

NO. 18-0438

IN THE SUPREME COURT OF TEXAS

**THE EPISCOPAL DIOCESE
OF FORT WORTH**

v.

THE EPISCOPAL CHURCH

On Petition for Review from Cause No. 02-15-00220-CV
in the Second Court of Appeals, Fort Worth, Texas

REPLY ON PETITION FOR REVIEW

Scott A. Brister - SBN 00000024 HUNTON ANDREWS KURTH LLP 111 Congress Ave., Ste. 510 Austin, TX 78701 Tel: (512) 542-5000 Fax: (512) 542-5049 <i>sbrister@andrewskurth.com</i>	Shelby Sharpe - SBN 18123000 SHARPE & RECTOR, P.C. 6100 Western Place, Ste. 1000 Fort Worth, TX 76107 Tel: (817) 338-4900 Fax: (817) 332-6818 <i>utlawman@aol.com</i>	R. David Weaver-SBN 21010875 WEAVER & WEAVER, PLLC 1601 E. Lamar Blvd., Ste. 102 Arlington, Texas 76011 Tel: 817-460-5900 Fax: 817-460-5908 <i>rdweaver@arlingtonlawfirm.com</i>
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ATTORNEYS FOR PETITIONERS

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Introduction

The first objection in Plaintiffs' response is that "The Episcopal Diocese of Fort Worth" should be removed from the cover of this brief, because it "obscure[s] the nature of the parties." *Resp. to Pet. at viii n.1*. No Texas rule allows a respondent to dictate the style of an appeal, or require that it mirror the order in which Plaintiffs chose to sue people in the trial court. This small example typifies the Plaintiffs' universal reflexive rule: the preferences expressed by The Episcopal Church ("TEC") must be obeyed regardless of the neutral principles and legal rules that apply to everyone else.

This is the same case the Court reversed and remanded in 2013. *See Episcopal Diocese of Fort Worth v. The Episcopal Church*, 422 S.W.3d 646 (Tex. 2013) ("*EDFW*"). The Diocese simply chose to name the same parties in the same order as before. But the Court should not overlook the overarching theme of Plaintiffs' response brief, which remains the same today as it was five years ago: TEC neither recognizes nor respects Neutral Principles of state law. The Court should once again reject that claim.

I. The Court of Appeals Abandoned Neutral Principles

This Court's mandate ordered the courts below to apply Neutral Principles of state law.¹ The trial judge did, granting summary judgment for Defendants (CR14024-25). But the court of appeals did not. In a flow chart illustrating the reasoning of the only judge to sign an opinion, a retreat to the Identity approach was justified by a "yes" answer to a question in the third box: "If title is held for [a] local entity, is there a question about who is the local entity?"²

That is flat wrong. Identifying a legal entity is not an exception to the Neutral Principles approach as adopted by virtually every state. Identifying which entity (or "faction") is entitled to property using Neutral Principles is *exactly* what this Court ordered all Texas courts to do in 2013³ – and 100 years before that in *Brown v. Clark*, 116 S.W. 360 (Tex. 1909). Had the court of appeals done that, it should have

¹ See *EDFW*, 422 S.W.3d at 652.

² *The Episcopal Church v. Salazar*, 547 S.W.3d 353, 409 (Tex. App. – Fort Worth 2018, pet. filed) ("*Salazar*").

³ See *EDFW*, 422 S.W.3d at 651.

affirmed (*see part A*). Plaintiffs cite no state law to the contrary, but simply change the question (*see part B*).

A. The Defendants represent the Diocese and Corporation under Texas law

Texas law provides that unincorporated associations are governed by the persons designated in “the governing documents of the entity.”⁴ Similarly the election, removal, or replacement of corporate directors is governed by a corporation’s articles and bylaws.⁵ So in church property disputes, state law “dictates” the officers of an entity, whether it is a church-affiliated corporation,⁶ or a church-affiliated association.⁷ That means the Defendants alone under the law and facts here. *See Pet. at 20-23.*

⁴ See TEX. BUS. ORGS. CODE § 1.102(35)(A); *see also id.* at §252.017(b) (providing that definitions in chapter 1 of the Code apply to unincorporated nonprofit associations); *Dist. Grand Lodge No. 25 v. Jones*, 160 S.W.2d 915, 922 (Tex. 1942) (“[T]he constitution and by-laws of a voluntary association, whether incorporated or not, are controlling as to its internal management.”).

