
- 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. *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.

43 *Masterson*, — S.W.3d —.

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

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

46 *See* TEX.R.APP. P. 57.2.

TAB 2

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REPORTER'S RECORD
TRIAL COURT CAUSE NO(S). 177,121-C

IN RE:) IN THE 89TH DISTRICT COURT
) OF
LILLIAN M. BURNS TRUST) WICHITA COUNTY, TEXAS

OBJECTION TO JUDGMENT

On the 16th day of September, 2013, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Mark T. Price, Judge presiding, held in Wichita Falls, Wichita County, Texas:

Proceedings reported by Machine Shorthand.

JOANNA BEVERAGE, CSR
OFFICIAL COURT REPORTER
89TH JUDICIAL DISTRICT
WICHITA COUNTY, TEXAS

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A P P E A R A N C E S

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	OBJECTION TO JUDGMENT			
	September 16, 2013			
	MOVANT'S WITNESSES	DIRECT	CROSS	VOIR
	(None in volume.)			DIRE VOL.
	RESPONDENT'S WITNESSES	DIRECT	CROSS	VOIR
	(None in volume.)			DIRE VOL.
	ALPHABETICAL WITNESS INDEX			
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	MOVANT'S EXHIBITS	OFFERED	ADMITTED	VOL.
	(None in volume.)			
	RESPONDENT'S EXHIBITS	OFFERED	ADMITTED	VOL.
	(None in volume.)			

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1 THE COURT: No. 177,121-C. This is in
2 The Matter of the Lillian M. Burns Trust. Is the
3 Movant ready?
4 MR. RUGELEY: Yes, Your Honor.
5 THE COURT: And Respondent?
6 MR. RUGELEY: Hank Rugeley on behalf of
7 wells Fargo Bank.
8 THE COURT: I'm sorry?
9 MR. RUGELEY: Hank Rugeley on behalf of
10 wells Fargo Bank.
11 THE COURT: Thank you.
12 MS. WELLS: Yes, Your Honor. Kathleen
13 wells for the Episcopal Dioceses of Fort worth and the
14 Corporation, ready.
15 THE COURT: Thank you.
16 MR. SHARPE: Shelby Sharpe for the
17 Episcopal Dioceses of Fort worth and Corporation.
18 THE COURT: well, thank you all.
19 MS. MICHAELS: And Ann Michaels, I
20 represent the local Episcopal congregation and Parish.
21 THE COURT: Thank you. It's good --
22 MR. SHARPE: Oh, and by the way, I'm
23 also here on behalf of David weaver for the parishes
24 that he represents.
25 THE COURT: Okay. How old is David

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1 weaver now? Be seated, please, you don't have to
2 stand up.
3 MR. SHARPE: well, I'm just so used to
4 that, Your Honor.
5 THE COURT: I know, I know.
6 MR. SHARPE: I would say David's in his
7 50s.
8 THE COURT: Oh, way too young then. I
9 had a fraternity brother, David weaver, and I had lost
10 track of him. I know he was going to go to law
11 school, but didn't know. well, it's nice to see all
12 of the faces that I've read in this file, so anyway,
13 we're ready to go ahead and proceed. I'm sorry for
14 the shortened time. If need be, we'll work over, so
15 we'll go ahead and get this resolved. All right.
16 MR. RUGELEY: Your Honor, if I may, just
17 a short background on this matter. The Burns Trust is
18 an inter vivos trust that was established by Ms. Burns
19 back in 1963 and we're all familiar with Ms. Burns for
20 her generous donations to Midwestern and --
21 THE COURT: Absolutely.

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22 MR. RUGELEY: -- the Burns Fantasy of
23 Lights. But she created this trust back in 1963 and
24 basically, it was for the benefit of what at that time
25 was called the Episcopal Day School and also, the
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1 Burns Chapel, which is located immediately west of the
2 Midwestern University campus. And under the terms of
3 this trust, at least it's my reading, that it was to
4 terminate in the event that the Episcopal Day school
5 building or the church were no longer used for those
6 purposes.

7 In June 2009, the property was sold to
8 Midwestern State University, which in my mind and in
9 the trust's mind -- trustee's mind, required the
10 termination of the trust. So at that time, we
11 contacted -- which at that time was Christ Academy was
12 the successor to the Episcopal School and we also
13 contacted the local Good Shepherd Episcopal Church.
14 And as a result of that, there are issues between the
15 parties as to what should be done with the trust
16 funds.

