

ORAL ARGUMENT REQUESTED

NO. 02-09-00405-CV

**In The Court Of Appeals
For The Second District Of Texas
Fort Worth, Texas**

In re

**FRANKLIN SALAZAR; JO ANN PATTON;
WALTER VIRDEN, III; ROD BARBER; CHAD BATES;
JACK LEO IKER; CORPORATION FOR THE
EPISCOPAL DIOCESE OF FORT WORTH; AND
THE EPISCOPAL DIOCESE OF FORT WORTH,**

Relators

The Honorable John P. Chupp,
141st Judicial District Court of Tarrant County, Texas, Respondent
Arising out of Cause No. 141-237105-09

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

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

Kendall M. Gray
State Bar No. 00790782
ANDREWS KURTH LLP
600 Travis, Suite 4200
Houston, Texas 77002
Phone: 713.220.4200
Fax: 713.220.4285
kendallgray@andrewskurth.com

J. Shelby Sharpe
State Bar No. 18523000
SHARPE TILLMAN & MELTON
6100 Western Place, Suite 1000
Fort Worth, Texas 76107
Phone: 817.338.4900
Fax: 817.332.6818
utlawman@aol.com

**ATTORNEYS FOR RELATORS FRANKLIN SALAZAR; JO ANN PATTON;
WALTER VIRDEN, III; ROD BARBER; CHAD BATES; JACK LEO IKER;
CORPORATION FOR THE EPISCOPAL DIOCESE OF FORT WORTH ;
AND THE EPISCOPAL DIOCESE OF FORT WORTH**

LIST OF PARTIES AND COUNSEL

Relators (*Defendants below*) “The Diocesan Majority”

Franklin Salazar; Jo Ann Patton; Walter Virden, III; Rod Barber; Chad Bates; Jack Leo Iker (the “Individual Relators”), Corporation for the Episcopal Diocese of Fort Worth (the “Corporation”) and The Episcopal Diocese of Fort Worth (the “Diocese”)

Counsel

J. Shelby Sharpe
Sharpe Tillman & Melton
6100 Western Place, Suite 1000
Fort Worth, Texas 76107

Scott A. Brister
Andrews Kurth LLP
111 Congress Ave., Suite 1700
Austin, Texas 78701

Kendall M. Gray
Andrews Kurth LLP
600 Travis, Suite 4200
Houston, Texas 77002

Real Parties in Interest¹

Jonathan D.F. Nelson
Jonathan D.F. Nelson, P.C.
1400 W. Abrams Street
Arlington, Texas 76013-1705

¹ Mr. Nelson and Ms. Wells are, procedurally, the real parties in interest. Rule 12 stipulates that the respondents to a motion to show authority are the counsel whose authority is challenged. Tex. R. Civ. P. 12. Mr. Nelson and Ms. Wells contend that they represent the Diocese and the Corporation who bring this original proceeding in which the Diocese and the Corporation argue that they have no such authority.

Kathleen Wells
Taylor, Olson, Adkins, Sralla & Elam L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76185-0174

Counsel

Frank Gilstrap
Anne Michels
Hill Gilstrap, PC
1400 W. Abram Street
Arlington, Texas 76013

Other Parties With An Interest In The Outcome (*Plaintiffs Below*)

The Episcopal Church

Counsel

Sandra Liser
Naman, Howell, Smith & Lee, L.L.P.
100 E. 15th Street, Suite 320
Fort Worth, Texas 76102

David Booth Beers
Heather H. Anderson
Goodwin Procter, LLP
901 New York Avenue, N.W.
Washington, D.C. 20001

Other Parties With An Interest In The Outcome (*Third-Party Defendants Below*)

Edwin F. Gulick, Jr., Margaret Mieuli, Walt Cabe, Anne T. Bass, J. Frederick Barber, Christopher Jambor, David Madison, Kathleen Wells, Robert M. Bass, James Hazel, Cherie Shipp, John Stanley and Trace Worrell

Counsel

Jonathan D.F. Nelson
Jonathan D.F. Nelson, P.C.
1400 W. Abrams Street
Arlington, Texas 76013-1705

Kathleen Wells
Taylor, Olson, Adkins, Sralla & Elam L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76185-0174

Other Parties With An Interest In The Outcome (*Intervenors Below*)

St. Anthony of Padua Church (Alvarado), St. Alban's Church (Arlington), St. Mark's Church (Arlington), Church of St. Peter & St. Paul (Arlington), Church of St. Philip the Apostle (Arlington), St. Vincent's Cathedral (Bedford), St. Patrick's Church (Bowie), St. Andrew's Church (Breckenridge), Good Shepherd Church (Brownwood), St. John's Church (Brownwood), Church of St. John the Divine (Burkburnett), Holy Comforter Church, (Cleburne), St. Matthew's Church (Comanche), Trinity Church (Dublin), Holy Trinity Church (Eastland), Christ the King Church (Fort Worth), Holy Apostles Church (Fort Worth), Iglesia San Juan Apostol (Fort Worth), Iglesia San Miguel (Fort Worth), St. Andrew's Church (Fort Worth), St. Anne's Church (Fort Worth), Church of St. Barnabas the Apostle (Fort Worth), St. John's Church (Fort Worth), St. Michael's Church (Richland Hills), Church of St. Simon of Cyrene (Fort Worth), St. Timothy's Church (Fort Worth), St. Paul's Church (Gainesville), Good Shepherd Church (Granbury), Church of the Holy Spirit (Graham), St. Andrew's Church (Grand Prairie), St. Joseph's Church (Grand Prairie), St. Laurence's Church (Southlake), St. Mary's Church (Hamilton), Trinity Church (Henrietta), St. Mary's Church (Hillsboro), St. Alban's Church (Hubbard), St. Stephen's Church (Hurst), Church of St. Thomas the

Apostle (Jacksboro), Church of Our Lady of the Lake (Laguna Park), St. Gregory's Church (Mansfield), St. Luke's Church (Mineral Wells), Church of St. Peter by the Lake (Graford), All Saint's Church (Weatherford), All Saint's Church (Wichita Falls), Church of the Good Shepherd (Wichita Falls), Church of St. Francis of Assisi (Willow Park) and Church of the Ascension & St. Mark (Bridgeport)

Counsel

R. David Weaver
The Weaver Law Firm, P.C.
1521 N. Cooper St., Suite 710
Arlington, Texas 76011

Respondent

The Honorable John P. Chupp
Judge, 141st District Court
Family Law Center
200 East Weatherford Street, 4th Floor
Fort Worth, Texas 76196-0230

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INTRODUCTION: THE DOG THAT DIDN'T BARK

The most striking thing about the Plaintiffs' Response is what it does not say. It does not say that the legal documents governing the Diocese or the Corporation grant authority to the people who hired the Plaintiffs' attorneys. The Plaintiffs likewise do not point to any document—of the Diocese or anyone else—giving them voice or vote in the Diocesan Convention or its leadership decisions.