⁵ See TEX. BUS. ORG. CODE §§ 22.206, 22.208, 22.211-.212 (formerly TEX. REV. CIV. STAT. art. 1396-2.15).

⁶ *EDFW*, 422 S.W.3d at 652.

⁷ See *Jones v. Maples*, 184 S.W.2d 844, 847-48 (Tex. App.—Eastland 1944, writ ref’d) (holding that unincorporated association “has the right that its funds be paid out only on the order of the president and be paid by check of the treasurer, as provided in the constitution and by-laws.”).

The Fort Worth court of appeals held that because the entity known as the Episcopal Diocese of Fort Worth was affiliated with TEC in 2006, it had to remain so after the dispute and division that occurred here in 2008.⁸ Why? What church charter says so? Under Neutral Principles, an entity's officers are determined by its governing documents, not its affiliations. If TEC's opinion on that issue overrides state law, then the Neutral Principles approach means nothing.

Plaintiffs claim it is "patently false" that the Diocese was formed under Texas law. *Resp. to Pet. at 10*. But only legal entities can bring a lawsuit.⁹ If the Diocese is not a legal entity, it has no capacity to sue or be sued.¹⁰ To claim property in court, the Diocese must render to Caesar that which Caesar requires for legal capacity. As an unincorporated association *formed* in Texas and *operating* in Texas for

⁸ See *Salazar*, 547 S.W.3d at 442-43; *Resp. to Pet. at 6*.

⁹ See *Christi Bay Temple v. GuideOne Specialty Mut. Ins. Co.*, 330 S.W.3d 251, 253 (Tex. 2010).

¹⁰ See *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005) (holding estate cannot sue or be sued since it is not a legal entity).

35 years (29CR10168-¶4; 17CR6086-6153), the Diocese is “a legal entity separate from its members,”¹¹ and is governed by Texas law.¹²

B. Plaintiffs’ bait-and-switch to require affiliation

Plaintiffs claim the Neutral Principles approach requires deference to TEC on three “ecclesiastical questions”:

- (1) “who constitutes a Diocese of The Episcopal Church”;
- (2) “who is a member in ‘good standing’ ... in such a Diocese”;
and
- (3) “who is ... ‘canonically resident’ in such a Diocese.”

Resp. to Pet. at viii, 1, 4, 6, 7. The words in this list, oft-repeated in the response, were undoubtedly chosen with care – and reflect an unabashed effort to rewrite the church charters to avoid Neutral Principles and this Court’s mandate.

There is no valid trust for “a Diocese *of The Episcopal Church.*”

The Dennis Canon attempted to impose a trust “for this Church and the Diocese thereof” (12CR4201). But this Court in 2013 and the court

¹¹ See TEX. REV. CIV. STAT. art. 1396–70.01, § 7(a) (currently TEX. BUS. ORGS. CODE § 252.006(a)).

¹² See TEX. REV. CIV. STAT. art. 1396–70.01; *see also* TEX. BUS. ORGS. CODE § 1.103 (providing that Texas law governs internal affairs of entities formed in Texas without filing a certificate of formation with a governmental authority).

of appeals in 2018 held that trust invalid on numerous state law grounds.¹³ The only valid trust – the one in the Diocese’s charters – places all property in trust for the Parish or Mission for which each was acquired,¹⁴ and defines “Parish” and “Mission” as the “body in union with Convention.”¹⁵ It undisputed that the Plaintiffs’ are not in union with the Convention since they walked out in 2008. *See Pet. at 12-13*. The honest and true legal question is which congregations are affiliated *with the Diocese*; switching the question to affiliation *with TEC* recast the trust in the Diocese’s charters into the Dennis Canon.

For the same reason, the legal question is not whether the Corporation’s Trustees are canonically resident in or in good standing with a diocese *affiliated with TEC* (“in such a Diocese”). The charters of the Diocese and the Corporation both require that Trustees be “Lay Communicants in good standing of a Parish or Mission *in the Diocese*

¹³ *See EDFW*, 422 S.W.3d at 653 (declaring Dennis Canon revocable); 29CR10169-¶7 & 17CR6202-§18.4 (revocation by Diocese); *Salazar*, 547 S.W.3d at 424 (declaring Dennis Canon invalid because not signed by property owner).