17 Christ Academy disagreed that the trust
18 should terminate or that the funds should go to the
19 Episcopal Church. And because of that, we filed this
20 petition asking for court direction. We had to sever
21 Christ Academy, they never answered, so it's a
22 default. We had a hearing on March 22nd where Judge
23 Towery heard the case where he approved basically the
24 relief that we were requesting.

25 The Fort Worth Dioceses is involved in
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1 litigation as to -- and I don't want to over speak
2 because these people have a much better understanding
3 than I do, but basically as to who owns or maybe who
4 controls the local churches and the local churches's
5 property. And because of that, we've had some issues
6 as to trying to resolve the wording of the judgment.

7 And let me say this, I am not trying to
8 effect anybody's rights in that Fort Worth Dioceses
9 litigation. It's over my head. I can't figure it
10 out. I'm just trying to get my client, Wells Fargo,
11 done with the trust and once it's done, they don't
12 have to worry about anything in the future.

13 The Court's probably familiar in
14 August -- August 30th this year, the Supreme Court
15 ruled upon one of the appeals or maybe two of the
16 appeals in the Fort Worth Dioceses litigation. I
17 think it's been remanded back to the trial court to
18 resolve some issues, so that's going to be ongoing for
19 at least a while.

20 What I'm trying to do is basically get
21 this trust terminated, allow the funds to be paid to
22 the registry of the Court pending finalization of the
23 Fort Worth Dioceses litigation and let them decide how
24 it's to go. And I've drafted probably a half dozen
25 different versions of the judgment, circulated,

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1 different issues have arisen. And -- and the most
2 current version is even after the version that was
3 attached to the letter that I sent to you back in

4 June, which I think resolved at least some of the
5 issues that were outstanding. And may I approach,
6 Your Honor?

7 THE COURT: Yes, you may.

8 MR. RUGELEY: This is the most recent
9 version of the judgment. And that was e-mailed to
10 everybody on, I believe, June the 19th and I have made
11 a couple of changes to this from the June 19th
12 version. One change is when I proved up attorney's
13 fees back in March, I didn't anticipate all of these
14 continued issues over the wording of the judgment, so
15 I just eliminated the attorney's fees as of March
16 22nd, 2013, and basically the only other change that I
17 did in the typed portion was just change the date.

18 Prior to today's hearing, I was meeting
19 with counsel and trying to resolve possible concerns
20 of their's and if I could state those into the record
21 and see whether -- if Mr. Sharpe has any objections to
22 this, perhaps we could speed things along.

23 On Page 2, there's a paragraph titled
24 "Issues Involving Dioceses of Fort Worth," and the
25 next to last line, where it starts "Regardless of any
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1 findings, rulings or judgment in the Fort Worth
2 Dioceses litigation," we proposed to add right before
3 that, "As to claims and matters involving Wells
4 Fargo." We don't want to be -- somehow allowing
5 this maybe to be some sort of evidence of binding as
6 to the Fort worth litigation and that just basically
7 limits this to the termination of the trust and claims
8 in this proceedings, so I think that's a fair --

9 THE COURT: And what page was that?

10 MR. RUGELEY: I'm sorry, Your Honor,
11 it's on Page 2.

12 THE COURT: Page 2? I thought so.

13 MR. RUGELEY: It'll be right here.

14 THE COURT: Oh, okay, okay. I got you.

15 MR. SHARPE: I want to be sure I'm
16 clear. where is it now?

17 MR. RUGELEY: See right here? I
18 just added, "As to claims and matters involving Wells
19 Fargo."

20 MR. SHARPE: No problem.

21 MR. RUGELEY: Next, Your Honor, on Page
22 5, there's a Paragraph 10 and at the end of Paragraph
23 10, we proposed to add the clause, "To be paid in
24 accordance with the final adjudication of the Fort
25 worth Dioceses litigation."

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1 MS. WELLS: would you say that again?

2 MR. RUGELEY: "To be paid in accordance
3 with the final adjudication of the Fort Worth Dioceses
4 litigation."

5 MS. WELLS: Thank you.

6 THE COURT: Okay. So counsel is hearing
7 this at the same time I'm hearing it, they have not
8 seen it before, is that what you are saying?