The heart of the Relators' Petition (and its longest section) analyzed the Constitution and Canons of the Diocese, and the Articles of Incorporation and By-Laws of the Corporation, demonstrating in detail that both the Diocese and Corporation are governed by the Individual Relators. They were selected and elected locally pursuant to the rules and procedures established almost 30 years ago. The Plaintiffs do not deny these contentions, so the Court should treat them as admitted.² Even if everything else in the Response were true (which it is not), this gap means the Plaintiffs' attorneys cannot show authority to represent either entity.

Despite its length and one-sided history lesson, the Response has only two arguments: (1) please do not decide this issue right now; or

² *Burgemeister v. Anderson*, 113 Tex. 495, 259 S.W. 1078, 1078 (1924); *Welch v. Overton*, 416 S.W.2d 879, 88 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.).

(2) if you do, do not apply Texas law to us because we believe and declare that TEC ought to prevail.

But the Diocese is an entity, not an idea; and the Corporation is a corporation, not a concept. Churches may believe what they want and structure their affairs as they wish, but once entities are created under Texas law and governing documents are filed with the Secretary of State as required by Texas law,³ the First Amendment is not offended by applying secular rules to secular matters—such as who in an organization is authorized to hire attorneys.⁴ Moreover, Rule 12 and mandamus jurisdiction give immediate protection to the right to select, direct, and go to trial only with the attorneys of one’s own choice.

ARGUMENT AND AUTHORITIES

A. Standard of Review

The Plaintiffs are of course mistaken that abuse of discretion is limited to rulings that are arbitrary and unreasonable.⁵ Instead, a trial court abuses its discretion if it errs “in determining what the law is or

³ See, e.g., Tex. Rev. Civ. Stat. art. 1396-3.03, -4.04 (requiring Texas non-profit corporations to file articles of incorporation and amendments with Secretary of State).

⁴ See *Lacy v. Bassett*, 132 S.W.3d 119, 126 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding church formed pursuant to Texas Non-Profit Corporation Act was bound by Act’s provisions regarding disclosure of books and records).

⁵ Response, p. xii.

applying the law to the facts, even when the law is unsettled.”⁶ Relators are entitled to mandamus relief because the trial court abused its discretion in determining what Rule 12 requires and how it applies to the facts here.

B. This Matter Cannot Be Deferred Until Trial

It is undisputed that there is only one Corporation and one Diocese. But it is also undisputed that two groups claim to control them. One of these groups neither has standing to appear nor authority to hire attorneys on their behalf. These questions cannot be postponed until trial because they impact the trial court’s subject-matter jurisdiction and fundamental rights that will be defeated by proceeding to trial.

Rule 12 requires a decision “before the parties have announced ready for trial.”⁷ There is a very practical reason for this requirement: if the Plaintiffs have their way, who will the final judgment bind? If the Plaintiffs lose, the judgment would bind TEC as well as Bishop Gulick, who was personally joined by counterclaim. But the Response says that Bishop Gulick is no longer bishop, and claims the Presiding

⁶ *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (internal quotations and citation omitted); *accord In re Jordan*, 249 S.W.3d 416, 424 (Tex. 2008) (orig. proceeding).

⁷ *See* Tex. R. Civ. P. 12.

Bishop of TEC can decide who is the local bishop at any given moment. As a result, the judgment may *never* bind anyone locally, because (1) TEC's new diocese is not a party (the Plaintiffs' attorneys claim to represent only the old one), and (2) the bishop can always be changed. There is only one way to make a final judgment binding on the two contending local groups: *each side must have their own organization*. The new diocese can sue the old one, but the old one cannot sue itself.

The Plaintiffs also say this issue should be postponed because it is dispositive of the merits, but that is less than candid. A simple question to the Plaintiffs would dispel this claim: will they stipulate that they lose this case if they cannot show authority to represent the Diocese and Corporation? Obviously not. TEC contends that local properties are held in trust for the national church. If that were true (which it is not), then it would not matter who controls the Corporation and the Diocese. Regardless of how the Rule 12 motion is decided, TEC can pursue its case in the trial court against the Diocese and the Corporation as adverse parties.

Rule 12 appears to be the only way to compel such action before judgment. The question here is not whether the named party has

capacity to file suit (as it was in the *Mobile Homes* case⁸), but whether the named party has hired these attorneys. If A hires an attorney for B, the attorney must show that A had authority to do so on B's behalf. This Court and others have recognized this as Rule 12's purpose.⁹ The attorneys who do not represent the Diocese and the Corporation must appear in the name of the organization that hired them, not some other.

This must be done *now*. If an attorney is litigating without a client, the courts must put a stop to it at once. Mandamus must issue when an organization is wrongly deprived of the right to direct its own claims and forced to trial with counsel it did not choose.¹⁰ This Court should not be the first in Texas to endorse indefinite postponement of a Rule 12 motion.

⁸ See *Mobile Homes of Am., Inc. v. Easy Living, Inc.*, 527 S.W.2d 847, 848 (Tex. Civ. App.—Fort Worth 1975, no writ) (holding corporation could not sue due to forfeiture of its charter). Contrary to the Response, this Court did not reverse in *Mobile Homes*; rather, it found that a plea in abatement had been tried by consent and affirmed the dismissal.

⁹ See, e.g., *Sloan v. Rivers*, 693 S.W.2d 782, 783-84 (Tex. App.—Fort Worth 1985, no writ); see also cases cited at Petition pp. 12-17.

¹⁰ See *In re Schmitz*, 285 S.W.3d 451, 459 (Tex. 2009); *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465-66 (Tex. 2008) (citing *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 383 (Tex. 2005)); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004); *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 52 (Tex. 1998); *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996)). See *infra* § D.

C. This Matter Cannot Be Deferred To TEC

Alternatively, the Plaintiffs argue that the Rule 12 motion must be decided by deferring to them. There are at least four reasons why this is wrong: (1) deference does not apply to procedural motions, (2) deference does not apply to disputes that can be decided by neutral principles; (3) deference does not apply to TEC but to the Diocese; and (4) deference does not apply to the Presiding Bishop, who is not TEC's highest authority.

I. Rule 12 requires a showing of authority, not deference to authority

Procedural motions are not ecclesiastical questions. Courts do not defer to religious authorities on motions to transfer venue, grant special exceptions, or allow a continuance. The First Amendment limits a court's subject-matter jurisdiction, but so does the separation-of-powers clause—and it requires a real controversy between real parties.¹¹ “[C]ourts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.”¹² Rule 12 would be rendered toothless if a church can simply declare that

¹¹ See Tex. Const. art. II, § 1; *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008).

