

NO. 11-0265

IN THE SUPREME COURT OF TEXAS

THE EPISCOPAL DIOCESE OF FORT WORTH, et al.,

Appellants,

v.

THE EPISCOPAL CHURCH, et al.,

Appellees.

On Direct Appeal From the
141st District Court of Tarrant County, Texas
Cause No. 141-252083-11

STATEMENT OF JURISDICTION

Scott A. Brister
State Bar No. 00000024
ANDREWS KURTH LLP
111 Congress Ave., Ste. 1700
Austin, TX 78701
Telephone: (512) 320-9200
Facsimile: (512) 320-9292
sbrister@andrewskurth.com

Shelby Sharpe
State Bar No. 18123000
SHARPE TILLMAN & MELTON
6100 Western Place, Ste. 1000
Fort Worth, TX 76107
Telephone: (817) 338-4900
Facsimile: (817) 332-6818
utlawman@aol.com

R. David Weaver
State Bar No. 21010875
THE WEAVER LAW FIRM
1521 N. Cooper St., Ste. 710
Arlington, TX 76011
Tel: 817-460-5900
Fax: 817-460-5908
rdweaver@weaverlawfirm.net

ATTORNEYS FOR THE EPISCOPAL DIOCESE OF FORT WORTH, et al.

IDENTITY OF PARTIES AND COUNSEL

Appellants/Cross-Appellees

The Episcopal Diocese of Fort Worth
The Corporation of The Episcopal Diocese of Fort
Worth
Bishop Jack Leo Iker
Franklin Salazar
Jo Ann Patton
Walter Virden, III
Rod Barber
Chad Bates
Judy Mayo
Julia Smead
Rev. Christopher Cantrell
Rev. Timothy Perkins
Rev. Ryan Reed
Rev. Thomas Hightower
St. Anthony of Padua Church (Alvarado)
St. Alban's Church (Arlington)
St. Mark's Church (Arlington)
Church of St. Peter & St. Paul (Arlington)
Church of St. Philip the Apostle (Arlington)
St. Vincent's Cathedral (Bedford)
St. Patrick's Church (Bowie)
St. Andrew's Church (Breckenridge)
Good Shepherd Church (Brownwood)
St. John's Church (Brownwood)
Church of St. John the Divine (Burkburnett)
Holy Comforter Church (Cleburne)
St. Matthew's Church (Comanche)
Trinity Church (Dublin)
Holy Trinity Church (Eastland)
Christ the King Church (Fort Worth)
Holy Apostles Church (Fort Worth)
Iglesia San Juan Apostol (Fort Worth)
Iglesia San Miguel (Fort Worth)
St. Andrew's Church (Fort Worth)
St. Anne's Church (Fort Worth)
Church of St. Barnabas the Apostle (Fort Worth)
St. John's Church (Fort Worth)
St. Michael's Church (Richland Hills)
Church of St. Simon of Cyrene (Fort Worth)
St. Timothy's Church (Fort Worth)
St. Paul's Church (Gainesville)
Good Shepherd Church (Granbury)
Church of the Holy Spirit (Graham)
St. Andrew's Church (Grand Prairie)

Counsel

Scott A. Brister
State Bar No. 00000024
ANDREWS KURTH LLP
111 Congress Avenue, Suite
1700
Austin, Texas 78701
Tel: 512.320.9200
Fax: 512.320.9292
scottbrister@andrewskurth.com

Shelby Sharpe
State Bar No. 18123000
SHARPE TILLMAN & MELTON
6100 Western Place, Suite 1000
Fort Worth, TX 76107
Tel: 817.338.4900
Fax: 817.332.6818
utlawman@aol.com

R. David Weaver
State Bar No. 21010875
THE WEAVER LAW FIRM
1521 N. Cooper Street, Suite 710
Arlington, TX 76011
Tel: 817.460.5900
Fax: 817.460.5908
rdweaver@weaverlawfirm.net

St. Joseph's Church (Grand Prairie)
St. Laurence's Church (Southlake)
St. Mary's Church (Hamilton)
Trinity Church (Henrietta)
St. Mary's Church (Hillsboro)
St. Alban's Church (Hubbard)
St. Stephen's Church (Hurst)
Church of St. Thomas the Apostle (Jacksboro)
Church of Our Lady of the Lake (Laguna Park)
St. Gregory's Church (Mansfield)
St. Luke's Church (Mineral Wells)
Church of St. Peter by the Lake (Graford)
All Saint's Church (Weatherford)
All Saint's Church (Wichita Falls)
Church of the Good Shepherd (Wichita Falls)
Church of St. Francis of Assisi (Willow Park)
Church of the Ascension & St. Mark (Bridgeport)

Appellees/Cross-Appellants

The Episcopal Church

Counsel

Sandra Liser
State Bar No. 17072250
Naman Howell Smith & Lee,
LLP 306 West 7th Street, Suite
405 Fort Worth, Texas 76102
Tel: 817.509.2025
Fax: 817.509.2060
sliser@namanhowell.com

David Booth Beers
Adam Chud
Goodwin Procter, LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
Tel: 202.346.4000
Fax: 202.346.4444
dbeers@goodwinprocter.com
achud@goodwinprocter.com

Mary E. Kostel
The Episcopal Church
c/o Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
Tel: 202.346.4000
Fax: 202.346.4444
mkostel@goodwinprocter.com

The Rt. Rev. C. Wallis Ohl
Robert Hicks
Floyd McKneely
Shannon Shipp
David Skelton
Whit Smith
The Rt. Rev. Edwin F. Gulick, Jr.
Robert M. Bass
The Rev. James Hazel
Cherie Shipp
The Rev. John Stanley
Dr. Trace Worrell
Margaret Meuli
Walt Cabe
Anne T. Bass
The Rev. J. Frederick Barber
The Rev. David Madison
The Rev. Christopher Jambor
Kathleen Wells

Jonathan D. F. Nelson
State Bar No: 14900700
JONATHAN D.F. NELSON,
P.C.
1400 West Abram Street
Arlington, Texas 76013
Tel: 817.261.2222
Fax: 817.274.9724
jnelson@hillgilstrap.com

Kathleen Wells
State Bar No. 02317300
3550 Southwest Loop 820
Fort Worth, Texas 76133
Tel: 817.332.2580
Fax: 817.332.4740
kwells@toase.com

William D. Sims, Jr.
State Bar No. 18429500
Thomas S. Leatherbury
State Bar No. 12095275
VINSON & ELKINS L.L.P.
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
Tel: 214.220.7792
Fax: 214.999.7792
tleatherbury@velaw.com

The Rev. Christopher Jambor and Stephanie Burk,
individually and as representatives of All Saints'
Episcopal Church (Fort Worth)
The Rev. ClayOla Gitane and Cynthia Eichenberger
as representatives of All Saints' Episcopal Church
(Weatherford)
The Rev. ClayOla Gitane and Harold Parkey as
representatives of Christ the King Episcopal
Church (Fort Worth)
Bill McKay and Ian Moore as representatives of
Episcopal Church of the Good Shepherd
(Granbury)
Ann Coleman as a representative of Episcopal
Church of the Good Shepherd (Wichita Falls)
Constant Roberts Marks, IV and William Davis as
representatives of St. Alban's Episcopal Church
(Arlington)
Vernon Gotcher and Ken Hood as representatives
of St. Stephen's Episcopal Church (Hurst)
Sandra Shockley as a representative of St. Mary's
Episcopal Church (Hamilton)
Sarah Walker as a representative of Episcopal
Church of the Holy Apostles (Fort Worth)
Linda Johnson as a representative of St. Anne's
Episcopal Church (Fort Worth)
The Rev. Susan Slaughter and Larry Hathaway
individually and as representatives of St. Luke-in-
the-Meadow Episcopal Church (Fort Worth)
David Skelton as a representative of St. Mary's
Episcopal Church (Hillsboro)
All Saints' Episcopal Church (Fort Worth)
All Saints' Episcopal Church (Wichita Falls)
All Saints' Episcopal Church (Weatherford)
Christ the King Episcopal Church (Fort Worth)
Episcopal Church of the Good Shepherd
(Granbury)
St. Alban's Episcopal Church (Arlington)
St. Simon of Cyrene Episcopal Church (Fort Worth)
St. Stephen's Episcopal Church (Hurst)
St. Mary's Episcopal Church (Hamilton)
St. Anne's Episcopal Church (Fort Worth)
St. Luke-in-the-Meadow Episcopal Church (Fort
Worth)
St. Mary's Episcopal Church (Hillsboro)
Episcopal Church of the Ascension & St. Mark
(Bridgeport)
Episcopal Church of the Good Shepherd
(Brownwood)

