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SUPREME COURT OF TEXAS
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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

RESPONSE TO CROSS-PETITIONERS' CONDITIONAL BRIEF ON THE MERITS

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the Diocese	Petitioner The Episcopal Diocese of Fort Worth
the Corporation	Petitioner The Corporation of The Episcopal Diocese of Fort Worth.
Plaintiffs	All Respondents, real or purported, regardless of how they were designated in the trial court
Defendants	All Petitioners, regardless of how they were designated in the trial court
TEC	The Episcopal Church
29CR10094	Clerk's Record, volume 29, page 10094
2SuppCR144–¶8	Second Supplemental Clerk's Record, page 144, paragraph 8
EDFW	*Episcopal Diocese of Fort Worth v. The Episcopal Church,* 422 S.W.3d 646 (Tex. 2013)
Masterson	*Masterson v. The Diocese of Northwest Tex.*, 422 S.W.3d 594 (Tex. 2013)
Salazar	*The Episcopal Church v. Salazar*, 547 S.W.3d 353 (Tex. App.—Fort Worth 2018, pet. filed)
Pet. Br.	Petitioners' Brief on the Merits filed April 10, 2019
Cond. Br.	Conditional Cross-Petitioners' Brief on the Merits filed April 10, 2019

ISSUES PRESENTED

1. Did the court of appeals err by failing to enforce the trust in the Diocese's charters benefitting Parishes and Missions in union with the Diocese's Convention as beneficiaries, by (a) disregarding the plain language of the trust terms, and (b) disregarding state law governing unincorporated associations and trusts, which requires that those trust terms be enforced?

2. Did the court of appeals correctly hold that the Dennis Canon was unenforceable?

3. Did the court of appeals correctly hold that Plaintiffs were not entitled to recover under (a) a constructive trust theory, (b) a quasi-estoppel theory, and (c) a trespass to try title theory?

4. Did the court of appeals correctly hold that TEC had no standing to sue the Corporation's individual officers?

INTRODUCTION

This case involves construction of an express trust. The written terms are the same today as when they were placed in the Diocese's original Constitution and Canons in 1982: Parishes and Missions that are "in union" with the Diocese's Convention enjoy beneficial title and use of the disputed church properties.

The most striking feature of Plaintiffs' conditional brief is that it never mentions this trust text. Defendants highlighted this plain language "in union" requirement 77 times in summary judgment papers,[1] 30 times in briefs below,[2] and 27 times in the petition stage in this Court.[3] Yet the Plaintiffs do not mention it a single time.

That is because they cannot claim to be "in union" with the Convention. The appellate record contains the list of all delegates who have attended the Convention since this suit was filed, and *none* of the

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1 *See, e.g., CR10171–72; CR12786; CR12789–90; CR12798; CR12801; CR12821; CR12826–27; CR12588–91; CR12382–84; CR13883; CR13794–98*.

2 *See, e.g., Appellees' Response Brief to Local Episcopal Parties* (filed March 4, 2016) at 7–10, 19, 31, 35; *Appellees' Response Brief to The Episcopal Church* (filed March 4, 2016) at 8–9, 25–27.

3 *See Pet. for Rev*. (filed July 27, 2018) at 9–10, 12–13, 15, 18–19; *Reply on Pet. for Rev*. (filed November 2, 2018) at 6, 9; *Response to Conditional Cross-Pet. for Rev*. (filed November 21, 2018) at 3–7, 11–12, 15.

individual Plaintiffs are listed with the congregations they claim to represent in this suit.[4] Instead, Plaintiffs ask the Court to award beneficial title to a different set of congregations using the same names but in union *only* with a different convention affiliated with TEC.

The Plaintiffs' brief rejects the neutral principles approach, even though the U.S. Supreme Court has held it constitutional, and this Court has held it applies to this case. They do so by stretching the word "ecclesiastical" to cover virtually every church property dispute, thus excluding neutral principles of Texas law *de facto*. With no support in any church charter or state law, they argue that if officers of a Texas legal entity are "disloyal" to a third party, they automatically vacate their offices and the entity automatically loses its property.

These are remarkable arguments in a nation pledged to liberty and justice for all. *Liberty* allows people to hold property however they wish, including those who form churches. *Justice* enforces their property arrangements once stated in a "legally cognizable form." Plaintiffs' conditional brief urges the Court to deny these principles.

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4 *39CR13813-24.*

The Court should reverse the court of appeals' judgment and reinstate the trial court's judgment for the reasons stated in Petitioners' Brief.

STATEMENT OF FACTS

The Court succinctly stated the facts in its 2013 opinion. *See Episcopal Diocese of Fort Worth v. The Episcopal Church*, 422 S.W.3d 646 (Tex. 2013) ("*EDFW*"). Having summarized the facts already,[5] Defendants will not repeat them here. Yet anyone reading the appellate record would be dissatisfied with the Plaintiffs' (mis)Statement of Fact in their Conditional Brief. Defendants pause briefly to point out the most glaring.[6]

The charter amendments. Plaintiffs take great pains to quote former provisions of the Diocese and Corporation charters indicating a prior affiliation with TEC.[7] But *none* of those provisions required a perpetual affiliation with TEC,[8] and *all* were amended in strict

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5 *Pet. Br.* at 3–6.

6 *See* TEX. R. APP. P. 55.3(b).

7 *Cond. Br.* at 6–10.

8 Plaintiffs' claim that the Diocese agreed to "a perpetual union," *Cond. Br.* at 5, 32, quotes an 1850 treatise by a New York lawyer (*3SuppCR281*), not a church charter or state law.

compliance with those charters and Texas law.[9] As this Court held in 2013, state law "dictates" how a legal entity can amend its charters,[10] and Plaintiffs concede the amendments did not need TEC's approval.[11]

The rump convention. Plaintiffs claim their new convention (which only they attend) was called by the Presiding Bishop pursuant to TEC's canons.[12] But the provisions they cite require an act by the Diocese's Convention before the Presiding Bishop can intervene.[13] The

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9 *17CR6106–07* (providing for amendments to Diocese's charters); *29CR10393*, *29CR10397–98* (amending Preamble, Article 1, and Article 18 of Diocese's Constitution to delete references to TEC); *17CR6060–62*, *17CR6079–85* (amending Corporation's charters to delete references to TEC).

10 *EDFW*, 422 S.W.3d at 652.

11 *2SuppCR358-59*.

12 *Cond. Br.* at 12.

13 *12CR4362* ("A Diocese without a Bishop may, *by an act of its Convention*, and in consultation with the Presiding Bishop, be placed under the provisional charge" (emphasis added)); *12CR4277–78* (allowing Presiding Bishop to *consult with the Ecclesiastical Authority* to ensure that adequate interim Episcopal Services are provided" (emphasis added)); *12CR4356*–III.12.3(e) ("No Bishop shall perform episcopal acts … without permission or a license to perform occasional public services *from the Ecclesiastical Authority of the Diocese*" (emphasis added)); *12CR4252–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*" (emphasis added)); *see also 12CR4420–IV.15* (defining "Ecclesiastical Authority" as "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*." (emphasis added)).

Diocese's Convention is governed by majority vote,[14] and the majority elects all officers,[15] who in turn must call any Convention.[16] Since Plaintiffs represent only a small minority group, they could not call a convention, could not elect its officers, and could not invite the Presiding Bishop to call one for them.[17] The official journal of Plaintiffs' "special convention" concedes it was "impossible" for them to call a convention that complied with the Diocese's charters.[18]

The "vacant" offices. Plaintiffs claim that disaffiliation rendered all offices of the Diocese and Corporation "vacant under church law."[19] But the only citation to a church charter applies to "a member in any body of the *General Convention*," not the local Convention.[20] The local charters alone "dictate" how local officers can be removed,[21] and

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14 *17CR6248* ("a majority of the aggregate votes shall be decisive").

15 *17CR6323–¶14* (Diocese officers); *17CR6250* (Standing Committee); *17CR6257* (Bishop); *17CR6278* (Corporation Trustees).

16 *17CR6244*; *17CR6263*

17 *Pet. Br.* at 20–24.

18 *20CR7028*.

19 *Cond. Br.* at 4, 12.

20 *12CR4431-32–V.4.1-2* (emphasis added).

