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

AMICUS CURIAE BRIEF OF MARK BROWN

MARK ADAMS BROWN
SBN 03153280
121 S. IRVING STREET
SAN ANGELO, TEXAS 76903
PHONE (325) 658-7200
TELECOPIER (325) 659-6432

FEBRUARY 17, 2010

Identity and Interest of Amicus Curiae

In preparing and submitting this brief, Mark Brown ("Brown") represents no other person. No fee has been paid nor is any to be paid to Brown for preparing the brief.

Brown has had cause to study these issues because he is being sued by persons associated with The Episcopal Church. In 2007 Brown was a director on the board of a non-profit Texas corporation in San Angelo, Texas, which was affiliated with the multi-national association known as The Episcopal Church. By a majority vote, the members of the non-profit corporation terminated the corporation's affiliation with The Episcopal Church. Believing that corporation law bound Brown, as a fiduciary, to obey the members' vote and protect property held in the corporation's name, Brown (and other directors) declined to surrender the corporation's property to persons associated with The Episcopal Church who demanded possession. Such refusal prompted a law suit against Brown and other directors which is still pending.

TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF AMICUS CURIAE i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES v

ISSUES PRESENTED 1

ISSUE 1 **Diocese Has Common Law Right To Withdraw From Association**

ISSUE 2 **Texas Adopted "Neutral-Principles" *Ipso Jure***

ISSUE 3 **Even If Texas Followed "Deference" Approach, Merely Being "Hierarchical" Does Not Entitle Church To "Deference"**

ISSUE 4 **Courts Can Review Church Organizational Documents**

ISSUE 5 **Court Cannot Search for Implied Church Authority**

ISSUE 6 ***Milivojevich* Highly Distinguishable from Instant Case**

STATEMENT OF FACTS 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 1

ISSUE 1 **Diocese Has Common Law Right To Withdraw From Association** 1

1. Common law gives right to withdraw. 2

   A. Principle of association law. 2

   B. Presumption of contract law. 2

      (i) Obligation in perpetuity must be unequivocally expressed.. . . . 2

      (ii) Continuing obligations indefinite in length are terminable at will.. 3

   C. Common law presumptions can apply in church cases. 3

2. Texas court, US Supreme Court recognize right to withdraw from hierarchical denomination. 3

3. The Diocese's common law right to withdraw is unrebutted. 4

ARGUMENT - continued

Page

A. No express prohibition of withdrawal. 4

B. Implied prohibition would not suffice, and would be forbidden by First Amendment. 4

4. Constitution reinforces common law right to withdraw from association. . . . 4

5. Withdrawal removes Diocese from Episcopal reach. 5

6. Diocesan withdrawal renders plaintiffs' case law irrelevant. 5

ISSUE 2 **Texas Adopted "Neutral-Principles" *Ipso Jure*** 5

1. "Neutral-principles" automatically incorporated into Texas law. 5

2. Texas does not restrict "neutral-principles" approach to congregational churches. 8

3. Texas Supreme Court in *Westbrook* acknowledges "neutral-principles" as part of Texas law. 9

4. South Carolina, from which Texas borrowed the the "question of identity" rule, now holds that neutral-principles, not the "question of identity" rule, apply to the Episcopal church. 10

ISSUE 3 **Even If Texas Followed "Deference" Approach, Merely Being "Hierarchical" Does Not Entitle Church To "Deference"** 11

1. No deference without tribunals and rules. 11

2. Compulsory deference rejected. 12

ISSUE 4 **Courts Can Review Church Organizational Documents** 12

1. *Milivojevich* authorized court review of church organizational documents. . . 12

2. *Jones v. Wolf*, a neutral-principles case, approved court scrutiny of church documents and polity. 13

3. *Brown v. Clark* scrutinized church document for prima facie showing of authority. 13