¹² *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949) (cited with approval in *Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 907 n.6 (Tex. 2009)).

it has authority to hire attorneys for some other entity. A court cannot defer to a religious entity's opinion about the court's own jurisdiction.

2. Texas courts do not defer to church authorities where neutral principles resolve the inquiry

Before the United States Supreme Court decided *Jones v. Wolf* in 1979,¹³ Texas courts sometimes deferred to church authorities in intra-church disputes. But they do not do so now. The rule today is what this Court said in 1999 and again 2006¹⁴—that Texas courts defer in a church dispute only if it cannot be resolved by neutral principles of law:

Notwithstanding the First Amendment's proscription, courts do have jurisdiction to review matters involving civil, contract, or property rights even though they stem from a church controversy. Neutral principles of law must be applied to decide such matters so that courts do not violate the constitutional prohibition against government established religion. If the conflict cannot be resolved solely by the application of neutral principles of law, we must defer to the decision made by the highest authority of the church from which the question or controversy arises.¹⁵

¹³ 443 U.S. 595 (1979).

¹⁴ *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.); *Smith v. N. Tex. Dist. Council of Assemblies of God & House of Grace*, No. 2-05-425-CV, 2006 WL 3438077, at *3 (Tex. App.—Fort Worth Nov. 30, 2006, no pet.).

¹⁵ *Dean*, 994 S.W.2d at 395 (citation omitted); see also *Smith*, 2006 WL 3438077, at *2.

This is not the only court to have said so; so have the First, Fifth, Sixth, Tenth, and Fourteenth Courts of Appeals.¹⁶ No property dispute has reached the Texas Supreme Court since 1979, but the Court treated the neutral-principles approach as a given in 2007, considering only whether to **expand** neutral principles **beyond** the property context in *Westbrook v. Penley*.¹⁷

In arguing deference instead, the Response relies heavily on the 1986 *Casa Linda* case from the Fifth Court of Appeals,¹⁸ but fails to disclose that the Fifth Court abandoned it in 2002. The Fifth Court

¹⁶ See *Chen v. Tseng*, No. 01-02-01005-CV, 2004 WL 35989, at *6 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.) (construing by-laws of religious nonprofit corporation to determine identity of its valid directors in property-rights case); *Hawkins v. Friendship Missionary Baptist Church*, 69 S.W.3d 756, 759 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (recognizing neutral principles but deferring as church had no governing documents to construe); *Cherry Valley Church of Christ/Clemons v. Foster*, No. 05-00-10798-CV, 2002 WL 10545, at *3 (Tex. App.—Dallas Jan. 4, 2002, no pet.) (not designated for publication) (recognizing neutral principles but deferring as church’s articles of incorporation and by-laws provided for selection of officers and directors “according to the custom and practices of the church”); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (applying neutral principles to determine who was entitled to proceeds from sale of church building); *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865, 870 (Tex. Civ. App.—Texarkana 1977, no writ) (construing church constitution to vest regional presbytery alone with power to dissolve church, and thus withdrawing congregation could not dissolve church and take its property).

¹⁷ *Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007) (“But even if we were to expand the neutral-principles approach beyond the property-ownership context as Penley requests, we disagree that free-exercise concerns would not be implicated.”).

¹⁸ Response, pp. 21, 28, 29, 30, & 48 (citing *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 703-07 (Tex. App.—Dallas 1986, writ ref’d n.r.e.).

(like this Court) now requires courts in a church dispute to “construe the articles of incorporation of a Texas non-profit corporation according to the body of neutral legal principles that governs Texas corporations generally” unless doing so requires resolving religious questions.¹⁹

The rule of neutral principles only employs deference when a dispute turns on doctrinal questions. “[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.”²⁰ Thus, deference may be required if a church’s governing documents employ religious terms such as the “custom and practices of the church,”²¹ or if a church has no governing documents to construe.²² But the governing documents here

¹⁹ See *Cherry Valley Church*, 2002 WL 10545, at *3 n.2 (Tex. App.—Dallas 2002, no pet.):

Ordinarily, we would construe the articles of incorporation of a Texas non-profit corporation according to the body of neutral legal principles that governs Texas corporations generally. If we could do so without running afoul of constitutional constraints, we would also apply those principles to construe the articles of incorporation of a non-profit corporation organized for religious or spiritual purposes. However, we cannot do so in this instance. By embedding the phrase “custom and practices of the church” in its articles of incorporation, this non-profit corporation removed any dispute regarding the selection of its directors from the purview of the judicial system.

²⁰ *Jones*, 443 U.S. at 602 (citation omitted).

²¹ See *Cherry Valley Church*, 2002 WL 10545, at *3.

²² See *Hawkins*, 69 S.W.3d at 759.

require no inquiry into religious doctrine,²³ and point only one way (as the Response’s silence impliedly concedes).

3. Neutral principles apply to property suits that involve “identity issues”

The Response claims that neutral principles apply only to “property issues,” not “identity issues” allegedly involved here.²⁴ In at least three respects, this argument directly contradicts what the United States Supreme Court held in *Jones v. Wolf* in 1979.

First, the Supreme Court expressly held that issues about who represents a church body are still in the “property issues” category. In the first three sentences of its analysis, the Court stated:

The only question presented by this case is ***which faction*** of the formerly united Vineville congregation is entitled to possess and enjoy the property located at 2193 Vineville Avenue in Macon, Ga. ***There can be little doubt about the general authority of civil courts to resolve this question.*** The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of

²³ Contrary to the Response, the requirement that Trustees be “Communicants in good standing of a Parish or Mission in the Diocese” is not an ecclesiastical question, as it can be determined by reference to the Parish Register kept in each parish for such purposes. See App. D at Diocese Canon 28 (requiring ministers to maintain a Parish Register listing communicants in good standing).

²⁴ Response, p. 20, 31.

church property can be determined conclusively.²⁵

Second, the Response makes the stunning claim that “only the Church has the power to decide what these church documents mean.”²⁶ Again, *Jones v. Wolf* says just the opposite, stating that neutral principles “**requires** a civil court to examine certain religious documents, such as a church constitution.”²⁷ While courts “must take special care to scrutinize the document in purely secular terms,” the Court concluded that these problems “should be gradually eliminated as recognition is given to the obligation of ‘States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.’”²⁸ That is what was done here, and the Court should not allow it to be undone by a set of unwritten rules manufactured after this dispute arose.

Third, *Jones v. Wolf* applied the same neutral principles that govern property cases to issues about who represents a church in property cases. For those issues, the Court said that states can apply

²⁵ *Jones*, 443 U.S. at 602 (citation omitted) (emphasis added).