21 *See EDFW*, 422 S.W.3d at 652; *see also* TEX. BUS. ORGS. CODE § 22.211 (providing that director of nonprofit corporation "may be removed from office

nothing in them declares their offices "vacant" under the present circumstances.

Putting a "spin" on facts is a hallmark not just of Plaintiffs' Statement of Facts but their entire brief. For example, they deny relying on the unique caselaw governing "Grand Lodges,"[22] but then do exactly what they deny by stating "default rules" derived solely from those cases.[23] They claim "well-settled Texas law" says the Diocese and congregations are "under [the Church's] government and control, and [are] bound by its orders and judgments,"[24] but fail to note this quotation comes from *Watson v. Jones*, an 1871 opinion regarding Presbyterian polity that preceded neutral principles by 108

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under any procedure provided by the certificate of formation or bylaws of the corporation."); *id*. at § 1.002(35)(A) (providing that an organization's "governing authority" are those entitled to manage its affairs under "the governing documents of the entity"); *id.* at § 252.017(b) (applying Chapter 1's definitions to unincorporated nonprofit associations); *Dist. Grand Lodge No. 25 v. Jones*, 160 S.W.2d 915, 922 (Tex. 1942) ("the constitution and by-laws of a voluntary association, whether incorporated or not, are controlling as to its internal management.").

[22] *Cond. Br.* at 34. Since 1899, a state law has declared "grand lodges" and all their affiliates to be a single corporate body "subject to the jurisdiction and control of its respective grand body." *See* TEX. BUS. ORGS. CODE, § 23.104; *see* Act of March 6, 1899, 26th Leg., R.S., ch. 138, Art. 713a, 1899 TEX. GEN. LAWS 235, 236.

[23] *Cond. Br.* at 29, 32–33.

[24] *Cond. Br.* at 29 (citing *Brown v. Clark*, 116 S.W. 360, 363 (Tex. 1909)).

years.[25] They say TEC's General Convention "passed a resolution recognizing Plaintiffs as the authorized leaders" of the Diocese,[26] citing a resolution that simply extended them a "special welcome."[27] As always under neutral principles, the Court must base its decision on what the documents say, not what either side *says* they say.

SUMMARY OF ARGUMENT

The parties agree the Diocese's charters impose a trust on all disputed property, and agree the court of appeals erred by holding otherwise. The only question is whether Plaintiffs or Defendants are the beneficiaries under this express trust. Defendants say the text itself answers that question (*part I.A*); Plaintiffs say TEC alone can answer that question (*part I.B*). Under neutral principles of Texas trust law, the text of the trust is dispositive, and requires the beneficiary congregations to be in union with the Diocese's Convention. By their own admission, Plaintiffs are not.

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25 *See* 80 U.S. 679, 726–27 (1871).

26 *Cond. Br.* at 13, 30.

27 *20CR6962*.

Texas law governing unincorporated associations provides the same answer. Texas courts avoid interference in disputes about membership in a private association, but not disputes about control of its property, which they decide by following the rules in the association's charters. According to the Diocese's charters (the only source of a valid trust), the beneficiary congregations are those in union with the Diocese's Convention (*part II*).

TEC's Dennis Canon is unenforceable here for several reasons. The court of appeals held it is was never valid, since nonowners like TEC cannot place a trust on someone else's property (*part III.A*). This Court held it was revocable under state law; the unambiguous text of this 75-year-old statute controls, not a 50-year-old stray opinion from the Fort Worth court of appeals (*part III.B*). Defendants unquestionably revoked the Dennis Canon in 1989 by amending the church charters to state that a trust interest for TEC was "expressly denied" (*part III.C*).

The courts below correctly rejected Plaintiffs' constructive trust, quasi-estoppel, and trespass to try title claims. There is no basis for a constructive trust, as there is no evidence of bad faith or

unjust enrichment, and neutral principles relies on legal principles to decide church property disputes, not equitable principles (*part IV*). There is no basis for a quasi-estoppel estoppel claim, as this is an affirmative defense rather than a cause of action (*part V*). There is no basis for a trespass to try title claim, since Plaintiffs do not have superior title under the plain language of the only valid trust (*part VI.B*). And TEC has no claim against the individual Trustees, since state law requires them to act for the sole benefit of the Corporation rather than for TEC (*part VI.C*).

ARGUMENT

In *Masterson v. The Diocese of Northwest Texas*, 422 S.W.3d 594 (Tex. 2013) ("*Masterson*"), this Court unanimously held that the property issues here must be decided under neutral principles of Texas law.[28] All parties agree legal title is held by the Corporation.[29]

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[28] *See Masterson*, 422 S.W.3d at 606; *id*. at 614 (Boyd, J., concurring) ("I join in the Court's adoption of the neutral-principles approach to deciding non-ecclesiastical issues"); *id*. at 615 (Lehrmann, J., dissenting) ("I wholeheartedly agree with the Court that church property disputes should be resolved under the neutral-principles approach approved by the Supreme Court in *Jones v. Wolf*").

[29] *See Salazar*, 547 S.W.3d at 360.

All that remains is equitable title: which beneficiaries may use the properties the Corporation holds in trust—Plaintiffs or Defendants?

I. The Trust in the local charters dictates the beneficiaries

The parties agree the Diocese's Constitution and Canons impose a trust on the disputed properties.[30] Plaintiffs agree it governs the two "exemplar" deeds addressed by the court of appeals, including a deed that had stated different terms.[31] Defendants have shown the trust in the charters modified and replaced any trusts stated in older deeds.[32]

But the court of appeals disagreed with both Plaintiffs and Defendants, holding the Diocese's charters did not create a trust because (1) they did not identify the beneficiaries by name; (2) the summary judgment evidence did not show for whom each property was "initially acquired"; and (3) the Diocese could not impose a trust on property it did not own.[33] Plaintiffs and Defendants agree this was error: (1) Texas trust law requires beneficiaries, but not their names; (2)

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30 *Pet. Br.* at 12–15*; Cond. Br.* at 17–22.

31 *Cond. Br.* at 19–21.

32 *Pet. Br.* at 33–39.

33 *See Salazar*, 547 S.W.3d at 435 n.104; 437.

nobody asserted as a summary judgment ground that property was not "initially acquired" for one of the congregations claiming it; and (3) every possible interest holder agreed to the 1984 Judgment, thereby ratifying the trust imposed in the Diocese's charters.[34]

The only question is whether Plaintiffs or Defendants are the beneficiaries. Defendants say the text itself answers that question (*I.A*); Plaintiffs say TEC alone can answer that question (*II.B*).

A. The trust text: Defendants are the beneficiaries

The delegates to the Fort Worth Primary Convention in 1982 put an express trust in the Diocese's Constitution *and* in its Canons: property "acquired for the use of a particular parish or mission" was to be held "in trust for the use and benefit of such parish or mission."[35] That trust is still in place today, exactly as it was in 2008 when this dispute arose:[36]

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34 *Pet. Br.* at 30–39*; Cond. Br.* at 19–21.

35 *17CR6254*; *17CR6279*–§18.2 ("Real property acquired by the Corporation for the use of a particular Parish, Mission or Diocesan School shall be held by the Corporation in trust for the use and benefit of such Parish, Mission or Diocesan School.").

36 2008 (*17CR6254, 17CR6279*) (emphasis added); 2006 (*17CR6175, 17CR6201*); 1982 (*17CR6102, 17CR612*); *see also Pet. Br.* at 12–14.

ARTICLE 14

TITLE TO CHURCH PROPERTY

Corporation of the Episcopal Diocese of Fort Worth 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***.

This trust text was unique to the Fort Worth Diocese; the Dallas Diocese did not state a similar trust either before or after the 1982 division.[37]

But the Dallas and Fort Worth charters defined a "parish" or "mission" in exactly the same way. Since 1895, the Dallas Constitution has defined a "parish" or "mission" in that Diocese as one that is "in union with and entitled to representation in the Convention of the Diocese."[38] The 1982 Fort Worth charters followed suit.[39] Both dioceses define a Parish or Mission as the unincorporated entity ***in union*** with

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[37] *Compare 17CR6102* (1982 Fort Worth Art. 13) *with 33CR11805* (1956 Dallas Art. 13) *and 33CR11819* (1982 Dallas Art. 13).