Frank Hill
State Bar No. 09632000
HILL GILSTRAP P.C.
1400 W. Abram Street
Arlington, TX 76013
Tel: 817.261.2222
Fax: 817.861.4685
fhill@hillgilstrap.com

Holy Comforter Episcopal Church (Cleburne)
St. Elisabeth's Episcopal Church (Fort Worth)
Holy Spirit Episcopal Church (Graham)
Holy Trinity Episcopal Church (Eastland)
Our Lady of the Lake Episcopal Church (Laguna Park)
Trinity Episcopal Church (Dublin)
Trinity Episcopal Church (Henrietta)
Iglesia San Juan Apostol (Fort Worth)
Iglesia San Miguel (Fort Worth)
St. Anthony of Padua Episcopal Church (Alvarado)
St. Alban's Episcopal Church (Hubbard)
St. Andrew's Episcopal Church (Fort Worth)
St. Andrew's Episcopal Church (Breckenridge)
St. Andrew's Episcopal Church (Grand Prairie)
St. Barnabas the Apostle Episcopal Church (Keller)
St. Gregory's Episcopal Church (Mansfield)
St. John's Episcopal Church (Fort Worth)
St. John's Episcopal Church (Brownwood)
St. John the Divine Episcopal Church (Burkburnett)
St. Joseph's Episcopal Church (Grand Prairie)
St. Laurence's Episcopal Church (Southlake)
St. Luke's Episcopal Church (Mineral Wells)
St. Mark's Episcopal Church (Arlington)
St. Matthew's Episcopal Church (Comanche)
St. Michael's Episcopal Church (Richland Hills)
St. Paul's Episcopal Church (Gainesville)
St. Patrick's Episcopal Church (Bowie)
St. Peter-by-the-Lake Episcopal Church (Graford)
St. Peter and St. Paul Episcopal Church (Arlington)
St. Phillip the Apostle Episcopal Church (Arlington)
St. Thomas the Apostle Episcopal Church (Jacksboro)
St. Timothy's Episcopal Church (Fort Worth)
St. Vincent's Episcopal Church (Bedford)
St. Stephen's Episcopal Church (Wichita Falls)
Holy Apostles (Fort Worth)
Episcopal Church of the Good Shepherd (Wichita Falls)

TABLE OF CONTENTS

Index Of Authorities.....	vii
Statement Of The Case.....	xii
Introduction.....	1
I. THE REQUIREMENTS FOR A DIRECT APPEAL ARE MET HERE.....	2
A. An Injunction	2
B. On The Ground Of Constitutionality	4
C. Of A State Statute.....	7
II. WHY A DIRECT APPEAL IS IMPORTANT.....	11
A. Abandonment of Neutral Principles	12
B. Trouble for Non-Profits	14
C. Guidance for Lower Courts	15
D. Irreparable Harm for these Churches	15
Conclusion.....	15
Appendix	18

INDEX OF AUTHORITIES

CASES

<i>Alexander Schroeder Lumber Co. v. Corona</i> , 288 S.W.2d 829 (Tex. Civ. App. – Galveston 1956, writ ref'd n.r.e.)	10-11
<i>Ayers v. Mitchell</i> , 167 S.W.3d 924 (Tex. App. – Texarkana 2005, no pet.)	9
<i>Best Inv. Co. v. Hernandez</i> , 479 S.W.2d 759 (Tex. Civ. App. – Dallas 1972, writ ref'dn.r.e.)	9
<i>Brown v. Clark</i> , 102 Tex. 323, 116 S.W. 360 (Tex. 1909)	1-2, 4, 5, 9, 10, 14, 15
<i>Browning v. Burton</i> , 273 S.W.2d 131 (Tex. Civ. App. – Austin 1954, writ ref'd n.r.e.)	4
<i>Bryson v. High Plains Undergr. Water Dist.</i> , 297 S.W.2d 117 (Tex. 1956)	3
<i>Cantwell v. Conn.</i> , 310 U.S. 296 (1940)	5
<i>Cf. State v. Hodges</i> , 92 S.W.3d 489 (Tex. 2002)	3, 15
<i>Chen v. Tseng</i> , No. 01-02-01005-CV, 2004 WL 35989 (Tex. App. – Houston [1st Dist.] Jan. 8, 2004, no pet.)	12
<i>Cherry Valley Church of Christ v. Foster</i> , No. 05-00-10798-CV, 2002 WL 10545 (Tex. App. – Dallas Jan. 4, 2002, no pet.)	12
<i>Church of God in Christ, Inc. v. Cawthon</i> , 507 F.2d 599 (5th Cir. 1975)	4

<i>Corona v. Garrison,</i> 274 S.W.2d 541 (Tex. 1955)	11
<i>Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London,</i> 327 S.W.3d 118 (Tex. 2010)	11
<i>Green v. Westgate Apostolic Church,</i> 808 S.W.2d 547 (Tex. App. – Austin 1991, writ denied)	4
<i>HEB Ministries, Inc. v. Texas Higher Educ. Coord. Bd.,</i> 235 S.W.3d 627 (Tex. 2007)	14
<i>Hawkins v. Friendship Missionary Bapt. Church,</i> 69 S.W.3d 756 (Tex. App. – Houston [14th Dist.] 2002, no pet.)	12
<i>Holmes v. Steger,</i> 339 S.W.2d 663 (Tex. 1960)	11
<i>Jones v. Maples,</i> 184 S.W.2d 844 (Tex. App. – Eastland 1944, writ ref'd)	1
<i>Jones v. Wolf,</i> 443 U.S. 595 (1979)	6, 13
<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America,</i> 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952)	5
<i>Libhart v. Copeland,</i> 949 S.W.2d 783 (Tex. App. – Waco 1997, no writ)	12-13
<i>Masterson v. Diocese of Northwest Texas,</i> No. 03-10-00015-CV, 2011 WL 1005382 (Tex. App. – Austin Mar. 16, 2011, pet. filed)	13
<i>Neeley v. West Orange-Cove Consol. Indep. School Dist.,</i> 176 S.W.3d 746 (Tex. 2005)	11

