

CAUSE NO. 141-237105-09

THE EPISCOPAL CHURCH ET AL.,

Plaintiffs,

v.

FRANKLIN SALAZAR ET AL.,

Defendants.

) IN THE DISTRICT COURT OF

) TARRANT COUNTY, TEXAS

) 141ST JUDICIAL DISTRICT

**PLAINTIFF THE EPISCOPAL CHURCH'S MOTION FOR SUMMARY JUDGMENT
AND BRIEF IN SUPPORT OF MOTION**

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MOTION AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff The Episcopal Church hereby moves for summary judgment to resolve all claims raised in its Third Amended Original Petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff The Episcopal Church (the “Church”) is a religious denomination consisting of a central governance in the form of its elected “General Convention,” regional units called “dioceses,” and local congregations usually called “parishes.” *See infra* at pp. 8-9. One of those dioceses is the Episcopal Diocese of Fort Worth (the “Diocese”), formed in January 1983 out of one of the Church’s older dioceses, the Episcopal Diocese of Dallas, in order to better carry out the Church’s mission and ministry. As a condition of its formation, the new diocese was required to accede to the Church’s Constitution and ecclesiastical rules, or “canons.” It did so both by a resolution of its organizing Convention and in the first article of its Constitution. *Infra* at pp. 22-23.

Later in 1983, following the provisions of the Diocesan Constitution and canons, the Corporation of the Diocese of Fort Worth (the “Diocesan Corporation” or the “Corporation”) was formed for the purpose of holding title to property acquired “for the use of the [Episcopal] Church in this Diocese, including the real property of all parishes and missions as well as Diocesan Institutions.” The diocesan canons required the Corporation to operate “in accordance with the Constitution and Canons of the Diocese.” The Corporation acquired all of its initial property from the Diocese of Dallas pursuant to a Texas court judgment affirming that the Corporation had been “duly organized under the Constitution and Canons of the Episcopal

Diocese of Fort Worth.” Accordingly, and since its founding, the Diocesan Corporation has functioned as a legal instrument of the Diocese. *See infra* at pp. 24-26.

In 1994, defendant Jack Leo Iker became the Bishop of the Diocese after he had been elected by the Convention of the Diocese, the leadership of a majority of the other dioceses of the Church had consented to his ordination as a bishop, he promised in writing to “conform to the Doctrine, Discipline, and Worship of The Episcopal Church,” and he was ordained and consecrated as a Bishop of the Church by the Presiding Bishop and other bishops of the Church, all in accordance with the Constitutions and canons of the Church and the Diocese. By virtue of his position as Bishop of the Diocese, he became Chair of the Board of Trustees of the Diocesan Corporation. *See infra* at pp. 24, 28-29. Other individual defendants assumed their respective positions as Trustees of the Diocesan Corporation at various times prior to November 2008 by virtue of their qualification under Diocesan canons as “[l]ay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese,” and their election to those offices by the Diocesan Convention. *See infra* at p. 29.

In November 2008, defendant Iker and his followers, including each of the other individual defendants, left the Church and joined another denomination; they also purport to have removed the Diocese from the Church and “realigned” it with that same other denomination. At a meeting in February 2009, the Diocese filled the offices left vacant by the departure of the those persons from the Church with loyal Episcopalians including, among others, Bishop Edwin Gulick and other third-party defendants in this action. Bishop Gulick has since been succeeded in his role as bishop by plaintiff Bishop Wallace Ohl. Bishops Gulick and Ohl and the persons elected by the Diocese in February 2009 (the “Diocesan Plaintiffs”) are in all respects recognized by the Church as the leadership of the Diocese, while the defendants deny

any connection to the Church or any of its dioceses. Despite this, defendants have refused to relinquish governance of the Diocese, the Diocesan Corporation, or possession of the real and personal property those entities hold. *See infra* at pp. 29-33.

This wrongful refusal forced the Church and others to file this lawsuit. The Church's petition thus seeks a declaration that (a) the Diocese is and remains the same Diocese that has been a part of the Church since its formation in 1983; (b) the Diocesan plaintiffs are, and have been since February 2009, the authorities and representatives of the Diocese entitled to use and control the Diocesan Corporation and the real and personal property of the Diocese; (c) all property held by or for the Diocese may be used only for the mission of the Church; and (d) changes made by the defendants to the articles and bylaws of the Diocesan Corporation in an attempt to remove the Corporation from the reach of the Church's rules are *ultra vires* and void. The Church seeks an injunction (i) requiring the defendants to surrender all Diocesan property, as well as control of the Diocesan Corporation, to the Diocesan plaintiffs and to provide an accounting of all Diocesan assets, and (ii) prohibiting the defendants from holding themselves out as leaders of the Diocese. *See Plaintiff The Episcopal Church's Third Amended Petition* at 19-21.

In this motion, the Church now seeks summary judgment on its petition and an order granting all the relief sought therein. In brief, in light of the undisputed facts set forth herein, the grounds for the Church's motion are as follows:

First: As discussed in detail in Argument Section I, *infra*, the Church is entitled to a declaratory judgment that the Diocesan Plaintiffs are entitled to the use and control of the Diocese, its Corporation, and assets, and that defendants, who have left The Episcopal Church, and their successors are not, because:

a) Texas authority establishes that a constituent part of a hierarchical church is comprised of those remaining loyal to the hierarchical denomination. *See infra* Argument Section I.A (discussing cases including *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909); *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.); *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599 (5th Cir. 1975); *Diocese of Nw. Tex. v. Masterson*, No. A-07-0237-C, Modified Final Summary Judgment (51st Dist. Ct., Tom Green County, Tex. Dec. 16, 2009), *appeal docketed*, No. 03-10-00015-CV (Tex. App. Jan. 7, 2010) (attached at Tab A)).

b) The undisputed evidence conclusively shows that The Episcopal Church is “hierarchical” as that term has been defined by the U.S. Supreme Court and Texas courts. *See infra* Argument Section I.B (discussing facts and cases including *Watson v. Jones*, 80 U.S. 679 (1871); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909)). And, every court in the country to have considered this question has concluded that the Church is hierarchical. *See infra* Argument Section I.B (citing 13 cases from courts in 9 states and one federal court of appeals).

c) It is undisputed that Bishops Gulick and Ohl and the other leaders of the Diocese elected in February 2009 and recognized as such by the Church are the persons who remain loyal to the Church, and that the defendants have disclaimed any connection to the Church; and, in any event, the First Amendment requires courts to defer to the Church’s determinations regarding the identity of its leaders. *See infra* Argument Section I.C (discussing facts and cases including *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff*, 344 U.S. 94; *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1

(1929); *Brown*, 102 Tex. 323, 116 S.W. 360; *Lacy v. Bassett*, 132 S.W.3d 119 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

d) The great weight of authority from across the country involving The Episcopal Church makes clear that property of an Episcopal Church body must remain with the Church in the event of a dispute. See *infra* Argument Section I.D (citing all recent cases involving The Episcopal Church).

Second: As discussed in detail in Argument Section II, *infra*, the Church is entitled to a declaratory judgment that all property of the Diocese may be used only for the mission of the Church and not diverted to another denomination because:

a) Texas law requires enforcement of the Church's property rules, which require that all property of the Diocese be held and used for the mission of the Church and not diverted to other purposes. See *infra* Argument Section II.A (discussing Church canons and authority including *Dist. Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones*, 138 Tex. 537, 160 S.W.2d 915 (1942); *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Casa Linda*, 710 S.W.2d 700; *Browning v. Burton*, 273 S.W.2d 131 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.); *Green v. Westgate Apostolic Church*, 808 S.W.2d 547 (Tex. App.—Austin 1991, writ denied); *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197 (Tex. App.—Amarillo 1998, no writ); *Presbytery of the Covenant*, 552 S.W.2d 865; *Milivojevich*, 426 U.S. 696; *Kedroff*, 344 U.S. 94; *Episcopal Church Cases*, 87 Cal. Rptr. 3d 275 (Cal. 2009), *cert denied*, 130 S.Ct. 179 (2009); *Diocese of Nw. Tex. v. Masterson*, No. A-07-0237-C, Modified Final Summary Judgment). And,

the overwhelming majority of courts to have considered the question have held that property held by a subordinate unit of The Episcopal Church is held in trust for the mission of the Church. *See infra* Argument Section II.A (citing all recent cases considering whether church property is held in trust for The Episcopal Church).

b) Texas law governing charitable trusts requires that property donated to a unit of The Episcopal Church continue to be held and administered for the mission of that church, and no other. *See infra* Argument Section II.B (discussing authority including *Boyd v. Frost Nat'l Bank*, 145 Tex. 206, 196 S.W.2d 497 (1946); *Blocker v. State*, 718 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); 4A William F. Fratcher & Austin W. Scott, *The Law of Trusts* § 348.1 (4th ed. 1989); *Episcopal Church Cases*, 87 Cal. Rptr. 3d 275.

Third: As discussed in Argument Section III, the Church is entitled to a declaratory judgment that defendants' attempted amendments to the Diocesan Corporation's articles and bylaws are *ultra vires* and void because Texas law does not allow an entity that is subordinate to a hierarchical church's rules to alter its relationship with that entity by corporate amendment. *See infra* Argument Section III (discussing facts and authority including *Temple Lumber Co. v. Miller*, 169 S.W.2d 256 (Tex. Civ. App.—Fort Worth 1943, writ ref'd w.o.m.); *Diocese of San Joaquin*, No. 08 CECG 01425, Order on Plaintiffs' Motion for Summary Adjudication; *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280 (Conn. 1993); *Huber v. Jackson*, 96 Cal. Rptr. 3d 346 (Ct. App. 2009), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (Ct. App. Sept. 17, 2009), *cert. denied*, 78 U.S.L.W. 3498 (Mar. 1, 2010) (No. 09-708); *New v. Kroeger*, 84 Cal. Rptr. 3d 464 (Ct. App. 2008), *ordered*

published by 202 P.3d 1089 (Cal. 2009); First Born Church of the Living God, Inc. v. Hill, 481 S.E.2d 221 (Ga. 1997)).

SUMMARY JUDGMENT EVIDENCE

The evidence supporting plaintiff's motion is discussed in detail in the Statement of Undisputed Facts included below at pp. 8-33, and is set forth in the following materials:

1. Copies of excerpts from Journals of the General Convention of The Episcopal Church; Journals of the Conventions of the Episcopal Diocese of Fort Worth and the Episcopal Diocese of Dallas; the Constitutions and canons of The Episcopal Church, the Episcopal Diocese of Fort Worth, and the Episcopal Diocese of Dallas; and other official documents from the Archives of The Episcopal Church, authenticated by Mark Duffy, the archivist and records custodian of The Episcopal Church, in the Second Affidavit of Mark Duffy ("Archivist's Aff.").

2. Copies of excerpts from the 2009 Journal of the General Convention of The Episcopal Church and the 2009 annual report of the Episcopal Diocese of Fort Worth to the Church's Executive Council authenticated by the Rev. Dr. Gregory S. Straub, Executive Officer and Secretary of the General Convention of The Episcopal Church, in the Affidavit of the Rev. Dr. Gregory S. Straub. ("Straub Aff.").

3. Affidavit of the Rev. Canon Charles K. Robertson, the Canon and Assistant to the Presiding Bishop of The Episcopal Church ("Robertson Aff.") (attaching and authenticating various documents from the files of the Presiding Bishop).

4. Affidavit of Kathleen Wells, Chancellor of the Episcopal Diocese of Fort Worth ("Wells Aff.") (attaching and authenticating various documents related to the Diocese).

5. Affidavit of Dr. Robert Bruce Mullin, Professor of Church History at the General Theological Seminary (“Mullin Aff.”) (describing the formation of The Episcopal Church and its governance structure, as reflected in official Church documents and other historical materials).

6. Certified copies of the articles of incorporation and other documents on file with the Texas Secretary of State regarding the Corporation of the Episcopal Diocese of Fort Worth as of May 19, 2009; certain certified pleadings, affidavits and judgment entered in Cause No. 84-8573, *Episcopal Diocese of Dallas et al v. Maddox*; certain certified pleadings, affidavits and other documents on file in Cause No. 153-144833-92, *Corporation of the Episcopal Diocese of Fort Worth, et al v. McCauley, et al.*; and a certified copy of an amicus brief and attachments on file in Cause No. 01-2377, *Dixon v. Edwards*, all of which are attached to the Affidavit of Jonathan Nelson (“Nelson Aff.”).

STATEMENT OF UNDISPUTED FACTS

I. The Governance Of The Episcopal Church

A. Governmental Structure of the Church

The Episcopal Church is a religious denomination comprised of worshipping congregations in the United States and several foreign countries. Constitution & Canons for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church (Church Publishing Inc., 2009) (“Const.” or “Canon”) Preamble (describing the Church) (A126);¹ The Episcopal Church Annual (Morehouse Church Resources, 2010) (“Church Annual”) at 16-19 (listing congregations of the Church) (A361-64).²

¹ Citations to “AXXX” refer to page numbers in the Appendix to All Episcopal Parties’ Motions for Summary Judgment and Partial Summary Judgment. The 2009 Constitution and Canons of the Church are attached as Exhibit 1 to the Archivist’s Affidavit. This is the version now in effect for Titles I-III and V of the Canons. Title IV of the Canons was substantially revised by the General Convention in 2009, and those revisions (which are in the text of the 2009 Constitution and Canons) will go into effect on July 1, 2011. Canon IV.20(2) (A288). Until that

The Church's structure has from its inception consisted of governance at three points: (1) a "General Convention," (2) regional, geographically defined "dioceses," and (3) local worshipping congregations, usually "parishes," within the dioceses. Const. Art. I (describing General Convention) (A126-28); Art. V (dioceses and parishes) (A130-31); Canon I.13 (parishes) (A176-77). Today the Church is comprised of 111 dioceses and approximately 7,600 congregations. Church Annual at 16-19 (listing dioceses and congregations) (A361-64).