[38] *33CR11790* (1895 art. IX (referring to the Convention as "the Council")); *33CR11804* (1956 art. IX); *33CR11818* (1982 art. IX).

[39] 1982 (*17CR6091* ("Every Parish and Mission in union with the Convention shall be entitled to Lay Delegates"); *see also* 2008 (*17CR6242* (same); 2006 (*17CR6163* (same)).

the ***local diocese's Convention***:[40]

> **CANON 31**
>
> **CORPORATIONS**
>
> Sec. 31.1 Any Parish, Mission or Diocesan Institution which desires to organize a corporation to use in connection with the administration of its affairs may do so upon compliance with the following requirements.
>
> a. If organized by a Parish or Mission, any such corporation shall be merely an adjunct or instrumentality of such Parish or Mission; ***the Parish or Mission itself, being the body in union with Convention***, shall not be incorporated.

In their conditional brief, Plaintiffs never mention this text a single time, and never claim they are "in union" with the Convention. Nor can they: the Convention's registry of attending delegates is in the record, and *none* of the individual Plaintiffs are listed with the Parishes or Missions they claim to represent in this suit.[41]

Instead, Plaintiffs actively replace this text with surrogates. For example, eight times they claim the Diocese's charters place equitable title in the Diocese "and its Congregations,"[42] but never include a record citation since the charters never designate the trust beneficiaries

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40 *33CR11829* (1982 Dallas Canon 36.1(a)); *17CR6144* (1982 Fort Worth Canon 34.1(a)); *see also 17CR6294* (2008 Fort Worth Canon 34.1(a)).

41 *39CR13813-24.*

42 *Cond. Br.* at 2, 21, 22, 23, 26, 27, 28, 30.

in those terms. Similarly, Plaintiffs claim the properties are reserved for "subordinate entities within the hierarchy of The Episcopal Church,"[43] or "Episcopalians,"[44] or "the continuing Diocese and Congregations,"[45] again without citing any trust text that so states. The plain text says the beneficiaries are congregations "in union" with the local Convention and who send delegates to it. As a matter of law, Plaintiffs do not meet that definition.

This connection between convention attendance and affiliation is traditional in TEC. Attendance at TEC's General Convention is limited to dioceses "in union" with TEC.[46] And when the individual Plaintiffs say TEC "recognized" them as the Diocese leaders, their proof is that they attended its General Convention.[47] In churches governed by a convention (as both the Diocese and TEC are), it is dispositive that Plaintiffs have attended TEC's convention but *not* the Diocese's.

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43 *Id.* at 2, 26.

44 *Id.* at 27.

45 *Id.* at 36.

46 *12CR4251*–§4, *12CR4254*–§1.

47 *Cond. Br.* at 13 (stating TEC "recognized and seated only Plaintiffs … at the General Convention's last two meetings in 2009 and 2012") (citing *31CR11257*); *18CR6442* (stating that Plaintiffs "were credentialed" by TEC and attended its General Convention in July 2009).

B. TEC's opinion: Plaintiffs are the beneficiaries

Instead of letting the text of the Diocese's charters define the beneficiaries, Plaintiffs say the beneficiaries should be decided by three other means. Each would patently violate the neutral principles methodology this Court unanimously adopted in *Masterson*.

This case involves an unincorporated association, not a corporation as in *Masterson*. But neutral principles "respects and enforces" the structure and property rights chosen by religious entities "in the same manner as those structures and rights are respected and enforced for other persons and entities."[48] Whether an association is incorporated or unincorporated does not "in any way affect its right to make its own rules."[49] In either case, it cannot be subjected to "the dictates of persons not identified in [the] governing documents as having the right to make, control, or override [its] decisions."[50] That is why the terms in the Diocese's charters are dispositive, not the three other sources on which Plaintiffs rely.

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48 *Masterson*, 422 S.W.3d at 606.

49 *Manning v. San Antonio Club*, 63 Tex. 166, 170, 1884 WL 20384 *4 (Tex. 1884); *see also* TEX. BUS. ORGS. CODE § 1.002(35)(A)

50 *Masterson*, 422 S.W.3d at 613.

1. … based on documents that aren't legally cognizable

In 1979, the U.S. Supreme Court held in *Jones v. Wolf* that after considering the language of deeds, church charters, and state laws, civil courts are "bound to give effect to the result indicated by the parties, *provided it is embodied in some legally cognizable form*."[51] For a Texas trust holding real property, a "legally cognizable form" must be signed by the settlor and comply with the statute of frauds.[52] Plaintiffs don't have that.

Instead, Plaintiffs ask the Court to name them as beneficiaries based on a "consistent intent, stretching back to the 19th century, to secure the property for use by *Episcopalians*."[53] For support they cite an 1895 TEC canon, a reference to an undated Dallas canon in a pleading,

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51 *Jones*, 443 U.S. at 606 (emphasis added).

52 *See* TEX. PROP. CODE § 112.004 ("A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent."); *see also* Texas Trust Act § 7 (formerly TEX. REV. CIV. STAT. art. 7425b-7), Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 TEX. GEN. LAWS 232, 234 ("[A] trust in relation to or consisting of real property shall be invalid, unless created, established, or declared … [b]y a written instrument subscribed by the trustor or by his agent thereunto duly authorized by writing").

53 *Cond. Br.* at 27.

and an affidavit in a 1992 lawsuit.[54] Anyone who reads these will see that none actually support Plaintiffs' claims.[55] But even if they did, the written trust in the Diocese's charters cannot be altered by canons of a different organization or affidavits in a different lawsuit: "The terms of a trust prevail."[56] External canons and expert opinions are not "legally cognizable forms" for amending the terms of an express trust.

As they did six years ago, Plaintiffs again argue that unless state courts dismiss the trust text and defer to TEC's views, the First Amendment and free exercise of religion would be violated.[57] The U.S. Supreme Court has rejected this claim in the strongest possible terms: "*Nothing could be further from the truth.*"[58] Whether a local or national church should win "is not foreordained" by state law; *the parties* can

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54 *Id*.

55 *See 31CR11267* (1895 predecessor to current TEC canon barring consecration of buildings not affiliated with TEC); *17CR6353* (general accession to TEC charters); *12CR4522* (reference to Dallas charters placing title in Dallas Bishop); *20CR7101* (affidavit that departing parish was not entitled to property because it was no longer "*in union with the Diocese*" (emphasis added)).

56 TEX. PROP. CODE § 111.0035(b); *see also Rachal v. Reitz*, 403 S.W.3d 840, 844 (Tex. 2013) ("Texas courts endeavor to enforce trusts according to the settlor's intent, which we divine from the four corners of unambiguous trusts.").

57 *Cond. Br.* at 2, 22, 26, 34, 58–59.

58 *Jones v. Wolf*, 443 U.S. at 606 (emphasis added).

specify who should win in their charters and deeds, and courts give effect to those documents if they are "embodied in some legally cognizable form."[59]

After *Jones v. Wolf*, TEC and the Diocese had 30 years to arrange their property affairs as they wished before this dispute arose. The Diocese did so by placing a local trust in its charters for its congregations. TEC did so by adopting the Dennis Canon, choosing text that anyone familiar with Texas law could see was revocable.[60] The Dennis Canon could have been made irrevocable simply by saying so, a requirement that does not offend the Constitution because "[t]he burden involved in taking such steps will be minimal."[61] Since TEC never took this minimal step, it cannot insist that this Court ignore Texas trust law to do so now.

2. … based on representatives who weren't legally elected

In any church property dispute, both sides claim to be the congregation entitled to the property. In *Jones v. Wolf*, the U.S.

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59 *Id*.

60 *See* TEX. PROP. CODE § 112.051(a); *see also* Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 TEX. GEN. LAWS 232, 234.

61 *Jones v. Wolf*, 443 U.S. at 606.

Supreme Court held that the "true congregation" was *not* an ecclesiastical question beyond the competence of courts.[62] The Court noted that there was nothing "ecclesiastical" about majority rule:

- "Majority rule is generally employed in the governance of religious societies";
- "the majority faction generally can be identified without resolving any question of religious doctrine"; and
- majority rule can always be overcome by church charters providing "that the identity of the local church is to be established in some other way."[63]

In this case, the Diocese's charters provide that (1) a majority vote of the Convention can amend its Constitution,[64] Canons,[65] and Convention rules;[66] (2) a majority vote of the Convention elects the officers of the Diocese and the Corporation;[67] and (3) a majority vote of the Convention can admit, suspend, or restore a Parish or Mission to

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62 See *id.* at 607.