9 MR. RUGELEY: Yes, Your Honor. We were
10 talking out in the hall and trying to address matters
11 ahead of time.

12 THE COURT: Okay. Okay.

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13 MR. RUGELEY: Then on the top of Page 6,
14 Paragraph 12, I've added -- and this is typed in
15 already, but this is where I added, "As of March 22nd,
16 2013," because as of March 22nd, I didn't anticipate
17 all the goings on as to the wording of the judgment.
18 Next, on Page 8, there's a Paragraph 7
19 that talks about the release and discharge granted to
20 wells Fargo. And we'd like to insert a clause toward
21 the end of the second line where it says, "without
22 limitation," it says, "claims," that, "by or against
23 wells Fargo Bank arising from or related in any way to
24 the Burns Trust," and then continue on with the way it
25 is. Sorry.

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1 MS. WELLS: But it would be: Any other
2 claim by or against wells Fargo arising --
3 MR. RUGELEY: Yeah. Arising from or
4 related in any way to the Burns Trust.
5 MS. WELLS: Right. But it would be:
6 Any other claim by or against wells Fargo arising --
7 limited to wells Fargo, right?
8 MR. RUGELEY: "By or against wells
9 Fargo."
10 MS. WELLS: Okay. Thank you.
11 MR. SHARPE: Thank you.
12 MR. RUGELEY: And Your Honor, there's
13 one other change which basically is the same change,
14 but there's the paragraph at the bottom of Page 8, the
15 standard Mother Hubbard type language and it states,
16 "Notwithstanding the Court's order regarding the funds
17 held in the registry of the Court, this judgment
18 disposes of all claims and all parties," again that's
19 the standard Mother Hubbard language, but we're taking
20 "and all parties" out and replacing with the same
21 language that we put up above where it reads, "All
22 claims by or against wells Fargo Bank arising from or
23 related in any way to the Burns Trust."
24 One other matter, one of the parties
25 that's named in the petition is The Episcopal Church

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1 and I was talking in the hall to counsel and we --
2 we've been fairly relaxed in dealing with the parties,
3 we're trying to be practical and apparently, at least
4 what was my understanding, if not the other counsel's
5 understanding, if the Episcopal Church ever was
6 included, but from talking to counsel, the Fort Worth
7 Dioceses, whoever the Fort Worth Dioceses is, is an
8 actual party, an actual entity. And the analogy that
9 I want to use is like the Episcopal Church is more or
10 less like the parent corporation to the Fort Worth
11 Dioceses, that's not correct?
12 MR. SHARPE: No.
13 MS. MICHAELS: To the people that broke
14 away that's not true. To those that are still in the
15 Episcopal Church, it is true.
16 MR. RUGELEY: Okay. Well, maybe you can
17 help me out on that, because I've been -- the
18 first notice that had anybody saying the Episcopal
19 Church wasn't part of this was -- was after I
20 submitted one of the versions of the judgment. And
21 I'm just trying to resolve this in a way where we

22 don't have to continue. Again, I'm not trying to
23 prejudice anybody's position.

24 THE COURT: Yeah, I understand.

25 MR. RUGELEY: I mean, I just want a
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1 final --

2 MS. WELLS: I have a suggestion.

3 THE COURT: Sure.

4 MS. WELLS: What if you nonsuit the
5 Episcopal Church?

6 MR. RUGELEY: Let me ask you this,
7 shelby --

8 MR. SHARPE: Sure.

9 MR. RUGELEY: -- do you think that --
10 for example, if I was to nonsuit the Episcopal Church,
11 I'm --

12 MR. SHARPE: I think that's the wise
13 thing to do because in my opinion the Episcopal Church
14 has no dog in this fight.

15 MR. RUGELEY: well, that's where I was
16 going.

17 MR. SHARPE: They have no interest.
18 They're not mentioned in the trust, I mean, they
19 shouldn't even be here. So nonsuit in my opinion is
20 fine as far as the Episcopal Church goes, because
21 let's put it this way: They're not going to be able
22 to come back and sue you. Now, they may be crazy
23 enough to try it, but if so, I'll be glad to defend
24 you on that one.

25 MR. RUGELEY: Your Honor, with the
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1 Court's permission, I would like to nonsuit the
2 Episcopal Church and I can modify that language.