The General Convention is a legislative body composed of a "House of Bishops" and a "House of Deputies," each with representatives from each of the Church's dioceses. Const. Art. I.1, I.2, I.4 (A126-27). It has adopted and from time to time amends a Constitution, a body of rules or "canons," and the Church's *Book of Common Prayer*. Const. Preamble (adoption and amendment of the Constitution by the General Convention) (A126), Art. XII (amendment of Constitution) (A134-35); Const. Art. X (amendment of *The Book of Common Prayer*) (A134); Canon V.1 (amendment of canons) (A291-92).

The General Convention elects a "Presiding Bishop" who is the Church's "Chief Pastor and Primate" and is "charged with responsibility for leadership in initiating and developing the policy and strategy in the Church and speaking for the Church as to the policies, strategies, and programs authorized by the General Convention." Const. Art. I.3 (A126-27); Canon I.2(4)(a)(1) (A153). The Church has an Executive Council comprised of elected bishops, priests, and lay persons which, under the leadership of the Presiding Bishop, manages the fiscal and

date, a slightly revised version of 2006 Title IV is in effect; a copy of that document is attached as Exhibit 2 to the Archivist's Affidavit and will be referred to herein as "2006 Canon IV (revised)."

² Excerpts from the Church Annual are attached as Exhibit 3 to the Archivist's Affidavit. The Church Annual is a publication listing the Church's clergy, dioceses, parishes, and missions based on data provided by the Church's General Convention Office and other Church-related bodies. Church Annual at 2 (A360).

programmatic affairs of the Church between meetings of the General Convention. Canon I.4 (A155-61).

Each diocese is governed by a legislative body (its “Diocesan Convention”) composed of representatives from each of its parishes that adopts and amends its own Constitution and canons. Const. Art. V.1 (discussing diocesan Constitution) (A130); Canon I.10(4) (same) (A172). Each diocese also has a “Diocesan Bishop” who is the “Ecclesiastical Authority” of the diocese. Const. Art. II (A128-29). The Diocesan Bishop is elected by the Diocesan Convention, and his or her selection must be consented to by a majority of the leadership of the other dioceses before taking office. *Id.*; Canon III.11(3)-(4) (A228-30). Each Diocesan Convention elects a “Standing Committee” that acts as the “Ecclesiastical Authority” in the absence of a Diocesan Bishop and that shares authority with the Bishop over certain matters prescribed by the Church’s and Diocese’s canons. Const. Art. IV (A130).

Each parish is part of the diocese in which it is located. Canon I.13.1 (A176). Each parish is governed by a “Vestry” of lay persons and its ecclesiastical and administrative leader, the “Rector.” Canon I.14 (A177).

B. Formation of the General Convention and its First Constitution and Canons

The Episcopal Church was formed in the 1780s as the successor to the Church of England in the new nation by those who could no longer pledge allegiance to the British Crown as required by that Church. Mullin Aff. ¶¶ 19-21 (A51-52).

The first meetings of the General Convention were in 1785 and 1786.³ In August 1789, the Convention adopted canons defining the Church’s three orders of ministry (Canon 1); setting

³ William White, ed., Journals of the General Conventions of the Protestant Episcopal Church in the United States of America, 1785-1814 (Philadelphia, Pa.: John Bioren, 1817) at 1, 17, 30 (showing meetings in 1785 and 1786) (A370, A373, A375) (attached as Exhibit 4 to

out requirements for the selection and ordination of bishops (Canons 2 and 9) and other clergy (Canons 4, 5, 6, 8, and 9); prescribing the duties of bishops (Canon 3); requiring every diocese to have a Standing Committee (Canon 7); and defining the jurisdiction of diocesan bishops (Canon 10). JGC 1789 at 57-60 (Canons 1-10) (A379-81).⁴

In October 1789, the Convention adopted the first “Constitution of the Protestant Episcopal Church in the United States of America.” JGC 1789 at 74-78 (showing adoption and text of first Constitution) (A384-86). This document contained the following provisions, among others:

- Article 2 provided that if any state Convention failed to send Deputies to the General Convention, it “shall nevertheless be bound by the acts of such Convention.” JGC 1789 at 75 (A384).
- Article 5 provided that “[a] Protestant Episcopal Church in any of the United States, not now represented may, at any time hereafter, be admitted, *on acceding to this constitution.*” JGC 1789 at 76 (emphasis added) (A385).
- Article 7 required persons being ordained to subscribe to an oath: “I do believe the holy scriptures of the Old and New Testament to be the word of God, and to contain all things necessary to salvation: *And I do solemnly engage to conform to the doctrines and worship of the Protestant Episcopal Church in these United States.*” JGC 1789 at 76 (emphasis added) (A385).
- Article 8 stated that *The Book of Common Prayer* would be “established by this or a future General Convention” and “shall be used in the ... Episcopal Church in those states which shall have adopted this constitution.” JGC 1789 at 76-77 (A385).
- Article 9 provided that amendments to the Constitution would be adopted “in the ... General Convention” itself. JGC 1789 at 77 (emphasis added) (A385).

Archivist’s Aff.). The Journals of the General Convention have been published individually as well as in collected reprints. They will be cited as “JGC” unless otherwise noted. All references to the Journals of the General Convention through 1814 will be from the William White, ed. collection.

⁴ Excerpts from JGC 1789 are included in Exhibit 4 to the Archivist’s Affidavit. In the early Church, regional bodies were “state Conventions”; later, they came to be referred to as “dioceses.” Mullin Aff. at 17 n.17 (A60).

The Constitution contained no provision reserving the rights of state Conventions as against the General Convention, *see generally* 1789 Const. (A384-85), such as that found in the Tenth Amendment to the United States Constitution. U.S. Const. amend. X. Nor did it provide for the ratification of amendments to the Constitution by the state Conventions or dioceses or for the withdrawal of state Conventions or dioceses from the Church. *See generally* 1789 Const. (A384-85).

C. Current Provisions of the Constitution, Canons, and Book of Common Prayer

Similar provisions remain in the Constitution today. Thus:

- Constitution Article V.1 (at A130) provides that dioceses are formed “with the consent of the General Convention and under such conditions as the General Convention shall prescribe by General Canon or Canons,” and requires new dioceses to promise “an unqualified accession to the Constitution and Canons of this Church.”
- Both Article VIII (at A132) and the Ordination Services for bishops and other clergy in *The Book of Common Prayer* (at A389, A391-92) obligate the person to be ordained to subscribe to the following written declaration:

“I do believe the Holy Scriptures of the Old and New Testaments to be the Word of God, and to contain all things necessary to salvation; and I *do solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church.*” (emphasis added).⁵

This is generally known as the “Declaration of Conformity.”

- Article X (at A134) provides that *The Book of Common Prayer* “shall be in use in all the Dioceses of this Church” and that any amendments “shall ... be adopted by the General Convention”
- Article XII (at A134-35) provides that amendments to the Constitution “shall ... be adopted by the General Convention”

⁵ *The Book of Common Prayer* (“BCP”) at 513, 526, 538 (A389, A391-92). Excerpts from *The Book of Common Prayer* that are cited in this paper are attached as Exhibit 5 to the Archivist’s Affidavit. *The Book of Common Prayer* was last amended by the General Convention in 1979. JGC 1979 at C8-10. Excerpts from the 1979 Journal of the General Convention are attached as Exhibit 6 to the Archivist’s Affidavit.

As in 1789, the Constitution today contains no provision reserving rights of dioceses as against the General Convention. *See generally* Const. (A126-35). Nor do either the Constitution or canons provide for the withdrawal of U.S. dioceses from the Church.⁶ *See generally* Const. & Canons (A126-293). In 1979, however, the General Convention adopted Canon 1.10(3)(b) (“Transfer of Area Missions”) (now Canon I.11(3)(f) (A175)) providing that “Missionary Dioceses” established by the House of Bishops outside of the United States could, with the consent of the General Convention, be released from union with the General Convention to join another entity outside of the United States. JGC 1979 at C143-44 (adoption of canon) (A397-98).

The Constitution, canons, and *The Book of Common Prayer* today also contain requirements for the selection, ordination, and resignation of bishops (Const. Art. II.2 & Canon III.11(3)-(4) (bishop-elect must be at least 30 and may not be ordained without consent of the leadership of a majority of the other dioceses) (A128, A228-30); BCP at 517 (requiring individual being ordained as bishop to promise to “guard the faith, unity, and discipline of the Church” and to “share in the leadership of the Church” with his or her fellow bishops) (A390); Const. Art. II.6 & Canon III.12(8) (bishop may not resign his or her office and remain a bishop in good standing of the Church without consent of Church authorities) (A129, A239-41); submission by dioceses of annual reports (Canon I.6(4) (A164)) and “copies of the Journals of the Convention of the jurisdiction, together with [E]piscopal charges, statements, and such other records in paper or electronic format as may show the state of the Church in that jurisdiction” (Canon I.6(5)(a) (A164)); adoption of prescribed business methods by dioceses and parishes, including annual audits by certified public accountants and adequate insurance of all buildings

⁶ In 1789, of course, there were no dioceses located outside of the United States. 1789 JGC at 46 (listing State Convention members) (A378).

and their contents (Canon I.7) (A164-66); formation and operation of parishes and other worshipping congregations under oversight of the dioceses (Canon I.13) (A176-77); and selection, training, ordination, deployment, and supervision of clergy by bishops and dioceses (Const. Art. VIII, Canons I.8, I.13, III.2-10, & III.15) (A132-33, A166-69, A176-77, A190-226, A244-45).

The canons also contain requirements concerning church property. Canon II.6 (at A189), originally adopted in 1868, provides:

“Sec. 1. No Church or Chapel shall be consecrated until the Bishop shall have been sufficiently satisfied that the building and the ground on which it is erected are secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons.

“Sec. 2. It shall be not lawful for any Vestry, Trustees, or other body authorized by law of any State or Territory to hold property for any Diocese, Parish or Congregation, to encumber or alienate any dedicated and consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish or Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.” JGC 1868 at 156 (showing original adoption) (A403).⁷

Similarly, Canon I.7(3) (at A165-66), adopted in 1940, provides:

“No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.” JGC 1940 at 230-31 (showing original adoption) (A406-07).⁸

Canon III.9(5)(a)(2) (at A212), adopted in 1904, provides that the “Rector or Priest-in-Charge shall at all times be entitled to the use and control of the Church and Parish buildings together

⁷ Excerpts from the 1868 Journal of the General Convention are attached as Exhibit 7 to the Archivist’s Affidavit.

⁸ Excerpts from the 1940 Journal of the General Convention are attached as Exhibit 8 to the Archivist’s Affidavit.

with all appurtenances and furniture” “[f]or the purposes of the office”; while Canon III.9(5)(a)(1) (at A212) states that the Rector or Priest-in-Charge shall exercise that office “subject to the ... Book of Common Prayer” and “the Constitution and Canons of this Church.” JGC 1904 at 99, 130, 583 (showing original adoption) (A409-11).⁹

And, Canon I.7(4) (at A166), adopted in 1979 following the U.S. Supreme Court’s decision in *Jones v. Wolf*, 443 U.S. 595 (1979), provides:

“All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitutions and Canons.” JGC 1979 at B60-61 & D154 (showing adoption) (A395, A400).

The Constitution and canons also provide standards of conduct for clergy and a judicial system to consider alleged violations of those standards. Disciplinary canons in Title IV make bishops and other clergy subject to discipline and removal for, among other things, “abandonment of the communion” of the Church, violation of the Church’s or Diocese’s Constitutions or canons, or violation of the vows required of clergy at ordination. 2006 Canons IV.1, .9., .10 (revised) (A295-98, A330-32). Constitution Article IX (at A133) provides for the creation by the General Convention of “Courts for the Trial of Bishops” and “Courts of Review of the determination of diocesan or other trial Courts.” That Article also requires dioceses to establish courts for the trial of other clergy. *Id.* The disciplinary canons create trial and review courts for bishops and review courts for other clergy. 2006 Canons IV.4, .5, .6 (revised) (A312-28).

⁹ Excerpts from the 1904 Journal of the General Convention are attached as Exhibit 9 to the Archivist’s Affidavit.

Finally, the canons set out a standard of conduct for all persons holding any office in the Church, including lay people. Canon I.17(8) (at A183) requires that “[a]ny person accepting any office in this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised.”

D. Recent Determinations by Church Tribunals Concerning Efforts to Remove Dioceses from The Episcopal Church

As set out above, the General Convention has provided for the discipline and removal of bishops for “abandonment of the communion” of the Church. Abandonment includes “an open renunciation of the Doctrine, Discipline, or Worship of this Church.” 2006 Canon IV.9(1) (revised) (A330). Under the abandonment process, a “Review Committee” consisting of five bishops, two priests, and two lay members of the Church must first “certify” that such abandonment has occurred. 2006 Canon IV.3(27) (revised) (Review Committee) (A308), IV.9(1) (revised) (certification) (A330). After a period within which the accused bishop has an opportunity to retract or deny the evidence on which the certification was based, the Presiding Bishop “shall ... present the matter to the House of Bishops” which then votes on whether to “consent” to the “deposition,” or complete removal, of the bishop from the ordained ministry of the Church. 2006 Canon IV.9(2) (revised) (A330-31). If consent is given, the Presiding Bishop “shall depose the Bishop from the Ministry.” *Id.*¹⁰

¹⁰ The canons also provide that a bishop may “declare, in writing, to the Presiding Bishop a renunciation of the ordained Ministry of this Church, and a desire to be removed therefrom,” in which case the Presiding Bishop “may pronounce that such renunciation is accepted, and that the Bishop is released from the obligations of all Ministerial offices, and is deprived of the right to exercise the gifts and spiritual authority as a Minister of God’s Word and Sacraments conferred in Ordinations” in The Episcopal Church. 2006 Canon III.12(7)(a) (revised) (A238). As shown below, this is the canon that applied in defendant Iker’s case.