63 *Id*. at 607–08.

64 *17CR6259* (requiring majority vote at two successive Conventions).

65 *17CR6258*.

66 *17CR6325.*

67 *17CR6323*–¶*14* ("The election of all officers shall be by a concurrent majority of both orders voting"); *see also 17CR6250* (Standing Committee); *17CR6257* (Bishop); *17CR6278* (Corporation Trustees).

union with (and representation in) the Convention.[68] Plaintiffs represented only a small minority of the Convention, so they did not have the votes sufficient to bar any of these.

Plaintiffs applaud the court of appeals for deferring to TEC's "prerogative" to decide the legal representatives of the Diocese and Corporation.[69] But that holding directly violated *Jones v. Wolf* and this Court's opinion in *Masterson*, which held that TEC could not dictate the officers of a parish corporation "absent corporate documents and law so providing."[70] *Masterson* involved a corporation, but the law in Texas governing legal entities is the same for *all* entities: persons "entitled to manage and direct the affairs of an entity" are those designated by "the governing documents of the entity."[71] For the Diocese and the Corporation, that excludes the Plaintiffs and TEC.

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68 *17CR6239* (authorizing Convention to create, admit, suspend, and dissolve Parish or Mission, and deeming those admitted to be "in union" with the Convention); *17CR6248* (providing that majority vote of Convention "shall be decisive"); *17CR6284*–¶*22.4* (requiring new parishes to apply to Convention for admission).

69 *Cond. Br.* at 15 (citing 547 S.W.3d at 435–37, 442-43).

70 422 S.W.3d at 609–10.

71 *See* TEX. BUS. ORGS. CODE § 1.002(35)(A) (defining "Governing authority" for legal entities as those persons "who are entitled to manage and direct the affairs of an entity under this code and *the governing documents of the entity*" (emphasis

Plaintiffs nevertheless claim TEC can disqualify Diocese and Corporation officers at will, pointing to requirements that officers must be lay persons "in good standing of a Parish or Mission" in the Diocese, or "members of the clergy canonically resident" in the Diocese.[72] But that begs the question posed by *Masterson*: what specific, lawful provisions in the church charters allow a splinter group (Plaintiffs) or outside entity (TEC) to make that decision?[73] Plaintiffs cannot point to any provision allowing them to disqualify the Diocese or Corporation officers for *any* reason.

Instead, canonical residence and good standing are determined locally. The Diocese's charters authorize the Bishop to determine

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added)); *see also id.* at § 252.017(b) (applying that definition to unincorporated nonprofit associations); *see also 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.").

[72] *Cond. Br.* at 9, 15, 24, 33; *see also 17CR6278*–§17.2 (Diocese provision regarding for Corporation Trustees); *17CR6080*–§3 (Corporation bylaw regarding Trustees); *17CR6242* (Diocese provision regarding Convention delegates); *CR6246* (Diocese provision regarding its officers).

[73] *Masterson*, 422 S.W.3d at 609–10. Even under the deference approach, civil courts "utilize neutral principles of law to determine where the religious organization has placed authority to make decisions about church property." *EDFW*, 422 S.W.3d at 650 (citing *Jones v. Wolf*, 443 U.S. at 603–04).

which clergy are canonically resident in the Diocese.[74] The minister of each Parish or Mission determines which lay persons should be added or removed from the list of lay persons "in good standing."[75] Similarly, the Corporation's bylaws allow removal of a board member only by a majority vote of its board,[76] and Texas law makes that procedure mandatory.[77] The court of appeals erred by holding it was TEC's "province" or "prerogative" to disqualify corporate officers,[78] since nothing in the church charters, corporate bylaws, or state law authorizes it to do so.[79] Nor do TEC's rules declare a local office

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74 *17CR6262*–§1.5 ("Immediately before the meeting of each Convention, the Bishop, or in case of his death or inability to act, the Standing Committee, shall prepare a list of the Clergy canonically resident in the Diocese."). Removal of resident clergy is also handled locally by representatives elected by majority vote of the local Convention (*17CR6302*–§III.A.1.b).

75 *17CR6262*–§1.1 (confirmed adult communicants in good standing determined from Annual Parochial Report); *17CR6289*–26.4(a) (parish Rector or Vicar to report number of confirmed communicants in good standing); *17CR6290* (requiring Annual Parochial Report from each Parish and Mission); *17CR6291*–§28.1 (every minister to record communicants in a Parish Register).

76 *17CR6081*–II.10.

77 *See* TEX. BUS. ORGS. CODE § 22.212 (formerly TEX. REV. CIV. STAT. art. 1396-2.16) (providing for removal of directors "under any procedure provided by the certificate of formation or bylaws of the corporation.").

78 *Salazar*, 547 S.W.3d at 441–43.

79 TEC's charters expressly recognize that local priests and deacons can only be removed at the diocese level (*12CR4385*). A nine-member court of TEC can remove a bishop from a diocese (*12CR4393*). Although that never took place here,

"vacant" if a parishioner loses "good standing." The only provision Plaintiffs cite applies to offices in a *TEC* body, not a local one.[80]

Plaintiffs have no power under the Corporation's or Diocese's charters to remove or replace officers, and calling it "disqualification" does not change that fact. They claim there is "nothing irrational" about a rule that you vacate your office if you quit a larger organization.[81] But there is nothing ***legal*** about it either, if the prerequisites of office do not require affiliation with a larger organization.

If the law were otherwise, corporations would be run by courts and minority groups, not their own boards. And those who do business with them would never know whether contracts with them are valid, since TEC could always retroactively declare the signatory "disqualified."

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it could not remove the Bishop from the Corporation's board, since the Corporation's articles *and* bylaws grant the Board "sole authority" to decide any disputes about the qualifications of the Bishop as its chair (*17CR6062; 17CR6079–II(2)*, and the Board has clearly recognized Bishop Iker as such (*30CR10532–¶10; 30CR10583-612* (2005–14 minutes of meetings); *2SuppCR144–¶8*).

80 *Cond. Br.* at 4, 33; *12CR4431–32* (addressing vacancies "in any body of the General Convention").

81 *Cond. Br.* at 33.

3. … based on redefining "ecclesiastical" to cover everything

The trust text is not all that Plaintiffs seek to rewrite. Though they profess grudging obedience to this Court's 2013 opinions, they ask the Court to define "ecclesiastical issues" so broadly those opinions would be a dead letter.

Plaintiffs say the Court held in 2013 that Texas courts can decide "non-ecclesiastical questions like contract formation," but must defer to TEC on "ecclesiastical questions like polity and control of church entities."[82] But that is not what the Court wrote. *Masterson* and *EDFW* both involved "control of church entities," yet this Court did not defer to TEC in either case. *Jones v. Wolf* involved "control of church entities," yet the U.S. Supreme Court did not defer to church authorities there either. The key question is control of church entities *for what*? Neutral principles courts do not decide who controls preaching, membership, or convention attendance; but they *must* decide who controls property according to secular principles of state law.

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82 *Cond. Br.* at 13.

This Court recognized that the line between ecclesiastical and non-ecclesiastical issues "will not always be distinct,"[83] but included numerous examples in *EDFW* and *Masterson* to provide guidance. Those opinions must be read together, and each read as a whole.[84] The following list includes every example the Court gave in both opinions, and unlike Plaintiffs' carefully crafted clips or summaries, it shows the present case does not fall on the ecclesiastical side of the table:

Ecclesiastical Issues	Non-ecclesiastical Issues
"who may be members of [religious] entities and whether to remove a bishop or pastor" (*EDFW at 650*)	"property ownership and whether trusts exist" (*EDFW at 650*)
"who is or can be a member in good standing of TEC or a diocese" (*EDFW at 652*)	"how [a] corporation can be operated, including determining the terms of office of corporate directors, the circumstances under which articles and bylaws can be amended, and the effect of the amendments" (*EDFW at 652*)
"matters concerning 'theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.'" (*Masterson at 601*)	"issues such as land titles, trusts, and corporate formation, governance, and dissolution, even when religious entities are involved." (*Masterson at 606*)

83 422 S.W.3d at 606.