¹⁴ 17CR6175 & 17CR6202-¶18.4 (2006); 17CR6102 & 17CR6120-¶12.4 (1982).

¹⁵ 17CR6216-¶31.1(a) (2006); 17CR6144-¶34.1(a) (1982)

or members of the Clergy canonically resident *in the Diocese*.”¹⁶ As Plaintiffs conceded in their Petition, only the Diocese can determine good standing or canonical residence *in the Diocese*; TEC cannot.¹⁷

The sole author of the opinion below sounded the retreat to Deference because the Diocese “lost its identity” by modifying its governing documents in ways TEC did not approve.¹⁸ But Plaintiffs have conceded the Diocese could amend its charters without TEC’s approval (34CR1860-¶7; 2SuppCR358-59). An entity that amends its charters does not “lose its identity”; it is still the same entity but with amended charters.

II. Defendants hold legal and equitable title to All Saints

For the two deeds the court of appeals addressed out of 121 in the trial court’s summary judgment, Plaintiffs claim “equitable title remained in the Protestant Episcopal Church” from the 1940s to the present. *Resp. to Pet. at 12*. This is simply another attempt to resurrect

¹⁶ See 17CR6200-¶17.2 (Diocese 2006); 17CR6119-¶11.2 (Diocese 1982); CR6080-§II.3 (Corporation 2006); CR6066-§II.2 (Corporation 1982).

¹⁷ 2SuppCR51-¶144; see also CR4272-§6(b); CR6183-§1.5.

¹⁸ *Salazar*, 547 S.W.3d at 434.

the Dennis Canon; it ignores all the *legal* changes that modified those deeds in the intervening 70 years.

The Dallas Diocese agreed to transfer “title to all property” by resolution (33CR11812-¶1). An agreement to transfer title *automatically* conveys a beneficial interest to the recipient,¹⁹ as Plaintiffs concede. *See Resp. to Pet. at 14*. Yet they claim without explanation that this transfer included an unstated restriction limiting use of each property to a TEC-affiliated congregation. *Resp. to Pet. at 14-15*. No transfer document says so; it isn’t in the Dallas resolution, or the 1984 judgment. But in the new Diocese’s charters, the holder of legal title and *every* beneficiary agreed to modify the trust so it benefitted Parishes and Missions affiliated *with the Convention* – not with TEC. *See Pet. at 10, 14-15*. Under Texas trust law, that agreement modified any and all trusts in the older deeds.²⁰

¹⁹ *See Milner v. Milner*, 361 S.W.3d 615, 620–21 (Tex. 2012) (“The legal dictionary broadly defines ‘beneficial interest as ‘[a] right or expectancy in something’ Similarly, we have said that “‘beneficial interest’ is profit, benefit or advantage resulting from contract” (internal citations and quotations omitted); *see also Sneed v. Webre*, 465 S.W.3d 169, 191 (Tex. 2015) (noting courts treat “beneficial” and “equitable” ownership interchangeably).

²⁰ *See* TEX. PROP. CODE §§ 112.054(a)(5), (d); 112.110; 112.051.

Plaintiffs cite “black-letter” law that those who cease to be members of an association lose any interest in its property. *Resp. to Pet. at 12*. But they have mixed up their associations: TEC (also an association) has never had a property interest in these churches, so there was property interest to lose by disassociating from TEC. The property belonged to the Diocese and its affiliated congregations, and it was the Plaintiffs who voluntarily ceased to be members of those associations. The “black-letter” rule of Texas law means the Plaintiffs’ small minority group forfeited any interest in these properties by withdrawing from the Diocese’s Convention.

Defendants do *not* agree that the trust in the Diocese’s charters (a/k/a the “Article 13 trust”) conveyed equitable title to All Saints Episcopal Church regardless of whether it remained in union with the Diocese’s Convention. *Resp. to Pet. at 15*. For 35 years, this trust has explicitly said it was for Parishes and Missions in union with that Convention. Both sides have a congregation named All Saints Episcopal Church; but only the Defendants’ congregation has been in union with that Diocese’s Convention for the last 10 years (*CR13811*).