In two recent instances, these tribunals have adjudged bishops to have abandoned the Church by an “open renunciation” of the Church’s Doctrine, Discipline, or Worship where the bishops’ actions have included attempts to remove a diocese from the Church. In January 2008, the Review Committee certified that “the information submitted to [it] demonstrated that the [Rt. Rev. John-David] Schofield [then-Bishop of the Diocese of San Joaquin in California] ha[d] abandoned the communion of this Church by an open renunciation of the Doctrine, Discipline or Worship of this Church.” Letter to The Most Rev’d Katharine Jefferts Schori (Presiding Bishop) from the Rt. Rev’d Dorsey F. Henderson, Jr., January 9, 2008 (Exhibit 1 to Robertson Aff.) (A1239). The “submitted information” was contained in a memorandum, attached to the Committee’s certification, demonstrating that “Bishop Schofield ha[d] departed from the Episcopal Church, purporting to take his Diocese with him and into affiliation with [another denomination].” *Id.* at attachment (A1240-48). In March 2008, the House of Bishops consented to the deposition of Bishop Schofield, and the Presiding Bishop deposed him. Deposition of a Bishop, March 12, 2008 (Exhibit 2 to Robertson Aff.) (A1249).

In December 2007, the Review Committee certified that “the information submitted to [it] demonstrated that the [Rt. Rev. Robert] Duncan [then-Bishop of the Diocese of Pittsburgh] ha[d] abandoned the communion of this Church by an open renunciation of the Doctrine, Discipline or Worship of this Church.” Letter to The Most Rev’d Katharine Jefferts Schori from the Rt. Rev’d Dorsey F. Henderson, Jr., December 17, 2007 (Exhibit 3 to Robertson Aff.) (A1250). The “submitted information” was contained in a memorandum, attached to the Committee’s certification, demonstrating, among other things, Bishop Duncan’s “persistent position that the Diocese may choose whether or not to remain a constituent part of the Episcopal Church, a choice that it does have the authority to make under the Church’s Constitution”; his

“intention to lead the Diocese out of the Church and into affiliation with some other entity within the Anglican Communion, while retaining diocesan and parish property”; and his “commitment to establishing an “ecclesiastical structure in North America” that is “separate” from the Episcopal Church.” *Id.* at attachment (A1251-61). In September 2008, the House of Bishops consented to the deposition of Bishop Duncan, and the Presiding Bishop deposed him. Deposition of a Bishop, September 19, 2008 (Exhibit 10 to Archivist’s Aff.) (A415).

In addition to these determinations, in June 2007 the Executive Council adopted a resolution stating:

“Resolved, That the Executive Council ... reminds the dioceses of The Episcopal Church that Article V, Section 1 of the Constitution ... requires each Diocese to have a Constitution which shall include “an unqualified accession to the Constitution and Canons of this Church; and be it further

“Resolved, that any amendment to a diocesan Constitution that purports in any way to limit or lessen an unqualified accession to the Constitution and Canons of The Episcopal Church is null and void; and be it further

“Resolved, that the amendments passed to the Constitution[] of the Diocese[] of ... Ft. Worth ... which purport to limit or lessen the unqualified accession to the Constitution and Canons of The Episcopal Church are accordingly null and void and the Constitution of [that diocese] shall be as [it was] as if such amendments had not been passed.” Copy of Resolution adopted by the Executive Council at its meeting on June 11-14, 2007 (Exhibit 11 to Archivist’s Aff.) (A416).

II. History of The Episcopal Diocese of Fort Worth

A. Early History

The Episcopal Church first established its ministry in the geographic territory now covered by the Episcopal Diocese of Fort Worth in the early 19th Century. JGC 1838 at 101 (Exhibit 12 to Archivist’s Aff.) (A418). In 1895, the General Convention gave permission to the congregations in what was then the “Missionary District of Northern Texas” to organize as a diocese of the Church by the name of the Diocese of Dallas. JGC 1895 at 293 & 336 (Exhibit 13 to Archivist’s Aff.) (A420-21). The organizing Convention of the Diocese of Dallas held in

December 1895 adopted a Constitution that stated: “The Church in this Diocese accedes to the Constitution and Canons of the Protestant Episcopal Church in the United States of America, and recognizes the authority of the General Convention of said church.” 1895 Constitution of the Diocese of Dallas, Art. II (Exhibit 14 to Archivist’s Aff.) (A423). That Constitution also provided that “Canons not inconsistent with ... the Constitution and Canons of the General Convention may be adopted.” *Id.*, Art. XXII (A424).

In 1896, the Diocese of Dallas adopted canons, including Canon XIII requiring the Constitution of each parish to state that it “expressly accedes to, recognizes and adopts the Constitution, Canons, Doctrines, Discipline and Worship of the Protestant Episcopal Church in the United States of America, and the Constitution and Canons of the Protestant Episcopal Church in this Diocese, and acknowledges their authority accordingly.” 1896 Canons of the Diocese of Dallas (Exhibit 15 to Archivist’s Aff.) (A426-27). Canon XXVI required missions to make similar affirmations. *Id.* (A428-29).

B. Formation of the Episcopal Diocese of Fort Worth

1. Actions of the Diocese of Dallas and the General Convention

In 1982, the Convention of the Diocese of Dallas adopted a resolution stating:

“Whereas, the Bishop believing that the call for creative Episcopal leadership can best be answered by a division of the Diocese and has given his consent to the proposal to divide the Diocese of Dallas into two dioceses in order to provide for effective Episcopal pastoral care and leadership of the clergy and congregations within the geographic area known at present as the Diocese of Dallas,

“....

“Now, therefore, be it resolved, that

“1. The Episcopal Church in the Diocese of Dallas with the approval of the Bishop shall be divided to form a new diocese which until it adopts a name, shall be referred to as the western diocese and the remainder to be known as the Diocese of Dallas.

“....

“3. The Secretary of the Convention of the Diocese of Dallas is instructed to forward this resolution to the 1982 General Convention for ratification.

“4. Upon ratification by the General Convention, the Bishop is requested to take steps to organize the new diocese no later than 1 October 1983.” Minutes of the Special Convention of the Diocese of Dallas (1982) at 2-3 (Exhibit 16 to Archivist’s Aff.) (A432).

In September 1982, the Church’s General Convention approved the division, contingent upon its receipt of certification that “all of the appropriate and pertinent provisions of the Constitution and Canons of the General Convention of the Episcopal Church in the USA and the Constitution and Canons of the Diocese of Dallas have been fully complied with.” JGC 1982 at C169-170 (Exhibit 17 to Archivist’s Aff.) (A434-35).

2. The Church’s Constitution and Canons in Effect in 1982

The Constitution and canons of the Church in effect at the time of the actions of the Diocese of Dallas and the General Convention just described and the actions of the first Convention of the new Diocese of Fort Worth described below were the 1979 Constitution and Canons.¹¹ The 1979 Constitution contained the following provisions:

- Article V.1 (at A441) provided that “a new Diocese may be formed, with the consent of the General Convention and under such conditions as the General Convention shall prescribe by General Canon or Canons,” and required all new dioceses to “accede[] to the Constitution and Canons of this Church.”
- Article VIII (at A442) and the Ordination Services for bishops and other clergy in the Church’s *Book of Common Prayer* (at 513, 526, 538) (A389, A391-92) obligated any person being ordained to subscribe to the oath known as the “Declaration of Conformity.”

¹¹ As today, the Constitution and canons in 1979 provided that, unless the Convention specified otherwise, amendments would go into effect on January 1 of the year following their adoption. See 1979 Const. Art. XI & 1979 Canon V.1(5) (the 1979 Constitution and canons are attached as Exhibit 18 to the Archivist’s Affidavit) (A443, A502). Thus, the 1982 Constitution and canons did not go into effect until January 1, 1983.

- Article X (at A443) provided that the *Book of Common Prayer* “shall be in use in all the Dioceses” of the Church and that any amendments “shall ... be adopted by the General Convention”
- Article XI (at A443) provided that amendments to the Constitution “shall ... be adopted by the General Convention”

As in 1789 and as today, the Constitution in 1979 contained no provision reserving the rights of dioceses as against the General Convention. *See generally* 1979 Const. (A439-43). Nor did either the Constitution or canons provide for the withdrawal of U.S. dioceses from the Church. *See generally* 1979 Const. & Canons. (A436-A503).

In addition, in 1979, the Constitution, canons, and *Book of Common Prayer* contained requirements for the selection, ordination, and resignation of bishops (1979 Const. Art. II.2 & 1979 Canon III.14 (bishop-elect must be at least 30 years old and may not be ordained without consent of the leadership of a majority of the other dioceses) (A440, A478-79); BCP at 517 (requiring individual being ordained as bishop to promise to “guard the faith, unity, and discipline of the Church” and to “share in the leadership of the Church”) (A390); 1979 Const. Art. II.6 & 1979 Canon III.18(8) (bishop may not resign his or her office and remain a bishop in good standing of the Church without consent of Church authorities) (A440, A483-84); submission by dioceses of annual reports (1979 Canon I.6(7) (A454)); adoption of prescribed business methods by dioceses and parishes, including annual audits by certified public accountants and adequate insurance of all buildings and their contents (1979 Canon I.6) (A454); formation and operation of parishes and other worshipping congregations under oversight of the dioceses (1979 Canon I.12) (A459); and selection, training, ordination, deployment, and supervision of clergy by bishops and dioceses (1979 Const. Art. VIII, 1979 Canons I.7, .12 & III.1-13, .21-25) (A442, A454-55, A459, A466-77, A485-89).

The canons in 1979 contained the same requirements concerning church property set out above. Thus, Canon II.7(2) (at A465) prohibited the “encumb[rance] or alienat[ion]” of any dedicated and consecrated Church or Chapel without the consent of the Bishop and Standing Committee, while Canon I.6(3) (at A454) imposed the same prohibition on the encumbrance or alienation of “all real property [held] for any Parish, Mission, Congregation, or Institution” without the same consents. And, Canon I.6(4) (at A454) provided that “[a]ll 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.”

Like the current scheme, the Constitution and canons in 1979 also provided standards of conduct for all clergy, including defining offenses such as “abandonment of the communion” of the Church, violation of the Church’s or Diocese’s Constitutions or canons, and violation of the vows required of clergy at ordination (1979 Canons IV.1, .9, .10) (A491-92, A499-500); and provided for a judicial system to consider alleged violations of those standards (1979 Const. Art. IX; 1979 Canons IV.3, .5, .6) (A442-43, A492-95, A497-98).

3. Actions of the Primary Convention of the New Diocese

The “Primary Convention of the Episcopal Diocese of Fort Worth” was held on November 13, 1982, after the action of the General Convention described above. Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) at 11 (Exhibit 19 to Archivist’s Aff.) (A516). That Convention was attended by clergy and lay delegates from each of the Episcopal parishes and missions of the Diocese of Dallas that the new diocese was to receive. *Id.* at 1-10 (A506-15); Journal of the Eighty Seventh Annual Meeting of the Diocese of Dallas (1982) at 10-18 (Exhibit 20 to Archivist’s Aff.) (A527-31).

At that meeting, the delegates unanimously concurred in and signed a resolution stating:

“WHEREAS, the Primary Convention of the Diocese of Fort Worth, meeting at All Saints Episcopal Day School, in Fort Worth, Tarrant County, Texas, on Saturday, 13 November 1982, *pursuant to approval of the 67th General Convention of The Episcopal Church, does hereby fully subscribe to and accede to the Constitution and Canons of The Episcopal Church*, and

“IN SO DOING, we unanimously hereunto set our hand this 13th day of November in the year of our lord, One Thousand Nine Hundred Eighty-two; and the Secretary of Convention is hereby instructed to promptly inform the Secretary of General Convention by copy of this Resolution with all signatures, in accordance with Canon I.9(4) of General Convention; and with copies of the Constitution and Canons of the Diocese of Fort Worth adopted this day.” Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) at 25-32 (emphasis added) (A518-25).

The Convention also adopted a Constitution for the Diocese which was to “commence and be in full force and effect on January 1, 1983.” *Id.* at 22 (A517); Constitution and Canons of the Episcopal Diocese of Fort Worth (1982) at 18 (A536).¹² The new Constitution provided:

“The Church in this Diocese accedes to the Constitution and Canons of the Episcopal Church in the United States of America, and recognizes the authority of the General Convention of said Church.” 1982 Const. Art. 1 (A533).

Article 18 of the new Constitution (at A536) stated: “Canons not inconsistent with this Constitution, or the Constitution and Canons of the General Convention, may be adopted.” Newly adopted Diocesan Canon 22 (at A539) required every new parish to “promise to abide by and conform to the Constitution and Canons of the General Convention and of the Diocese of Fort Worth.”

The first Diocesan Constitution and canons also contained provisions regarding diocesan property and for a diocesan corporation to hold such property. Article 13 of that Constitution provided that title to all real estate acquired

¹² Excerpts from the 1982 Constitution and canons of the Episcopal Diocese of Fort Worth are attached as Exhibit 21 to the Archivist’s Affidavit.

“for the use of the Church in this Diocese, including the real property of all parishes and missions as well as Diocesan Institutions, shall be held subject to control of the Church in the Episcopal Diocese of Fort Worth acting by and through a corporation known as ‘Corporation of the Episcopal Diocese of Fort Worth.’ All such property as well as all property hereafter acquired for the use of the Church and the Diocese, including parishes and missions, shall be vested in Corporation of the Episcopal Diocese of Fort Worth.” (Emphasis added) (A534).

Article 13 also provided that the Corporation of the Episcopal Diocese of Fort Worth (the “Diocesan Corporation”) was to hold title to “other property belonging to the Diocese, as such,” including trust and endowment accounts. *Id.* Diocesan Canon 12.1 (at A538) further specified that property held by the Diocesan Corporation “may only be conveyed or encumbered with the approval of the Board of Trustees and in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth.”

Diocesan Canon 11.2 (now Canon 17.2 (at A974-75)) provided that the

“management of [the Diocesan Corporation’s] affairs 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, in addition to the Bishop of the Diocese who shall serve as Chairman of the Board or may designate the President or other officer of the corporation to serve as such.” (Emphasis added) (A537).