84 *See, e.g., Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 356 (Tex. 1993); *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 652 (Tex. 1988)

Ecclesiastical Issues	Non-ecclesiastical Issues
"what happens to the relationship between a local congregation that is part of a hierarchical religious organization and the higher organization when members of the local congregation vote to disassociate" (*Masterson at 607*)	But what happens to the property is not, unless the congregation's affairs have been ordered so that ecclesiastical decisions effectively determine the property issue" (*Masterson at 607*)
"Whether Bishop Ohl was authorized to form a parish and recognize its membership, whether he could or did authorize that parish to establish a vestry, and whether he could or did properly recognize members of the vestry" (*Masterson at 608*)	"whether the corporation's bylaws were complied with when the vote occurred to disassociate the corporation from the Diocese and TEC" (*Masterson at 608*)
"which worshipers are loyal to the Diocese and TEC, whether those worshipers constituted a parish, and whether a parish properly established a vestry" (*Masterson at 608*)	"whether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws" (*Masterson at 609*)
"which faction of believers was recognized by and was the 'true' church loyal to the Diocese and TEC" (*Masterson at 610*)	"whether the vote by the parish members to amend the bylaws and articles of incorporation was valid under Texas law" (*Masterson at 610*)

These statements by the Court clarify that the dividing line is generally between membership issues (ecclesiastical) and property issues (non-ecclesiastical). This line has a long history in Texas, one much older than neutral principles itself (*see part II*).

Plaintiffs claim the courts cannot decide this case without deciding whether a diocese can secede from TEC.[85] But that is not issue for two reasons. First, it is irrelevant since all the documents a civil court reviews (deeds, church charters, state laws) never even refer to it. Second, it is moot; "a case is moot when the court's action on the merits cannot affect the parties' rights or interests."[86] Whether a diocese can secede from TEC does not affect the parties' property rights, since the trust in the Diocese's charters does not require affiliation with TEC. Nor does it affect the parties' interests or future relations, since each side has made it clear they no longer wish to be affiliated with the other.

While most church schisms involve doctrine to some degree, this Court recognized over a century ago that civil courts have jurisdiction to decide who keeps the property, so long as they do so without entanglement in doctrinal questions.[87] As the Supreme Court held in *Jones v. Wolf*, deference to religious authorities is required only if a

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85 *Cond. Br.* at 22–27.

86 *Hays St. Bridge Restoration Group v. City of San Antonio*, 570 S.W.3d 697, 702–03 (Tex. 2019) (quoting *City of Krum v. Rice*, 543 S.W.3d 747, 749 (Tex. 2017)).

87 *See Brown v. Clark*, 116 S.W. 360 (Tex. 1909).

document "incorporates religious concepts," so that "interpretation of the instruments of ownership would require the civil court to resolve a religious controversy."[88] That is not required here.

The dividing line between membership and property disputes distinguishes this case from *Milivojevich*, in which the "basic dispute" was control of the Eastern Orthodox Diocese for the United States of America and Canada.[89] Control of property was merely an "incidental effect" of deciding who ran the church itself.[90] By contrast, the parties here arranged affairs so a Texas unincorporated association controlled local property, and a majority of the association's Convention elected officers of the Diocese and the Corporation. Plaintiffs' tiny minority had no right to control after they lost fair and square according to the Convention rules.

In defense of the trial court, summary judgment was not granted for Defendants based on a "philosophical preference for local self-

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88 *Jones v. Wolf,* 443 U.S. at 604.

89 *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 698 (1976).

90 *See id.* at 720. The church charters in *Milivojevich* gave full control of the property-holding corporation to the head of the U.S. church, and the Mother Church had exclusive authority to appoint or remove bishops. *See id.* at 699, 709.

determination."[91] Plaintiffs' counsel introduced the state of New York into the record, arguing TEC "is not bureaucrats of New York"[92] despite its office location there.[93] The trial court simply responded by asking why it was unconstitutional for the Diocese to establish a trust benefitting local congregations rather than TEC.[94] This was not a personal preference; he was simply stating what the trust says.

The delegates to every Diocese Convention since 2008 have known the individual Defendants are not affiliated with TEC, and have re-elected them repeatedly on that basis.[95] Indeed, the *overwhelming* majority of the Convention has *insisted* that its officers have no affiliation with TEC. Any issue of disqualification has been settled decisively in Defendants' favor by the only organizations with authority under the church charters to make that decision.

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91 *Cond. Br.* at 14.

92 *8RR27–28*.

93 *12CR4245*.

94 *8RR92-93* (THE COURT: "It seems like the best interest of the Fort Worth Diocese would be that the Fort Worth Diocese have their own property…. And that's what they've done. MR. LEATHERBURY: No. THE COURT: That's what they've done. Yes, they have. They have said that there are no trusts that benefit the people in New York.").

95 *29CR10441–92*.

II. Texas associations law follows the trust text

Texas law governing unincorporated associations is set out in Defendants' merits brief: courts will enforce what an association's charters say.[96] The trust stated in the Diocese's charters require affiliation with its local Convention, from which Plaintiffs admit they have withdrawn.

Plaintiffs claim that Texas associations law requires the opposite result. Their argument is not based on any church charter or state law. As TEC's Presiding Bishop admitted at her deposition, ***nothing*** in TEC's charters addresses withdrawal of a diocese, much less prohibits it.[97] In a church with a long history of secession from its previous affiliations,[98] one would expect that if that were no longer the rule, some rule would say so. While Plaintiffs point to old treatises and experts' opinions barring withdrawal from TEC, the actual church charters of TEC are silent on the issue.

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96 *Pet. Br.* at 19–24.

97 *2SuppCR602* ("Q. Are you aware of any Canon that addresses a diocese within the United States withdrawing? A. No.").

98 *See Salazar*, 547 S.W.3d at 361 (noting TEC's withdrawal from the Church of England, and the Church of England's withdrawal from Rome).

Instead, Plaintiffs claim state law allows unincorporaed associations to "interpret" their charters to mean something they don't actually say, and prohibits civil courts from interfering in such issues of internal management.[99] Based on these faulty premises, they argue that TEC interprets its charters to prohibit disaffiliation, so the Defendants' acts were all "null and void" and the courts must defer to that opinion.[100]

This is merely the deference approach in disguise. Under deference, it does not matter what the property documents or church charters say; hierarchical churches can "interpret" property rules however they wish and command obedience from the courts. As then-Justice William Rehnquist objected in dissent in *Milivojevich*, the deference approach to church property disputes avoids a Free Exercise problem by creating an Establishment Clause problem:

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99 *Cond. Br.* at 28–34. Plaintiffs concede there is an exception that interpretation cannot be legislation or violate public policy. *Cond. Br.* at 31. But asthe Amarillo court of appeals recently noted, no court has ever found that exception met. *See Haedge v. Cent. Texas Cattlemen's Ass'n*, 2016 WL 5929596, at *5 n.7 (Tex. App.—Amarillo Oct. 11, 2016, pet. denied).

100 *Cond. Br.* at 28–37.

> Such blind deference, however, is counseled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.[101]

Under neutral principles, courts defer to what the property documents say, not to a hierarchical church's interpretation of them.

Virtually every step in the Plaintiffs' argument on Texas associations law is a misstep. First, it contradicts the rules of the neutral principles doctrine, which do not take a *laissez faire* approach to legal texts by deferring to the interpretation of one side. Neutral principles is constitutional because it requires that "a civil court must take special care to scrutinize the document[s] in purely secular terms," and courts cannot rely on religious precepts in deciding whether a "document indicates that the parties have intended to create a trust."[102] That is precisely what Plaintiffs want the courts to do.

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101 *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting).

102 *Jones v. Wolf*, 443 U.S. at 604.

Second, Plaintiffs tender no competent evidence from any association's charters. They rely instead on "church precedents" like:

- an affidavit by TEC's "testifying agent" for litigation;[103]
- affidavits by bishops Plaintiffs elected after the division;[104]
- letters from TEC's Presiding Bishop and President of its House of Deputies;[105] and
- treatises and commentaries from the 1800s.[106]

None of these are "legally cognizable" in real property disputes under Texas law; relying on them would simply defer to TEC and its agents. Texas trust and property law have no exception allowing associations to "interpret" documents to create a trust that isn't there.