<i>Norton v. Green</i> , 304 S.W.2d 420 (Tex. Civ. App. – Waco 1957, writ ref'd n.r.e.)	4
<i>Perry v. Del Rio</i> , 67 S.W.3d 85 (Tex. 2001)	3, 15
<i>Presbyterian Church v. Hull Church</i> , 393 U.S. 440 (1969)	5
<i>Presbytery of the Cov. v. First Pres. Church of Paris, Inc.</i> , 552 S.W.2d 865 (Tex. Civ. App. – Texarkana 1977, no writ)	4
<i>Qaddura v. Indo-European Foods, Inc.</i> , 141 S.W.3d 882 (Tex. App. – Dallas 2004, pet. denied)	10
<i>Querner Truck Lines, Inc. v. State</i> , 652 S.W.2d 367 (Tex. 1983)	3
<i>Republican Party of Texas v. Dietz</i> , 940 S.W.2d 86 (Tex. 1997)	15
<i>In re Salazar</i> , 315 S.W.3d 279 (Tex. App. – Fort Worth 2010, orig. proc.)	1
<i>Shannon v. Texas General Indem. Co.</i> , 889 S.W.2d 662 (Tex. App. – Houston [14th Dist.] 1994, no writ)	11
<i>Smith v. N. Tex. Dist. Council of Assem. of God</i> , No. 2-05-425-CV, 2006 WL 3438077 (Tex. App. – Fort Worth Nov. 30, 2006, no pet.)	12
<i>State Farm Lloyds v. Page</i> , 315 S.W.3d 525 (Tex. 2010)	6
<i>Texas Workers' Comp. Comm'n v. Garcia</i> , 817 S.W.2d 60 (Tex. 1991)	4
<i>Vaughn v. Drennon</i> , 202 S.W.3d 308 (Tex. App. – Tyler 2006, pet. denied)	10

Watson v. Jones,
80 U.S. 679 (1871).....5, 6, 7

Westbrook v. Penley,
231 S.W.3d 389 (Tex. 2007).....5, 6, 13

Wilson v. Galveston County Cent. Appraisal Dist.,
713 S.W.2d 98 (Tex. 1986).....3

STATUTES, REGULATIONS, AND RULES

Tex. Gov't Code Ann. § 22.001(c).....2

Tex. Bus. Orgs. Code §§ 402.006, 402.014.....8

Tex. Prop. Code Ann. § 112.002.....9

Tex. Prop. Code Ann. § 112.004.....9

Tex. Prop. Code Ann. § 112.005(a).....9

Tex. R. App. P. § 52.3(e).....15

Tex. R. App. P. § 57.211

Tex. R. Civ. P. § 57.4.....2, 15

Tex. Rev. Civ. Stat. art. 1396-2.03(B)10

Tex. Rev. Civ. Stat. art. 1396-2.158

Tex. Rev. Civ. Stat. art. 1396-4.01(A)10

Tex. Const. Art. V, § 3-b.....2

MISCELLANEOUS

Andrew Soukup, Note, *Reformulating Church Autonomy: How Employment Division v. Smith Provides a Framework for Fixing the Neutral Principles Approach*, 82 NOTRE DAME L. REV. 1679 1692 n.105 (2007).....13

Benton C. Martin, Comment, *Protecting Preachers From Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII*, 59 EMORY L.J. 1297, 1322 (2010)13

BLACK’S LAW DICTIONARY 615 (9th ed. 2009)14

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 764 (2002).....14

STATEMENT OF THE CASE

- Nature of the Case:** Suit by national religious association against Texas religious association and related non-profit corporation to remove officers, declare rights to possession and use of property, for monetary damages, and for other declaratory and injunctive relief.
- Trial Court:** 141st District Court of Tarrant County, The Hon. John Chupp presiding.
- Course of Proceedings:** Numerous parties filed cross-motions for summary judgment for declaratory and injunctive relief.
- Trial Court Disposition:** The trial court partially granted Plaintiffs' motions and denied Defendants' motions, signing an Amended Order on Summary Judgment on February 8, 2011. The Order became final by severance on April 5, 2011.
- Appeal:** Defendants filed a Notice of Direct Appeal to this Court to this Court on April 13, 2011.

REFERENCES TO THE RECORD

- 32CR7127 Vol. 32 of the Clerk's Record, page 7127
- 3RR18-20 Vol. 3 of the Reporter's Record, pages 18-20

INTRODUCTION

This is by far the largest church-property suit in Texas history. It involves 60 churches and over \$100 million in property. It arises from an ecclesiastical dispute,¹ but should be decided on neutral principles of law.

After The Episcopal Church (“TEC”) began departing from traditional church practices and beliefs, both clergy and lay delegates of the Episcopal Diocese of Fort Worth (“the Diocese”) voted by a 4-to-1 margin to remove references to TEC from the Diocese’s Constitution. (28CR5962 (¶7)). Whether a diocese can withdraw from TEC is not a matter for the courts.² But property ownership is, and the deeds, church constitutions, and state statutes show the Diocese is entitled to keep property that it has bought, built, and maintained for decades without TEC contributing a dime.³

Aware that neutral principles of Texas law are against it, TEC has mounted a frontal attack on that doctrine: “the Neutral Principles Test Does Not Apply to Hierarchical Churches.” (30CR6420). Citing *Brown v. Clark*, an opinion from this Court in 1909 (70 years before the Neutral Principles

¹ See *In re Salazar*, 315 S.W.3d 279 (Tex. App.—Fort Worth 2010, orig. proc.).

² See *Jones v. Maples*, 184 S.W.2d 844, 848 (Tex. App.—Eastland 1944, writ ref’d) (holding “courts will not interfere in the internal affairs of an association” except to the extent “property rights are involved”).

³ See 28CR5964-65 (¶¶16, 21); 29CR6281 (¶4); 31CR6785-6803. Of the few parishes voting to stay with TEC, the Corporation voluntarily deeded all parish property to three of them — a policy that ended when TEC filed this suit.

doctrine was approved), TEC has convinced three Texas courts in the last year to abandon such principles and defer to TEC's discretion.⁴ In other words, TEC decides whether TEC keeps the property, no matter what the deeds, statutes, or church constitutions say. As this violates both state law and constitutional rules, this Court should note probable jurisdiction.⁵

I. THE REQUIREMENTS FOR A DIRECT APPEAL ARE MET HERE

Since 1940, the Texas Constitution has authorized direct appeals to this Court.⁶ Government Code section 22.001(c) governs such appeals:

An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

The statute states three requirements: (1) an order granting or denying an injunction, (2) on the ground of constitutionality, (3) of a state statute.

A. An Injunction

The Order here contains two injunctions:

⁴ This district court plus others in San Angelo and El Paso. *See Masterson v. Diocese of Nw. Tex.*, No. 03-10-00015-CV, 2011 WL 1005382, at *6 (Tex. App.—Austin Mar. 16, 2011, pet. filed); *St. Francis on the Hill Church v. The Episcopal Church*, Cause No. 2008-4075, Final Summ Jdgt., (Dist. Court-El Paso [210th Jud. Dist.], Dec. 17,2010) (30CR6541-44).

⁵ *See* TEX. R. CIV. P. § 57.4 (“If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 38 as in any other case.”).

⁶ *See* TEXAS CONST., Art. V, Sec. 3-b (Tab C).

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

The Court hereby ORDERS the Defendants to desist from holding themselves out as leaders of the Diocese when this Order becomes final and appealable.⁷

These became permanent injunctions by severance on April 5, 2011.⁸

No statute was explicitly enjoined, but that is not required. If it were, trial judges could thwart all direct appeals by simply enjoining a party.⁹

The test is whether an injunction **determines** a question of constitutionality:

For us to have jurisdiction of a direct appeal, it must appear that a question of the constitutionality of a Texas statute ... was properly raised in the trial court, that such question **was determined** by the order of such court granting or denying an interlocutory or permanent injunction, and that the question is presented to this Court for decision.¹⁰

Even if a statute is found entirely constitutional, injunctive relief that turns on that determination qualifies for a direct appeal.¹¹

⁷ See Tab A, p. 2 (32CR7127).

⁸ See Tab F.

⁹ Cf. *State v. Hodges*, 92 S.W.3d 489, 493 (Tex. 2002) (basing direct-appeal jurisdiction on injunction against local political party); *Perry v. Del Rio*, 67 S.W.3d 85, 89 (Tex. 2001) (basing direct-appeal jurisdiction on injunction against governor and secretary of state).

¹⁰ *Bryson v. High Plains Undergr. Water Dist.*, 297 S.W.2d 117, 119 (Tex. 1956) (emphasis added).