Canon 11.2 further specified that the Trustees’ duties were to be conducted “in accordance with [the Corporation’s] charter and by-laws and in accordance with the Constitution and Canons of the Diocese.” *Id.*

Article 15 of the Diocese’s Constitution (at A535) provided:

“There shall be a Fund for the Endowment of the Episcopate which shall be managed and controlled by a Board of Trustees consisting of not less than five (5), and not more than nine (9) members of the Church in this Diocese ... who shall be nominated by the Bishop and elected by the Convention at the Annual Meeting.” (Emphasis added).

In February 1983, the Diocesan Corporation was formed. Its articles stated that “the property held [by the Corporation] shall be administered in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth as they now exist or as they may hereafter be amended.” Certified Copy, Articles of Incorporation of the Corporation of the Episcopal Diocese of Fort Worth (1983) (Exhibit 8 to Nelson Aff.) (A1209).

4. The Diocesan Corporation’s Acquisition of Its Property from the Diocese of Dallas

In August 1984, the Diocese of Fort Worth and the Diocesan Corporation joined with the Diocese of Dallas and its corporation to petition the District Court of Dallas County, Texas, for a division of the property held by the Diocese of Dallas. In that action, the Diocese of Fort Worth and the Diocesan Corporation represented to the court that the Diocese was “organized pursuant to the Constitution and Canons of the Protestant Episcopal Church in the United States of America,” and that the Diocesan Corporation was “duly organized under the Constitution and Canons of the Episcopal Diocese of Fort Worth.” Certified Copy, Plaintiffs’ Original Petition, *The Episcopal Diocese of Dallas v. Mattox*, No. 84-8573 (95th District Court Dallas County) at 2 (Exhibit 6 to Nelson Aff.) (A1075).

Later that month, the District Court of Dallas County issued a declaratory judgment approving the transfer of substantial assets of the Diocese of Dallas to the plaintiffs Diocesan Corporation and Diocese of Fort Worth. Certified Copy, Judgment, *The Episcopal Diocese of Dallas v. Mattox*, No. 84-8573 (95th District Court Dallas County) (Exhibit 7 to Nelson Aff.) (A1139-52). The court noted that “Plaintiff, The Episcopal Diocese of Fort Worth ... is ... organized pursuant to the Constitution and Canons of the Protestant Episcopal Church in the United States of America,” and that “Plaintiff, Corporation of the Episcopal Diocese of Fort

Worth ... is a Texas non-profit corporation, duly organized under the Constitution and Canons of the Episcopal Diocese of Fort Worth.” *Id.* at 2 (A1140).

C. Evidence of the Diocese’s Relationship to the Church Since the Diocese’s Formation

In addition to the actions taken at the Diocese’s inception:

(1) In 1989, the Diocesan Convention adopted an amended Constitution that again included the provisions acceding to the Church’s Constitution, canons, and authority and describing Diocesan property as property “acquired for the use of the Church in this Diocese.”¹³

(2) In conformity with the Church’s Constitution, every Diocesan Bishop of the Diocese has taken office only with the consent of the leadership of a majority of the Church’s other dioceses.¹⁴

(3) In 1994, the Diocesan Corporation filed suit to recover local church property for the Diocese and the loyal Episcopalian minority of one of the parishes in the Diocese from a withdrawing faction. In support of its motion for summary judgment, the Diocesan Corporation filed the affidavit of an assistant to then-Bishop Iker quoting Article I of the Diocesan Constitution as stating that “[t]he Church in this Diocese accedes to the Constitution and Canons of The Episcopal Church, and recognizes the authority of the General Convention of said Church,” and explaining that “[t]herefore, each Parish within The Episcopal Diocese of Fort Worth has acknowledged that they are governed by and recognize the authority of the General

¹³ Proceedings of the Seventh Annual Convention of the Episcopal Diocese of Fort Worth (Oct. 6-7, 1989) at 21 and App. B at pp. 45, 57 (Exhibit 25 to Archivist’s Aff.) (A544-46).

¹⁴ Declaration executed by the Rt. Rev. A. Donald Davies (Exhibit 22 to Archivist’s Aff.) (A540); Declaration executed by the Rt. Rev. Clarence C. Pope (Exhibit 23 to Archivist’s Aff.) (A541); Declaration executed by the Rt. Rev. Jack Leo Iker (Exhibit 24 to Archivist’s Aff.) (A542).

Convention and the Constitution and Canons of The Episcopal Church in the United States of America.”¹⁵

(4) In an *amicus* brief filed in 2002 in the United States Court of Appeals for the Fourth Circuit, in a case involving another Episcopal diocese, defendant Iker, through counsel, stated:

“An episcopal bishop is elected by the laity and clergy of a diocese and must be approved by the House of Bishops and the Standing Committees of the Episcopal Church before being seated as a bishop of the Church [citing Title III, Canon 22 of The Episcopal Church]. Although given great deference as a leader in much the same way as the President of the United States is given deference, neither the President nor an Episcopal bishop acts independently of the checks and balances of the legal system of which they are a part. *A bishop must adhere to the constitution and canons of the Church* or be subject to discipline.”¹⁶

(5) At a special meeting of the Diocesan Convention held on September 27, 2003, the Convention passed a resolution declaring and affirming:

“The Church in the Episcopal Diocese of Fort Worth is a constituent part of the Protestant Episcopal Church in the United States of America, acceding to and recognizing the Constitution and Canons of the Episcopal Church, and is thereby a constituent member of the Anglican Communion
....”¹⁷

(6) The Diocese has consistently sent representatives to meetings of both houses of the Church’s General Convention, including to its most recent meetings in 2006 and 2009.¹⁸

¹⁵ Certified Copy, Affidavit of the Reverend Canon Billie Boyd in *Corp. of the Episcopal Diocese of Fort Worth v. McCauley*, No. 153-144833-92, at 1-2 (153rd Dist. Ct., Tarrant County, Texas) (Exhibit 2 to Nelson Aff.) (emphasis added) (A1036-37).

¹⁶ Certified Copy, Brief of *Amici Curiae* Jack Leo Iker, et al., in *Dixon v. Edwards*, No. 01-2337 (U.S. Ct. App. 4th Cir.), at 4 (emphasis added) (Exhibit 5 to Nelson Aff.) (A1056).

¹⁷ Journal of the 2003 special meeting of the Convention at 21-22 (Exhibit 26 to Archivist’s Aff.) (A548-49).

¹⁸ JGC 1985 at 61 & 70; JGC 1988 at 59 & 68; JGC 1991 at 65 & 72; JGC 1994 at 70 & 79; JGC 1997 at 18 & 25; JGC 2000 at 64 & 71; JGC 2003 at 43 & 50; JGC 2006 at 38 & 46

(7) The Diocese and the clergy of the Diocese, including defendant Iker, have participated in and accepted the valuable benefits of the Church Pension Fund, reserved solely for clergy of the Church, as required by Church Canon I.8.¹⁹

III. The Current Dispute

In recent years, The Episcopal Church has experienced an internal debate over various theological issues, including those related to human sexuality. Actions taken by the Church in this regard have prompted vocal opposition from a small minority of the Church's clergy and laity, and some former clergy and lay members who have left the Church have sought to retain local parish property for their own use.²⁰ Among those persons are the defendants in this case.

In 1992, defendant Iker was elected by the Diocese to be its Bishop Coadjutor – a bishop with a right of succession upon the resignation of the Bishop of the Diocese. 1992 JEDFW at 17-19 (Exhibit 30 to Archivist's Aff.) (A599-601). After receiving the required consents of the larger Church, defendant Iker was ordained as a Bishop of the Diocese. The Order of Service for the Ordination and Consecration of the Reverend Jack Leo Iker (Apr. 24, 1993) (Exhibit 31 to Archivist's Aff.) (A602-05). As a condition of his ordination as a bishop, defendant Iker executed the "Declaration of Conformity" discussed above. *See supra* at p. 26 & n.14. In 1994,

(excerpts from the 1985-2006 Journals are attached as Exhibit 27 to the Archivist's Aff.) (A550-73); JGC 2009 at 42 & 50 (Exhibit 1 to Straub Aff.) (A867, A869).

¹⁹ See, e.g., 1994 Journal of the Episcopal Diocese of Fort Worth ("JEDFW") at 24, 28, 41 (Exhibit 28 to the Archivist's Aff.) (A575-77); JEDFW 2006 at 96, 113 (Exhibit 29 to the Archivist's Aff.) (A592, A596); JEDFW 2007 at 111 (Exhibit 10 to Wells Aff.) (A929). The Journals of the Episcopal Diocese of Fort Worth will be cited as "JEDFW" unless otherwise noted.

²⁰ See, e.g., *Episcopal Church Cases*, 87 Cal. Rptr. 3d 275 (Cal. 2009); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); *New v. Kroeger*, 84 Cal. Rptr. 3d 464 (2008), *ordered published* by 202 P.3d 1089 (Cal. 2009).

upon the resignation of his predecessor, defendant Iker became Diocesan Bishop. 1995 JEDFW at 10 (Exhibit 32 to the Archivist's Aff.) (A607).

The other individual defendants assumed their respective positions as members of the diocesan Standing Committee and Trustees of the Diocesan Corporation and of the Fund for the Endowment at various times prior to November 15, 2008. 2006 JEDFW at 8, 23, 73 (Exhibit 29 to Archivist's Aff.) (A579, A582-83); 2007 JEDFW at 10, 31, 39 (Exhibit 10 to Wells Aff.) (A918-20). At the time of each of their elections, the Diocesan canons required that such officeholders be “[l]ay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese,” Diocesan Canon 17.2 in effect in 2006 and 2007 (Exhibit 12 to Wells Aff.) (A974-75); and the Church's canons required that that “[a]ny person accepting any office of this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised.” 2006 Canon I.17(8) (Exhibit 36 to Archivist's Aff.) (A675-76).

In September 2006, some of the individual defendants caused to be filed with the Texas Secretary of State “Amended and Restated Articles of Incorporation of [the] Corporation of the Episcopal Diocese of Fort Worth,” which purported to delete provisions describing the property authorized to be held by the Diocesan Corporation as property “acquired for the use of the Episcopal Diocese of Fort Worth as well as the real property of all parishes, missions and diocesan institutions”; delete provisions stating that the aforesaid property “shall be administered in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth”; and insert provisions purporting to give the Trustees of the Diocesan Corporation the “sole authority to determine the identity and authority of the Bishop [of the Episcopal Diocese of Fort Worth]”

in the event of a dispute or challenge regarding the identity of the Bishop, and “the sole authority to appoint, as provided in the Bylaws of the Corporation, a Chairman of the Board” in the event the Diocese is without a Bishop. Certified Copy, Amended and Restated Articles of Incorporation of Corporation of the Episcopal Diocese of Fort Worth (Exhibit 11 to Nelson Aff.) (A1222-24).

At the annual meeting of the Diocesan Convention in November 2008, a majority of the members of the Convention voted in favor of a resolution stating that the Diocese “does hereby accept the provision made by the Anglican Province of the Southern Cone, and the Episcopal Diocese of Forth Worth does hereby immediately enter into membership with the Anglican Province.” Proposed Resolution for Admission to the Anglican Province of the Southern Cone (Exhibit 4 to Wells Aff.) (A895). A majority also voted to replace Article I of the diocesan Constitution (which previously stated that the Diocese “accede[d]” to the Church’s Constitution and canons and “recognize[d]” the General Convention’s authority) with a new Article I titled “Anglican Identity.” As purportedly amended, Article I stated:

“The Episcopal Diocese of Fort Worth is a constituent member of the Anglican Communion, a Fellowship within the One, Holy, Catholic, and Apostolic Church, consisting of those duly constituted Dioceses, Provinces and regional churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Old and New Testaments and expressed in the Book of Common Prayer.” Proposed Constitutional Amendment B (Exhibit 3 to Wells Aff.) (A894).

Since that time, the individual defendants have held themselves out as the leadership of the Diocese that has purportedly realigned with the Southern Cone Province and have exercised possession of the Diocesan Corporation and diocesan assets.

Later that month, defendant Iker issued a written statement that he no longer had any connection with the Church. “Responses to Attempted Inhibition of the Bishop” (Nov. 24, 2008)

(Exhibit 6 to Wells Aff.) (A898). Following that, on December 5, 2008, pursuant to Canon III.12(7)(a) and with the advice and consent of a majority of the members of her Advisory Council, the Presiding Bishop of the Church declared that defendant Iker had voluntarily renounced his ordained ministry in the Church and that he was “therefore, removed from the Ordained Ministry of [the] Church and released from the obligations of Ministerial offices” in the Church. Renunciation of Ordained Ministry and Declaration of Removal and Release (Dec. 5, 2008) (Exhibit 33 to Archivist’s Aff.) (A608).

At a special meeting of the Diocesan Convention on February 7, 2009, the Diocese, in consultation with the Presiding Bishop, elected Bishop Gulick as provisional bishop to exercise all the duties and offices of the Bishop of the Diocese. 2009 JEDFW at 20 (A940).²¹ Also at that meeting, the Diocese and Bishop Gulick filled positions on the Standing Committee, the Board of the Diocesan Corporation, Deputies to the General Convention, and other diocesan positions that the Convention recognized were vacant as the result of the actions of November 2008. *Id.* at 20-23, 33-35, 37-40 (A940-43, A948-54). Finally, the Diocesan Convention passed a resolution recognizing and declaring that the 2008 purported amendment to the Diocesan Constitution to eliminate the accession clause, as well as certain other constitutional and canonical amendments, were *ultra vires* and void. *Id.* at 23-27 (A943-47).

In April 2009, Bishop Gulick and the other trustees of the Diocesan Corporation approved and filed with the Secretary of State “Amended and Restated Articles of Incorporation” that removed the 2006 amendments and replaced the original provisions. Certified Copy, Amended and Restated Articles filed on April 14, 2009 (Exhibit 12 to Nelson Aff.) (A1226-30).

²¹ Excerpts from the Journal of the 2009 Convention (Nov. 13-14, 2009) and Special Meeting (Feb. 7, 2009) of the Convention of Episcopal Diocese of Fort Worth are attached as Exhibit 11 to the Wells Affidavit.