ISSUE 5 **Court Cannot Search for Implied Church Authority** 14

ISSUE 6 ***Milivojevich* Highly Distinguishable from Instant Case** 14

Page

PRAYER 15

CERTIFICATE OF SERVICE

INDEX OF AUTHORITIES

Cases

Adickes v. Adkins, 215 S.E.2d 442 (S.C. 1975) 11

All Saints Parish Waccamaw v. The Protestant Episcopal Church in Diocese of South Carolina, 685 S.E.2d 163 (S.C. 2009) 11

Bangor & Aroostook Rd. Co. v. Daigle, 607 A.2d 533, 535 (Me. 1992) 2

Bell v. Leven, 90 P.3d 1286, 1288 (Nev. 2004) 2

Bramlett v. Young, 93 S.E.2d 873(S.C. 1956) 11

Brown v. Clark, 102 Tex. 323, 116 S.W. 360, 364-365 (1909) 13

Chambers v. Pruitt, 241 S.W.3d 679, 684 (Tex. App.-Dallas 2007, no pet.) 6

Citizens United v. Federal Election Commission, No. 08–205, slip op. at 25-26 (U.S. 2010) 4

Clear Lake City Water Authority v. Clear Lake Utilities Company, 549 S.W.2d 385, 391 (Tex. 1977) 3

Coughran v. Nunez, 133 Tex. 303, 127 S.W.2d 885, 887 (1939) 6

Dean v. Alford, 994 S.W.2d 392, 395 (Tex.App.-Fort Worth 1999, no pet.) 8

Delta Services And Equipment, Inc. v. Ryko Manufacturing Co., 908 F.2d 7, 9 (5th Cir. 1990) 2

Doggett v. Nitschke, 498 S.W.2d 339, 339 (Tex.1973) 6

In re Entergy Corp., 142 S.W.3d 316, 322 (Tex. 2004) 6

Freeport Sulphur Co. v. Aetna Life Ins. Co., 206 F.2d 5, 8 (5th Cir. 1953) 2

Greanias v. Isaiah, No. 01-04-00786-CV, 2006 WL 1550009 (Tex. App.-Houston [1st Dist.] 2006, no pet.) 5

Green v. Westgate Apostolic Church, 808 S.W.2d 547, 549 (fn 4) (Tex. App. - Austin 1991, writ den.) 3

Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 776 (Okla. 1989)) 4

Hawkins v. Friendship Missionary Baptist Church, 69 S.W.3d 756, 758-59 (Tex. App.-Houston [14th Dist.] 2002, no pet.) 8

Jones v. Wolf, 443 U.S. 595 (1979) 3, 7, 8, 9, 12, 13, 14

INDEX OF AUTHORITIES - continued

Kennedy v. Mullen, 39 S.W.2d 168, 174 (Tex. Civ. App. - Beaumont 1931, writ ref'd) . 3

Libhart v. Copeland, 949 S.W.2d 783, 793 (Tex. App. - Waco 1997, no pet.) 8

Lundine v. McKinney, 183 S.W.2d 265, 273 (Tex.Civ.App.-Eastland 1944, no writ) . . 2

Maryland & Virginia Churches v. Sharpsburg, 396 U.S. 367, 367-368 (1970) 3

NAACP v. Patterson, 357 U. S. 449, 460 (1958)) 4

Norton v. Green, 304 S.W.2d 420, 424 (Tex. Civ. App.- Waco 1957, writ ref'd, n.r.e.).. 11

Patton v. Jones, 212 S.W.3d 541 (Tex. App.-Austin 2006, pet. den.) 7, 8

Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969) 7

Presbytery Of The Covenant v. First Presbyterian Church of Paris, Inc.,
552 S.W.2d 865 (Tex. Civ. App.- Texarkana 1977, no writ). 8, 10

Schismatic and Purported Casa Linda Presbyterian Church In America v. Grace Union Presbytery, Inc., 710 S.W.2d 700, 705 (Tex. App.- Dallas 1986, writ ref'd, n.r.e.) . . . 10

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 4, 5, 11-15

State of Oklahoma v. Gasaway, 863 P.2d 1189, 1193-1194 (Okla. 1993) 2

Texas Court Reporters Certif. Bd. v. Esquire Deposition, 240 S.W.3d 79, 89
(Tex. App.-Austin 2007, no pet.) 6