¹¹ See, e.g., *Wilson v. Galveston County Cent. Appraisal Dist.*, 713 S.W.2d 98, 99 (Tex. 1986); *Querner Truck Lines, Inc. v. State*, 652 S.W.2d 367, 367 (Tex. 1983).

B. On The Ground Of Constitutionality

The trial court's Order (drafted by Plaintiffs' counsel) doesn't directly mention constitutionality. But "[t]he **effect** of the trial court's order, not the parties' litigation strategies, is what determines this Court's direct appeal jurisdiction."¹² For three reasons, the effect of the trial court's Order's was obviously "on the ground of constitutionality."

First, the only grounds stated in the Order are constitutional. With his own hand, the trial judge struck all but three legal findings from the Plaintiffs' draft order.¹³ Those three all relied on *Brown v. Clark*, a 1909 opinion of this Court.¹⁴ Four other cases were cited, but all stemmed from and relied on *Brown v. Clark*.¹⁵ No other grounds were stated.

Brown v. Clark is a constitutional ground. This Court said so in 2007:

This Court, too, has long recognized a structural restraint on the **constitutional power** of civil courts to regulate matters of religion in general, ***Brown v. Clark***, 102 Tex. 323, 116 S.W. 360, 363 (Tex. 1909)¹⁶

¹² *Texas Workers Comp. Comm'n v. Garcia*, 817 S.W.2d 60, 61-62 (Tex. 1991).

¹³ See Tab B (32CR6994-97).

¹⁴ 116 S.W. 360 (Tex. 1909).

¹⁵ See *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599 (5th Cir. 1975) (relying on *Browning v. Burton*, 273 S.W.2d 131, 135-36 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.) (citing and quoting *Brown*)); *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 551 (Tex. App.—Austin 1991, writ denied) (relying on *Brown* and its progeny); *Presbytery of the Cov. v. First Pres. Church of Paris, Inc.*, 552 S.W.2d 865, 871-72 (Tex. Civ. App.—Texarkana 1977, no writ) (same); *Norton v. Green*, 304 S.W.2d 420, 425 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.) (same).

¹⁶ *Westbrook v. Penley*, 231 S.W.3d 389, 397-98 (Tex. 2007) (emphasis added).

Brown v. Clark actually states two constitutional rules:

- Loyalty Rule: upon a division in a “hierarchical” church, those remaining “loyal” are entitled to possession of property;¹⁷ and
- Doctrine Rule: on questions of doctrine or faith, courts must defer to the ultimate authority within the church.¹⁸

Both rules were borrowed from the U.S. Supreme Court’s 1871 opinion in *Watson v. Jones*.¹⁹ *Watson* and *Brown* both long pre-dated application of the First Amendment to the states in 1940.²⁰ But by 1952, *Watson* had been “converted” into a constitutional rule,²¹ a fact this Court has recognized.²² The Plaintiffs conceded as much in their motions below.²³

¹⁷ See 116 S.W. at 365 (“[T]hose members who recognize the authority of the Presbyterian Church of the U.S.A. are entitled to the possession and use of the property.”).

¹⁸ *Id.* at 363 (“[W]henver the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these 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.” (quoting *Watson v. Jones*, 80 U.S. 679, 727 (1871))).

¹⁹ *Id.* at 363-65 (quoting extensively and relying on *Watson v. Jones*, 80 U.S. 679 (1871)).

²⁰ See *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (holding that with respect to laws violating the First Amendment’s religion clauses, “[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”).

²¹ See *Presbyterian Church v. Hull Church*, 393 U.S. 440, 447 (1969) (“In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 ... (1952), the Court converted the principle of *Watson* as qualified by *Gonzalez* into a constitutional rule.”).

²² *Westbrook v. Penley*, 231 S.W.3d 389, 397 n.5 (Tex. 2007) (“Although *Watson* was decided before application of the Fourteenth Amendment to state action and thus turned on general federal law, it nevertheless delineated the limited role civil courts may constitutionally play in resolving controversies that touch upon religion.”).

²³ See, e.g., 27CR5854 (arguing that Loyalty Rule was recognized in 1909 and 2007, and “is based on the United States Supreme Court’s First Amendment doctrine dating back to *Watson* in 1871”); 21CR4355 (citing *Watson* as a First Amendment rule).

The Doctrine Rule is still constitutionally required.²⁴ An alternative to the Loyalty Rule — Neutral Principles — was recognized by the U.S. Supreme Court in *Jones v. Wolf* in 1979.²⁵ But both Neutral Principles and the Loyalty Rule are constitutional grounds; the First Amendment requires states to follow one or the other in church property cases. By relying on *Brown v. Clark*, the trial court necessarily relied “on grounds of constitutionality.”

Second, this was a summary judgment Order, so the grounds are limited to those in the Plaintiffs’ motions.²⁶ Those motions repeatedly requested summary judgment on grounds of constitutionality:

- “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” (21CR4347);
- “The secular act of incorporation does not alter the relationship between a hierarchical church and one of its subordinate units.... Indeed, to find otherwise would risk **First Amendment** implications” (21CR4298);

²⁴ *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (“[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.”).

²⁵ *Id.* at 604 (1979); *see also Westbrook*, 231 S.W.3d at 398 (“The Supreme Court has recognized an exception to the doctrine of church autonomy when neutral principles of law may be applied to resolve disputes over ownership of church property.”)

²⁶ *See State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (“Summary judgment may not be affirmed on appeal on a ground not presented to the trial court in the motion.”).

- “Under Texas law and **the First Amendment**, the Local Episcopal Parties . . . are entitled to control any property of any character or kind of the Episcopal Diocese of Fort Worth” (27CR5828 (¶2));
- “Under the First Amendment, Texas courts and courts around the country defer as a matter of **constitutional law** to a hierarchical church's decisions” (27CR5835 (¶2));
- “Since this hierarchical/congregational distinction was developed by the Supreme Court in **First Amendment** jurisprudence dating back to *Watson*” (27CR5850);
- “Under Texas law and **the First Amendment** as applied by the United States Supreme Court, courts must defer to the hierarchical church” (27CR5854 (Title 1)); and
- “Defendants’ bizarre argument that this Court should ignore **Constitutional limits** in favor of common law principles fails as a matter of law” (30CR6502).

The Plaintiffs’ motions asserted constitutional grounds, so they cannot deny that the Order was “on the ground of constitutionality.”

Third and finally, the trial court rejected state statutes that apply (*see next part*). It also expressly held that state statutes could not be invoked.²⁷ A court can only reject statutes like this on constitutional grounds.

C. Of A State Statute

A constitutional ruling is subject to direct appeal only if a state statute is implicated. Here, each of the three numbered grounds stated in the trial court’s Order directly annuls a Texas statute.

²⁷ See Tab A, p. 2 (32CR7127) (“Applying those same cases and their recognition that a local faction of a hierarchical church may not avoid the local church's obligations to the larger church by ... **invoking nonprofit corporations law**” (emphasis added)).

¶ 1 Nullifies The Non-Profit Act. It is undisputed that legal title to all church property here is held by a Texas non-profit entity, the Corporation of the Episcopal Diocese of Fort Worth (“the Corporation”).²⁸ The Order requires the Defendants to surrender their positions as the Corporation’s directors to the Plaintiffs, citing *Brown*.²⁹ But under the Texas Non-Profit Corporation Act,³⁰ directors can only be removed or replaced on grounds and procedures stated in the Corporation’s articles and by-laws.³¹ TEC never even offered the articles or by-laws, much less tried to prove compliance. It just declared the offices vacant,³² and insisted this was binding under *Brown*. If the Non-Profit Act is valid, the Order is wrong; if *Brown* renders the Act invalid, the Order is right. Either way, the Order turns on the constitutionality of a state statute.