A week later, defendant Iker caused to be filed with the Secretary of State a purported amendment to those articles in which he represented that he and the other individual defendants are the current trustees of the Diocesan Corporation. Certified Copy, Amended and Restated Articles filed on April 21, 2009 (Exhibit 13 to Nelson Aff.) (A1231-33).

At its annual meeting in November 2009, the Convention elected Bishop Ohl as Provisional Bishop to succeed Bishop Gulick. 2009 JEDFW at 77, 86 (A967, A971).

Since February 2009, Bishops Gulick and Ohl and the other leaders elected at the February 2009 special meeting of the Diocesan Convention have been recognized by various bodies of the Church as the persons and bodies with authority to govern the continuing Episcopal Diocese of Fort Worth. Thus:

- The February 2009, special meeting of the Convention of the Diocese was called to order by the Presiding Bishop of The Episcopal Church. 2009 JEDFW at 19 (A939).
- Bishops Gulick and Ohl and their Standing Committee have been asked to give their canonical consents to the ordination of new bishops who have been elected by other dioceses of the Church since February 2009. Consent forms signed by Bishop Edwin F. Gulick (Oct. 15, 2009) and the Standing Committee of the Diocese of Fort Worth (Nov. 12, 2009) (Exhibit 34 to Archivist's Aff.) (A609-10), and Bishop C. Wallis Ohl (June 14, 2010 and July 17, 2010) (Exhibit 4 to Robertson Aff.) (A1262).
- The Diocese's annual report required by Church Canon I.6 has been accepted by The Episcopal Church's Executive Council. 2009 Diocesan Report to the Executive Council (Exhibit 2 to Straub Aff.) (A877-80).
- The Church Annual for 2009 included the Diocese of Fort Worth formed in 1983 as a constituent diocese and identified Bishop Gulick as the provisional Bishop of the Diocese. Church Annual (2009) at 213 (Exhibit 35 to Archivist's Aff.) (A613-14).
- The Church Annual for 2010 includes the Diocese of Fort Worth formed in 1983 as a constituent diocese and identified Bishop Ohl as the provisional Bishop of the Diocese. Church Annual (2010) at 217 (A365-66).
- Bishop Gulick and the Deputies elected in February 2009 were accepted as representatives of the Episcopal Diocese of Fort Worth at The Episcopal Church's meeting of the General Convention in July 2009. JGC 2009 at 42 & 50 (Exhibit 1 to Straub Aff.) (A867, A869).

- At its July 2009, meeting, the General Convention adopted a resolution which explicitly commended Episcopalians in the Diocese of Fort Worth and three other dioceses “for their unflagging efforts to continue to live as witnesses to the mission of The Episcopal Church during recent difficult times as they reorganize their continuing dioceses,” and further resolved that “the leadership in each of those four continuing dioceses be commended for their similar efforts, including in particular the Rt. Rev. Edwin F. Gulick, Provisional Bishop of the Diocese of Fort Worth ... and especially the strong lay leadership of each diocese;” and that “the deputations from those four continuing dioceses be extended a special welcome to this 76th General Convention of The Episcopal Church.” JGC 2009 at 354 & 734-35 (Exhibit 1 to Straub Aff.) (A871, A875-76).

The Diocesan Corporation holds title to substantial real and personal property of the Diocese acquired by it as an instrument and constituent part of the Church, pursuant to the declaratory judgment described above (*supra* at pp. 25-26), and subsequently. Other property, including operating accounts of the Diocese and the Fund for the Endowment of the Episcopate, is to be and historically has been held and controlled by the Episcopal Diocese of Fort Worth and its officers directly. *See, e.g.*, 2006 JEDFW at 88-99 (A584-95); 2007 JEDFW at 103-14 (A921-32). As noted above, since November 2008, defendant Iker and the other defendants have had possession of substantially all such property, even though they no longer have any connection with The Episcopal Church or the Episcopal Diocese of Fort Worth, and even though the individual plaintiffs have demanded that such property be returned to them for their use in support of the mission of The Episcopal Church and its Diocese of Fort Worth.

ARGUMENT

Summary judgment should be granted when the pleadings and evidence “show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Tex. R. Civ. P. 166a(c); *see also, e.g., Hasty v. Keller HCP Partners, L.P.*, 260 S.W.3d 666, 668-69 (Tex. App.—Dallas 2008, no pet.). This motion presents such a situation.

The Church's petition seeks a declaration that (a) the Diocese is and remains the same Diocese that has been a part of the Church since its formation in 1983, (b) Bishops Gulick and Ohl and other leaders of the Episcopal Diocese of Fort Worth recognized by the Church and the Diocese (the "Diocesan plaintiffs") are, and have been since February 2009, the authorities and representatives of the Diocese entitled to use and control the Diocesan Corporation and the real and personal property of the Diocese, (c) all property held by or for the Diocese may be used only for the mission of the Church, and (d) the changes made by the defendants to the articles and bylaws of the Diocesan Corporation are *ultra vires* and void. The petition also seeks an injunction (i) requiring the defendants to surrender all Diocesan property, as well as control of the Diocesan Corporation, to the Diocesan plaintiffs and to provide an accounting of all Diocesan assets, and (ii) prohibiting the defendants from holding themselves out as leaders of the Diocese. Plaintiff The Episcopal Church's Third Amended Petition at 19-21. As demonstrated below, the Church is entitled to summary judgment on its petition and all of the relief requested therein because there "is no genuine issue as to any material fact" on any of its claims.

I. **The Episcopal Church is Entitled to Summary Judgment on its Claim for a Declaration that the Diocesan Plaintiffs are the Persons Entitled to Control the Diocese, its Corporation and Assets and for an Injunction Enforcing that Declaration.**

Well-settled Texas law establishes that in the event of a dispute among its members, a local part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. *See, e.g., Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909); cases discussed *infra* at pp. 35-38. As we show below, the undisputed evidence conclusively shows that (1) the Church is hierarchical and (2) the Diocesan plaintiffs are those individuals who remain loyal to, and are recognized as such by, the Church. Accordingly, as a matter of law, the

Diocesan plaintiffs are the persons authorized to lead the Diocese and entitled to use and control its Diocesan Corporation and assets.

A. Texas Authority Establishes That a Constituent Part of a Hierarchical Church Entitled to Control Church Property is Comprised of Those Remaining Loyal to the Hierarchical Denomination.

In the event of a dispute within a constituent part of a hierarchical church, the continuing entity holding title to property under Texas law is represented by those individuals remaining loyal to and recognized by the general church. Since at least 1909, the Texas Supreme Court has followed this approach to resolving disputes within hierarchical religious denominations.

In *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909), the Court considered a dispute between two factions of a local church that arose after the hierarchical church of which the local church was a constituent part merged with another denomination. 116 S.W. at 361-62. A faction of the local church opposed this merger and sued to establish ownership and take possession of the local church property. *Id.* The Court of Appeals held in favor of the faction opposing the merger, but the Supreme Court reversed.

Reviewing the Court of Appeals decision, the Supreme Court held that “the church to which the deed was made still owns the property, and that whatever body is identified as being the church to which the deed was made must still hold the title.” *Id.* at 364-65. Because the local church “was but a member of and under the control of the larger [denomination],” it “was by the union” of the two denominations “incorporated into the [newly merged denomination].” *Id.* at 365. Accordingly, the local church property properly belonged to that congregation that remained loyal to the merged, general church. *Id.*

Since 1909, numerous Texas courts have repeatedly and unanimously applied the *Brown* approach to decide cases such as the one now before the Court, involving a dispute within a constituent part of a hierarchical church. In *Presbytery of the Covenant v. First Presbyterian*

Church, 552 S.W.2d 865 (Tex. Civ. App.—Texarkana 1977, no writ), for example, the Court of Appeals made clear that individuals who withdraw from a hierarchical church cannot “by their unilateral action ... dissolve ... an integral part of” the general church. *Id.* at 871. Rather, when “[t]hose persons constituting the loyal faction ... have been recognized by [the general church] as the duly existing local congregation[,]” they constitute the continuing entity “entitled to possession and control of the property.” *Id.* It was of no import whether a majority of the congregation voted to withdraw from the general church, or even that the vote was unanimous, because

“unanimous or not, the members of a church organization which is hierarchical as to church government cannot dissolve a local church in contravention of the governing rules or edicts of the mother church, and then re-establish themselves as an independent church or one associated with a schismatic group and take the church property with them.” *Id.* at 871-72.

In short, the Court held,

“[w]hen a division occurs in a local church affiliated with a hierarchical religious body, and a dispute arises between rival groups as to the ownership or control of the local church property, *the fundamental question as to which faction is entitled to the property is answered by determining which of the factions is the representative and successor to the church as it existed prior to the division, and that is determined by which of the two factions adheres to or is sanctioned by the appropriate governing body of the organization. It is a simple question of identity.* [Citation omitted] In making such a determination, the civil court exercises no role in determining ecclesiastical questions. It merely settles a dispute as to identity, which in turn necessarily settles a dispute involving property rights.” *Id.* at 871 (emphasis added).

Similarly, in *Norton v. Green*, 304 S.W.2d 420 (Tex. Civ. App.—Waco 1957, writ ref’d n.r.e.), a majority of a congregation of a hierarchical church voted to withdraw from the general church and declare themselves independent. The general church’s governing body recognized the remaining loyal congregation as the continuing local church, but the withdrawing group

refused to relinquish control of the church property. *Id.* at 421. Ruling in favor of the loyal minority, the Court of Appeals reaffirmed:

“[T]he answer to this question is that where there has been a division in a congregation, those members who renounced their allegiance to the church lose any rights in the property involved, and the property and the use thereof belong to the members which remain loyal to the church. It is a question of identity.” *Id.* at 424.

The District Court in Tom Green County recently applied the same analysis to resolve a dispute over Episcopal parish property. In *Diocese of Nw. Tex. v. Masterson*, No. A-07-0237-C, Modified Final Summary Judgment (51st Dist. Ct., Tom Green County, Tex., Dec. 16, 2009), *appeal docketed*, No. 03-10-00015-CV (Tex. App. Jan. 7, 2010), the court held that the Episcopal parish “is identified as and represented by those persons recognized by the Bishop”; “the actions of [former Episcopalians] ... to withdraw [the Parish] as a Parish of the Diocese and from the Episcopal Church are void and without effect”; the dissidents “may not divert, alienate, or use the real or personal property of [the parish] ... except for the mission of the Episcopal Church, as provided by and in accordance with the Constitutions and Canons of the [Church] and the Diocese”; and “all real and personal property of [the parish] is held in trust for the Episcopal Church and the Diocese.” *Id.* at 1-2.

Numerous other Texas cases involving a variety of denominations have applied the same analysis to similar effect. *See, e.g., Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975) (applying Texas law and holding that the withdrawing faction of local church could not “exercise acts of possessory control over the local church property [or] interfer[e] with the local church property and with the conduct of services therein by the local faction loyal to the national church”); *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App.—Austin 1991, writ denied) (“Where a congregation of a hierarchical church has split, ... the

property belongs to the members who remain loyal to the church.”); *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197, 198 (Tex. App.—Amarillo 1988, no writ) (in the case of a hierarchical church, “only members loyal to [the hierarchical church] may possess the church property”); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 706-07 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (because “state law requires deference to the Presbytery’s identity of ... the loyal group, as the representative of the local church,” the loyal faction was “entitled to possession and use of all church property”); *Browning v. Burton*, 273 S.W.2d 131, 136 (Tex. Civ. App.—Austin 1954, writ ref’d n.r.e.) (the withdrawing group “by their withdrawal could not destroy the identity of the local church and could not take the properties of that church with them into an independent organization”).

These cases are entirely consistent with Texas law governing secular voluntary associations, which similarly holds that the majority of the current membership of a local chapter of a national association may not unilaterally alter the national affiliation of the local chapter or divert its property to some other association. See *Minor v. St. John's Union Grand Lodge of Free & Accepted Ancient York Masons*, 130 S.W. 893, 896-97 (Tex. Civ. App.—Galveston 1910, writ ref’d) (attempt by dissident majority to withdraw local lodge from “Grand Lodge” and transfer local lodge’s property to another organization held improper because local lodge was “not an independent organization existing solely for the benefit of its members, but ... part and parcel of a larger organization”; remaining loyal members were “the true and lawful successors, under the laws of the order, of the original trustees of [the local lodge] to whom the property was conveyed” and were thus “entitled to hold the property for the use of [the] lodge”) (citing *Brown v. Clark*, 116 S.W. 360); *Progressive Union of Tex. v. Indep. Union of Colored Laborers*, 264

S.W.2d 765, 768 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e) (“It is well settled that when a person ceases to be a member of a voluntary association, his interest in its funds and property ceases and the remaining members become jointly entitled thereto, and this rule applies where a number of members secede in a body and although they constitute a majority and organize a new association.”); *Norton*, 304 S.W.2d at 425 (relying on 36 Tex. Jur. *Religion & Religious Societies* § 20 (1935), which describes the application to church property disputes of voluntary association law, wherein “[t]hose who adhere to the acknowledged organization are entitled to the use of property”).²²

Thus, under Texas law, in the event of a dispute within a hierarchical denomination, the continuing church body entitled to the use and control of the church property is that group loyal to and recognized by the general church.

B. The Undisputed Evidence Requires the Conclusion that The Episcopal Church is Hierarchical.

The U.S. Supreme Court has recognized two forms of church government: “hierarchical” and “congregational.” *Jones v. Wolf*, 443 U.S. 595, 597-98 (1979). A local church is congregational if it exists “strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority,” and is part of a larger, hierarchical church if it is a “subordinate member of some general church

²² Texas statutes also support the conclusion that religious corporations are subordinate to, and hold property in trust for, the religious organizations that formed them. *See* TEX. BUS. ORG. CODE § 22.207 (“[t]he board of directors of a religious ... corporation may be affiliated with, elected, and controlled by an incorporated or unincorporated convention, conference, or association organized under the laws of this or another state, the membership of which is composed of representatives, delegates, or messengers from a church or other religious association”) (emphasis added); *id.* at § 2.102 (“a domestic nonprofit entity or institution formed for a religious ... purpose may acquire, own, hold, mortgage, and dispose of and invest its funds in property for the use and benefit of, under the discretion of, and in trust for any convention, conference, or association ... with which it is affiliated or by which it is controlled”) (emphasis added).

organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.” *Watson v. Jones*, 80 U.S. 679, 722-23 (1871). See also *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 110 (1952) (defining “hierarchical churches” as “those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head.”). In the same vein, the Texas Supreme Court in *Brown* distinguished between “an independent church” and a “local congregation [that] is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments.” 102 Tex. at 332, 116 S.W. at 363 (quoting *Watson v. Jones*, 80 U.S. 679, 722-23 (1871)) (internal quotations omitted).

