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

RESPONSE TO APPELLEES' MOTION FOR REHEARING

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INTRODUCTION

Over a year ago, this Court heard two cases on the same day. Both involved TEC and its allies ("TEC") claiming that they are exempt from the Texas Trust Code, the Texas Non-Profit Corporation Act, and Texas law on unincorporated associations. The Court held TEC is not above the law.

Appellants' parishioners and parishes should not be kept waiting for a final decision any longer merely because TEC seeks a second bite on issues already briefed and decided. TEC tries again to recast this suit as "unconstitutionally retroactive" and as an "identity" suit, arguments the Court has soundly rejected. There is no basis for rehearing.

I. RETROACTIVITY

Most of TEC's motion for rehearing argues that applying Texas law is "unconstitutionally retroactive" unless a state "clearly enunciated" its adoption of Neutral Principles years earlier. *See Motion* at 3–14. The Opinion here adequately disposes of retroactivity (a) by noting that Texas law has substantively reflected Neutral Principles for 100 years, and (b) by postponing

further consideration until Texas law is actually applied on remand. *See Opinion* at 8, 13.

A. TEC's argument is premature

The Neutral Principles approach cannot be facially unconstitutional, as *Jones v. Wolf* held precisely the opposite.[1] TEC's only claim must be that it is unconstitutional as applied. But as the Opinion notes, whether neutral state laws are unconstitutional as applied depends on how they are applied. *Opinion* at 8. Since the trial court has never applied Texas property, trust, corporation, or association law to this case, TEC's claim is premature until the trial court does so on remand.

B. *Jones v. Wolf* does not support TEC's argument

"Nothing in the Constitution alters the fundamental rule of retrospective operation that has governed judicial decisions . . . for near a thousand years." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349,

[1] 443 U.S. 595, 604 (1979) ("We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.").

372 (1910) (Holmes, J., dissenting)). *Jones v. Wolf* does not alter that fundamental rule either.

In footnote 4 in *Wolf,* Justice Blackmun noted in passing that no claim of retroactive application existed in that case.[2] The footnote merely explained why retroactivity was not addressed; it did not purport to establish a special rule on retroactivity in constitutional cases.

The gist of TEC's argument is that when a state court *adopts* Neutral Principles in a pending case, it cannot actually *use* the approach in that case. Nobody shares that reading of this footnote; in the 30+ years since *Jones v. Wolf* was decided, not a single court anywhere has accepted such an argument. Virtually every state has adopted Neutral Principles since *Wolf*, and none of them has held that the approach could not actually be applied until some later date in some later case.

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[2] *Wolf*, 443 U.S. at 606 n.4 ("Given that the Georgia Supreme Court clearly enunciated its intent to follow the neutral-principles analysis in *Presbyterian Church II* and *Carnes*, this case does not involve a claim that retroactive application of a neutral-principles approach infringes free-exercise rights.").

Indeed, TEC's argument could create rather than resolve a constitutional problem. If a court cannot both adopt Neutral Principles and apply it to the parties in a pending case, that would seem to require an advisory opinion: "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Even in the rare case in which this Court limits the retroactivity of an opinion, it still applies the new rule in the pending case.[3]

As discussed in the next section, Texas courts have been applying Neutral Principles for many years. But even if they hadn't, nothing in *Wolf* prohibits a state from applying the

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[3] *See, e.g., State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 720 (Tex. 1996) ("[T]oday's holding applies in this case . . . and to every such assignment executed after today."); *Elbaor v. Smith*, 845 S.W.2d 240, 251 (Tex. 1992) ("[T]his holding shall be applicable only in the present case . . . and to those actions tried on or after [today]"); *Huston v. F.D.I.C.*, 800 S.W.2d 845, 849 (Tex. 1990); *Friedman v. Texaco, Inc.*, 691 S.W.2d 586, 589 (Tex. 1985); *Moser v. United States Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984); *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983); *cf. Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 434 (Tex. 1984) (declining to apply new rule of comparative causation because defendant failed to tender evidence of pilots' negligence). The only exception appears to be in tax cases, where refunds to thousands of taxpayers raise insuperable logistical problems. *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 521 (Tex. 1992).