Third, Plaintiffs confuse whose charters are being interpreted. The trust at issue here was created by the Diocese, not TEC. Plaintiffs' theory never explains why one association (TEC) has leeway to "interpret" the charters of another (the Diocese). The two are not even governed by the same state law: the Diocese is a Texas association

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103 *Cond. Br.* at 4, 26, 30, 32 (citing *31CR11256–60*).

104 *Id.* at 26 (*citing 18CR6415–22, 18CR6440–46*).

105 *Id.* at 26, 33 (citing *18CR6435–37*).

106 *Id.* at 5, 26, 30, 32 (citing *3SuppCR281–87*).

governed by Texas law;[107] but TEC is not because it was formed in 1789, years before Texas even existed.[108]

Fourth, Plaintiffs are ambivalent about why disaffiliation means they get the property:

- they suggest it might be because corporate officers who vote to disaffiliate automatically vacate their offices[109] (though no law or rule says so[110]), but don't explain why that allows an unelected minority group to replace them. "[S]tate law dictates" how organizational officers can be removed,[111] and it does not allow splinter groups to do so.[112]
- they suggest it might be because a diocese cannot withdraw as an "intact entity," but don't explain how this splits apart a legal entity but leaves its property behind.[113] This unprecedented rule would stand the state's alter ego doctrine on its head, disregarding a legal entity's separate existence *not* because it disregarded corporate formalities or operated as a sham, but because it took actions a third party did not want it to take.

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107 *Pet. Br.* at 20.

108 *See* TEX. BUS. ORGS. CODE § 1.103 ("[T]he law governing the entity's formation and internal affairs is the law of the entity's jurisdiction of formation.").

109 *Cond. Br.* at 33.

110 The rule Plaintiffs cite applies to "any body of the General Convention," not the Diocese or Corporation. *12CR4431–32*.

111 *Masterson*, 422 S.W.3d at 613; *EDFW*, 422 S.W.3d at 652.

112 *See De Zavala v. Daughters of the Republic of Texas*, 124 S.W. 160, 166 (Tex. Civ. App.—Galveston 1909, writ ref'd) (holding majority faction of legal entity had custody of the Alamo).

113 *Cond. Br.* at 23.

- or they suggest it might be because no explanation is necessary; hierarchical churches simply need not give one.

This kind of vague and unbridled rule has nothing to do with secular state law; it results from a deference doctrine in which no rules apply.

These problems all arise because Plaintiffs' initial premises are faulty: they misstate Texas associations law. For at least 135 years, Texas courts have drawn a dividing line between membership issues in an association (in which they don't interfere) and property issues (in which they do). In 1884, this Court refused to entertain a suit regarding expulsion from membership in a literary society.[114] But in 1944, the Court in a writ-refused case *did* entertain a lawsuit between competing sets of officers claiming title to an association's property: "where civil or property rights are involved … judicial redress may be secured."[115] Many Texas cases over the years have recognized this line between membership disputes (nonjusticiable) and property disputes (justiciable).[116] As the Court will note, that is the same line the Court

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114 *Manning v. San Antonio Club*, 63 Tex. 166, 170, 1884 WL 20384 *4 (Tex. 1884).

115 *Jones v. Maples*, 184 S.W.2d 844, 847 (Tex. App.—Eastland 1944, writ ref'd).

116 *See, e.g., Dallas County Med. Soc'y v. Ubinas Brache*, 68 S.W.3d 31, 42 (Tex. App.—Dallas 2001, pet. denied) (declining jurisdiction of suit for membership in

drew in 2013 between ecclesiastical issues (nonjusticiable) and non-ecclesiastical issues (justiciable).

Plaintiffs deny there is any such line, claiming associations have free rein to "interpret" their own charters even when valuable property is involved.[117] But the two cases they cite for support both involved membership, not property: one holding that membership in a country club was nonjusticiable,[118] and the other that a horse's exclusion from a quarter-horse registry was nonjusticiable.[119] Since the issue in those two cases was membership-related, the courts deferred to the association. But this suit involves control of over $100 million in

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private medical association); *Harden v. Colonial Country Club*, 634 S.W.2d 56, 59 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (declining jurisdiction of suit for membership in country club); *Owens Entm't Club v. Owens Cmty. Imp. Club*, 466 S.W.2d 70, 73 (Tex. Civ. App.—Eastland 1971, no writ) (affirming jurisdiction and judgment in suit to declare ownership of building); *Lundine v. McKinney*, 183 S.W.2d 265, 273 (Tex. Civ. App.—Eastland 1944, no writ) (affirming jurisdiction of suit for control of local labor union's property).

117 *Cond. Br.* at 35.

118 *Id.* (citing *Harden*, 634 S.W.2d at 59).

119 *Id.* (citing *Burge v. Am. Quarter Horse Ass'n*, 782 S.W.2d 353, 355–56 (Tex. App.—Amarillo 1990, no writ). It is a mystery how Plaintiffs could claim support from *Jones v. Maples*, as they have never even alleged much less proved their slate of local officials were "regularly elected." 184 S.W.2d 844, 848 (Tex. App.—Eastland 1944, writ ref'd).

real property.[120] The examples the Court listed in its 2013 opinions fit neatly in the state's jurisprudence of associations, deferring to TEC on membership in dioceses, conventions, or clergy, but not deferring to TEC on issues regarding title and use of property.

A lot of valuable property is held by unincorporated associations like the NFL,[121] or the NCAA.[122] Texas courts would not allow those associations to dispose of property by deferring to their "private interpretation," and should not do so here either. Plaintiffs' argument is simply one more effort to reverse what the Court held in 2013:

- under Plaintiffs' theory, TEC would have leeway to "interpret" the Dennis Canon as irrevocable, though this Court held it was not under Texas law;[123]
- under Plaintiffs' theory, TEC could "interpret" its *own* charters to prevent Defendants from amending the *Diocese's* charters, though this Court held that TEC could not;[124] and
- under Plaintiffs' theory, TEC could "interpret" its charters to allow removal of the Diocese and Corporation officers,

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120 *30CR10532*– §11.

121 *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 187 (2010) (noting NFL is unincorporated association).

122 *See National Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 87 (Tex. 1999) (noting NCAA is an unincorporated association).

123 *Masterson*, 422 S.W.3d at 613; *EDFW*, 422 S.W.3d at 654.

124 *Masterson*, *id*. at 612–13.

> though this Court held it could not do so "absent corporate documents and law so providing."[125]

Once again, Plaintiffs' version of Texas law is simply an excuse for reimposing the deference approach.

III. The Dennis Canon is unenforceable

Both this Court in 2013 and the court of appeals in 2018 rejected Plaintiffs' claim that the Dennis Canon was enforceable under Texas law, each for different reasons. Both are right; either is sufficient to reject any trust under the Dennis Canon.

A. The Dennis Canon was never valid as to these properties

As the court of appeals stated: "Texas law requires a writing signed by the *settlor* or the settlor's agent to create a trust with regard to real property."[126] Since TEC never owned any of the disputed properties, it could not "establish a trust for itself simply by decreeing that it is the beneficiary."[127]

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125 *Masterson*, *id*. at 609–10.

126 *See Salazar*, 547 S.W.3d at 424 (citing TEX. PROP. CODE § 112.004 and many other authorities).

127 *Id*.

Plaintiffs spend an extraordinary number of words trying to prove otherwise. It is true that every "conceivably relevant" owner agreed in the 1984 Judgment that the disputed properties would be held in trust as stated in the Diocese's charters. But Plaintiffs go much further, arguing that by acceding to TEC's charters and an accompanying Resolution in 1982,[128] Defendants agreed the property was held in perpetual trust for TEC under the Dennis Canon.[129]

This argument violates the canon of construction that specific provisions govern over general ones in case of a conflict.[130] Or as this Court rephrased the rule in 2012: "To harmonize conflicting provisions, we treat narrow provisions as exceptions to general provisions."[131] Scalia and Garner explain why: "the specific provision

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128 *17CR6090*; *17CR6354.*

129 *Cond. Br.* at 37– 44.

130 *See Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183 (Thomson/West 2012) (hereinafter "READING LAW") ("General/Specific Canon: If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*)").