Under this legal standard, the undisputed facts in this case conclusively show that The Episcopal Church is hierarchical. It is undisputed that:

- The Church’s governance structure includes the General Convention, diocesan conventions, and parishes, *supra* at pp. 8-10. Each parish is represented at its diocese’s convention, and each diocese is represented at the General Convention, *supra* at p. 10.
- The Church’s Constitution, canons, and *Book of Common Prayer* are adopted and amended by the General Convention and pervasively regulate the Church’s dioceses and parishes on such matters as the selection, ordination, duties, and resignation of bishops, *supra* at pp. 9, 12-14; requirement of a diocesan Standing Committee, *supra* at p. 10; designation of the *Book of Common Prayer* as the only prayer book to be used in every diocese, *supra* at p. 12; submission by dioceses of annual reports, *supra* at p. 13; prescribed business methods for dioceses and parishes, *supra* at pp. 13-14; formation and operation of parishes and other congregations under the oversight of dioceses, *supra* at p. 14; selection, training, ordination, deployment, and supervision of clergy by bishops and dioceses, *id.*; clergy standards of conduct and discipline, *supra* at p. 16; and use and protection of church property, *supra* at pp. 14-15.
- All dioceses must promise an “unqualified accession” to the Church’s Constitution and canons, *supra* at p. 12, and therefore no diocese may adopt a constitutional or canonical provision that conflicts with the Church’s Constitution or canons.

- All bishops, priests and other clergy of the Church are required by the Declaration of Conformity made upon ordination, *supra* at p. 12, to obey the rules set out by the General Convention in the Church's Constitution, canons, and *Book of Common Prayer*, and are subject to discipline under the Church's canons for violation of those rules, *supra* at pp. 15-16.
- All persons holding any office in the Church, including its leaders at every level, are required by canon to "well and faithfully perform the duties of that office in accordance with the Constitution and Canons of [the] Church ...," *supra* at p. 16.
- The Church's Constitution and canons provide for a system of trial and appellate courts to resolve alleged violations by bishops and other clergy of the Declaration of Conformity or of the Church's Constitution, canons, or *Book of Common Prayer*, which proceedings may result in the deposition, or complete removal, of the clergy person from ordained ministry in the Church, *supra* at pp. 15-16.
- The Church's canons also provide for the deposition of bishops and other clergy from the Church for "abandonment of the communion" of the Church by "an open renunciation of the Doctrine, Discipline, or Worship of th[e] Church," *supra* at p. 16.

These undisputed facts show that the Church is a three-tiered structure, with the General Convention at the apex as the ultimate authority of the Church. Moreover, the undisputed facts show that these provisions existed at the time the Diocese was formed in 1983, *see supra* at pp. 20-22, and that as a condition of its formation the Diocese acceded to them, *supra* at p. 23.

Accordingly, it is clear that the Church's dioceses and parishes – including in particular the Diocese of Fort Worth and its parishes – are "subordinate member[s] of some general church organization in which there are superior ecclesiastical tribunals" – the Church's General Convention and its trial and appellate courts – "with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization" – the General Convention. *Watson*, 80 U.S. at 722-23. Similarly, the Diocese of Fort Worth and its parishes, with the other dioceses and parishes of the Church, are without question "organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head" – the General Convention. *Kedroff*, 344 U.S.

at 110. And, it cannot be disputed that each of the Church's dioceses and parishes – again including the Diocese of Fort Worth and its parishes – “is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments.” *Brown*, 102 Tex. at 332, 116 S.W. at 363. In short, the Church is, without question, hierarchical, with the Diocese of Fort Worth and its parishes among its subordinate parts.

In the light of this overwhelming evidence concerning the Church's structure, it is not surprising that every court in the nation to have considered this question has found the Church to be hierarchical. *See, e.g., Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002); *Episcopal Church Cases*, 87 Cal. Rptr. 3d 275, 281, 292-93 (Cal. 2009); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008); *In re Church of St. James the Less*, 2003 Phila. Ct. Com. Pl. LEXIS 91, at *24 (Pa. Ct. Com. Pl. 2003), *aff'd in relevant part*, 888 A.2d 795, 810 (Pa. 2005); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 931 (Mass. 1997); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1285 (Conn. 1993); *Protestant Episcopal Church in Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980); *Tea v. Protestant Episcopal Church in Diocese of Nev.*, 610 P.2d 182, 183 (Nev. 1980); *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 469-71 (Ct. App. 2008), *ordered published by* 202 P.3d 1089 (Cal. 2009); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 923 (Mass. App. Ct. 2003); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003); *Bennison v. Sharp*, 329 N.W.2d 466, 472 (Mich. Ct. App. 1982); *Diocese of San Joaquin v. Schofield*, No. 08 CECG 01425, Order on Plaintiffs' Motion

For Summary Adjudication at 5-6 (Cal. Super. Ct., County of Fresno, filed July 21, 2009) (attached hereto at Tab B), *appeal pending*.²³

C. The Undisputed Evidence and the First Amendment Require the Conclusion that the Diocesan Plaintiffs Represent the Faction that is Loyal to the Church and Therefore are Entitled to Control the Diocese and its Corporation and Assets.

There can be no dispute that Bishops Gulick and Ohl and the other leaders of the Diocese elected in February 2009 are the persons who have remained “loyal” to the Church, and are recognized by the Church as such. *See supra* at pp. 31-33. Nor is there any question that defendant Iker and his followers expressly deny any connection to the Church. *See supra* at pp. 29-31. These facts alone dispose of this step of the *Brown* inquiry.

But even if there were any question about which group of individuals is the “loyal” leadership of the Diocese, the First Amendment would require the court to defer to the Church’s recognition of Bishops Gulick and Ohl and the others elected in February 2009 as the conclusive determination of this issue.

In *Watson*, the U.S. Supreme Court stated that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest ... church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.” 80 U.S. at 727. The Court has reaffirmed these principles numerous times over the past 130 years, *see, e.g., Jones*, 443 U.S. 595; *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976);

²³ Although all but one of these cases involved litigation over parish property, as opposed to diocesan property as here, the one court to have considered the issue in the latter context rejected the argument that the Church can be hierarchical as to parishes but not as to dioceses. *See Diocese of San Joaquin v. Schofield*, Order on Plaintiffs’ Motion For Summary Adjudication at 5 (citing cases for the proposition that “it is beyond dispute that the Episcopal Church is a hierarchical church” and noting that “[t]he fact that [those cases] were ultimately analyzing the actions of a parish, rather than the actions of a diocese, do not invalidate the findings regarding the nature of the Church as a whole”).

Kedroff, 344 U.S. 94; *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), and Texas precedent is unequivocally consistent with these pronouncements. See *Brown*, 102 Tex. 323, 116 S.W. 360 at 363-64 (rejecting argument by a dissident faction of a hierarchical church that the general church's decision to merge with another denomination "could [not] be properly entered into" by the general church's governing body, its General Assembly).

The identity of a church's clergy, leaders, and members are core ecclesiastical issues at the heart of this First Amendment protection. In *Gonzalez*, for example, the plaintiff sought an order that he was entitled to a chaplaincy and its associated income pursuant to the unambiguous terms of a civil will. 280 U.S. at 10-11. The Roman Catholic Church, however, determined that the plaintiff was not eligible to hold the chaplaincy under that church's rules and regulations. *Id.* The Supreme Court held that the church's determination was conclusive in the civil litigation:

"Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.... [T]he decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." *Id.* at 16.

A similar result was reached in *Milivojevich*, which involved a dispute arising out of a general church's decision to defrock a sitting bishop and divide his former diocese into three. 426 U.S. at 703-06. The bishop of the original, undivided diocese refused to recognize this decision, and filed suit "to have himself declared the true Diocesan Bishop," entitled to control of the property at issue. *Id.* at 706-07. The general church, in turn, sought "declaratory relief that [the original bishop] had been removed as Bishop of the Diocese and that the Diocese had been properly reorganized into three Dioceses." *Id.* at 707.

The Illinois courts ruled that the denomination had not properly acted under its own rules when it purported to depose the original bishop and divide his diocese, but the Supreme Court

reversed, reasoning that “*questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern*” *Id.* at 717 (emphasis added). When such issues are implicated, therefore, “civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity....” *Id.* at 713. Indeed, as the *Milivojevich* court recognized, courts must accept those decisions even where they are determinative (as here) of disputes over control of church property: “[A]lthough the Diocesan Bishop controls [a monastery] and is the principal officer of [the diocese’s] property-holding corporations, the civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject to judicial abrogation.” *Id.* at 720.²⁴

The courts of Texas have reached the same conclusion. As the Court of Appeals affirmed in *Lacy v. Bassett*, 132 S.W.3d 119, 123 (Tex. App.—Houston [14th Dist.] 2004, no pet.), under the First Amendment,

“civil courts may not intrude into the church’s governance of religious or ecclesiastical matters, such as theological controversy, church discipline, ecclesiastical government, or the conformity of members to standards of morality. [Citation] In addition, courts should not involve themselves in matters relating to the hiring, firing, discipline, or administration of clergy. [Citation] The relationships between an organized church and its ministers are considered a church’s ‘lifeblood’ and matters involving those relationships are recognized as ‘of prime ecclesiastical concern.’” (Citation omitted.)

²⁴ Further, courts must accept and enforce such church decisions without inquiring into the process by which they were made. *See, e.g., Milivojevich*, 426 U.S. at 708-09 (“civil courts do not inquire whether the relevant church governing body has power under religious law to make certain decisions as such an inquiry” would violate the First Amendment in much the same manner as civil determination of religious doctrine); *Patterson v. Sw. Baptist Theological Seminary*, 858 S.W.2d 602, 605-06 (Tex. App.—Fort Worth 1993, no writ) (“[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.”)

See also, e.g., *Casa Linda*, 70 S.W.2d at 707 (Texas law “requires deference to [a hierarchical church’s] identity of ... the loyal group, as the representative of the local church”).²⁵

A trial court in California has recently applied this bedrock principle to a case involving another diocese of The Episcopal Church whose leaders also sought to take the diocese out of the Church and into the Anglican Province of the Southern Cone, and accordingly held that “since the Episcopal Church has seen fit to recognize [Bishop] Lamb as the new Bishop of the Diocese of San Joaquin, we must do so as well.” *Diocese of San Joaquin v. Schofield*, Order on Plaintiffs’ Motion for Summary Adjudication at 10. The court lacked authority to “look into the propriety of the election and deposition of church officers according to church regulations and rules,” because it “is without the power to countermand th[e] decision” to recognize Bishop Lamb. *Id.* at 12-13. The court thus held that Bishop Lamb, and not the prior bishop who had attempted to lead his diocese out of The Episcopal Church and had begun functioning as a bishop of another denomination, was the individual entitled to control of the corporation and other legal entities holding title to diocesan property. *Id.* at 10-13.

In short, binding precedent from both Texas and the U.S. Supreme Court, consistent with authority from numerous other jurisdictions across the country, requires civil courts to respect

²⁵ Courts of numerous other jurisdictions have ruled similarly. See *New*, 84 Cal. Rptr. 3d at 485 (courts are required to defer to diocese’s determination concerning the qualifications and identity of individuals entitled to serve as leaders of an Episcopal parish); *St. Mary of Egypt Orthodox Church, Inc. v. Townsend*, 532 S.E.2d 731, 736 (Ga. Ct. App. 2000) (trial court had erred in determining whether dissident group were “members in good standing with the power to participate in the affairs of the [church] corporation”); *Metro. Philip v. Steiger*, 98 Cal. Rptr. 2d 605, 609 (Ct. App. 2000) (“[C]ivil courts are ‘ill-equipped’ to resolve disputes over which faction represents the ‘true’ church.”); *Protestant Episcopal Church in Diocese of N.J. v. Graves*, 417 A.2d 19, 24-25 (N.J. 1980) (the “individual defendants have disaffiliated themselves from The Protestant Episcopal Church and thereby automatically terminated their eligibility to hold office as Wardens and Vestrymen of [the parish]”); *Church of God of Madison v. Noel*, 318 S.E.2d 920, 924 (W. Va. 1984) (where “the proper church authorities had already determined who were the proper trustees of the Church of God of Madison, the civil courts were bound to abide by that decision).

and enforce a hierarchical church's determination of the identity of its clergy, leaders, and members. And, the undisputed facts clearly show that the Church has recognized the Diocesan plaintiffs – Bishops Gulick and Ohl and the other leaders elected in February 2009 – as the leaders of the Diocese, *see supra* at pp. 32-33. That determination is conclusive here and must be enforced.

* * *

Because the law and undisputed evidence require the conclusions that (1) the Church is hierarchical and (2) the Diocesan plaintiffs are the “loyal” leadership of the Diocese as recognized by the Church, the court should enter summary judgment in the Church’s favor and declare that (a) the Diocese is and remains the same Diocese that has been a part of the Church since its formation in 1983, and (b) Bishops Gulick and Ohl and other leaders of the Episcopal Diocese of Fort Worth recognized by the Church and the Diocese are, and have been since February 2009, the authorities and representatives of the Diocese entitled to use and control the Diocesan Corporation and the real and personal property of the Diocese; and enter an injunction (i) requiring the defendants to surrender all Diocesan property, as well as control of the Diocesan Corporation, to the Diocesan plaintiffs and to provide an accounting of all Diocesan assets, and (ii) prohibiting the defendants from holding themselves out as leaders of the Diocese.