Waters v. Hargest, 593 S.W.2d 364, 365 (Tex.Civ.App.---Texarkana 1979, no writ) . . 8

Westbrook v. Penley, 231S.W.3d 389 (Tex. 2007) 6, 9, 10

Constitutions and Statutes

U. S. Const. amend. I 2, 4

Tex. Gov't Code Ann. §§24.007-24.008 (West 2004) 6

Treatises, Other Secondary Sources

6 Am. Jur. 2d *"Associations And Clubs"* §26 (2009) 2

7 Corpus Juris Secundum 51 *"Associations"* §48 (2004) 4

17B Corpus Juris Secundum 56 *"Contracts"* §439 (1999) 2

ADDRESS TO COURT

Now comes Mark Brown who submits this amicus curiae brief.

STATEMENT OF FACTS

1. The association that identifies itself as "The Episcopal Church" is a multi-national, unincorporated amalgamation of over 100 non-uniform dioceses and other miscellaneous entities in the U.S., Venezuela, Colombia, Cuba, Taiwan, Europe, Haiti, Ecuador, Honduras, and the Dominican Republic (hereinafter "The Episcopal Church").

2. The Episcopal Church has no express provision in its organizational documents that prohibits dioceses from withdrawing from the association.

3. The Episcopal Diocese of Fort Worth withdrew from The Episcopal Church in 2008, placing it beyond any authority of The Episcopal Church.

SUMMARY OF THE ARGUMENT

Texas has adopted the neutral-principles approach to church property disputes. Texas courts are constitutionally authorized to follow neutral principles of law, and to enforce the express organizational documents, by which the Episcopal Diocese of Fort Worth validly withdrew from The Episcopal Church. The position of The Episcopal Church, that courts may not question the great and powerful Oz, is as hollow as the wizard's famous declaration to Dorothy, and is wholly foreign to the rule of law.

ARGUMENT

ISSUE 1 **Diocese Has Common Law Right To Withdraw From Association**

The position of the Episcopal Diocese of Fort Worth headed by Bishop Iker

(hereinafter "the Diocese") and its corporation, that they have withdrawn from The Episcopal Church, is supported by the common law and the First Amendment.

1. **Common law gives right to withdraw.** The common law of associations and contracts entitles a member to withdraw without the consent of the association.

A. **Principle of association law.** Ordinarily, an individual is free to resign from an association, subject to any financial obligations due and owing the group, and a by-law which restricts this right or makes the withdrawal subject to the organization's approval is invalid. 6 Am. Jur. 2d *"Associations And Clubs"* §26 (2009).

B. **Presumption of contract law.** Association law is grounded in contract law. The constitution and by-laws of an association are a contract between the members themselves and between the association and the individual member. *Lundine v. McKinney*, 183 S.W.2d 265, 273 (Tex.Civ.App.-Eastland 1944, no writ); *State of Oklahoma v. Gasaway*, 863 P.2d 1189, 1193-1194 (Okla. 1993).

(i) **Obligation in perpetuity must be unequivocally expressed.** A contract will not be construed to impose an obligation in perpetuity unless the intention is unequivocally expressed and the language of the contract compels such construction. 17B Corpus Juris Secundum 56 *"Contracts"* §439 (1999); *Delta Services And Equipment, Inc. v. Ryko Manufacturing Co.*, 908 F.2d 7, 9 (5th Cir. 1990); *Freeport Sulphur Co. v. Aetna Life Ins. Co.*, 206 F.2d 5, 8 (5th Cir. 1953); *Bell v. Leven*, 90 P.3d 1286, 1288 (Nev. 2004); *Bangor & Aroostook Rd. Co. v. Daigle*, 607 A.2d 533, 535 (Me. 1992).

(ii) **Continuing obligations indefinite in length are terminable at will.** Contracts that contemplate continuing performance but are indefinite in duration can be terminated at the will of either party. *Clear Lake City Water Authority v. Clear Lake Utilities Company*, 549 S.W.2d 385, 391 (Tex. 1977); *Kennedy v. Mullen*, 39 S.W.2d 168, 174 (Tex. Civ. App. - Beaumont 1931, writ ref'd).