131 *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 814 (Tex. 2012).

comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."[132]

There is no question which provision here is more specific. Defendants rely on provisions specifically creating a trust for local property; Plaintiffs rely on a general accession to all of TEC's rules. The Dennis Canon occupies less than a quarter-page of the more than 200-pages in TEC's charters.[133] The record of the 1982 Primary Convention and the 1984 Judgment never mention the Dennis Canon, or any trust other than the one stated in the Diocese's charters. The specific references to the Diocese's trust unquestionably "come closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."[134]

There is also no question the two provisions conflict: this lawsuit is proof. The trust in the Diocese's charters benefits congregations in union with the local Convention; the trust in the Dennis Canon

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132 SCALIA & GARNER, READING LAW at 183.

133 *12CR4289*–I.7.4; *see generally 12CR4244–476*.

134 SCALIA & GARNER, READING LAW at 183.

benefits TEC.[135] The two trusts cannot be harmonized, since only Defendants' congregations are affiliated with the local Convention, and only Plaintiffs' congregations are affiliated with TEC.

The same rules of construction apply to trusts as to other writings.[136] Because the trusts in the Diocese's charters and the Dennis Canon conflict, the specific provision stating the former governs rather than the general accession to hundreds of TEC rules.[137]

B. The Dennis Canon was neither contractual nor irrevocable

This Court in 2013 held the Dennis Canon was revocable under Texas law: "even assuming a trust was created by the Dennis Canon

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135 *12CR4289*–I.7.4.

136 *Lee v. Rogers Agency*, 517 S.W.3d 137, 145 (Tex. App.—Texarkana 2016, pet. denied) ("We interpret trust instruments the same way as we interpret wills, contracts, and other legal documents."); *Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 802 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (same); *Lesikar v. Moon*, 237 S.W.3d 361, 366 (Tex. App.–Houston [14th Dist.] 2007, pet. denied) (same).

137 In addition, "accession" is a term borrowed from the law of treaties, whereby a party joins a treaty already signed by others. *See Accession*, BLACK'S LAW DICTIONARY 16 (10th ed. 2014). A joining party may qualify its accession to a treaty unless reservations are expressly forbidden or an opposing party promptly objects. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312. TEC did not require an unqualified accession from new dioceses until January 1, 1983 (*1CR79*–¶*35*); since the Fort Worth Diocese was admitted the day before (*7CR2078*), it qualified its accession with a specific trust governing its property. TEC received the Diocese's Constitution and Canons for review, and after raising no objection but certified admission on that basis (*7CR2290*). Thus, while the accession clause consented to TEC's charters generally, the Diocese's qualified accession did not consent to the Dennis Canon.

…, we disagree that the Canon's terms make the trust expressly irrevocable as Texas law requires."[138] Undeterred by this mandate or the law of the case, Plaintiffs insist the Dennis Canon is irrevocable.

Their argument rests entirely on a 1970 opinion from the Fort Worth court of appeals holding that the state law passed in 1943, which declared all trusts revocable unless they expressly state otherwise,[139] did not apply to "contractual trusts." In *Shellberg v. Shellberg*, five settlors signed a trust agreement stating the trust could be revoked by three or more of them.[140] When one of them tried to revoke the trust, pointing out that it did not expressly say it was irrevocable, the Fort Worth court could have easily rejected the claim because (as the court noted) it was never revoked by three settlors as required.[141] But instead the court, citing only an Oklahoma case, declared the statute "inapplicable to a trust that is created by contract

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138 *See Masterson*, 422 S.W.3d at 613*; EDFW*, 422 S.W.3d at 653 (both citing TEX. PROP. CODE § 112.051).

139 *See* Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 41, 1943 TEX. GEN. LAWS 232, 246 (currently TEX. PROP. CODE § 112.051(a)).

140 459 S.W.2d 465, 466-67 (Tex. App.—Fort Worth 1970, writ ref'd w.o.m.).

141 *Id*. at 468.

and based on a valuable consideration."[142] *Shellberg* has never been followed by any court in Texas or elsewhere. Not one.

Plaintiffs claim "trust lawyers" and "scholars" support *Shellberg*, but courts "must take statutes as they find them,"[143] not as scholars would prefer them. When a state law says trusts are revocable unless they expressly state otherwise, attorneys and clients naturally assume that means what it says. They will be badly misled if an ex-spouse or prodigal child can render a family trust *irrevocable* simply by alleging it was granted in return for "valuable consideration"—which in probate cases can include housework,[144] yard work,[145] or a promise not to file for divorce.[146] Plaintiffs' contractual-trust theory would thwart state policy by making trusts irrevocable when state law says they are not.

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142 *Id*. at 470.

143 *Ferreira v. Butler*, 2019 WL 1575592, at *5 (Tex. Apr. 12, 2019) (quoting *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920)).

144 *See Jordan v. Abney*, 78 S.W. 486, 488-490 (Tex. 1904) (holding promise to provide household duties and "affectionate, loving service" was consideration); *cf. Hooks v. Bridgewater*, 229 S.W. 1114, 1118-19 (Tex. 1921) (finding agreement between for personal services was consideration).

145 *See Wright v. Donaubauer*, 154 S.W.2d 637, 640 (Tex. 1941) (holding yard work, home repairs, and housework was consideration).

146 *See Hamilton v. Hamilton*, 280 S.W.2d 588, 594 (Tex. 1955) (finding wife's promise not to sue for divorce constituted consideration).

Plaintiffs claim the Legislature is "presumed by law" to have adopted *Shellberg*'s unique interpretation by recodifying it as part of the Property Code in 1983.[147] But the prior-construction canon applies only to "an *ambiguous* statute that has been interpreted by a *court of last resort* or given a longstanding construction by a proper administrative officer."[148] This statute is not ambiguous, and the Fort Worth court stands alone in disregarding its plain terms. Presuming that the Legislature intended to adopt a single court opinion that would wipe out a statute's plain terms is presuming too much, especially when the court simply reached the right result for the wrong reason.

C. The Dennis Canon was emphatically revoked

Finally, Plaintiffs argue that even if the Dennis Canon trust was revocable, it was never revoked. This is preposterous.

The Diocese amended Canon 18.4 in 1989 to state:

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147 *Cond. Br.* at 48–49.

148 *Texas Dept. of Protective & Regulatory Services v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004) (emphasis added); *see* SCALIA AND GARNER, READING LAW, at 322 (stating that rule applies when "a word or phrase has been *authoritatively* interpreted by the *highest court* in a jurisdiction, or has been given a *uniform interpretation by inferior courts* or the responsible agency" (emphasis added)).

> Property held by the Corporation for the use of a Parish, Mission or Diocesan School belongs beneficially to such Parish, Mission or Diocesan School only. ***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***.[149]

Since Plaintiffs claim the Diocese impliedly ratified the Dennis Canon by the general accession in its charters, amending the same charters to deny any such implication was the proper means of revoking it.

Plaintiffs claim this 1989 amendment was "void on its face" because it violated an article in the Diocese's Constitution permitting amended canons "not inconsistent" with "the Constitution and Canons of the General Convention."[150] But agreeing to a revocable trust is not inconsistent with revoking it; that is exactly what revocable trusts allow. In any event, the Diocese's Convention repealed the rule requiring consistency with TEC's charters in 2008,[151] so the Dennis Canon was revoked both then and long before.

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149 *17CR6202*–§18.4; *see 29CR10199, 29CR10205* (1989 revocation by Diocese).

150 *Cond. Br.* at 50 (citing *17CR6107*).

151 2007: *29CR10319–21, 29CR10331* (*"Amendment F"*); 2008: *29CR10393, 29CR10398* (*"Amendment D"*).

IV. There is no basis for a constructive trust

Both the trial court and court of appeals agreed Plaintiffs were not entitled to a constructive trust on these church properties.[152] To impose a constructive trust requires both a breach of fiduciary duty and unjust enrichment.[153] Broken promises are not enough;[154] there must be proof of "bad faith and unconscientious acts."[155] Despite the Plaintiffs' bitter accusations, this is not that kind of case.