D. The Great Weight of Authority from Across the Country Confirms That Property Held By Constituent Parts of The Episcopal Church Must Remain With The Church in the Event of a Dispute.

The conclusion advocated in Sections I.A-C above is confirmed by the great weight of authority from across the country, which makes clear that property of an Episcopal Church body must remain with the Church in the event of a dispute.

Every state court but one to consider disputes over Episcopal church property has uniformly held that disaffiliating members had no right to use and control that property. *See:*

- *Episcopal Church Cases*, 87 Cal. Rptr. 3d 275, 297 (Cal. 2009) (when majority of parishioners “disaffiliated from the Episcopal Church, the local church property reverted to the general church”), *cert. denied*, 130 S. Ct. 179 (2009);
- *Huber v. Jackson*, 96 Cal. Rptr. 3d 346, 357 (2009) (parish holds property “in trust for the Episcopal Church and the Los Angeles Diocese, and by disaffiliating from the church defendants and their new parish under another church have no right in the property”), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (Sept. 17, 2009), *cert. denied*, 78 U.S.L.W. 3498 (Mar. 1, 2010) (No. 09-708);
- *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 482, 486 (2008) (noting “the Episcopal Church impressed a trust on local church property” and holding “[o]nce the defendants renounced their membership in the Episcopal Church, they could no longer serve as members of the vestry and directors of the Parish corporation”);
- *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (enforcing “trust [that] has been imposed upon the [parish’s] real and personal property ... for the use of [The Episcopal Church]”);
- *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1292 (Conn. 1993) (enforcing “trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [The Episcopal Church] in 1789”);
- *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga.*, No. A10A1375, -- S.E.2d --, 2010 WL 2683934, at *8 (Ga. Ct. App., July 8, 2010) (“a trust over the [parish] property exists in favor of the ... Church and the Diocese”; thus, “[w]hen [the local congregation] disaffiliated from the ... Episcopal Church, the local church property reverted to the control of the Bishop of the Diocese of Georgia for the uses and purposes of the ... Church”);
- *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 923 (2003) (parish “holds its property in trust for the Diocese and [The Episcopal Church]”);
- *Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982) (“although the majority faction of a local congregation within a hierarchical church may secede, it may not take property with it.”);
- *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 83 N.J. 572, 581–82, 417 A.2d 19, 24-25 (N.J. 1980) (parishioners “disaffiliated themselves from The ... Episcopal Church” which “automatically terminated their eligibility to hold office” as parish leaders in control of church property; “individual [parishioners] are free to disassociate themselves from [The Episcopal Church] and to affiliate themselves with another religious denomination.... The problem lies in [their] efforts to take the church property with them. This they may not do.”);
- *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) (The Episcopal Church’s rules “clearly establish an express trust in favor of the Rochester Diocese and the National Church”);

- *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 81 (App. Div. 1999) (enforcing “trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the ... Episcopal Church”);
- *Tea v. Protestant Episcopal Church in Diocese of Nev.*, 610 P.2d 182, 184 (1980) (enforcing “ecclesiastical authority’s decision as to identity of” the “loyal” congregation entitled to possess parish property);
- *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003) (The Episcopal Church’s rules “precluded the seceding vestry from taking control of the [parish] property”);
- *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) (parish “is bound by the express trust language in [The Episcopal Church’s canons] and therefore, its vestry and members are required to use its property for the benefit of the Diocese”).

See also:

- *Diocese of San Joaquin v. Schofield*, No. 08 CECG 01425, Order on Plaintiffs’ Motion For Summary Adjudication at 5-6 (Cal. Super. Ct., County of Fresno, filed July 21, 2009) (attached hereto at Tab B), *appeal pending* (person recognized by the Church as Diocesan Bishop was the incumbent of diocesan corporation holding diocesan property and president of diocesan investment fund);
- *Grace Church & St. Stephen’s v. Bishop & Diocese of Colo.*, No. 07 CV 1971, Order at 26 (Colo. Dist. Ct. Mar. 24, 2009) (attached hereto at Tab C) (“trust [in favor of The Episcopal Church] that has been created through past generations of members of [the parish] prohibits the departing parish members from taking the property with them”);
- *Diocese of Cent. N.Y. v. Rector, Church Wardens, & Vestrymen of the Church of the Good Shepherd*, No. 2008-0980, 2009 NY Slip Op. 50023U, at *2–3, 880 N.Y.S.2d 223 (Sup. Ct. Jan. 8, 2009) (enforcing The Episcopal Church’s trust interest in parish property);
- *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05, Mem. at 31 (N.Y. Sup. Ct. Mar. 12, 2008) (attached hereto at Tab D) (“all real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island”);
- *Convention of the Protestant Episcopal Church in Diocese of Tenn. v. Rector, Wardens & Vestrymen of St. Andrew’s Parish*, No. 09-2092-11, Order at 11 (Tenn. Ch. Ct. Apr. 29, 2010) (attached hereto at Tab E) (parish property “is impressed with a trust in favor of the Diocese and The Episcopal Church” and individuals “who have disassociated from ... the Diocese shall be enjoined from claiming any ownership interest [in] the [parish] real property”);
- *Diocese of Nw. Tex. v. Masterson*, No. A-07-0237-C, Modified Final Summary Judgment at 1-2 (51st Dist. Ct., Tom Green County, Tex. Dec. 16, 2009), *appeal docketed*, No. 03-10-00015-CV (Tex. App. Jan. 7, 2010) (attached hereto at Tab A) (withdrawing parishioners “may not divert, alienate, or use the real or personal property of [the parish] ... except for the mission of the Episcopal Church, as provided by and in accordance with the Constitutions

and Canons of the [Church] and the Diocese”; and “all real and personal property of [the parish] is held in trust for the Episcopal Church and the Diocese.”

But see:

- *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163, 174 (S.C. 2009) (no trust interest in parish property).²⁶

All but one of these decisions has involved a dispute over parish, rather than diocesan, property. But the result must be the same in either context, for to hold that Episcopal *parish* property must remain with The Episcopal Church in the event of a dispute, but that property held by the dioceses that form and supervise those parishes need not, would be nonsensical. Indeed, as noted above, much of the property that the Diocese of Fort Worth holds *is* property held for the use of the Church’s local congregations. *Supra* at p. 24.

Thus, the sole decision involving a diocese of the Church has held that because the diocese had been required to accede to the Church’s Constitution as a condition of its formation and had so acceded, it lacked authority to revoke its accession or “disaffiliate” from the Church. *Diocese of San Joaquin*, Order on Plaintiffs’ Motion for Summary Adjudication at 7-9. For this reason, and because in any event the proper leadership of the continuing diocese was an ecclesiastical matter on which the Court could not second-guess the Church itself, the court held that the Bishop recognized by the Church as the bishop of its diocese was in fact the individual entitled to control of the corporation and legal entities holding title to diocesan property. *Id.* at 10-13.

²⁶ *All Saints* is distinguishable and inapplicable here because the law in South Carolina – at least as it is described in the *All Saints* decision – is distinctly different from Texas law, and indeed the law of every other state that has resolved a dispute over Episcopal church property. As set out above, Texas law requires that in the event of a dispute over property of a local unit of a hierarchical church, the faction that remains loyal to the hierarchical church is entitled to the property. *Supra* Section I.A. And as set out below, Texas law also requires the enforcement of a hierarchical church’s rules governing church property. *Infra* Section II.A. Neither of these principles appeared in the *All Saints* decision.

The conclusion dictated in this case, as set out in Sections I.A-C above, is thus fully consistent with the decisions reached by courts around the country resolving property disputes within The Episcopal Church.

E. Defendants' Position that the Diocese May Unilaterally Withdraw from the Church Must Be Rejected.

Defendants have indicated in their filed papers in this case that they believe the Diocese unilaterally withdrew from the Church and therefore the defendants are the proper leaders of the Diocese and its Corporation and are entitled to the possession and use of all diocesan assets. *See, e.g., In re Franklin Salazar*, No. 02-09-00450-CV, Petition for Writ of Mandamus at 4-7 (Ct. App. 2d Dist. Nov. 13, 2009) (arguing that defendants are authorized to represent the Diocese and its Corporation because a majority of delegates at the 2007 and 2008 Diocesan Convention voted to amend the Diocesan Constitution). But as we have seen, the First Amendment forbids civil courts from second-guessing a church's resolution of "questions of discipline, or of faith, or ecclesiastical rule, custom, or law," *Watson*, 80 U.S. at 727; rather, where such questions "have been decided by the highest of these church judicatories to which the matter has been carried," the courts "must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* *See also Brown*, 102 Tex. at 331-34, 116 S.W. at 363-64 (refusing to review decision by church's General Assembly to merge with another denomination).

This principle applies not only to determinations about the identity of a church's clergy, as we have seen above, *supra* Section I.C, but also to a church's determinations about its governmental structure. Thus, in *Milivojevich*, the U.S. Supreme Court reversed the Illinois courts' determination that the hierarchical church had not properly acted under its own rules when it purported to divide one of its dioceses into three, stating that "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern."

426 U.S. at 717. When such issues are implicated, therefore, “civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity.” *Id.* at 713.

There is no question here that the Church has determined that an Episcopal diocese may not unilaterally withdraw from the Church. First, on two separate occasions, the Church’s House of Bishops – the “highest judicatory” to which such matters are committed – has determined that efforts by bishops to remove their dioceses from the Church constitutes a “renunciation of the Doctrine, Discipline, or Worship” of the Church, and has disciplined those bishops accordingly. *See supra* at pp. 17-18. Second, the Church’s Executive Council – the body which, under the leadership of the Presiding Bishop, manages the programmatic affairs of the Church between meetings of the General Convention – has passed a resolution stating that any effort by a diocese to “limit or lessen” their accession to the Church’s Constitution and Canons is “null and void,” and specifically declaring such efforts by the Diocese of Fort Worth to be “null and void.” *Supra* at p. 18. Finally, at its 2009 meeting, the General Convention adopted a resolution recognizing Bishop Gulick and the other leaders elected in February 2009 as the true leadership of the “continuing” Diocese, thus evidencing its understanding that the Diocese never left the Church. *Supra* at p. 33.

The First Amendment requires the court to defer to these determinations. As in *Milivojevich*, the hierarchical church’s determination about the status of its diocese – whether it may be divided into three (*Milivojevich*) or whether dioceses may withdraw from the larger polity (here) - is final, binding, and must be enforced.

II. The Episcopal Church is Entitled to Summary Judgment on its Claim for a Declaration that the Diocese’s Property Must be Held and Used for the Mission of the Church.

As we have seen, under *Brown* and its progeny a church property dispute may be conclusively resolved by focusing on the question of “identity” – that is, by determining which

persons have remained “loyal” to the hierarchical church, and declaring their right to control the property. But there are at least two other reasons why the church property at issue in this case must remain in the hands of loyal Episcopalians: (1) Texas law requires the enforcement of the Church’s property canons, which protect all property for the mission of the Church; and (2) Texas law governing charitable trusts requires that donations to a charitable trust remain dedicated to that charity and not diverted to another use.

A. **Texas Law Requires Enforcement of the Church’s Property Canons Commanding that All Diocesan Property be Held and Used for the Mission of the Church.**

Texas law governing voluntary associations generally holds that the rules of a voluntary association constitute a binding contract between an association and its members. *See, e.g., Dist. Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones*, 138 Tex. 537, 545, 548-50, 160 S.W.2d 915, 920, 922-23 (1942) (“*Order of Odd Fellows*”) (a voluntary association’s internal rules are “part and parcel of the contract the [members] made for themselves when they became members”); *see also Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 74 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (“A member, by becoming such, subjects himself to his organization’s power to administer, as well as its power to make, its rules.”).

Religious organizations are no exception to these rules. Texas courts have long recognized “that persons who unite themselves to a hierarchical church organization do so with an ‘implied consent’ that intrachurch disputes ... will be decided by the” church’s own rules and judicatories. *Casa Linda*, 710 S.W.2d at 703. As the Court of Appeals has explained, “members of the local church ... united ... with [a hierarchical church] ... thereby consented to its laws, and their rights and obligations are to be determined by the laws of that church.” *Browning*, 273 S.W.2d at 134; *see also Green*, 808 S.W.2d at 551 (Texas law “imputes to members ‘implied

consent' to the governing bylaws of their church"); *Templo Ebenezer*, 752 S.W.2d at 198 (“[W]here a local congregation is a subordinate member of some higher ecclesiastical tribunal that controls the entire membership[,] ... [t]he local congregation is bound by the constitution and rules of the parent body.”).

Indeed, in the case of churches, the First Amendment *requires* the courts to respect the association’s own internal rules in order to ensure that churches are able to govern themselves, free from state interference. *See, e.g., Milivojevich*, 426 U.S. at 709-10; *Kedroff*, 344 U.S. at 116 (religious organizations have a constitutional right “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”); *Episcopal Church Cases*, 87 Cal. Rptr. 3d at 294 (“Respect for the First Amendment free exercise rights of persons to enter into a religious association of their choice ... requires civil courts to give effect to the provisions and agreement of that religious association.”). The policy of deference to voluntary associations is heightened in the case of religious organizations, because “[m]embership in a church creates a different relationship from that which exists in other voluntary societies formed for business, social, literary, or charitable purposes. Church relationship stands upon a different and higher plane” *Minton v. Leavell*, 297 S.W. 615, 621-22 (Tex. Civ. App.—Galveston 1927, writ ref’d).

Thus, it is not surprising that Texas law requires courts to enforce a hierarchical church’s rules governing the use and disposition of local church property. As noted above, in *Presbytery of the Covenant*, the court held that a dissenting faction of a local church “cannot dissolve a local church in contravention of the governing rules or edicts of the mother church, and then re-establish themselves as an independent church ... and take the church property with them.” 552 S.W.2d at 872. But “[e]ven if the action of withdrawal had amounted to a dissolution of the

local church,” the court went on to say, the local church property could not be diverted from the larger Presbyterian Church because “the [Presbyterian] Constitution provides that upon such a dissolution the church property shall be transferred to the appropriate presbytery.” *Id.*; see also *Cumberland Presbyterian Church v. North Red Bank Cumberland Presbyterian Church*, 430 S.W.2d 879, 882 (Tenn. Ct. App. 1968) (cited with approval by *Presbytery of the Covenant*, 552 S.W.2d at 872, and holding that a hierarchical church’s governing documents created a trust in local church property in favor of the general church).