²⁸ See 21CR4337; 27CR5889 (¶30); 28CR5955; 28CR5961; 21CR6093.

²⁹ See Tab A, p. 2 (32CR7127) (ordering Defendants “to surrender ... control of the Diocesan Corporation”).

³⁰ The Texas Business Organizations Code does not apply as this suit was filed before January 1, 2010, and all events occurred before that date. See TEX. BUS. ORGS. CODE §§ 402.006, 402.014. But all cited provisions have been carried over into that Code.

³¹ See TEX. REV. CIV. STAT. art. 1396-2.15 (*recodified as* TEX. BUS. ORGS. CODE §§ 22.206, 22.208, & 22.211); *id.* at 2.15(C) (“Unless removed in accordance with the provisions of the articles of incorporation or the by-laws, each director shall hold office for the term for which he is elected, appointed, or designated . . .”).

³² See 20CR4050; 22CR4503 (¶¶ 4-5).

¶ 2 Nullifies The Texas Trust Code. The Order requires all property to be used for the “mission” of TEC.³³ The only evidentiary support was a purported trust TEC added to its own constitution in 1979.³⁴ But the Texas Trust Code requires that trusts be created and signed by the property owner,³⁵ and there is no evidence of that. The Code also declares all trusts revocable unless they specify otherwise,³⁶ which this one did not.³⁷ Thus, the Diocese validly revoked it more than 20 years ago.³⁸ If the Trust Code is valid, the Order is wrong; if *Brown* renders it invalid, the Order is right. Either way, the Order turns on the constitutionality of a state statute.

¶ 3 Nullifies The Non-Profit Act. The Order declared the Defendants’ amendments to the Corporation’s articles and bylaws “*ultra vires* and

³³ See Tab A, p. 2 (32CR7127) (ordering Defendants to “surrender all Diocesan property,” as it “may be used only for the mission of” TEC).

³⁴ See 21CR4359-61; 27CR5869; 27CR5881 (¶15).

³⁵ See Tab E, Tex. Prop. Code § 112.002 (“A trust is created only if the settlor manifests an intention to create a trust.”); *id.* § 112.004 (“A trust in either real or personal property is enforceable only if there is written evidence of the trust’s terms bearing the signature of the settlor”); *Best Inv. Co. v. Hernandez*, 479 S.W.2d 759, 763 (Tex. Civ. App.—Dallas 1972, writ ref’dn.r.e.) (“Declarations of the purported beneficiary of the trust are not competent to establish the trust.”).

³⁶ See *id.* § 112.051(a) (“A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.”); see also *Ayers v. Mitchell*, 167 S.W.3d 924, 930 (Tex. App.—Texarkana 2005, no pet.) (“Trusts created under Texas law are revocable, unless made specifically irrevocable.”).

³⁷ See 28CR5964 (¶14-17);

³⁸ See 28CR6122 (§18.4); 28CR 160 (12.4); 28CR6157-60.

void.”³⁹ But the Non-Profit Act prohibits ultra-vires claims by anyone except the Attorney General or a “member,”⁴⁰ and the Corporation has no members.⁴¹ Further, the Act allows a corporation to amend its articles in “as many respects as may be desired.”⁴² If the Non-Profit Act is valid, the Order is wrong; if *Brown* renders the Act invalid, the Order is right. Either way, the Order turns on the constitutionality of a state statute.

After summary judgment was granted, the trial judge orally stated his “understanding” that the Order held no statutes unconstitutional.⁴³ But Rule 683 requires that “[e]very order granting an injunction ... shall set forth the reasons for its issuance.”⁴⁴ The grounds of an order are those

³⁹ See Tab A, p. 2 (32CR7127) (ordering Defendants to “surrender ... control of the Diocesan Corporation” as changes to articles and by-laws “are *ultra vires* and void”).

⁴⁰ See Tab D, TEX. REV. CIV. STAT. art. 1396-2.03(B) (*recodified as* Tex. Bus. Orgs. Code § 22.002).

⁴¹ See *id.* art. 1396-2.08(A) (*recodified as* Tex. Bus. Orgs. Code § 22.151); 28CR6176 (¶7) (“The Corporation has no ‘members’”).

⁴² See *id.* art. 1396-4.01(A) (“A corporation may amend its articles of incorporation from time to time, in any and as many respects as may be desired, so long as its articles of incorporation as amended contain only such provisions as are lawful under this Act.”) (*recodified as* Tex. Bus. Orgs. Code § 22.107).

⁴³ 3RR18-20 (“[M]y understanding was that the -- the trust laws that you were talking about don't apply in this situation because of *Brown*, not because they're not constitutional.”).

⁴⁴ Several intermediate appellate courts have held this rule does not apply to permanent injunctions. See, e.g., *Vaughn v. Drennon*, 202 S.W.3d 308, 321 (Tex. App.—Tyler 2006, pet. denied); *Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 892 (Tex. App.—Dallas 2004, pet. denied); *Alexander Schroeder Lumber Co. v. Corona*, 288 S.W.2d 829, 835 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.). But the plain language of the rule says otherwise. Moreover, as rule 683's second paragraph adds requirements applicable only to temporary injunctions, limiting the first paragraph also to temporary injunctions renders part of the rule superfluous.

stated in the Order and legal findings; they do not include what a judge later says he was thinking, but did not say.⁴⁵

Defendants asserted all these statutes in a cross-motion for summary judgment, so each is before the Court in this appeal.⁴⁶ The Order creates a constitutional exception to every one of them — but only for “hierarchical” churches. That is why a direct appeal is appropriate.

II. WHY A DIRECT APPEAL IS IMPORTANT

Rule 57.2 allows this Court to decline direct-appeal jurisdiction of an “interlocutory order” on three grounds: inadequate record, advisory nature, or lack of importance.⁴⁷ The Order here is not interlocutory, so these constraints do not apply. Even if they did, they are easily met.

⁴⁵ See, e.g., *Neeley v. West Orange-Cove Consol. Indep. School Dist.*, 176 S.W.3d 746, 771 (Tex. 2005) (finding unconstitutionality in “extensive findings and conclusions”); *Holmes v. Steger*, 339 S.W.2d 663, 663-64 (Tex. 1960) (denying direct appeal from judgment based on lack of justiciable interest); *Corona v. Garrison*, 274 S.W.2d 541, 541 (Tex. 1955) (denying direct appeal as judgment stated that ground was that defendant “suffered no injuries”); see also *Shannon v. Texas General Indem. Co.*, 889 S.W.2d 662, 664 (Tex. App.—Houston [14th Dist.] 1994, no writ) (holding grounds for summary judgment were those stated in order, not in judge’s letter to parties).

⁴⁶ See *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) (holding that on cross-motions “reviewing courts consider both sides’ summary-judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered.”).

⁴⁷ See TEX. R. APP. P. § 57.2 (“The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.”).

The record is hardly inadequate: the Plaintiffs' summary judgment record totals 1,736 pages; the Defendants' totals 498 pages. Lawyers from six firms represent Plaintiffs; lawyers from three represent Defendants.

Nor is the Order advisory. The Order to "surrender all Diocesan property" involves parishes where 5,600 people attend weekly.⁴⁸ Their 57 ministers have all been deposed by TEC;⁴⁹ upon turnover they will be turned out, and it is unclear how they can all be replaced at once.⁵⁰

And the issues are important for the reasons that follow.

A. Abandonment of Neutral Principles

Until 18 months ago, Texas courts routinely said that Neutral Principles of law governed church property disputes — so said the First, Second, Fifth, Tenth, and Fourteenth Courts of Appeals.⁵¹ This Court implied the same in 2007 in declining to "*expand* the neutral-principles

⁴⁸ See 32CR7007-08.

⁴⁹ See 32CR7010.

⁵⁰ 32CR7007-08.