C. **Common law presumptions can apply in church cases.** In the landmark *Jones v. Wolf*, 443 U.S. 595, 607 (1979), where a congregation in Georgia had by majority vote elected to withdraw from the Presbyterian Church in the United States, the Court held that a common law rule (the presumptive common law rule of majority representation, which generally governs religious societies) would be consistent with neutral-principles analysis under the First Amendment, would avoid questions of religious doctrine or polity, and could be applied to determine which faction controlled a local parish in a hierarchical church.

2. **Texas court, US Supreme Court recognize right to withdraw from hierarchical denomination.** Even a mere parish can withdraw from a denomination. It need only amend its by-laws. *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 549 (fn 4) (Tex. App. - Austin 1991, writ den.). In 1979 the U.S. Supreme Court recognized that the neutral-principles approach can enable a parish to withdraw from a hierarchical church, *Jones v. Wolf*, at 607, and previously had recognized the right of congregations to withdraw from a general eldership in *Maryland & Virginia Churches v. Sharpsburg*, 396

U.S. 367, 367-368 (1970).

3. The Diocese's common law right to withdraw is unrebutted.

A. **No express prohibition of withdrawal.** Plaintiffs in this case have not shown that The Episcopal Church has any *express* prohibition of diocesan withdrawal that would override the common law right to withdraw.

B. **Implied prohibition would not suffice, and would be forbidden by First Amendment.** An implied prohibition of withdrawal would be inadequate to satisfy the contract law requirement noted above that membership in perpetuity be expressed *unequivocally*. Moreover, plaintiffs cannot ask the courts to search for an *implied* prohibition of diocesan withdrawal, for that would be a "searching and therefore impermissible" inquiry into church polity. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).

4. Constitution reinforces common law right to withdraw from association. The First Amendment protects a member's right to withdraw from a religious association. 7 C.J.S. "*Associations*" §48 (2004); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 776 (Okla. 1989). Freedom of association is a fundamental constitutional right. *NAACP v. Patterson*, 357 U. S. 449, 460 (1958). It should not be surprising that First Amendment protections can apply to associations and corporations, *Citizens United v. Federal Election Commission*, No. 08–205, slip op. at 25-26 (U.S. 2010) (addressing corporation's right to free speech), since associations and corporations are aggregations

of natural persons.

5. Withdrawal removes Diocese from Episcopal reach. Having withdrawn in 2008, the Diocese, its bishop, the corporation and trustees removed themselves, their identity, and their entities' property from the ecclesiastical and hierarchical authority, if any, of The Episcopal Church. The Episcopal Church's efforts in 2009 to remove Bishop Iker and the trustees were void *ab initio*.

6. Diocesan withdrawal renders plaintiffs' case law irrelevant. In the Serbian Orthodox Church and Greek Orthodox Church cases[1] cited by plaintiffs, where the hierarchy possessed express authority to remove a bishop of a diocese or trustees of a parish, respectively, that authority was exercised against a diocese and a parish that were *still part* of the hierarchical church. The diocese and parish had not withdrawn, and they therefore remained subject to whatever degree of ecclesiastical authority the highest church judicatory possessed. In the instant case, however, the Diocese has withdrawn, making this a property dispute between independent entities rather than an "internal" church matter.

ISSUE 2 **Texas Adopted "Neutral-Principles" *Ipso Jure***

1. "Neutral-principles" automatically incorporated into Texas law. The very

---

[1] *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Greanias v. Isaiah*, No. 01-04-00786-CV, 2006 WL 1550009 (Tex. App.-Houston [1st Dist.] 2006, no pet.)

nature of Texas district court jurisdiction and its interplay with the First Amendment served to incorporate the "neutral-principles" approach into Texas law *ipso jure* (by operation of law). A ruling from the Texas high court was not needed.