²⁶ Response, p. 39 (emphasis added).

²⁷ 443 U.S. at 604 (emphasis added).

²⁸ *Id.* at 604 (citation omitted).

either a majority rule (“generally employed in the governance of religious societies”²⁹), or construe a church’s charters (if “the identity of the local church is to be established in some other way”³⁰). Either way favors the Relators here—both the Diocesan Majority and the organizational charters designate the Individual Relators as their only duly-appointed representatives.³¹

In deciding whether a case involves ecclesiastical or secular issues, this Court has held that “the court must examine the substance and effect of the plaintiff’s petition.”³² The substance and effect of this suit is not “to ask if the real Bishop . . . would please stand up.”³³ Relators concede that TEC can recognize a new diocese, a new bishop, and new trustees as its representatives in Fort Worth—which appears to be what it has done. What it cannot do under neutral principles of

²⁹ *Id.* at 607.

³⁰ *Id.* at 607-08.

³¹ *Id.* at 607-09.

³² *Smith*, 2006 WL 3438077, at *3; *see also Westbrook*, 231 S.W.3d at 405 (“[C]ourts must look to the ‘substance and effect of a plaintiff’s complaint to determine its ecclesiastical implication, not its emblemata.’”).

³³ *Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevich*, 426 U.S. 696, 726 (1976) (Rehnquist, J., dissenting).

Texas law is to appoint representatives for the existing Diocese and Corporation contrary to the rules that govern those organizations.³⁴

4. If deference were required (which it is not), it would be to the Diocese rather than TEC

One of the problems of the deference rule is that the courts must “examine the polity and administration of a church to determine which unit of government has ultimate control over church property.”³⁵ Were this Court to undertake such an inquiry into religious history and practice, the conclusion would place ultimate authority in this matter in the Diocese, not the Presiding Bishop or TEC.

The very name of the Episcopal denomination points to regional rather than national control. “Episcopal” means “bishop” as Black’s Law Dictionary recognizes,³⁶ and a bishop is “[t]he chief superintendent

³⁴ *Greanias v. Isaiah* did not involve a property dispute, but whether a Metropolitan Bishop of the Greek Orthodox Church had authority to override the parish council of a local church. No. 01-04-00786-CV, 2006 WL 1550009 *3, *7 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Holding that this dispute was ecclesiastical, the court deferred to the Metropolitan because the local church’s by-laws established him as the ecclesiastical authority. *Id.* at *9. As discussed in the next section, such authority in this case also resides in the Bishop rather than TEC.

³⁵ *Jones*, 443 U.S. at 605.

³⁶ See *Black’s Law Dictionary* 615 (9th ed. 2009) (“**episcopacy** . . . 1. The office of a bishop”); see also *Webster’s Third New International Dictionary of the English Language Unabridged* 764 (2002) (“fr. *episcopus* **bishop** . . . 1: of, being, or suited to a bishop.”).

and highest-ranking member of the clergy within a diocese.”³⁷ TEC’s own Canons define the term “Ecclesiastical Authority” (used more than 150 times in its Constitution and Canons) as “the Bishop of the Diocese.”³⁸

Only the local bishop has authority in diocesan matters like hiring attorneys for the diocese or calling a special convention. TEC’s Constitution expressly provides that no bishop—not even the Presiding Bishop—can “perform episcopal acts” in an existing diocese except by invitation of the local bishop.³⁹ Dioceses themselves are created when a bishop calls together a convention of local clergy and laity; TEC can ratify and admit dioceses, but it cannot create them.⁴⁰ And while

³⁷ See *Black’s Law Dictionary* 191; see also *Webster’s*, 221 (“**bishop** . . . 2: a clergyman of the highest order in Christian Churches usu. charged with an administrative function such as the supervision of a diocese and in certain communions held to be ordained in direct succession from the apostles”).

³⁸ See R1 at Attachment 2, p.171, TEC Canon IV.15 (“Ecclesiastical Authority shall mean the Bishop of the Diocese or, if there be none, the Standing Committee or such other ecclesiastical authority established by the Constitution and Canons of the Diocese.”).

³⁹ See R1 at Attachment 1, p. 3, TEC Const. Art. II, § 3 (“A Bishop shall confine the exercise of such office to the Diocese in which elected, unless requested to perform episcopal acts in another Diocese by the Ecclesiastical Authority thereof”); see also TEC Canon III.12, § 3(e) (“No Bishop shall perform episcopal acts or officiate by preaching, ministering the Sacraments, or holding any public service in a Diocese other than that in which the Bishop is canonically resident, without permission or a license to perform occasional public services from the Ecclesiastical Authority of the Diocese in which the Bishop desires to officiate or perform episcopal acts.”).

⁴⁰ R1 at Attachment 1, p. 5, TEC Constitution, Art. V, § 1 (“A new Diocese may be formed, with the consent of the General Convention and under such

certain bodies within TEC have the power to remove a bishop,⁴¹ no one except a diocese has the power to appoint a replacement.⁴²

The Response is drafted to give the impression that the sole purpose of the Diocese of Fort Worth was “to accede to the National Constitution and Canons.”⁴³ This might be important if those national charters gave TEC authority in diocesan affairs—but they do not. Moreover, any fair reading of the Minutes of the Primary Convention (attached at Tab A) show that the purpose was “to become a unit *in and to ourselves*” and “to determine the way we want to live—the manner in which we are to be governed.”⁴⁴ The very first Constitution

conditions as the General Convention shall prescribe. . . . The proceedings shall originate in a Convocation of the Clergy and Laity of the unorganized area called by the Bishop for that purpose; or, with the approval of the Bishop, in the Convention of the Diocese to be divided In case the Episcopate of a Diocese be vacant, no proceedings toward its division shall be taken until the vacancy is filled.”); R1 at Attachment 2, p. 45, TEC Canon I.10, § 1 (“Whenever a new Diocese shall be formed within the limits of any Diocese . . . and such action shall have been ratified by the General Convention, the Bishop of the Diocese within the limits of which a Diocese is formed . . . shall thereupon call the Primary Convention of the new Diocese, for the purpose of enabling it to organize, and shall fix the time and place of holding the same, such place being within the territorial limits of the new Diocese.”).

⁴¹ See R1 at Attachment 3, p. 144, TEC Canon IV.5 § 2 (requiring five Bishops, two Priests, and two lay communicants to serve as court for trial of a Bishop); R1 at Attachment 3, p. 154, TEC Canon IV.9, § 1 (requiring majority vote of the House of Bishops to depose in cases of abandonment of communion).