Neutral Principles approach in the same case in which that approach is adopted.

C. TEC wasn't surprised that Neutral Principles applies

Texas courts have recognized the Neutral Principles approach for years. Yet TEC claims it had no inkling before this dispute arose that Texas would apply the Neutral Principles approach. In fact, TEC immediately reacted to *Wolf* by adopting the Dennis Canon in 1979, and has argued throughout this litigation that it should prevail under an alternative Neutral Principles analysis.

1. TEC Responded to Neutral Principles in 1979

TEC responded to *Wolf* almost immediately by adopting the Dennis Canon in 1979. *See Masterson Opinion* at *15. That action shows TEC had plenty of notice that Neutral Principles could govern its property arrangements, and plenty of opportunity to arrange its affairs differently.

But as any Texas lawyer would have known, TEC's response to *Wolf*, the Dennis Canon, does not comply with long-standing Texas law. For almost 75 years, Texas law has provided

that all trusts are revocable unless they expressly state otherwise.[4] Nothing in the Dennis Canon expressly stated otherwise. *See id.* at *17. Thus, TEC's method of dealing with "Neutral Principles" was simply not legally cognizable in Texas (and other states). The Free Exercise Clause does not immunize churches from faulty legal advice and drafting.

2. Jones and Brown clearly foreshadowed the Opinion here

The Opinion correctly states that the Court's 1909 analysis and holding in *Brown v. Clark*[5] "substantively reflected the neutral principles methodology." *Opinion* at 13.[6] TEC objects that *Brown* did not "cite Texas corporations or associations law" and "makes no reference to the neutral principles doctrine." But no corporation or association rules were involved in *Brown*, and

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[4] Tex. Prop. Code Ann. § 112.051(a); *see also* Texas Trust Act § 7 (formerly Tex. Rev. Civ. Stat. art. 7425b-41), Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234 ("Every trust shall be revocable by the trustor during his lifetime, unless expressly made irrevocable by the terms of the instrument creating the same or by a supplement or amendment thereto.").

[5] 116 S.W. 360 (Tex. 1909).

[6] *See also Masterson Opinion* at 24 n.7.

Neutral Principles can be adopted by using the ***method*** without using the ***moniker***.

On the latter point, the Supreme Court in *Wolf* said that Georgia adopted Neutral Principles in 1969 — citing a case that never used that label but did use that methodology:

> On remand, the Georgia Supreme Court . . . adopted *what is now known as the "neutral principles of law" method* for resolving church property disputes. The court examined the deeds to the properties, the state statutes dealing with implied trusts, and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church.[7]

Examining the deeds and the church charters is precisely what this Court did in *Brown*. [8] What matters is what the court *did*, not what *label* was attached to it. This Court "adopted" Neutral Principles without using that name in 1909 just as clearly as the Supreme Court held Georgia had done in 1969.

The Texas courts of appeals were not confused about whether to apply Neutral Principles, at least not until TEC began

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[7] *Jones v. Wolf*, 443 U.S. 595, 600 (1979) (emphasis added, internal citations omitted) (citing *Presbyterian Church in U. S. v. Eastern Heights Presbyterian Church*, 167 S.E.2d 658, 659–60 (Ga. 1969)).

[8] *See* 116 S.W. at 364–65.

aggressively filing suits here. In the region where the Diocese and its properties are mostly located, the Fort Worth Court of Appeals said in 1999 and again in 2006 that "***[n]eutral principles of law must be applied***" to church property disputes.[9] The First, Fifth, Tenth, and Fourteenth Courts of Appeals all held the same.[10] And this Court suggested the same by declining to "expand" the Neutral Principles approach from property to personal injury cases. *See Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007).