A. Texas district courts have general jurisdiction and are presumed to have subject-matter jurisdiction of every case, absent a showing to the contrary.[2] (This presumption shifts the burden to plaintiffs to show that this court lacks subject-matter jurisdiction to apply neutral-principles of law in this case.)

B. District courts have exclusive jurisdiction of suits to recover real estate.[3]

C. Texas has always had "neutral principles of law" for deciding property disputes, including statutes of frauds, estoppel by deed, trust principles, and business organization law.

D. In Texas, the First Amendment's restraint on courts deciding religious questions operates as a subject-matter bar to the court's jurisdiction, *Westbrook v. Penley*, 231S.W.3d 389, 394 (fn 3) (Tex. 2007), as opposed to being a doctrine of justiciability or

---

[2] "[D]istrict courts are courts of general jurisdiction and generally have subject matter jurisdiction absent a showing to the contrary." *In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004). District courts "... may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity." *Texas Court Reporters Certif. Bd. v. Esquire Deposition*, 240 S.W.3d 79, 89 (Tex. App.-Austin 2007, no pet.), citing Tex. Gov't Code Ann. §§24.007-24.008 (West 2004).

[3] *Doggett v. Nitschke*, 498 S.W.2d 339, 339 (Tex.1973); *Coughran v. Nunez*, 133 Tex. 303, 127 S.W.2d 885, 887 (1939); *Chambers v. Pruitt*, 241 S.W.3d 679, 684 (Tex. App.-Dallas 2007, no pet.).

affirmative defense, *id.*, at 394, or judicial abstention.[4]

E. In 1969 and 1979, the U.S. Supreme Court removed the subject-matter bar to Texas courts having jurisdiction to apply neutral principles of law to church property disputes. In 1969 the U.S. Supreme Court held that the First Amendment did not bar courts from applying existing neutral principles of law in church property disputes as long as religious doctrine was not being decided. It explained in *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969):

> Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded. ... [The First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.

In 1979 the Court elaborated on neutral-principles in *Jones v. Wolf*, at 602, 604-605, where a congregation by majority vote had elected to withdraw from the monolithically hierarchical PCUS. The Court held:

> The only question presented by this case is which faction of the ... congregation ... is entitled to possess and enjoy the property... . 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 ... providing a civil forum where the ownership of church property can be determined conclusively. ... We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.

This constitutional clarification, that the First Amendment did not bar courts from

---

[4] "Ecclesiastical abstention doctrine" was the nomenclature in *Patton v. Jones*, 212 S.W.3d 541, 547 (Tex. App.-Austin 2006, pet. den.).

applying their neutral principles of law to church property disputes, freed Texas districts courts to exercise their general jurisdiction in such cases.

2. **Texas does not restrict "neutral-principles" approach to congregational churches.** Since 1977, at least five Texas courts of appeal,[5] including the Fort Worth court, have recognized the "neutral-principles" approach as part of Texas law. One case involved a hierarchical church.[6] The other cases involved congregational churches, but expressed no intent to restrict the "neutral principles" approach to such churches. (To so restrict the reach of "neutral-principles" would fundamentally alter the U.S. Supreme Court doctrine,[7] and thus one would have expected the cases to expressly note and explain

[5] *Patton v. Jones*, 212 S.W.3d 541, 547 fn 5 (Tex. App.-Austin 2006, pet. den.); *Hawkins v. Friendship Missionary Baptist Church*, 69 S.W.3d 756, 758-59 (Tex. App. - Houston [14th Dist.] 2002, no pet.); *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App. - Fort Worth 1999, no pet.); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App. - Waco 1997, no pet.); *Waters v. Hargest*, 593 S.W.2d 364, 365 (Tex.Civ.App.- Texarkana 1979, no writ); *Presbytery Of The Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865 (Tex. Civ. App.- Texarkana 1977, no writ).

[6] *Presbytery Of The Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865 (Tex. Civ. App.- Texarkana 1977, no writ).