⁴² R1 at Attachment 1, p. 3, TEC Constitution, Art. II, § 1 (“In every Diocese the Bishop . . . shall be chosen agreeably to rules prescribed by the Convention of that Diocese . . .”); TEC Canon 9.

⁴³ Response, p.6.

⁴⁴ See The Proceedings of the Primary Convention, Second Mullin aff., ex. 12, p. 11 [Tab A, p. 11] (emphasis added). The order of business for the

and Canons proposed for the Diocese were changed by floor amendment to clarify that the Corporation would hold church property in trust for the *parishes* and the *Diocese*, not for TEC.⁴⁵ The Constitution and Canons to that effect were filed with and approved by TEC's Executive Council.⁴⁶

The Response gives short shrift to *Jones v. Wolf* (cited 2 times in 50 pages), instead relying heavily on the earlier case *Serbian Eastern Orthodox Diocese v. Milivojevich* (cited almost 20 times). But *Milivojevich* is different because the church hierarchy there was different:

Convention was listed as: (1) to organize itself, appoint officers, and elect leadership to represent us in decision making; (2) to select a name; (3) to adopt its own Constitution and Canons; (4) to adopt a budget; and (5) “[l]astly . . . [to] affirm our desire as a new Diocese to come into union with the other dioceses within the Episcopal church in the United States of America by accession to the National Constitution and Canons.” *Id.* at 11-12 [Tab A, p. 11-12].

⁴⁵ Moore Affidavit, Ex. 9, p. 21 [Tab A, p. 21].

⁴⁶ R1 at Attachment 1, p. 5, TEC Constitution, Art. V, § 1.

Church Body	Serbian Orthodox	TEC
Diocese	An “organic part” of the mother church ⁴⁷	Local entity created by local clergy and laity ⁴⁸
Bishop	Appointed by mother church ⁴⁹	Elected by Diocese ⁵⁰
Amendments to Diocese Constitution	Must be approved by mother church ⁵¹	No approval by TEC required

Milivojevich has no more application here than an opinion involving Independent Baptists, as each church government must be given effect according to its own terms.

The Plaintiffs state categorically that the Court must defer to TEC because “the Episcopal Church is hierarchal.”⁵² But “[t]he terms hierarchical and congregational are poles on a continuum along which church organizations fall.”⁵³ The church organization here provides for the Diocese alone to select a Bishop and Trustees, and bars anyone else from performing “episcopal acts.” The Response asserts that TEC has

⁴⁷ *Milivojevich*, 426 U.S. at 701.

⁴⁸ See R1 at Attachment 1, p. 1, TEC Preamble.

⁴⁹ *Milivojevich*, 426 U.S. at 700.

⁵⁰ R1 at Attachment 1, p. 5, TEC Constitution, Art. II, § 1.

⁵¹ *Milivojevich*, 426 U.S. at 701.

⁵² Response, p. 3.

⁵³ *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 551 (Tex. App.—Austin 1991, writ denied).

“national hierarchy” based on the opinion of an expert witness and a retelling of church history.⁵⁴ In other words, TEC is demanding deference based *not* on its own constitution, but on (1) *ipse dixit*, or (2) a one-sided analysis of religious history and practice. The latter involves precisely the kinds of matters into which courts *cannot* inquire; the former begs the question, as TEC’s opinion about the appropriate religious authority is definitive only if TEC *is* the appropriate religious authority. The gist of TEC’s Response is that it should win *no matter what* its form of government or what the relevant documents say.

The Response claims that courts have “uniformly recognized” that TEC is a hierarchical church.⁵⁵ But in every case cited (11 are in a footnote in a different document, but there are scores of others), suit was filed by a *Bishop* or *Diocese* against a local church; TEC is almost never a party in Episcopalian property disputes.⁵⁶ Nor did TEC ever

⁵⁴ Response, p. 3 (citing 1st Mullin Affidavit).

⁵⁵ Response, p. 34.

⁵⁶ See *Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002); *New v. Kroeger*, 84 Cal. Rptr. 3d 464 (Cal. Ct. App. 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); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923 (Mass. 1997); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916 (Mass. App. Ct. 2003); *Bennison v. Sharp*, 329 N.W.2d 466 (Mich. Ct. App. 1982); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182 (Nev. 1980);

buy or sell the properties at issue here; the Diocese or Corporation alone were involved. This leads to only one logical conclusion: Episcopalians are hierarchical only within a Diocesan region for all purposes at issue here.

5. If deference were required to TEC (which it is not), the Plaintiffs are not the church authority to whom deference is due

In no event is legal deference owed to TEC's Presiding Bishop. According to the Plaintiffs themselves, the highest authority within TEC's national organization is the General Convention.⁵⁷ Yet all the acts at issue here, from appointing a local bishop to hiring counsel to filing suit, were taken by Presiding Bishop Katherine Schori, who is not TEC's highest ecclesiastical authority.

The Presiding Bishop is "the Chief Pastor and Primate" of TEC, with very limited authority.⁵⁸ She presides over one of the two houses

Protestant Episcopal Church in the Diocese of N.J. v. Graves, 417 A.2d 19 (N.J. 1980); *Daniel v. Wray*, 580 S.E.2d 711 (N.C. Ct. App. 2003); *In re Church of St. James the Less*, 888 A.2d 795 (Pa. 2005); cf. *In re Episcopal Church Cases*, 198 P.3d 66 (Cal.), cert. denied sub nom. *Rectors, Wardens & Vestryman of St. James Parish in Newport Beach, Cal. v. Protestant Episcopal Church in Diocese of Los Angeles*, 130 S. Ct. 179 (2009) (TEC intervened in suit by Diocese against local church).

⁵⁷ Response, p. 1 ("The General Convention is the Church's highest authority . . .").

⁵⁸ R1 at Attachment 2, p. 28, TEC Canon I.2, § 4(a).

of the General Convention.⁵⁹ She speaks for TEC only “as to the policies, strategies and programs authorized by the General Convention.”⁶⁰ “In the event of an Episcopal vacancy within a Diocese,” her only role is to consult with the local officials “to ensure that adequate interim Episcopal Services are provided.”⁶¹ She cannot appoint temporary bishops except in a “territory not yet organized into Dioceses of this Church.”⁶²

The Plaintiffs cite courtesy resolutions from the General Convention applauding local parishioners for their “unflagging efforts” and extending them a “special welcome.” Assuming the General Convention has power to do something more substantive than this, it has not done so here. Presiding Bishop Schori has no inherent power to appoint a bishop, hire the Plaintiffs’ attorneys, or file this suit, and the General Convention has neither authorized nor ratified her doing so either.

⁵⁹ See R1 at Attachment 2, p. 28, TEC Canon I.2, § 4(a)(5) (providing for Presiding Bishop to preside over House of Bishops); *cf.* R1 at Attachment 2, p. 11, TEC Canon I.1, § 1(a) (providing for House of Deputies to elect its own President).