⁵¹ See *Smith v. N. Tex. Dist. Council of Assem. of God*, No. 2-05-425-CV, 2006 WL 3438077, at *2 (Tex. App.—Fort Worth Nov. 30, 2006, no pet.) (holding "[n]eutral principles of law must be applied" in church property cases); *Chen v. Tseng*, No. 01-02-01005-CV, 2004 WL 35989, at *6 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.) (applying Neutral Principles to church's by-laws); *Hawkins v. Friendship Missionary Bapt. Church*, 69 S.W.3d 756, 759 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (recognizing but not applying Neutral Principles as church had no governing documents to construe); *Cherry Valley Church of Christ v. Foster*, No. 05-00-10798-CV, 2002 WL 10545, at *3 (Tex. App.—Dallas Jan. 4, 2002, no pet.) (not designated for publication) (recognizing but not applying Neutral Principles as church's articles and by-laws adopted "the custom and practices of the church"); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (applying Neutral Principles to determine entitlement to proceeds from sale of church building).

approach” from property disputes to personal-injury cases.⁵² Since 1979, most states have adopted the neutral-principles approach.⁵³

But at TEC’s behest, Texas courts are abandoning Neutral Principles. The Third Court of Appeals held that trial courts are “not required to adopt any particular approach” in a church property case.⁵⁴ This is surely wrong — trial judges cannot switch constitutional rules on a case-by-case basis.

Abandoning Neutral Principles will lead to doctrinal dilemmas. As *Jones v. Wolf* noted, it is often hard to discern the final ecclesiastical authority in a church.⁵⁵ Here, for example, many factors point to bishops and dioceses as the final authority within TEC:

- the very name “Episcopal” means “bishop”;⁵⁶

⁵² *Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007) (emphasis added).

⁵³ See also Benton C. Martin, Comment, *Protecting Preachers From Prejudice*, 59 EMORY L.J. 1297, 1322 (2010) (“A majority of states that have decided on a test following *Jones* have chosen the “neutral principles” approach for addressing intra-church disputes.”); Andrew Soukup, Note, *Reformulating Church Autonomy*, 82 NOTRE DAME L. REV. 1679, 1692 n.105 (2007) (“Following *Jones*, most states decided to adopt, in church property disputes, the neutral principles approach”).

⁵⁴ *Masterson v. Diocese of Nw. Tex.*, No. 03–10–00015–CV, 2011 WL 1005382, at *6 (Tex. App.— Austin Mar. 16, 2011, pet. filed) (“Because the trial court was not required to adopt any particular approach in resolving the instant dispute ... we overrule the Former Parish Leaders’ first issue asserting that the trial court erred by failing to apply neutral principles of law.”).

⁵⁵ 443 U.S. 595, 605 (1979) (noting that absent neutral principals, “courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property.”)

⁵⁶ See BLACK’S LAW DICTIONARY 615 (9th ed. 2009) (“**episcopacy** . . . 1. The office of a bishop”); see also WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 764 (2002) (“fr. *episcopus* **bishop** . . . 1: of, being, or suited to a bishop.”).

- the dioceses formed TEC, and have the power to dissolve it;⁵⁷
- TEC's Canons define bishops as the "Ecclesiastical Authority";⁵⁸
- TEC's Constitution prevents it from taking any actions in a diocese without an invitation from the bishop;⁵⁹ and
- until 2008, TEC was hardly ever a party in church property suits.⁶⁰

Though "the government cannot determine what a church should be,"⁶¹ the Loyalty Rule of *Brown v. Clark* requires Texas courts to decide the nature of each church's government and who bears final authority within it.

B. Trouble for Non-Profits

Churches organize as non-profit corporations for practical reasons. One reason is that banks and vendors will not extend credit without certainty as to who has authority to sign. Under the Non-Profit Act, they can simply look to the corporate records; under *Brown v. Clark*, they can never know whether someone in New York may have declared all church offices vacant (as this Order did). This is a big problem for Texas churches.

⁵⁷ See 29CR6373.

⁵⁸ See 23CR4829.

⁵⁹ See 24CR5131 (Art. II, Sec. 3).

⁶⁰ See 29CR6378 (listing cases).

⁶¹ *HEB Ministries, Inc. v. Texas Higher Educ. Coord. Bd.*, 235 S.W.3d 627, 642 (Tex. 2007)

C. Guidance for Lower Courts

This Court has not addressed a church property dispute since *Brown v. Clark* — long before Neutral Principles was approved in 1979. Whether Texas courts should apply Neutral Principles (as most other states) or revert to *Brown's* Loyalty Rule is a question this Court can best answer.

D. Irreparable Harm for these Churches

This appeal involves compelling facts that would justify skipping the court of appeals in a mandamus case.⁶² Uncertainty and discouragement necessarily accompany this Order for the majority parishes to hand over all their assets to a tiny minority loyal to TEC. If that Order is not corrected promptly, the losses in membership and funds may prove irreparable.⁶³

CONCLUSION

Church lawsuits are not easy. But they are easier if courts apply the same legal rules that apply to everyone else; they are harder if courts apply “special” rules based on judicial findings about who within a church should be in charge. To avoid that problem, this Court should note probable jurisdiction and order full briefing on all the legal questions raised.⁶⁴

⁶² See TEX. R. APP. P. 52.3(e); *Republican Party v. Dietz*, 940 S.W.2d 86, 93 (Tex. 1997).

⁶³ See 32CR7010-11.

⁶⁴ See TEX. R. CIV. P. 57.4 ; see also *State v. Hodges*, 92 S.W.3d 489, 493 (Tex. 2002) (holding that if direct appeal is proper on any issue, the Court acquires “extended jurisdiction” over all legal questions in the case); *Perry v. Del Rio*, 67 S.W.3d 85, 89 (Tex. 2001) (same).

Respectfully submitted,

Andrews Kurth LLP

By: /s/ Scott A. Brister

Scott A. Brister
State Bar No. 00000024
Lino Mendiola III
State Bar No. 00791248
ANDREWS KURTH LLP
111 Congress Avenue,
Suite 1700
Austin, Texas 78701
Tel: 512.320.9200
Fax: 512.320.9292
scottbrister@andrewskurth.com

R. David Weaver
State Bar No. 21010875
THE WEAVER LAW FIRM
1521 N. Cooper Street, Suite 710
Arlington, TX 76011
Tel: 817.460.5900
Fax: 817.460.5908
rdweaver@weaverlawfirm.net

Shelby Sharpe
State Bar No. 18123000
SHARPE TILLMAN & MELTON
6100 Western Place, Suite 1000
Fort Worth, TX 76107
Tel: 817.338.4900
Fax: 817.332.6818
utlawman@aol.com

ATTORNEYS FOR THE EPISCOPAL DIOCESE OF FORT WORTH, et al.

APPENDIX

- Tab A** Amended Order on Summary Judgment dated February 8, 2011
- Tab B** Order on Summary Judgment dated January 21, 2011 (with handwritten changes)
- Tab C** Provisions relating to direct appeals:
- Texas Constitution, Article V, section 3-b
 - Texas Government Code, Section 22.001(c)
- Tab D** Provisions from the Texas Non-Profit Corporation Act:
- Article 1396—2.15
 - Article 1396—2.03(B)
 - Article 1396—2.08(A)
 - Article 1396—4.01(A)
 - Article 1396—2.09
- Tab E** Provisions from the Texas Trust Code:
- Texas Property Code, Section 112.002
 - Texas Property Code, Section 112.004
 - Texas Property Code, Section 112.051
- Tab F** Order Granting Defendants' Motion to Sever and Stay Proceedings dated April 5, 2011

CAUSE NO. 141-237105-09

THE EPISCOPAL CHURCH, et al.,)	IN THE DISTRICT COURT OF
)	
VS.)	TARRANT COUNTY, TEXAS
)	
FRANKLIN SALAZAR, et al.)	141 ST DISTRICT COURT

AMENDED ORDER ON SUMMARY JUDGMENT

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

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

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

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

Defendants’ Motion for Partial Summary Judgment is **DENIED**.