[7] In *Jones v. Wolf*, 443 U.S. 595, 603-605 (1979), which involved an extremely hierarchical Presbyterian Church, the Court applauded the fact that the "neutral principles of law" approach applied to all churches no matter how they were organized:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate *all forms of religious organization and polity*. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, *polity*, and practice. ... The neutral-principles approach ... obviates entirely the need for an analysis or examination of ecclesiastical *polity* or

any such revisionist intent.) Three of the courts (Austin, Houston [14th Dist.], Texarkana) cited the hierarchical church case *Jones v. Wolf* and the other two courts (Fort Worth, Waco) cited the hierarchical case *Presbytery Of The Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865 (Tex. Civ. App.- Texarkana 1977, no writ).

3. **Texas Supreme Court in *Westbrook* acknowledges "neutral-principles" as part of Texas law.** *Westbrook v Penley*, 231 S.W.3d 389, 395, 398-399 (Tex. 2007) confirmed that the "neutral-principles" approach is part of Texas law, and revealed the incorporating mechanism - the operation of subject-matter jurisdiction. In reviewing a church member's suit for professional negligence against a licensed counselor who was also her minister, the *Westbrook* court declined to "expand" the neutral-principles approach beyond the church property context into a tort context. The Court explained:

D. The Neutral-Principles Exception

> The [U.S.] Supreme Court has recognized an exception to the doctrine of church autonomy when neutral principles of law may be applied to resolve disputes over ownership of church property. ... Penley urges us to apply the neutral-principles approach to her professional-negligence claim, contending her claim can be resolved under neutral tort principles without resorting to or infringing upon religious doctrine. 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. A church's decision to discipline members for conduct considered outside of the church's moral code is an inherently religious function with which civil courts should not generally interfere. ... In sum, while the elements of Penley's professional-negligence claim can be

---

doctrine in settling church property disputes. (italics added)

> defined by neutral principles without regard to religion, the application of those principles to impose civil tort liability on Westbrook would impinge upon Crossland's ability to manage its internal affairs and hinder adherence to the church disciplinary process that its constitution requires. (italics added)

Id. at 398-400. A necessary premise of that holding is that the neutral-principles approach is the law in Texas for church property disputes, but cannot be expanded to the tort context because it would interfere with free exercise of religion. If the neutral-principles approach were not already part of Texas law:

(1) the court would not have had a state doctrine to consider "expanding", since a state supreme court cannot "expand" an optional federal doctrine that has not been adopted in the state,

(2) the court's three-page discussion of neutral-principles in the tort context would have been pointless, and

(3) the court would have either refused discretionary review at the outset or held merely that the neutral-principles exception to church autonomy is no part of Texas law and thus cannot be "expanded" to the tort context.

4. South Carolina, from which Texas borrowed the the "question of identity" rule, now holds that neutral-principles, not the "question of identity" rule, apply to the Episcopal church. Texas' trilogy[8] of PCUS cases borrowed the "question of

---

[8] *Schismatic and Purported Casa Linda Presbyterian Church In America v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 705 (Tex. App.- Dallas 1986, writ ref'd, n.r.e.); *Presbytery Of The Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865,

identity" rule from PCUS cases in South Carolina and cited *Bramlett v. Young*, 93 S.E.2d 873(S.C. 1956) and *Adickes v. Adkins*, 215 S.E.2d 442 (S.C. 1975). However, in 2009 the South Carolina Supreme Court abandoned these cases and the "deference" approach that underlay them and applied "neutral principles of property, trust, and corporate law" in holding that an Episcopal parish by majority vote lawfully severed its ties with the Diocese and the Episcopal Church. *All Saints Parish Waccamaw v. The Protestant Episcopal Church in Diocese of South Carolina*, 685 S.E.2d 163 (S.C. 2009). The court found that "... the Diocese and ECUSA [The Episcopal Church] organized their affairs with All Saints Parish in a manner that makes the complete resolution of the questions presented achievable through the application of neutral principles of property, trust, and corporate law."

ISSUE 3 Even If Texas Followed "Deference" Approach, Merely Being "Hierarchical" Does Not Entitle Church To "Deference"

1. No deference without tribunals and rules. Texas follows the neutral-principles approach, as noted above. Even if Texas followed the "deference" approach, however, that approach would not automatically entitle a church to "deference" from the courts merely because the church was "hierarchical". *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-725 (1976). A church can be "hierarchical" and yet not have created appropriate hierarchical tribunals or internal rules to which a court can defer.