3 THE COURT: That makes sense, sure.

4 MR. RUGELEY: And really, that's all I
5 have at the present time, Your Honor.

6 THE COURT: Okay.

7 MR. RUGELEY: I would welcome any
8 suggestions on the judgment from the other parties.

9 THE COURT: Do y'all want a chance to
10 look at it or are you ready to -- any suggested
11 changes you may have now or -- or what? I mean, we
12 can -- my time is your time.

13 MR. SHARPE: Your Honor, as far as most
14 of the -- as far as the changes that have been
15 interlineated, I have no problem with those changes.
16 I think they're perfectly fine. But we do have a
17 serious issue here on parties and I think that
18 particularly with the way the signature lines are at
19 the end and then also with respect to sending certain
20 things to parties that are not before this Court, and
21 that's a part of my Motion to Strike and whenever the
22 Court wants to hear me on that, I'll -- I'll be glad
23 to address that and explain why then what's being
24 asked here really is really a -- to some degree a
25 prejudgment of the 141st.

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1 Now, we got accused of saying that we
2 were trying to decide issues here that are in the
3 141st. No way. I -- I want to address the proper

4 posture of that 141st case so that the Court will
5 understand who's before that court and who isn't
6 before that court. So if the -- any time the Court
7 wants to hear from me, I'll be glad to do it.
8 THE COURT: Go ahead.
9 MS. MICHAELS: He wants you to go ahead.
10 MR. SHARPE: Are you ready?
11 THE COURT: Yeah, you can go ahead and
12 proceed.
13 MR. SHARPE: Okay. All right. The
14 nature of our Motion to Strike their objections goes
15 to the fact of not being parties before this Court.
16 This is not a Rule 12 motion at all, period. And it's
17 important to understand that that's not the nature of
18 the motion.
19 Now, what's the posture of the motion?
20 Because that's what drives every case. The petition
21 that was filed here named certain individuals. It
22 named the Corporation, the Episcopal Dioceses of Fort
23 Worth. It named the Dioceses of Fort Worth reflecting
24 that there is a dispute about that. Those are the two
25 parties that this petition names.

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1 Now, the other part of this is that when
2 the objections came in, there's a footnote that says
3 they are in the Fort Worth suit and they're objecting
4 here based on their participation in the Fort Worth
5 suit. That's why it's extremely important to
6 understand what is before Judge Chupp in the 141st.
7 Well, first of all, if you look at the
8 Plaintiff's side of that brought by the Episcopal
9 Church and if you look at the interventions on that
10 side, there is not a corporation for the Episcopal
11 Dioceses of Fort Worth on that Plaintiff's side.
12 THE COURT: Uh-huh.
13 MR. SHARPE: Period. Not there. There
14 was the corporation of the Episcopal Dioceses of Fort
15 Worth on that side. There was also the Episcopal
16 Dioceses of Fort Worth and those are out. That's the
17 Salazar case. And it says there's only one dioceses
18 and there's one Diocesan Corporation and they are
19 represented by me. Not these folks.

20 So as you look at the posture of that
21 case and then let's look at the appeal of the judgment
22 before the Supreme Court of Texas.

23 THE COURT: Uh-huh.
24 MR. SHARPE: The Supreme Court of Texas
25 recognizes that Justice Brister and I represent the
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1 Episcopal Dioceses of Fort Worth and the Corporation
2 of the Episcopal Dioceses of Fort Worth. There's
3 nothing in there. In fact, the findings of the
4 Supreme Court track the finding of the Salazar case on
5 who's representing whom.

6 So what do we have then that they're
7 alleging here? They're saying that you disregard
8 Salazar because it is early in the case. It's three
9 years old. And it's not res judicata. We've never
10 contended it was res judicata because the case isn't
11 over with, but it is a ruling that is controlling the
12 141st litigation. And if they are not representing

13 the Episcopal Dioceses of Fort Worth or the
14 Corporation in the 141st and that's their basis for
15 being here, they can't be representing them. There's
16 no way that that can happen.

17 And the Supreme Court has so affirmed
18 that -- that part in his pleadings. So what's the
19 significance of Salazar? One, it controls as to who
20 represents what parties. That is no longer in dispute
21 before them. What's the dispute that's now back there
22 based upon the remand from the Supreme Court? The
23 Court has said that this deference argument -- in
24 other words, if the Episcopal Church accepts and
25 identifies this, then that's who it is. The Supreme

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1 Court has rejected that argument. Basically the
2 argument they're trying to make here is a deference
3 argument that the Supreme Court has said no. You're
4 not going to do that.