Despite this track record, TEC insists Texas courts have always "understood *Brown* to be a deference case, not a neutral

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

[10] *See 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 to settle property rights); *Hawkins v. Friendship Missionary Baptist 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/Clemons v. Foster*, No. 05-00-10798-CV, 2002 WL 10545, at *3 & n.2 (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 provided for officer selection "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 entitlement to proceeds from sale of church).

principles case."[11] But in the seven cases TEC cites, (a) five were written before *Wolf* drew a distinction between the different approaches;[12] (b) one was by a court that later recognized the neutral-principles approach;[13] and (c) the last deferred to the church's by-laws, not its litigation claims.[14]

In one sense, of course, *Brown* ended up being a deference case because the principal question was whether the doctrinal views of two denominations prevented a merger, a question courts simply cannot answer.[15] That does not take it out of the

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[11] *See Motion* at 8–11.

[12] *Church of God in Christ, Inc. v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975); *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865 (Tex. Civ. App.—Texarkana 1977, no writ); *Norton v. Green*, 304 S.W.2d 420 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.); *Browning v. Burton*, 273 S.W.2d 131, 134 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.); *Cussen v. Lynch*, 245 S.W. 932 (Tex. Civ. App.—Amarillo 1922, writ ref'd).

[13] *Compare Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 704–05 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) *with Cherry Valley Church*, 2002 WL 10545, at *3 ("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.").

[14] *See Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 551–52 (Tex. App.—Austin 1991, writ denied) ("The trial court properly deferred to church bylaws").

[15] *Brown v. Clark*, 116 S.W. 360, 363 (Tex. 1909) ("The principal question in this case is: Did the General Assembly of the Cumberland

Neutral Principles approach, which also requires deference on purely doctrinal questions.[16] But the only reason the *Brown* court deferred was because no deed or by-laws indicated who the church owner was.[17] Looking to the deeds and the church charters to determine ownership is the Neutral Principles approach.

All the property arrangements at issue in this case were settled after *Wolf*, after the Dennis Canon, and long after *Brown*:

- the Diocese of Fort Worth was created and adopted a Constitution and Canons in November of 1982;[18]
- the Corporation was formed to hold church property in February of 1983;[19] and
- all church property was transferred to the Corporation by trial court judgment in August of 1984.[20]

Church have authority to consummate the reunion and union of that church with the Presbyterian Church?").

[16] *See Wolf*, 443 U.S. at 604 ("If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.").

[17] *See Brown*, 116 S.W. at 364.

[18] *See* 28CR5967–6035; 28CR6037; 28CR6049.

[19] *See* 28CR6179–82.

[20] *See* 26CR5673–90.

TEC accepted all these arrangements without objection until filing suit 25 years later.

TEC certainly hoped Texas would be the first state in many years to back-track from Neutral Principles, but its lawyers and allies were not so sanguine. Two years before the Fort Worth suit was filed, TEC's allied diocese in *Masterson* felt compelled to urge the San Angelo trial court to reject Neutral Principles in favor of the deference approach.[21] Throughout the Fort Worth suit, TEC has argued that it should prevail even if Neutral Principles should apply.[22] TEC's claims about its historical practices for property are glaringly inaccurate;[23] but even if they were true, TEC had ample opportunity to arrange its affairs to comply with Neutral Principles if that is what its members (rather than its national office) agreed was the church's polity.

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[21] *See Masterson* record at 1CR46.

[22] *See* 1CR32, 43, 82, 89, 94–95; *Local TEC Br.* at 32–36.

[23] *See Appellants' Br.* at 21 ("TEC's 'history' fails to mention that TEC itself began when dioceses left the Church of England ***with all their property*** — just like the Church of England had done from Rome before that.").

II. IDENTITY

TEC takes another run at convincing the Court this is an "identity" suit rather than a property suit, an argument the Court soundly rejected.[24] The Court could not have been clearer: the identity of the Church or the Diocese is a question for the church on ecclesiastical matters, but a question for the courts on secular questions like property. The motion for rehearing raises nothing new.