---

871 (Tex. Civ. App.- Texarkana 1977, no writ); *Norton v. Green*, 304 S.W.2d 420, 424 (Tex. Civ. App.- Waco 1957, writ ref'd, n.r.e.).

The *Milivojevich* opinon concluded by holding:

> [T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. *When this choice is exercised and ecclesiastical tribunals are created* to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them. (italics added)

In the instant case plaintiffs have not shown that The Episcopal Church has created any hierarchical tribunal with authority and rules to make the many purported adjudications trumpeted by plaintiffs.

2. Compulsory deference rejected. Plaintiffs argue over and over that courts must always defer to a church's decision, but the rule of "compulsory deference" was expressly rejected by the U.S. Supreme Court in *Jones v. Wolf*, at 605.

ISSUE 4 **Courts Can Review Church Organizational Documents**

Plaintiffs grievously mis-state the law when they assert "only the Church has the power to decide what these church documents mean."[9] The U.S. Supreme Court and the Texas Supreme Court have approved court review of church documents.

1. *Milivojevich* authorized court review of church organizational documents. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) did *not* hold that only the church can construe church documents.[10] In fact, that Court extensively

---

[9] Response To Petition For Writ Of Mandamus, Real Parties In Interest, at 20, 39.

[10] The Court did say "ecclesiastical decisions" are "matters of faith" and don't have to be "rational or measurable by objective criteria", and that church decisions are not

examined, quoted, and found significance in the content of the constitutions of both the Mother Church and the Diocese.[11] The Court even suggested that had the diocese's constitutional provisions been more "express" in their intent, the "courts could enforce them". *Id.*, at 723. The Court plainly allowed itself to conduct a prima facie examination of the churches' constitutional provisions and to consider them in deciding the case.

2. Jones v. Wolf **, a neutral-principles case, approved court scrutiny of church documents and polity.** In *Jones v. Wolf*, 443 U.S. 595 (1979), the Court affirmed its prior approval of courts looking at local church charters and the general church's constitution to decide property disputes, at 603, and wholeheartedly endorsed courts conducting secular scrutiny of religious documents and polity. *Id.*, at 604.

3. *Brown v. Clark* scrutinized church document for prima facie showing of authority. In *Brown v. Clark,* 102 Tex. 323, 116 S.W. 360, 364-365 (1909), the Texas high court did not accept the Cumberland General Assembly's decision on the merger issue until the *Brown* court had satisfied itself that there were express provisions giving the church judicatory (the Cumberland General Assembly) such authority. The *Brown* court examined at least ten sections of the Cumberland Church's constitution for

---

subject to "arbitrariness" review.

[11] "... Arts. 57 and 64 of the Mother Church constitution commit such questions of church polity to the final province of the Holy Assembly." *Id.*, at 721. "The constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissibly inquiry into church polity." *Id.*, at 723. *See also* the Court's lengthy quotation of excerpts from the Mother Church constitution. *Id.*, at 701, 716-717.

prima facie evidence of merger authority before concluding merger "...was clearly a question committed to the assembly by that provision of the constitution which authorized it ... ." *Id.* at 363.

ISSUE 5 **Court Cannot Search for Implied Church Authority**

For plaintiffs to assert *implied* authority - that an implied power to remove bishops or trustees, or to create new dioceses, somehow emanates from the presiding bishop's status as an "executive" for The Episcopal Church - would require a "searching inquiry" into the implied powers, if any, of the presiding bishop's office. Such a searching inquiry by this court would be prohibited by the First Amendment as a "searching and therefore impermissible inquiry into church polity." *Jones v. Wolf*, 443 U.S. 595, 605 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).