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

1. The Episcopal Church (the “Church”) is a hierarchical church as a matter of law, and since its formation in 1983 the Episcopal Diocese of Fort Worth (the “Diocese”) has been a constituent part of the Church. Because the Church is hierarchical, the Court follows Texas precedent governing hierarchical church property disputes, which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those

individuals remaining loyal to the hierarchical church body. *See, e.g. Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909); *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865 (Tex.Civ.App. - Texarkana 1977, no writ). Under the law articulated by Texas courts, those are the individuals who remain entitled to the use and control of the church property. *Id.*

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

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

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

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

Signed this 8 day of February, 2011.



 JUDGE PRESIDING

TAB B

CAUSE NO. 141-237105-09

THE EPISCOPAL CHURCH, et al.,)	IN THE DISTRICT COURT OF
)	
VS.)	TARRANT COUNTY, TEXAS
)	
FRANKLIN SALAZAR, et al.)	141 ST DISTRICT COURT

ORDER ON SUMMARY JUDGMENT

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

The Episcopal Church’s Motion for Summary Judgment is **GRANTED**.

Defendants’ Motion for Partial Summary Judgment is **DENIED**.

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

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

TAB B

Defendants' arguments based on the Texas Corporations Code and private trust law do not alter the result dictated by the Texas precedent specifically governing hierarchical church property disputes.

2. Accordingly, Bishops Gulick and Oki and other leaders of the Episcopal Diocese of Fort Worth recognized by the Church (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; defendants are not such authorities or representatives and have no such entitlements.

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

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

5. Even if the Court were to apply the "neutral principles" analysis proposed by Defendants, the result would be the same because:

TAB B

a. Defendants did not satisfy their burden in support of their motion by failing to submit evidence of the deeds at issue in the case;

b. Taken together, the four neutral principles factors require the conclusion as a matter of law that all property of the Diocese is held in trust for the Church:

i. The deeds submitted by the Church in response to Defendants' motion show that the property of the Diocese was conveyed to an entity affiliated with The Episcopal Church;

ii. The Texas Non-Profit Corporations Act permits subordinate parts of hierarchical churches to incorporate and hold property "for the use and benefit and under the discretion of, and in trust for" the larger church that controls it, "in furtherance of the purposes of" the larger church. TEX. REV. CIV. STAT. ANN. art. 1396, § 2.02(A)(16);

iii. The Church's longstanding canons require that church property be held in trust for the Church; and

iv. The Diocese acceded to those rules when it became a Diocese in 1983.

The Court hereby ORDERS 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 within 60 days of this Order.

TAB B

The Court hereby ORDERS the Defendants not to hold themselves out as leaders of the
Diocese.

Signed this 2/ day of January, 2011.



JUDGE PRESIDING

**CONSTITUTION OF THE STATE OF TEXAS 1876
ARTICLE V. JUDICIAL DEPARTMENT**

§ 3-b. Appeal from order granting or denying injunction

Sec. 3-b. The Legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this State from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State.

**TEXAS GOVERNMENT CODE
TITLE 2. JUDICIAL BRANCH
SUBTITLE A. COURTS
CHAPTER 22. APPELLATE COURTS
SUBCHAPTER A. SUPREME COURT**

§ 22.001. Jurisdiction

* * *

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

TEXAS REVISED CIVIL STATUTES
TITLE 32. CORPORATIONS
CHAPTER NINE. NON-PROFIT, COOPERATIVE, RELIGIOUS AND CHARITABLE
1. TEXAS NON-PROFIT CORPORATION ACT

Art. 1396-2.15. Number, Election, Classification, and Removal of Directors

* * *

B. The directors constituting the initial board of directors shall be named in the articles of incorporation and shall hold office until the first annual election of directors or for such other period as may be specified in the articles of incorporation or the by-laws. Thereafter, directors shall be elected, appointed, or designated in the manner and for the terms provided in the articles of incorporation or the by-laws. If the method of election, designation, or appointment is not provided in the articles of incorporation or by-laws, the directors, other than the initial directors, shall be elected by the board of directors. In the absence of a provision in the articles of incorporation or the by-laws fixing the term of office, a director shall hold office until the next annual election of directors and until his successor shall have been elected, appointed, or designated and qualified.

C. Directors may be divided into classes and the terms of office of the several classes need not be uniform. Unless removed in accordance with the provisions of the articles of incorporation or the by-laws, each director shall hold office for the term for which he is elected, appointed, or designated and until his successor shall have been elected, appointed, or designated and qualified.

D. A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation or by-laws. In the absence of a provision providing for removal, a director may be removed from office, with or without cause, by the persons entitled to elect, designate, or appoint the director. If the director was elected to office, removal requires an affirmative vote equal to the vote necessary to elect the director.

Acts 1959, 56th Leg., p. 286, ch. 162, art. 2.15. Amended by Acts 1989, 71st Leg., ch. 801, Sec. 45, eff. Aug. 28, 1989; Acts 1993, 73rd Leg., ch. 733, Sec. 10, eff. Jan. 1, 1994 (current version at Tex. Bus. Orgs. Code §§ 22.206, 22.208, & 22.211)

Art. 1396-2.03. Defense of Ultra Vires

* * *

B. No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that such act, conveyance or transfer was beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation or by reason of limitations on authority of its officers and directors to exercise any statutory power of the corporation, as such limitations are expressed in the articles of incorporation, but that such act, conveyance or transfer was, or is, beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation or inconsistent with any such expressed limitations of authority, may be asserted:

(1) In a proceeding by a member against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation. If the unauthorized act or transfer sought to be enjoined is being, or is to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceedings and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as part of the loss or damage sustained.

(2) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through members in a representative suit, against the incumbent or former officers or directors of the corporation for exceeding their authority.

(3) In a proceeding by the Attorney General, as provided in this Act, to dissolve the corporation, or in a proceeding by the Attorney General to enjoin the corporation from performing unauthorized acts, or to enforce divestment of real property acquired or held contrary to the laws of this State.

Acts 1959, 56th Leg., p. 286, ch. 162, art. 2.03 (current version at Tex. Bus. Orgs. Code § 20.002).

Art. 1396-2.08. Members

A. A corporation may have one or more classes of members or may have no members.

* * *

Acts 1959, 56th Leg., p. 286, ch. 162, art. 2.08. Amended by Acts 1961, 57th Leg., p. 653, ch. 302, Sec. 1 (current version at Tex. Bus. Orgs. Code § 22.151).

Art. 1396-4.01. Right to Amend Articles of Incorporation

A. A corporation may amend its articles of incorporation from time to time, in any and as many respects as may be desired, so long as its articles of incorporation as amended contain only such provisions as are lawful under this Act.

Acts 1959, 56th Leg., p. 286, ch. 162, art. 4.01 (current version at Tex. Bus. Orgs. Code § 22.107).

Art. 1396-2.09. By-Laws

A. The initial by-laws of a corporation shall be adopted by its board of directors or, if the management of the corporation is vested in its members, by the members. The by-laws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

B. A corporation's board of directors may amend or repeal the corporation's by-laws, or adopt new by-laws, unless:

- (1) the articles of incorporation or this Act reserves the power exclusively to the members in whole or in part;
- (2) the management of the corporation is vested in its members; or
- (3) the members in amending, repealing, or adopting a particular by-law expressly provide that the board of directors may not amend or repeal that by-law.

Acts 1959, 56th Leg., p. 286, ch. 162, art. 4.01 (current version at Tex. Bus. Orgs. Code § 22.102).