Neither the Diocese nor the Corporation is a free-floating idea that can be claimed by passers-by. Each is a legal entity governed by its own rules and state law. This is not a case like *Brown v. Clark* in which it was unclear who the "members" were of the unincorporated association that owned the property. Indeed, avoiding that quandary is precisely why Texas churches usually form nonprofit corporations, whose officers are specified by corporate charters and state statute. TEC's effort to re-

[24] *See Masterson* Opinion, at 27 (noting that bishop's identification of loyal members did not determine property ownership issue).

introduce "identity" questions into corporate law would undo the very purpose of the Texas nonprofit corporation statutes.

There will be no "identity" issues on remand if the trial court applies Neutral Principles of Texas law:

- the trial court will not have to decide who is the Diocese, as it is undisputed that title to all church property is held by the Corporation, not the Diocese;[25]
- the trial court will not have to decide who is the Diocese for trust purposes, as any alleged trust in favor of TEC was revoked in 1989;[26] and
- the trial court will not have to decide whether the Corporation's trustees are in "good standing in the Diocese," as the Corporation's by-laws provide that trustees can be removed only by the Board — which has not occurred.[27]

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[25] *See* 21CR4337 (TEC's motion for summary judgment stating that "The Diocesan Corporation holds title to substantial real and personal property of the Diocese"); 27CR5889 (Local TEC's motion stating the same); *see also* 28CR5981 (Diocese's 1982 Constitution); 28CR6093 (Diocese's 2006 Constitution); 28CR6179–82 (Corporation's articles); 26CR5673 (1984 court judgment).

[26] *See* 28CR6122 (Canon 18.4: "No adverse claim to such beneficial interest by the Corporation, by the Diocese, or by The Episcopal Church of the United States of America is acknowledged, but rather is expressly denied."); *see also* 28CR6150, 6154–55 (showing adoption in 1989).

[27] *See* 28CR6195 (Corporation's 2006 by-laws: "Any Elected Trustee of the Corporation may be removed by a majority of the remaining members of the Board"); 28CR5963 (¶ 10). In any event, the Corporation's by-laws make clear that any deference would be to the membership rolls of the Diocese that existed in 2006, not to the rump diocese TEC created thereafter. *See* 28CR6194 (Corporation's 2006 by-laws: "Elected Trustees may be either

The Opinion rightly recognizes that courts defer to a church on ecclesiastical questions, but do not defer on non-ecclesiastical questions that must be decided by state property, trust, corporate, and association law. *See Opinion* at 11.

TEC's motion assumes it might wind up with control of the Corporation because it created a new diocese in 2009 that also calls itself "The Episcopal Diocese of Fort Worth."[28] But naming a child "Bill Gates" does not entitle the child to somebody else's fortune. Under Neutral Principles of state law, control of the existing property will be determined according to the documents governing the existing entities, not the rules or decisions of a faux-entity declaring itself to be the rightful heir.

Appellants severed any connection with TEC when 79% of the clergy and 80% of the lay delegates voted for *a second time* in 2008 to do so.[29] How the nonprofit Corporation's articles, by-

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laypersons in good standing of a parish or mission in the body now known as the Episcopal Diocese of Fort Worth."); *see also Appellants' Reply Br.* at 13–14.

[28] *See* 25CR5459 *et seq*.

[29] *See* 28CR5962.

laws, and trustees can be changed are secular, not ecclesiastical, questions. *See Masterson,* at *13. The jurisdiction of the church does not extend to telling secular courts how to decide secular matters. TEC has no more control over Appellants' property or affairs than Royal Dutch Shell has over the property or affairs of ExxonMobil.

CONCLUSION

The Court noted probable jurisdiction of this direct appeal two years ago. By May 2014 it will have been on this Court's docket for three years. It is time to dispose of it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response to Appellees' Motion for Rehearing was served upon counsel for all parties as indicated on the attached list by U.S. First Class certified mail, return receipt requested, on this the 6th day of December, 2013.

/s/ Scott A. Brister
Scott A. Brister

CERTIFICATE OF COMPLIANCE

I certify that this Response to Appellees' Motion for Rehearing contains 3,091 words as calculated per Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

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