5 Now, to determine who is in control of
6 the Dioceses and the Diocesan Corporation under
7 neutral principles of law, which is what the Supreme
8 Court said, that's going to be determined by the
9 governing documents of the Dioceses and the governing
10 documents of the corporation. That's not
11 ecclesiastical. That's a plain, what did you do based
12 on the governing documents? An ecclesiastical
13 decision would be, who's the Bishop? Hey, that's an
14 ecclesiastical decision, but that's not what's going
15 to be decided. It's going to be decided on neutral
16 principles of law as to who goes home.

17 Now, what do both the Salazar opinion
18 and the Supreme Court note? They note that the
19 Dioceses and the Diocesan Corporation that I represent
20 intervene in the Fort Worth litigation. And they were
21 the ones who filed the Rule 12 against the people they
22 said were them and they couldn't prove they were them.
23 So that's why on their intervention, we are -- the
24 Dioceses and the Diocesan Corporation.

25 Now, there's another important aspect of
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1 that. And that is the Supreme Court and the Salazar
2 case recognize this: The Dioceses that they represent
3 did not come into existence until February of 2009.
4 That's noted in both opinions.

5 The quote Dioceses that they represent
6 didn't come into existence until 2009. There is no
7 question that you have a Dioceses that began in 1982.
8 Salazar and the Supreme Court recognized that. You
9 have a Diocesan Corporation that's existed since 1983
10 where all of the property has been. The Supreme Court
11 in Salazar represent that. And now you have this
12 Dioceses and Diocesan Corporation that come about in
13 February of 2009.

14 Now, whether they've properly put their
15 stuff together, that's not our concern. We know our
16 history. And it's been confirmed by two appellate
17 courts.

18 Okay. So what do we have? They're
19 going to say that this minority group is the one that
20 is really the Dioceses and this minority group that's
21 the corporation is really the corporation.

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22 But I want to read you just a little bit
23 of language straight out of Salazar written by Justice
24 Anne Gardner and here's what it says: "We are aware
25 of no statute or common law ruling allowing attorneys
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1 to prosecute a suit in the name of a corporation or
2 other entity on behalf of only one faction or part of
3 that corporation or entity." That's exactly what they
4 are. And the Court says we're not aware of any basis
5 for that to happen.

6 So Your Honor, here you have before --
7 before you the Supreme Court of Texas, which I think
8 while that decision's not final yet, a Motion for
9 Rehearing is still to come, that decision, when it
10 tracks what's in Salazar, all of the sudden Salazar
11 takes on a completely different meaning. While it
12 determined who the parties were and who represents the
13 various parties, the Supreme Court has now said, yeah,
14 and when it goes back, it will be decided on that
15 basis.

16 Now, here's the other part of it, and
17 this is really what concerns me more than anything
18 else. And that is who's going to get the property?
19 That's all they're really interested in, who gets the
20 property? The Supreme Court says that a trust is
21 determined on neutral principles of Texas trust law.
22 Period. It's not an ecclesiastical deference. In
23 fact, they said that their decision back in the early
24 1900s on deference, that is no longer the law in
25 Texas. That Dennis Cannon that they were relying on
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1 saying that created a trust, the Supreme Court of
2 Texas, that's gone. You, Judge Chupp, you listen to
3 neutral principles of law and you decide do they have
4 a trust interest?

5 Now, what does Texas trust law say?
6 Only the owner of a piece of property can create a
7 trust over that property, not somebody else. That's
8 Texas law. And it also says this: That a trust,
9 unless it's made expressly irrevocable, it's
10 revocable. And that was also done.

11 So Judge Chupp following the Masterson
12 opinion and the Episcopal Dioceses opinion, because in
13 the remand to him, it -- it says you will follow the
14 Masterson opinion. So Your Honor, they are not
15 properly before the Court.

16 Now, what about the Parishes that
17 Mr. Weaver represents? He's Chancellor of the
18 Dioceses. First of all, those Parishes have been in
19 existence way before the Dioceses left. And by the
20 way, you know, under unincorporated association law,
21 that's a voluntary deal. You can leave. Every
22 unincorporated association can be dissolved. A person
23 can leave, period, and go and they're gone.