ISSUE 6 ***Milivojevich* Highly Distinguishable from Instant Case**

Plaintiffs' enormous reliance on *Milivojevich* is misplaced. The facts of that diocese's relationship with its mother church differed dramatically from the Diocese's membership in The Episcopal Church:

(i) in *Milivojevich* the **parties agreed** that the Holy Assembly and Holy Synod of the Mother Church had the power to remove and appoint the bishop of the diocese[12], and **"there [was] no question"** the diocese had no voice in appointing the bishop,[13]

---

[12] *Id.*, at 715.

[13] *Id.*, fn 12 at 722.

(ii) *Milivojevich* was an internal dispute, as opposed to the instant dispute between separate entities whose relationship has been terminated,

(iii) the court specified that *Milivojevich* was a religious, not a property, dispute,[14] and

(iv) in *Milivojevich* the Court applied the "deference" approach, not the "formal title" approach,[15] and the Court did not fully explain "neutral-principles" until three years later.

<u>Prayer</u>

Amicus curiae prays that this brief will help illuminate the issues before the Court.

Respectfully submitted,

Mark Brown SBN 03153280
Attorney & Counselor At Law
Amicus Curiae
121 S. Irving St., San Angelo, Texas 76903
Phone (325) 658-7200 Telecopier (325) 659-6432

[14] [T]his case essentially involves not a church property dispute, but a religious dispute... . *Id.*, at 709.

[15] *Id.*, fn 15, at 723.

CERTIFICATE OF SERVICE

I certify that on this day of February 17th, 2010, a copy of the foregoing **Amicus Curiae Brief of Mark Brown** has been served by telephonic document transfer to the recipients shown below at their respective current telecopier numbers:

1. Mr. Jonathan D.F. Nelson, Jonathan D.F. Nelson, P.C., 1400 W. Abram Street Arlington, Texas 76013-1705, Telecopier No. 817.861.4685

2. Ms. Kathleen Wells, Taylor, Olson, Adkins, Sralla & Elam L.L.P., 6000 Western Place, Suite 200, Fort Worth, Texas 76185-0174, Telecopier No. 817.332.4740

3. Mr. Frank Gilstrap , Ms. Anne Michels, Hill Gilstrap, PC, 1400 W. Abram Street, Arlington, TX 76013, Telecopier No. 817.861.4685 *(Counsel for Real Parties in Interest)*

4. Ms. Sandra Liser, Naman, Howell, Smith & Lee, L.L.P., 100 East 15th St., Suite 320, Fort Worth, Texas 76102, Phone: (817) 870-1996, Telecopier No. 817. 878.2573 *(Counsel for The Episcopal Church))*

5. Mr. David B. Beers, Ms. Heather H. Anderson, Goodwin Procter, LLP, 901 New York Ave., N.W., Washington, D.C. 20001, Telecopier No. 202.346.4444

6. Mr. R. David Weaver, The Weaver Law Firm, P.C., 1521 Cooper St., Suite 710, Arlington, Texas 76011, Phone (817) 460-5900, Telecopier No. 817.460.5908 (*Counsel for Intervenors*)

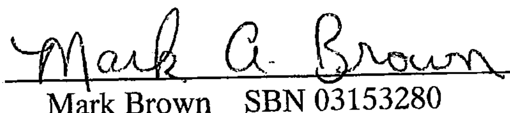
7. Mr. Scott A. Brister, Andrews Kurth LLP, 111 Congress Ave., Suite 1700, Austin, TX 78701, Telecopier No. 512.320.9292

8. Mr. Kendall M. Gray, Andrews Kurth LLP, 600 Travis, Suite 4200, Houston, TX 77002, Telecopier No. 713.220.4285

9. Mr. J. Shelby Sharpe, Sharpe Tillman & Melton, 6100 Western Place, Suite 1000, Fort Worth, Texas 76107, Telecopier No. 817.332.6818

and has been served by depositing same, enclosed in a postpaid, properly addressed wrapper, in an official depository under the care and custody of the United States Postal Service, for delivery by first class mail, addressed to the following:

10. The Honorable John P. Chupp, Judge, 141st District Court, Family Law Center 200 E. Weatherford St., Fort Worth, Texas 76196-0230.



Mark Brown SBN 03153280