III. Neutral Principles Looks to Facts, Not Affiliations

The theme throughout Plaintiffs' response is that since the "body now known" as the Diocese in 2006 was affiliated with TEC, it still has to be affiliated with TEC today. But why? Nothing in any church charter or Texas law says a legal entity that existed in 2006 vanishes or dissolves if it severs an affiliation. The Plaintiffs are the ones who "reconstituted" themselves as a new entity after disaffiliating from the existing Diocese (*20CR7028, 2SuppCR316*). Legal entities are not dissolved or created anew by changing affiliation unless their governing documents say so. When Texas A&M changed its athletic affiliation, it was still Texas A&M – the same legal entity.

Plaintiffs wrongly accuse the Defendants of asking the courts to decide whether "an Episcopal Diocese may unilaterally secede" from TEC. *Resp. to Pet. at 10*. It is again the Plaintiffs who asked the courts to address that question; the Defendants long ago disclaimed the courts' power to decide matters of religious affiliation (*CR2354*). This has been a property dispute from the outset, and no appellate alchemy can turn

it into an ecclesiastical dispute. The only question is whether a Texas legal entity can be taken over by a faction that withdraws from it.

To answer that question, Texas courts look to Neutral Principles of state law; they do not defer to a church's unwritten opinions about property rights.²¹ If lenders and creditors cannot identify a church's officers from its governing documents, they will stop dealing with churches because of the uncertainty (*1SuppCR205-¶5*).

Conclusion

It is appalling to think of the time and money that have been wasted because the court of appeals retreated to the Identity/Deference approach. Had this Court intended to defer to TEC to designate the "true" officers of the Diocese and Corporation, it could have done that five years ago.²² Surely the Court expected more action and fewer words than the court of appeals expended here.

It was not enough for the court of appeals to pay lip service to the law of Neutral Principles, or to Texas property, trust, and

²¹ See *EDFW*, 422 S.W.3d at 657.

²² See *EDFW*, 422 S.W.3d at 652.

corporate law; it had to follow them. Justice is rendered not by what a court *says* (the form) but by what it *does* (the substance). This Court should grant review and insist that what it said before *in this very case* is still the law.

Respectfully submitted,

By: /s/ Scott A. Brister

Scott A. Brister - SBN 00000024
HUNTON ANDREWS KURTH LLP
111 Congress Ave., Suite 510
Austin, TX 78701
Phone: 512-542-5000
Fax: 512-542-5049
sbrister@andrewskurth.com

J. Shelby Sharpe - SBN 18123000
SHARPE & RECTOR, P.C.
6100 Western Place, Suite 1000
Fort Worth, Texas 76107
Phone: 817-338-4900
Fax: 817-332-6818
utlawman@aol.com

R. David Weaver - SBN 21010875
WEAVER & WEAVER, PLLC
1601 E. Lamar Blvd., Suite 102
Arlington, Texas 76011
Phone: 817-460-5900
Phone: 817-460-5908
rdweaver@arlingtonlawfirm.com

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF COMPLIANCE

I certify that this Reply on Petition for Review contains 2,238 words as calculated per Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

/s/ Scott A. Brister
Scott A. Brister

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply on Petition for Review was served on the following counsel of record via electronic transmission on November 2, 2018:

William D. Sims, Jr.
Thomas S. Leatherbury
Daniel L. Tobey
Vinson & Elkins LLP
2001 Ross Avenue, Suite 3700
Dallas, TX 75201
bsims@velaw.com
tleatherbury@velaw.com
dtobey@velaw.com

Frank Hill
Frank Gilstrap
Hill Gilstrap, P.C.
1400 W. Abram Street
Arlington, TX 76013-1705
fhill@hillgilstrap.com
fgilstrap@hillgilstrap.com

Sandra Liser
Naman Howell Smith Lee, PLLC
Fort Worth Club Building
306 West 7th Street, Suite 405
Fort Worth, Texas 76102-4911
sliser@namanhowell.com

Kathleen Wells
P.O. Box 101174
Fort Worth, Texas 76185-0174
Kathleen@kwellslaw.com

Jonathan D.F. Nelson
Jonathan D.F. Nelson, P.C.
1400 W. Abram Street
Arlington, TX 76013-1705
jnelson@hillgilstrap.com

Mary E. Kostel
The Episcopal Church
c/o Goodwin | Procter LLP
901 New York Ave., N.W.
Washington, D.C. 20001
mkostel@goodwinprocter.com

David Booth Beers
Goodwin | Procter LLP
901 New York Ave., N.W.
Washington, D.C. 20001
dbeers@goodwinprocter.com

/s/ Scott A. Brister

Scott A. Brister