24 Did the Fort Worth Dioceses through two
25 convictions, sever relationships with the Episcopal
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1 Church? Absolutely it did. That Dioceses and
2 Diocesan Corporation are there. They're no longer
3 related to the Episcopal Church. But the only thing

4 the Episcopal Church is trying to do is impress a
5 trust on property that they have.
6 Now, these Parishes also existed prior
7 to that time. Those Parishes now have a minority
8 group that's saying, no, we're the true church and the
9 Episcopal Church says, yep, this minority group,
10 that's the true church. The Supreme Court of Texas
11 says, huh-uh, you will determine which of those
12 Parishes gets the property based on neutral principles
13 of law and their governing documents.

14 And that's why I'm saying, Your Honor,
15 these folks should not be a part of the judgment. For
16 her signature to go on under a line that says she
17 represents the Episcopal Dioceses of Fort Worth and
18 the Corporation for the Episcopal Dioceses of Fort
19 Worth is contrary to Salazar and the Supreme Court.
20 She's not entitled to sign that.

21 For anybody to sign on behalf of those
22 Parishes, that hasn't been determined yet. That's the
23 neutral principles of law. That's what the 141st has
24 done decided. This Court shouldn't give any
25 indication by signatures on a line that you've decided

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1 that, yeah, they're probably before it.
2 Now, Wells Fargo, once you sign your
3 judgment -- and by the way, with these changes right
4 here, other than to remove the language that, "Wells
5 Fargo shall send it," they can send that thing to
6 anybody they want.
7 And if as a matter of courtesy, they
8 want to send it to these folks, hey, that's fine, but
9 for it to come from a judgment from this Court that
10 indicates they have any interest of any kind, that's
11 what the 141st is only going to decide based on a
12 remand from the Supreme Court.

13 Now, let me say one final thing. Since
14 this lawsuit got started, I have never made a
15 representation to the Court that the Court followed
16 and it got reversed. Every time the Court has
17 followed the recommendations of the other side, been
18 reversed, once on the mandamus on the parties and
19 second on the judgment. We've never misled the Court
20 because we know we're on solid, sound law.

21 So Your Honor, those folks should not be
22 permitted to sign on this as representing those
23 parties and the part about ordering that it be sent to
24 these other sides, I don't think that's appropriate
25 because they're not before the Court, Your Honor.

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1 Thank you very much.
2 THE COURT: Thank you.
3 MS. WELLS: Your Honor, my name is
4 Kathleen Wells, I am the Chancellor of the Episcopal
5 Dioceses of Fort Worth that is recognized by the
6 Episcopal Church. Mr. Sharpe is correct in that who
7 represents the Corporation and the Dioceses has not
8 yet been determined, whether that's the Bishop or the
9 lawyers or the trustees or anybody else. And that is
10 before -- we each say that we represent them. And
11 Judge Chupp is going to figure that out. But -- but
12 he has no greater or -- or no greater right to claim

13 that than do -- than do I. So we are here
14 representing the Episcopal entities before the Court,
15 which you need in order to sign this judgment. So we
16 are here for that purpose.

17 The Supreme Court has not determined who
18 is the real Dioceses and the real trustee. It has
19 not. And in citing Salazar, Mr. Sharpe forgot to tell
20 you about the quote on Page 286 that said, "The trial
21 court did not determine the merits of which Bishops
22 and which trustees are authorized persons within the
23 Corporation in the Fort worth Dioceses, nor do we."

24 The question of identity remains to be
25 determined in the course of the litigation. And then
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1 it goes on talk about the confusion that's called --
2 that's caused what happens when folks leave a church,
3 continue to call themselves by the name of the church,
4 while the church is trying to use its own name. And
5 this is the confusion that Justice Gardener referred
6 to talking about confusion in the litigation will be
7 perpetuated, including the appearance of an issue
8 already decided in one favor on the issues of identity
9 entitled to the property held by the Corporation in
10 the Fort worth Dioceses, all of which is going to be
11 determined in the course of the litigation.

12 Now, this was a three-year-ago thing.
13 There's been a lot going on since then. There's been
14 no Rule 13 motion, there's no attempt to file a
15 rule -- excuse me, a Rule 12 motion here.

16 Your Honor, with all due respect, I
17 don't think you want to hear dueling Rule 12 motions
18 from these parties. And I don't think that you want
19 to hear the reams -- the -- you don't want to look
20 through the reams of documents from both sides related
21 to who is the real Dioceses and who's not. That's the
22 beauty of your deferring to the Fort worth litigation
23 on this.