Similarly, in *Browning*, the appeals court examined the hierarchical church’s rules governing “transfer of church property by the trustees.” 273 S.W.2d at 135. The court concluded that, even if the dissidents could validly withdraw the local congregation from the mother church, their “purported transfer of the church property [nevertheless] cannot be given effect” because that transfer did not comply with the larger church’s rules governing transfer of church property. *Id.*

In this case, the Church’s rules could not be clearer. Since before the Diocese’s creation in 1982 and up to today, the canons have

- provided that “[a]ll 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,” *supra* at pp. 15, 22; and
- prohibited the encumbrance or alienation without the consent of the Bishop and Standing Committee of any real property, consecrated or unconsecrated, held for any Parish, Mission, Congregation, or Institution of the Diocese, *supra* at pp. 14, 22.

Moreover, since the formation of the Diocese its Constitution has explicitly described the property it holds as that acquired “for the use of the Church in this Diocese, including the real property of all parishes and missions, as well as Diocesan institutions,” *supra* at p. 24. And, the governance of the Corporation holding title to most diocesan property is to be vested in

individuals who are members of The Episcopal Church, *id.* These provisions make clear that diocesan property is held for the Church's work and mission, and cannot be diverted to another denomination. Under Texas law, they must be enforced.

Thus, one Texas court has reviewed the Church's canons and held that "all real and personal property of [a particular Episcopal parish] is held in trust for the Episcopal Church and the Diocese." *Diocese of Nw. Tex.*, Modified Final Summary Judgment at 2. And, courts in other states that have considered the Church's property canons have almost unanimously held that the canons impose a trust on church property, protecting it for the mission of the Church. *See, e.g., Episcopal Church Cases*, 87 Cal. Rptr. 3d at 292 (1979 Trust Canon "recites an express trust in favor of the denominational church"); *Huber*, 96 Cal. Rptr. 3d at 357 (parish holds property "in trust for the Episcopal Church and the ... diocese"); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish*, 620 A.2d at 1292 (1979 Trust Canon "merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [the Church] in 1789"); *Bishop & Diocese of Colo.*, 716 P.2d at 108 (enforcing "trust [that] has been imposed upon the [parish's] real and personal property ... for the use of [The Episcopal Church]"); *Grace Church & St. Stephen's*, Order at 26 (enforcing trust in favor of the Church); *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 2010 WL 2683934 at *8 (Ga. Ct. App. July 8, 2010) ("a trust over the [parish] property exists in favor of the ... Church and the Diocese"); *Episcopal Diocese of Mass.*, 797 N.E.2d at 923 (parish "holds its property in trust for the Diocese and [The Episcopal Church]"); *Protestant Episcopal Church in Diocese of N.J.*, 417 F.2d at 24 (1979 Trust Canon "reflects established customs, practices and usages of The ... Episcopal Church"); *Episcopal Diocese of Rochester*, 899 N.E.2d at 925 (The Episcopal Church's rules "clearly establish an express trust in favor of the Rochester

Diocese and the National Church”); *Trustees of the Diocese of Albany*, 684 N.Y.S.2d at 81 (enforcing “trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the ... Episcopal Church”); *Diocese of Cent. N.Y.*, 2009 NY Slip Op. 50023U, at *2–3, (enforcing the Church’s trust interest in parish property); *St. James Church, Elmhurst*, Mem. at 31 (“all real and personal property held by [the parish] is held in trust for the Episcopal Church and the ... Diocese”); *Daniel*, 580 S.E.2d at 719 (1979 Canon “essentially established a deed of trust”); *In re Church of St. James the Less*, 888 A.2d at 810 (1979 Canon contains “express trust language”); *Convention of the Protestant Episcopal Church in the Diocese of Tennessee*, Order at 11 (parish property “is impressed with a trust in favor of the Diocese and The Episcopal Church”). *But see All Saints Parish Waccamaw*, 685 S.E.2d at 174 (finding no trust interest).²⁷

Because Texas law requires this court to enforce the Church’s rules governing local church property, and because the undisputed facts show that the Church’s rules require that all church property be held and used for the mission of the Church, the court should enter summary judgment in favor of the Church and declare that all property held by or for the Diocese may be used only for the mission of the Church and the Diocese, and enter an injunction requiring the defendants to surrender all Diocesan property to the Diocesan plaintiffs and to provide an accounting of all Diocesan assets.

B. Texas Charitable Trust Law Confirms that Property Donated To a Constituent Part of a Hierarchical Church Must Be Used For That Church.

Texas courts have also long recognized the basic principle that “[a] gift to a charitable institution or society will be presumed to be a charitable gift, though no purpose is named, and such institution or society will be presumed to hold such gifts in trust for those charitable

²⁷ As noted above, *supra* p. 49 n.27, the *All Saints* decision is unpersuasive here.

purposes for which it exists.” *Boyd v. Frost Nat’l Bank*, 145 Tex. 206, 220, 196 S.W.2d 497, 505 (1946) (quoting *De Camp v. Dobbins*, 29 N.J. Eq. 36 (1878)). Accordingly, when a charitable association receives a gift, that property is imposed with a charitable trust “and the association would be wholly unauthorized to devote it otherwise than to charity only.” *Boyd*, 145 Tex. at 219, 196 S.W.2d at 505.

In general, “property transferred unconditionally to a [charitable] corporation ... is ... subject to implicit charitable ... limitations defined by the donee’s organizational purpose” *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.) (emphasis omitted); 4A William F. Fratcher & Austin W. Scott, *The Law of Trusts* § 348.1 (4th ed. 1989). There is no suggestion in the case law that such trusts are presumed to be transferable to some other charitable or corporate purpose by the corporation’s current members or leadership. To the contrary, to protect the expectations of generations of individual donors, the law requires that property donated to a particular church – like any charity – be used for that charity’s mission. *See also, e.g., Episcopal Church Cases*, 87 Cal. Rptr. 3d at 297 (“The only [donor] intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.”); *Metro. Baptist Church of Richmond, Inc. v. Younger*, 121 Cal. Rptr. 899, 903 (Ct. App. 1975) (“trust property of a nonprofit religious or charitable corporation [should] be not diverted from its declared purpose,” and may only be used “to carry out the objects for which the [corporation] was created”) (citation omitted).

The undisputed facts show that since its formation in 1983, and at least until defendants’ attempt to remove the Diocese and its assets from the Church, the Diocese has received

charitable donations as an institution of The Episcopal Church. It received all of its initial property from the Diocese of Dallas, another Episcopal Diocese, with the clear understanding that the Diocese of Fort Worth was also an Episcopal Diocese, as represented to the Court that approved the transfer. *See supra* at pp. 25-26. Since that time, the Diocese has always described its property as that of “the Church in this Diocese,” *supra* at p. 24, and has been and held itself out as a Diocese of the Church, repeatedly confirming that identity by actions of its Convention and statements made in litigation. *See supra* at pp. 26-28. In the light of these undisputed facts, there can be no question that donations to the Diocese have been to a Diocese that is part of The Episcopal Church, serving the mission of that Church, and under Texas law must remain committed to the mission of the Church. For these reasons, the court should enter summary judgment in favor of the Church and declare that all property held by or for the Diocese may be used only for the mission of the Church, and enter an injunction requiring the defendants to surrender all Diocesan property to the Diocesan plaintiffs and to provide an accounting of all Diocesan assets.

III. The Episcopal Church is Entitled to Summary Judgment on its Claim for a Declaration that the Changes Made by the Defendants to the Articles and Bylaws of the Diocesan Corporation are *Ultra Vires* and Void.

Texas law regards as *ultra vires* any corporate act that is “beyond the scope either of the express or implied powers of its charter.” *Temple Lumber Co. v. Miller*, 169 S.W.2d 256, 258 (Tex. Civ. App.—Fort Worth 1943, writ ref’d w.o.m.); *see also* 19 C.J.S., *Corporations* § 673 (2007) (same). Efforts of some of the defendants to amend the articles of the Diocesan Corporation fall squarely within this rule, and must be declared void.

As noted above, in 2006 some of the defendants purportedly amended the corporate articles to (1) remove the description of the property held by the Corporation as property held “for the use of the ... Diocese”; (2) delete the requirement that such property should be

administered by the Corporation “in accordance with the [Diocesan] Constitution and Canons”; and (3) insert provisions giving the Trustees of the Corporation the “sole authority to determine the identity and authority of the Bishop [of the Diocese].” *Supra* at pp. 29-30.

These actions went far beyond any and all express and implied authority of the Corporation, which clearly was created and existed as a corporate entity subordinate to a Diocese of The Episcopal Church. As explained above, the Diocesan Corporation cannot arrogate to itself the authority to determine the qualification, identification, or discipline of a Bishop of The Episcopal Church. This is a matter comprehensively governed by The Episcopal Church itself. *See supra* at pp. 13-16. Moreover, the defendants were bound by their oaths to “conform to the Doctrine, Discipline, and Worship of [the Episcopal] Church,” and/or by Canon I.17(8)’s requirement that they as fiduciaries will “well and faithfully perform the duties of their office in accordance with the Constitution and Canons” of the Church and the Diocese. *See supra* pp. 12, 16. The Corporation, similarly, was bound by Diocesan Canon 17 (formerly Canon 11) to operate in accordance with the Church’s and the Diocese’s rules, and the Diocese itself had committed as a condition of its formation to accede to the Constitution, canons, and authority of The Episcopal Church. *See supra* at pp. 23-24. And at all relevant times the Diocesan canons have provided that “[t]he Board of Trustees shall have the power and authority to conduct the affairs of said Corporation in accordance with ... the Constitution and Canons of the Diocese from time to time adopted.” *See supra* at pp. 24, 29 (1982 Diocesan Canon 11.2 & 2007 Diocesan Canon 17.2).

The secular act of incorporation does not alter the relationship between a hierarchical church and one of its subordinate units. Thus, “[r]eligious corporations are merely ‘permitted as a convenience to assist in the conduct of the temporalities of the church.’ Notwithstanding

incorporation the ecclesiastical body is still all-important. The corporation is a subordinate factor in the life and purposes of the church proper.” *Diocese of San Joaquin*, Order on Plaintiffs’ Motion for Summary Adjudication at 11 (quoting *Wheelock v. First Presbyterian Church of Los Angeles*, 51 P. 841, 843 (1897)). See also *Episcopal Diocese of Rochester*, 899 N.E.2d 920 (changes to corporate documents did not preclude holding that parish property held in trust for Church and the Diocese); *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish*, 620 A.2d 1280 (same); *Huber*, 96 Cal. Rptr. 3d at 357-58 (rejecting argument that religious corporation was separate from parish and existed outside Church and diocese), 361 (religious corporation subordinate to ecclesiastical body); *New*, 84 Cal. Rptr. 3d at 479 (religious corporation does not change the ecclesiastical status of congregation). Indeed, to find otherwise would risk First Amendment implications. Cf. *First Born Church of the Living God, Inc. v. Hill*, 481 S.E.2d 221, 222 (Ga. 1997) (local church members have “no legal right [under Georgia corporations code] to wrest the governing of the Church from the [duly elected Church leaders]”).

The purported amendments to the Corporate Articles were thus *ultra vires* and void, and in any event could not serve to sever the Corporation or its property from the Church as a matter of law. See, e.g., *Diocese of San Joaquin*, Order on Plaintiffs’ Motion for Summary Adjudication at 8-9, 14-15 (holding that similar efforts to amend the Constitution and corporate articles of the Episcopal Church’s Diocese of San Joaquin were *ultra vires* and void). See also, e.g., *Norton*, 304 S.W.2d at 423-24 (rejecting argument that the incorporation of the local church meant “that a majority of the corporation could secede from” the hierarchical church under general principles of corporations law, because the general church’s governing documents required that the local church’s corporate “Charter and By-laws must always be in accord with

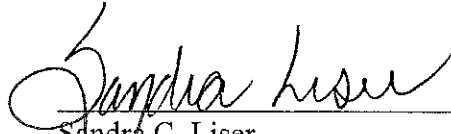
the standards of the [general] Church”); *Gray v. St. Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488, 489 (Tex. Civ. App.—Texarkana 1976, writ ref’d n.r.e) (The Episcopal Church’s “Canon Law also authorizes the Vestry to organize a corporation, *as an adjunct or instrumentality of the parish*, to use in connection with the administration of the parish and its funds and properties”) (emphasis added); *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App.—Austin 1991, writ denied) (“In a conflict between the general procedures outlined in the Texas Non-Profit Corporation Act and the specific procedures contained in the church bylaws, [civil courts] must defer to the church bylaws.”); *Wheelock*, 51 P. at 843 (“[I]ncorporation is only permitted as a convenience to assist in the conduct of the temporalities of the church. Notwithstanding incorporation, the ecclesiastical body is still all important.... A religious corporation’s ... function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church.”); *New*, 84 Cal. Rptr. 3d at 479 (“[R]eligious corporations are, in their basic sense, different from ordinary corporations.”).

For these reasons, the court should declare *ultra vires* and void the 2006 amendments to the Diocesan Corporation’s corporate articles.

CONCLUSION

For the reasons set forth above, the Church’s motion for summary judgment should be granted, and the Court should, *inter alia*, declare that the Diocese is the continuing Episcopal Diocese of Fort Worth; order defendants to turn over all property of the Diocese or the Diocesan Corporation to the Diocesan Plaintiffs; and order defendants to provide an accounting of all property of the Diocese or Diocesan Corporation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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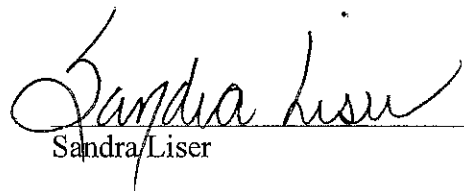
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