⁶⁰ R1 at Attachment 2, p. 28, TEC Canon I.2, § 4(a)(1).

⁶¹ R1 at Attachment 2, p. 28, TEC Canon I.2, § 4(a)(3).

⁶² R1 at Attachment 1, p. 3, TEC Constitution, Art. II, § 3.

In practical terms, the Plaintiffs are asking the courts to defer to the Presiding Bishop, not TEC. Neither has the authority the Plaintiffs claim. This Court cannot recognize a hierarchy that is foreign to TEC's own constitutional hierarchy—especially one that presumes the founding fathers created TEC not as an association of dioceses but merely to replace the Archbishop of Canterbury with an Archbishop in New York.

D. There Is No Adequate Appellate Remedy For Someone Pursuing An Unauthorized Suit In Your Name

The Plaintiffs point out that most cases decided under Rule 12 involve an appeal after the motion was granted and the case dismissed. True enough. Those trial courts properly granted the Rule 12 motions. This one did not. In the circumstances here, there is no adequate remedy by appeal.

Any authority of recent vintage from the Supreme Court of Texas (notably absent from the Plaintiffs' Response) holds that appeal is inadequate when mandamus would avoid "the time and money utterly wasted enduring eventual reversal of improperly conducted

proceedings”⁶³ as when “proceeding to trial—regardless of the outcome—would defeat the substantive right involved.”⁶⁴

Here, the right involved is the right to hire and direct one’s own counsel. If attorneys not hired by the Diocese or the Corporation nevertheless purport to represent their interests—and in fact take positions directly contrary to the positions actually held by the Diocese and the Corporation—the right to hire and direct counsel is lost forever whether the trial is won or lost. Indeed, the Supreme Court has specifically granted mandamus to enforce a board of directors’ substantive right to control a lawsuit.⁶⁵ The Court likewise holds that

⁶³ *In re Prudential*, 148 S.W.3d at 136; see also *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 209-10 (2009) (orig. proceeding); *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465-66 (Tex. 2008) (orig. proceeding); *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding).

⁶⁴ *In re McAllen Med. Ctr.*, 275 S.W.3d at 465 (citing *In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007)); *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006) (orig. proceeding); *In re Ford Motor Co.*, 165 S.W.3d 315, 317. 322 (Tex. 2005) (orig. proceeding) (per curiam); *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 383 (Tex. 2005) (orig. proceeding) (per curiam); *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 558-50 (Tex. 2004) (orig. proceeding) (per curiam); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding) (per curiam); *In re Prudential*, 148 S.W.3d at 138; *In re AIU Ins. Co.*, 148 S.W.3d 109, 115 (Tex. 2004) (orig. proceeding); *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002) (orig. proceeding); *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 54 (Tex. 1998) (orig. proceeding); *Nat’l Med. Enters. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996) (orig. proceeding); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992) (orig. proceeding); see also *In re Schmitz*, 285 S.W.3d 451, 459 (Tex. 2009) (orig. proceeding).

⁶⁵ *In re Schmitz*, 285 S.W.3d at 459 (“Allowing this case to proceed to trial would effectively allow a shareholder to sue for damages connected with a merger without giving the corporation’s board an opportunity to make such a decision for itself.”)

mandamus is appropriate where parties are forced to trial with an attorney other than the one they properly chose.⁶⁶

Extraordinary relief is appropriate to protect rights of corporate governance,⁶⁷ and rights in real property,⁶⁸ because the legal remedy of damages after a final judgment is inadequate. Here, the Plaintiffs have threatened ongoing interference with the Diocesan Majority's exercise of these same rights by preemptorily appointing their own bishop and hiring counsel. Any remedy granted to the Diocesan Majority by appeal would therefore be inadequate.

The law does not require a sham trial merely in the interest of avoiding piecemeal litigation and appeal. Indeed, it forbids it. “[I]nsisting on a wasted trial simply so that it can be reversed and tried

⁶⁶ *In re McAllen Med. Ctr.*, 275 S.W.3d at 465 (citing *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 383 (Tex. 2005)); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004); *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 52 (Tex. 1998); *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996).

⁶⁷ *See, e.g., Health Discovery Corp. v. Williams*, 148 S.W.3d 167, 170-71 (Tex. App.—Waco 2004, no pet.) (reversing and remanding with instructions to issue temporary injunction in favor of corporation in suit to cancel corporate shares issued to officers and directors); *Biodynamics, Inc. v. Guest*, 817 S.W.2d 128, 129 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.) (affirming issuance of temporary injunction to postpone annual meetings of shareholders pending resolution of proxy dispute concerning a vote on the removal of certain directors).

⁶⁸ *See, e.g., Rus-Ann Dev., Inc. v. ECGC, Inc.*, 222 S.W.3d 921, 924, 927 (Tex. App.—Tyler 2007, no pet.) (affirming issuance of temporary injunction preventing eviction of commercial lessee of golf course, and observing that, “[i]n Texas, the potential loss of rights in real property is a probable, imminent, and irreparable injury that qualifies a party for a temporary injunction.”).

all over again creates the appearance not that the courts are doing justice, but that they don't know what they are doing.”⁶⁹ The Court need not “[s]it[] on [its] hands while unnecessary costs mount up” and thereby “contribute[] to public complaints that the civil justice system is expensive and outmoded.”⁷⁰ Mandamus exists for such a time as this.

CONCLUSION AND PRAYER

The courts of this state have “an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.”⁷¹ That resolution requires that this Court decide at the outset who represents whom. The failure to do so here threatens confusion if not chaos.

If the Plaintiffs’ attorneys are permitted to represent the Corporation and the Diocese, simply by virtue of having filed suit and without showing authority, then TEC is exercising a property interest that has yet to be validated by the courts. Thousands of parishioners in as many as 50 Fort Worth area churches are subject to expulsion from

⁶⁹ *In re McAllen Med. Ctr.*, 275 S.W.3d at 466.

⁷⁰ *Id.*

⁷¹ *Jones*, 443 U.S. at 602.

places of worship. It is one thing to take over an organization after due process; it is another to do so in the peremptory manner TEC has used here.

Churches are free to adopt whatever organizations and rules they desire regarding allocation of authority among affiliated churches. But having done so, the very nature of neutral principles means they cannot unilaterally ignore those rules—such as by hiring attorneys for a Diocese whose governing documents do not permit it.