24 At no time did the Supreme Court or the
25 Fort Worth Court of Appeals ever say that Mr. Sharpe's
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1 clients were the real Dioceses or the real
2 Corporation. At no time has that -- has that been
3 said.

4 Our Dioceses did not come into existence
5 in 2009. In fact, our Dioceses came into existence
6 out of the Dioceses of Dallas in 1983, 1982 was -- it
7 was formed, effective 1983. The Corporation was
8 formed that year, 1983.

9 In fact, the Masterson case, which was
10 decided with the Episcopal Dioceses case talked about
11 how the -- the folks that left formed a new church.
12 They're the ones that formed a new church in 2009 --
13 in 2008 when they left. So there are -- the Court
14 knows that -- that a -- you know, unless you really
15 want to get into a Rule 12 motion, and I hope we don't
16 have to do that for judicial economy, let's get this
17 judgment signed, let Judge Chupp sort out who's the
18 real Dioceses, who's the real Corporation, who's the
19 lawyers for those real continuing entities and let's
20 let wells Fargo go off and do what wells Fargo needs
21 to do and let's just exercise some good judicial

22 economy here.
23 This is not something that you want to
24 jump into with all due respect, Your Honor. Thank
25 you.

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1 MS. MICHAELS: Your Honor, if I could
2 have one minute.
3 THE COURT: Sure.
4 (Brief pause in the proceeding.)
5 MS. MICHAELS: Your Honor, I would
6 suggest -- my name is Ann Michaels. I would suggest
7 that you don't need to go anywhere near what
8 Mr. Sharpe's talking about and Ms. Wells talked about
9 in her response. I think the parties now are good
10 with the judgment. If you just remove everybody's
11 name off of the last page of the judgment, except for
12 the language that's there that says that this doesn't
13 effect any other matter, then I think we've got a
14 final judgment and you don't have to go down either
15 one of these roads.

16 THE COURT: Let me hear from
17 Mr. Rugeley. It's his turn to hear -- just kind of
18 holding the cake right now, aren't you, Mr. Rugeley?
19 MR. RUGELEY: That's true, Your Honor.
20 Again, I -- I know I'm repeating myself, I just want
21 to know when it's done, it's done.

22 THE COURT: Yeah, I understand. Well,
23 I'll tell you what I feel inclined to do and that is
24 that all of this has been done in the 141st and it's
25 been to the Supreme Court and now it's up to Judge

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1 Chupp, is it?
2 MR. SHARPE: That is correct, Your
3 Honor.
4 MS. WELLS: Yes.
5 MS. MICHAELS: Yes, sir.
6 THE COURT: To make his decision and
7 then I will just hold this in abeyance until that
8 decision is made and you have a final decision. The
9 only problem is, it's in effect holding Wells Fargo
10 Bank captive and I -- since they haven't done anything
11 wrong, all they want is to get out of this and turn
12 the assets back over is my understanding and then be
13 free of it, I hate for that to happen. But I don't
14 know of any other good alternative to take right now
15 from hearing you all argue.

16 MR. SHARPE: Your Honor, I think that
17 when a deposit is made into the registry of the Court,
18 I really think Wells Fargo is off, once it comes into
19 the registry of the Court. And with what we've got, I
20 think that -- that solves it. Now, it doesn't come
21 out of the registry of the Court anyhow until the
22 141st makes its decision. That's when it comes out,
23 so this can be final.

24 THE COURT: Is it -- is it already in
25 the registry?

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1 MR. RUGELEY: No, Your Honor.
2 MR. SHARPE: No.
3 THE COURT: Oh, it is?