TEXAS PROPERTY CODE
TITLE 9. TRUSTS
SUBTITLE B. TEXAS TRUST CODE: CREATION, OPERATION, AND
TERMINATION OF TRUSTS
CHAPTER 112. CREATION, VALIDITY, MODIFICATION, AND
TERMINATION OF TRUSTS
SUBCHAPTER A. CREATION

§ 112.002. Intention to Create Trust

A trust is created only if the settlor manifests an intention to create a trust.

§ 112.004. Statute of Frauds

A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. A trust consisting of personal property, however, is enforceable if created by:

(1) a transfer of the trust property to a trustee who is neither settlor nor beneficiary if the transferor expresses simultaneously with or prior to the transfer the intention to create a trust; or

(2) a declaration in writing by the owner of property that the owner holds the property as trustee for another person or for the owner and another person as a beneficiary.

SUBCHAPTER C. REVOCATION, MODIFICATION, AND TERMINATION OF TRUSTS

§ 112.051. Revocation, Modification, or Amendment by Settlor

(a) A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.

(b) The settlor may modify or amend a trust that is revocable, but the settlor may not enlarge the duties of the trustee without the trustee's express consent.

(c) If the trust was created by a written instrument, a revocation, modification, or amendment of the trust must be in writing.

NO. 141-237105-09

<p>THE EPISCOPAL CHURCH, et al.</p> <p>v.</p> <p>FRANKLIN SALAZAR, et al.</p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>IN THE DISTRICT COURT</p> <p>TARRANT COUNTY, TEXAS</p> <p>141ST JUDICIAL DISTRICT</p>
---	--	--

**ORDER GRANTING DEFENDANTS’
MOTION TO SEVER AND TO STAY PROCEEDINGS**

On this day came on to be considered Defendants’ Motion To Sever and To Stay Proceedings. The Court, after reviewing the motion and the opposition, and having heard the argument of counsel, finds that Defendants’ Motion To Sever and To Stay Further Proceedings should be granted and the following order entered:

IT IS, THEREFORE, ORDERED that all claims that are the subject of this Court’s Amended Order on Summary Judgment signed on February 8, 2011, are severed from this cause and shall appear on the docket of this Court as Cause No. _____ styled *The Episcopal Church, et al vs. Franklin Salazar, et al.*

IT IS FURTHER ORDERED that the clerk of this Court shall make a new file for the severed suit including the following Court papers from this suit:

- (1) Order Granting Rule 12 Motion (9-16-09);
- (2) Judgment and Opinion of Second District Court of Appeals (6-25-10);
- (3) Modified Order Granting Rule 12 Motion (7-8-10);
- (4) Plaintiff The Episcopal Church’s Third Amended Original Petition (10-12-10);
- (5) Individual Plaintiffs’ Sixth Amended Original Petition (12-21-10);
- (6) First Amended Third-Party Petition of Defendant The Episcopal Diocese of Fort Worth (12-23-10);

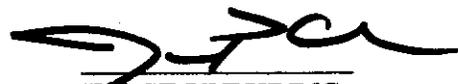
- (7) First Amended Third-Party Petition of Intervenor The Corporation of The Episcopal Diocese of Fort Worth (12-23-10);
- (8) First Amended Original Plea in Intervention (11-15-10) (Weaver);
- (9) Intervenor's Third Amended Original Answer to Third-Party Defendants' Counterclaim and Second Amended Original Answer to Plaintiffs' Third Amended Original Petition (11-5-10);
- (10) Defendants' Answer to Plaintiff The Episcopal Church's Third Amended Original Petition (12-23-10);
- (11) Defendants' Answer to Individual Plaintiffs' Sixth Amended Original Petition (12-23-10);
- (12) The Episcopal Diocese of Fort Worth's Answer to Counterclaims of Third-Party Defendants (12-23-10);
- (13) The Corporation of The Episcopal Diocese of Fort Worth's Answer to Counterclaims of Third-Party Defendants (12-23-10);
- (14) Original Answer of Judy Mayo, The Rev. Christopher Cantrell, The Rev. Timothy Perkins and The Rev. Ryan Reed (10-12-10);
- (15) Original Answer of Julia Smead (11-5-10);
- (16) The Episcopal Diocese of Fort Worth's Answer to Counterclaims of Third-Party Defendants (12-23-10);
- (17) Fourth Amended Answer and Counterclaims to Southern Cone Diocese's Third-Party Petition (12-21-10);
- (18) Fourth Amended Answer and Counterclaims to Southern Cone Corporation's Plea in Intervention and Third-Party Petition (12-21-10);
- (19) Plaintiff The Episcopal Church's Motion for Summary Judgment and Brief in Support of Motions (10-18-10);
- (20) Appendix to All Episcopal Parties' Motions for Summary Judgment and Partial Summary Judgment (10-18-10);
- (21) Plaintiff The Episcopal Church's Supplemental Evidence in Support of Its Motion for Summary Judgment (10-22-10);

- (22) Local Episcopal Parties' Amended Motion for Partial Summary Judgment (12-21-10);
- (23) Supplemental Evidence in Support of All Local Episcopal Parties' Motions for Summary Judgment (12-21-10);
- (24) Defendants' Motion for Partial Summary Judgment (12-23-10);
- (25) Appendix to Defendants' Motion for Partial Summary Judgment (12-23-10);
- (26) Defendants' Objections to Plaintiffs' Summary Judgment Motions and Evidence (1-7-11);
- (27) Defendants' Supplemental Appendix (1-7-11);
- (28) Defendants' Response to Plaintiff The Episcopal Church's Motion for Summary Judgment (1-7-11);
- (29) Defendants' Response to Local Episcopal Parties' Amended Motion for Partial Summary Judgment (1-7-11);
- (30) The Episcopal Church's Response to Defendants' Motion for Partial Summary Judgment (1-7-11);
- (31) Local Episcopal Parties' Response to Defendants' Motion for Partial Summary Judgment (1-7-11);
- (32) Supplemental Evidence in Support of All Local Episcopal Parties' Responses to Defendants' Motion for Partial Summary Judgment (1-7-11);
- (33) All Episcopal Parties' Objections to Defendants' Summary Judgment Evidence (1-7-11);
- (34) The Episcopal Church's Reply in Support of Its Motion for Summary Judgment (1-11-11);
- (35) Episcopal Parties' Objections to Defendants' Supplemental Appendix and Evidence Attached to Response (1-11-11);
- (36) Motion for Leave to File Supplemental Affidavits (1-14-11);
- (37) Supplemental Affidavit of Walter Virden, III (1-14-11);
- (38) Supplemental Affidavit of Charles A. Hough, III (1-14-11);

- (39) Order Granting Motion for Leave to File Supplemental Affidavits (1-14-11);
- (40) Order on Summary Judgment (1-21-11);
- (41) Order Granting Local Episcopal Parties' Amended Motion for Partial Summary Judgment (1-21-11);
- (42) Objections to Form of Summary Judgment Orders (1-25-11);
- (43) Affidavit of Charles A. Hough, III in support of Objections to Form of Summary Judgment Orders (1-27-11);
- (44) Episcopal Parties' Response to Defendants' Objections to Form of Summary Judgment Orders (1-31-11);
- (45) Episcopal Parties' Objections to Affidavit of Charles A. Hough, III (1-31-11);
- (46) Amended Order on Summary Judgment (2-8-11);
- (47) Defendants' Motion to Sever and Stay Remaining Proceedings (2-8-11);
- (48) This Order Granting Defendants' Motion To Sever and To Stay Proceedings;
- (49) Docket Sheet itemizing the foregoing items.

IT IS FINALLY ORDERED that all further proceedings in this cause are stayed pending a final determination of the severed claims through the appellate process.

SIGNED this 5 day of ^{April}~~March~~, 2011.


 JUDGE PRESIDING