Respectfully submitted,

ANDREWS KURTH LLP

By: Scott A. Brister

Scott A. Brister

by permission -JNT

State Bar No. 00000024

111 Congress Ave., Suite 1700

Austin, Texas 78701

Phone: 512.320.9200

Fax: 512.320.9292

scottbrister@andrewskurth.com

Kendall M. Gray

State Bar No. 00790782

ANDREWS KURTH LLP

600 Travis, Suite 4200

Houston, Texas 77002

Phone: 713.220.4200

Fax: 713.220.4285

kendallgray@andrewskurth.com

J. Shelby Sharpe

State Bar No. 18523000

SHARPE TILLMAN & MELTON

6100 Western Place, Suite 1000

Fort Worth, Texas 76107

Phone: 817.338.4900

Fax: 817.332.6818

utlawman@aol.com

ATTORNEYS FOR RELATORS

FRANKLIN SALAZAR; JO ANN

PATTON; WALTER VIRDEN, III; ROD

BARBER; CHAD BATES; JACK LEO

IKER; AND THE EPISCOPAL DIOCESE

OF FORT WORTH

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing document were served on all counsel of record by FedEx or hand delivery as indicated below on this 8th day of February, 2010, as follows:

Jonathan D.F. Nelson (*via hand delivery*)⁷²
Jonathan D.F. Nelson, P.C.
1400 W. Abrams Street
Arlington, Texas 76013-1705

Kathleen Wells (*via hand delivery*)
Taylor, Olson, Adkins, Sralla & Elam L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76185-0174

Frank Gilstrap (*via hand delivery*)
Anne Michels
Hill Gilstrap, PC
1400 W. Abram Street
Arlington, Texas 76013
(*Counsel for Real Parties in Interest*)

Sandra Liser (*via hand delivery*)
Naman, Howell, Smith & Lee, L.L.P.
100 E. 15th Street, Suite 320
Fort Worth, Texas 76102
(*Counsel for The Episcopal Church*)

⁷² Mr. Nelson and Ms. Wells are, procedurally, the real parties in interest. Rule 12 stipulates that the respondents to a motion to show authority are the counsel whose authority is challenged. Tex. R. Civ. P. 12. Mr. Nelson and Ms. Wells contend that they represent the Diocese and the Corporation who bring this original proceeding in which the Diocese and the Corporation argue that they have no such authority.

David Booth Beers (*via FedEx*)
Heather H. Anderson
Goodwin Procter, LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(*Counsel for The Episcopal Church*)

R. David Weaver (*via hand delivery*)
The Weaver Law Firm, P.C.
1521 N. Cooper St., Suite 710
Arlington, Texas 76011
(*Counsel for Intervenors*)

The Honorable John P. Chupp (*via hand delivery*)
Judge, 141st District Court
Family Law Center
200 East Weatherford Street, 4th Floor
Fort Worth, Texas 76196-0230
(*Respondent*)

Scott A. Brister
Scott A. Brister by permission-JNT

A

ARCHIVES OF THE
EPISCOPAL CHURCH
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THE PROCEEDINGS
OF THE
PRIMARY CONVENTION
TOGETHER WITH THE
CONSTITUTION AND CANONS
OF THE
EPISCOPAL DIOCESE
OF
FORT WORTH

All Saints' Episcopal Day School
Fort Worth, Texas

November 13, 1982

AD-9-83



ECUSA 001087

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ECUSA 001088

PROCEEDINGS

PRIMARY CONVENTION - DIOCESE OF FORT WORTH

November 13, 1982

THE CONVENTION WAS CALLED TO ORDER BY THE RT. REV. A. DONALD DAVIES.

While waiting for the report of the Committee on Credentials, the Bishop shared the following thoughts with the Convention:

COMMENTS OF THE BISHOP

"If you would indulge me, first of all, to make a statement as your Bishop about this Convention, and following that statement, to proceed to organize and to engage the work which is before us.

"This is a very eventful and historic day. The 13th of November in the Year of our Lord 1982, will long be remembered. Not since 1910, under the leadership of Bishop Garrett, has such a convention as this, in this area of Texas, assembled to give birth to a new diocese. We celebrate a new beginning, filled with the kind of excitement and sense of anticipation which reflects a renewed and committed people of God. I don't know about you -- I couldn't sleep last night -- being with you, and I share this, I am sure from the comments I have received, a tremendous enthusiasm for what is to transpire.

"What an envious position we are in to be able to start fresh; to bring no weighty or excess baggage on our journey; to determine the way we want to live -- the manner in which we are to be governed -- to establish new constellations of relationship, of leadership -- which is to guide a new family. And it ought to be noted that it is not with a sense of pride nor with a celebration of triumphalism that marks this beginning, but with a note of thanksgiving -- for fellow churchmen who remain in the continuing Diocese of Dallas -- for gifts which have been shared with us during these long and many years we have been one, known as the Diocese of Dallas -- for the mutual commitments with friends with whom we have enjoyed blessings, engaged in growth, manifested a sense of adventure -- and with the opportunity to break bread. We need to remember that out of that kind of fellowship this Diocese has emerged, strong and daring to become a unit in and to ourselves.

"Our chief business here today is to come in to being in such a manner as to glorify the Lord and His Church. Thus, this Convention will first of all organize itself as a family, appoint officers, elect the necessary leadership to represent us in decision making, in planning -- how we are to manifest our mission and exercise our ministry.

"Secondly, this Convention will select a name -- a name by which we will be known and identified with the other dioceses within the world, how we will be known and identified with the other some 450 dioceses as part of the greater Anglican Communion, and how we will be known and identified with the whole body of the faithful within Christendom.

"Thirdly, this Convention will adopt its own Constitution and Canons. These are really guidelines, pastoral guidelines to bind us together, to direct our mission, and to set forth the kind of disciplined way in which we will work and live as a fellowship of Christ.

"Fourthly, this Convention will adopt a budget for the year of 1983, which is really a commitment, a mutual sharing, by the parishes and missions represented here in the work and witness of Christ within this Diocese in particular and with the other dioceses of the Episcopal Church in the United States.

"Lastly, this Convention will affirm our desire as a new Diocese to come into union with the other dioceses within the Episcopal Church in the United States of America by accession to the National Constitution and Canons.

"With this significant work accomplished this day, we will be ready to launch the newest missionary effort within the Episcopal Church on the 1st of January 1983. I say this with a great deal of joy and expectation: that it would be my privilege to be your Shepherd and to walk with you all in this, a most exciting Venture of Faith, for our Lord's sake. Thank you."

Following the Bishop's remarks, the Rev. Laurens Williams, Chairman of the Credentials Committee, reported a quorum present.

Clerical Order	82 Canonically resident 57 Required for a quorum 71 Registered to vote
Lay Order	53 Parishes and Missions in Diocese 1 Mission Station 131 Delegates representing 53 Parishes and Missions registered to vote.