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4 MR. RUGELEY: No, Your Honor.
5 THE COURT: Oh, it's not? Oh, okay.
6 Now you wanted to say something?
7 MS. WELLS: Your Honor, you said another
8 suggestion, why not sever out the issue related to
9 wells Fargo and abate the remaining claims about --
10 put the money into the registry of the Court and abate
11 the rest of it? That would get you -- I think where
12 people need to be.
13 THE COURT: That would get the bank its
14 relief, if you pay the money into the registry and
15 then sever you out.
16 MR. RUGELEY: But I -- I think that's
17 what's being done already, that we're through.
18 THE COURT: Yeah.
19 MR. RUGELEY: Once we get a final
20 judgment. I mean, I don't even -- if the Court prefer
21 that we pay the money to Fort Worth --
22 THE COURT: Just pay it to the
23 registry -- and -- yeah, the Fort Worth court, I think
24 would be the way to do it.
25 MR. SHARPE: No. It needs to go in the
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1 registry of this Court because that's the only place
2 under law it can go.
3 THE COURT: Okay. Well, if that's --
4 that's the reason why.
5 MR. SHARPE: That's -- that's the reason
6 why. And by the way, none of us really has any claims
7 against this. It's just a part of the bigger
8 picture --
9 MS. WELLS: Yes.
10 MR. SHARPE: -- of Fort worth that gets
11 decided there. So there are no continuing claims up
12 here at all. In fact, we've never asserted a claim
13 against wells Fargo and this trust.
14 THE COURT: well, I've been reading some
15 about the -- about the developments -- or the matters
16 of your church, but I'm a Methodist, so I haven't kept
17 that close a track, so...
18 MS. WELLS: well, welcome to our world,
19 Your Honor.
20 MS. MICHAELS: Your Honor, if I could
21 say one thing. The only reason that I would suggest
22 that he be severed out is that keeps this case in
23 place and gives you a vehicle to maintain
24 jurisdiction.
25 THE COURT: And it gives them a way out
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1 so that they're out and they're no longer the stake
2 holder. Does that sound okay to you?
3 MR. SHARPE: I have no problem with a
4 severance, along the lines of what she's -- or along
5 what she's talking about. And I think her suggestion
6 of just taking everybody's signature off and it just
7 being your ruling, I think that's fine because it's
8 not an agreed judgment, so therefore, you just sign it
9 and -- and then they can sever it and we're fine.
10 MS. WELLS: It would have to be redrawn
11 or something.
12 THE COURT: Do you want to think about

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13 that or --
14 MR. RUGELEY: I think I can draft it.
15 Basically, it'd be easy enough to take the officers'
16 approvals off.
17 MR. SHARPE: Oh, yeah, just take that
18 off.
19 THE COURT: Yeah, just take that off.
20 MR. RUGELEY: And just do a separate
21 severance and then their fight as to who gets the
22 money --
23 MR. SHARPE: And then what continues --
24 THE COURT: You're out of it.
25 MR. SHARPE: -- just continues to the
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1 judgment of the 141st is fine, because I have a
2 feeling that once that thing becomes final at the
3 trial court level, it will go up to the Court of
4 Appeals, so the finality of that really won't come in
5 the 141st.
6 THE COURT: No, it's going to take some
7 time.
8 MS. MICHAELS: But what you'll be
9 holding in abeyance then is the remainder of this case
10 with the money.
11 THE COURT: Correct. Why don't we do
12 that then?
13 MS. WELLS: And we can give you reports
14 if you want. We can do whatever you want us to do.
15 THE COURT: Well, I don't know -- I
16 don't know how often I need reports. I mean, the
17 money's in the registry, you can keep me informed from
18 time to time as to the status of the Fort Worth
19 litigation, I guess.
20 MS. MICHAELS: Yeah.
21 MS. WELLS: Yeah. We'll be happy to if
22 you want us to.
23 THE COURT: I don't need formal reports
24 because I know where the money is.
25 MR. SHARPE: It's only those federal
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1 courts that want those.
2 THE COURT: Yeah. Does that sound okay?
3 MR. RUGELEY: That's fine, Your Honor.
4 I believe that's it.
5 THE COURT: well, we'll do that then.
6 we'll do that and that should give everybody some
7 relief anyway, all right?
8 MR. RUGELEY: Thank you.
9 MR. SHARPE: Thank you, Your Honor.
10 MS. WELLS: Thank you, Your Honor.
11 MS. MICHAELS: Thank you so much.
12 (Hearing concluded at 4:55 p.m.)
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1 STATE OF TEXAS)
2 COUNTY OF WICHITA)

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I, Joanna Beverage, Official Court Reporter in and for the 89th District Court of Wichita County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and -numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted, tendered in an offer of proof or offered into evidence.

I further certify that the total cost for the preparation of the Reporter's Record is \$345.00 and was paid/will be paid by Ms. Ann Michaels.

WITNESS MY OFFICIAL SIGNATURE on this the 1st day of October, 2013.

Joanna Beverage, CSR No. 7962
Expiration Date: 12-31-13
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