ORGANIZATION OF THE CONVENTION

The Rev. Logan E. Taylor was nominated by the Bishop to be Secretary of the Diocese and Secretary of the Convention. The Convention concurred.

The Rev. Ted Karpf and Mrs. Chiquita Foster were nominated by the Bishop to serve as Assistant Secretaries. The Convention concurred.

Mr. Tom K. Ward, President, Texas Commerce Bank of Fort Worth, was appointed Treasurer of the Diocese. The Convention concurred.

Bishop Davies nominated N. Michael Kensel to serve as Chancellor of the Diocese and Mr. Robert Randolph as Assistant Chancellor. The Convention concurred.

The Rev. Bruce Coggin was named Historiographer, and the Rev. Frank Reeves was appointed Registrar of the Diocese. The Convention concurred.

Mr. N. Michael Kensel was appointed Parliamentarian for this Convention. The Convention concurred.

CONSTITUTION AND CANONS

The Rev. James P. DeWolfe, Jr., Chairman, Committee on Constitution and Canons, presented the draft of the proposed Constitution and Canons for the new Diocese. Fr. DeWolfe moved the Convention recess as the Convention and reconvene as a Committee of the Whole for discussion. Motion seconded; carried.

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THE CONVENTION RECESSED AND CONVENED AS A COMMITTEE OF THE WHOLE

The Chair called the meeting of the Committee to order, and work began on the proposed Constitution and Canons.

Revisions adopted in the proposed Constitution:

A. Article II - Members of Convention - an addition []

"The Diocese of Fort Worth entrusts its legislation to a Convention to consist as follows: First, of the Bishop, when there be one; of the Bishop Coadjutor, when there be one; of the Suffragan Bishops [or Assistant Bishops], if there be any;"

B. Article III - The Annual Meetings of Convention - add paragraph from the Dallas Constitution and Cannons []

"The Convention of this Diocese shall assemble annually on the first Friday in October.

["All meetings of the Convention of this Diocese shall be held in Fort Worth, Texas; provided, however, that an Annual Convention shall have the authority, if it so choose, to designate the place of the next meeting of the Convention; and for sufficient cause the Bishop, with the consent of the Standing Committee, may change the time of meeting, or appoint some other place for holding the Convention; provided that thirty days' notice of such change shall be given to each Parish and Mission in union with the Convention."]

C. Article VI - add "and Assistant Bishops".

D. Article VII - add "within the Diocese".

E. Article XVI - change title with regard to calling of an Assistant Bishop; change wording to "the Bishop with consent of Diocesan Convention may call a Bishop to serve as Assistant Bishop, who will serve at his pleasure."

F. Article XIII - Title to Church Property - add new paragraph regarding property []

"The title to all real estate acquired for the use of the Church in this Diocese, including the real property of all parishes and missions, as well as Diocesan Institutions, shall be held subject to control of the Church in the Episcopal Diocese of Fort Worth acting by and through a corporation known as the '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 the Corporation of the Episcopal Diocese of Fort Worth.

["The Corporation of the Episcopal Diocese of Fort shall hold real property acquired for the use of a particular parish or mission in trust for the use and benefit of such parish or mission. The income from such property shall belong to such parish or mission, which will be responsible for expenses attributable thereto. Such property may not be conveyed, leased, or encumbered by the Corporation of the Episcopal Diocese of Fort Worth without the consent of the Rector, Wardens, and Vestry of such parish or mission. Upon dissolution of such parish or mission, property held in trust for it shall revert to said Corporation for the use and benefit of the diocese, as such.]

"All other property belonging to the Diocese, as such, shall be held in the name of the corporation known as the 'Corporation of the Episcopal Diocese of Fort Worth,' and no conveyance or encumbrance of any kind shall be valid unless executed by such corporation and as may otherwise be provided by the Canons of the Diocese."

Revisions adopted in the proposed Canons:

- A. Canon 5 - add "(d) Assistant Bishop"
- B. Canon 9 - separate Historiographer and Registrar, etc.
- C. Canon 24 - add new paragraph "24.3" []

["Sec. 24.3. Should the accused be a member or members of the Standing Committee, the several Deans together with the remaining clerical member or members of the Standing Committee, if there be any, shall follow the procedure set forth in Section 24.2 of this Canon."]

- D. Canon 25 - at the top of page 40 following "if a witness should refuse to sign," etc., change "Commissary" to "Commissioner" in three places.
- E. Canon 33 - on page 48, Section 33.4, add "lay" representation, and in the second to last sentence change the words to read "Mission of the Church."

F. Canon #39 - On page 53 add a new paragraph "39.4" []

["Sec. 39.4. Real property acquired by the Corporation for the use of a particular parish or mission shall be held by the Corporation in trust for the use and benefit of such parish or mission. It is immaterial whether said acquisition is by conveyance to the Corporation by a parish or mission now holding title, by the Bishop now holding title as a corporate sole, or by subsequent conveyance to the Corporation, so long as such property was initially acquired by a parish or mission by purchase by its parishioners, or by gift or devise to it, as a parish or mission. Such parish or mission shall be entitled to all income from property held for it in trust by the Corporation and will be responsible for the direct expenses attributable to such property, but not for any administrative expenses of the Corporation. Property held in trust by the Corporation for a particular parish or mission may not be conveyed, leased, or encumbered in any way by the Corporation without the written consent of the Rector, Wardens, and Vestry or the parish, or the Wardens and Vestry of the mission, for which such property is held in trust. Upon dissolution of a parish or mission, such property held in trust for it shall revert to the Corporation for the use and benefit of the Diocese, as such."]

The meeting of the Committee of the Whole adjourned.

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THE CONVENTION RECONVENED AS THE PRIMARY CONVENTION - DIOCESE OF FORT WORTH

The Convention was reconvened to vote on the Constitution and Canons. Fr. DeWolfe moved that the proposed Constitution and Canons be accepted as revised in the Committee of the Whole and that he be authorized to retitle, renumber, and index them.

The motion was seconded and carried. (See revised, renumbered, and rearranged Constitution and Canons in Appendix C of this Journal)

COMMITTEE ON NAME

The Rev. Charles Jenkins, Chairman of the Committee on a Name presented the following report:

"The Committee to name the New Diocese met on Wednesday, 27 October, 1982, at St. Mark's Church in Arlington. Committee members present were: the Rev. Dr. William Risinger, the Rev. John Hildebrand, Mr. Sam Cotton, Mr. Bob Beadle, and the Rev. Charles Jenkins, Chairman. Mr. Richard Bourland was unable to attend the meeting.

"A brief historical survey [see Appendix B] provided by Fr. Risinger showed three categories from which a Diocesan name might be chosen:

COPY: Material located in the
Archives of the Episcopal Church