First, Plaintiffs have no proof of bad faith or unconscientious acts. This case arose not from disloyalty but from higher loyalties. The Diocese's decision to disaffiliate was not taken for venal purposes, but due to TEC's "departure from the biblical and historic faith."[156] While it is tempting to ask whether TEC's leaders might be the ones who departed furthest from their oaths to "believe the Holy Scriptures of the Old and New Testaments to be the Word of God," and to conform to TEC's "doctrine, discipline, and worship" as traditionally

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152 *39CR10425*–¶8; *Salazar*, 547 S.W.3d at 443–45.

153 *See id*.

154 *See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 596 (Tex. 1992); *Thigpen v. Locke*, 363 S.W.2d 247, 252 (Tex. 1962).

155 *Kinsel v. Lindsey*, 526 S.W.3d 411, 425 (Tex. 2017).

156 *29CR10299*.

understood.[157] But this Court is not the proper forum for that debate; jurisdiction lies in a higher court according to deeds listed in a different book.[158] The author of the court of appeals' opinion made many mistakes, but properly decided that imposing a constructive trust in this dispute was beyond judicial jurisdiction.

Second, the dispute here is based in law, not equity. Neutral principles requires a civil court to base its decision in state law, while a constructive trust "is an equitable, court-created remedy."[159] Neutral principles authorizes civil courts to decide who *owns* property legally, not who *should* own it in equity. And in any event, the equities are hardly all on TEC's side. Whether parishioners intended their offerings to benefit TEC or the Diocese cannot be determined from this record; what *can* be determined is that for 20 years everyone had notice that contributions to property were held in trust for congregations in union with the Convention, and "expressly denied"

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157 *12CR4256.*

158 *See* REV. 20:12.

159 *Kinsel v. Lindsey*, 526 S.W.3d 411, 425 (Tex. 2017).

any interest for TEC.[160] Plaintiffs cite TEC's Fiduciary Responsibility Canon, but it cuts both ways, requiring officers to well and faithfully perform duties according to the charters "of this Church *and* of the Diocese in which the office is being exercised."[161] Plaintiffs claim the Defendants breached the Canon by leaving TEC, yet Plaintiffs breached the same Canon by abandoning the Diocese and its Convention.[162]

Third, Defendants have not been unjustly enriched.[163] This complaint is especially galling, as the only parties that stand to be unjustly enriched under the court of appeals' judgment are the Plaintiffs. TEC paid for none of the properties here.[164] The local Plaintiffs didn't pay for most of them either, since *no* Plaintiffs represent 50 of the 60 churches on which they seek to impose a

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160 *17CR6202*–§18.4

161 *12CR4304-05*–I.17.8 (emphasis added).

162 *29CR10170*– §9.

163 *Cond. Br.* at 52–53.

164 *30CR10530-31*–¶¶5 & 7.

constructive trust.[165] Plaintiffs had an opportunity to leave amicably with the properties they paid for,[166] but responded by threatening Bishop Iker with arrest.[167] Plaintiffs also complain of "missing" funds that were moved out of state, a temporary step taken solely because Plaintiffs' counsel threatened Frost Bank with liability unless it froze all the Diocese's accounts.[168]

Plaintiffs argue that Texas courts use constructive trusts when church property has been "wrongfully taken" due to "improper conduct."[169] But in the only case they cite, the pastor sold the church sanctuary and kept the money.[170] No one can credibly argue this case is similar to that. Plaintiffs argue that a constructive trust can apply where express trusts fail.[171] But the Dennis Canon did not fail, it was

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165 *2SuppCR38*–Table A (listing individual plaintiffs to represent only 12 of the 62 congregations).

166 *30CR10533*–*¶13*; *17CR6295*–*§32.3*.

167 *1SuppCR241* ("We understand that you have indicated to our Rector that you intend to make an 'annual visit' to our church in February, 2009. Please understand that you will not be permitted to do so and you will be considered a trespasser if you attempt it.").

168 *33CR11774*; *33CR11776–79*.

169 *Cond. Br.* at 52.

170 *See Libhart v. Copeland*, 949 S.W.2d 783 (Tex. App.—Waco 1997, no writ).

171 *Cond Br.* at 52.

revoked; and there is nothing unconscionable about revoking a revocable trust. Plaintiffs also point out that the Virginia Supreme Court imposed a constructive trust on a church property in 2013.[172] But it did so based on the Dennis Canon,[173] since the Virginia law presuming all trusts are revocable did not apply to trusts created before 2006.[174] There is simply no case for a constructive trust.

V. There is no basis for quasi-estoppel

Texas does not recognize a cause of action for "quasi-estoppel." This is instead an affirmative defense that can apply if it would be unconscionable for a plaintiff to recover after taking a contrary position in an earlier transaction and gaining a benefit from it.[175]

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172 *See Falls Church v. Protestant Episcopal Church*, 740 S.E.2d 530, 542 (Va. 2013).

173 *See id*.

174 *See* VA. CODE § 64.2-751(A) ("Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before July 1, 2006.").

175 *See Willacy County Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 48 n.13 (Tex. 2018) (referring to quasi-estoppel as an affirmative defense); *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 774 (Tex. 2017) (same); *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 553 (Tex. 2002) (same).

Quasi-estoppel cannot be invoked against the Defendants because they are defendants; they seek nothing from the Plaintiffs except a declaratory judgment to be left alone (and attorneys' fee because they weren't).[176] Plaintiffs try to employ quasi-estoppel as a sword rather than a shield. But quasi-estoppel is "defensive in nature and operate[s] to prevent the loss of existing rights"; it does not "operate to create liability where it does not otherwise exist."[177] Since Plaintiffs have no property interest in any legally cognizable form, they cannot use estoppel to create a right they never had.

Plaintiffs claim it would be unconscionable for the Diocese to gain "property worth millions" by impliedly acknowledging the Dennis Canon and then denying it. But there is nothing unconscionable about revoking a revocable trust; that is what "revocable" means. Nor can it be unconscionable for the people who bought, built, and maintained these churches to refuse to turn them over to people who did not.

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176 *10CR3477–81*; *10CR3496–98*; *6CR1699*.

177 *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988); *see also In re Weekley Homes, L.P.*, 180 S.W.3d 127, 133 (Tex. 2005) ("Promissory estoppel does not create liability where none otherwise exists").

Finally, while the Diocese and Corporation took control of extensive trust property under the 1984 Judgment and the Diocese's charters, they did not get it from the Plaintiffs. It all came from offerings by local members and benefactors within the Diocese or its predecessor in Dallas.[178] And since the Diocese sent over $2.7 million directly to TEC between 1983 and 2009,[179] the record reflects that TEC received more benefits from the Diocese than the other way around. There is nothing unconscionable about enforcing the trust terms that everyone agreed to when the Diocese's charters were adopted in 1982.

VI. There is no basis for the tag-along claims

A. Plaintiffs' preservation claims

Plaintiffs do not ask the Court to revisit its 2013 opinions. Since their complaints regarding those opinions are raised for preservation purpose only,[180] no response from Defendants is required.

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178 *See 30CR10530-31*–¶¶5 & 7.

179 *36CR12836*–38. Defendants did not receive "six grants" from TEC, *Cond. Br.* at 57; the Diocese actually *contributed* funds to that TEC program, which were then distributed directly or indirectly to third-party shelters or relief providers. *36CR12837*–¶5; *36CR4526–7.*

180 *Cond. Br.* at 58–59.

B. Plaintiffs' trespass to try title claims

Plaintiffs' argument on trespass to try title consists of four sentences, all conclusory and simply incorporating previous arguments.[181] Defendants respond in kind by adopting all their previous arguments in response thereto.[182]

C. TEC's standing to sue the individual Trustees

The court of appeals held TEC had no standing to assert claims against the Corporation's individual Trustees, since nothing in the corporate charters prevented the Trustees from taking the actions they did.[183] Plaintiffs' claim that was error because TEC could assert claims based on duties the individual Trustees owed to TEC.[184] There is no evidence in the 15,000-page record showing any such duties.

TEC has never had any involvement in the Corporation. It did not create it, contribute to it, of pay for any property it holds, and cannot control it, or elect or remove any of its officers.[185] The

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181 *Cond. Br.* at 59.

182 *See* TEX. R. APP. P. 9.7.

183 *Salazar*, 547 S.W.3d at 442.

184 *Cond. Br.* at 60.

185 *30CR10531*–¶7.

individual Trustees owe no duty to TEC, because no contracts, confidential relationships, oaths, or fiduciary commitments exist between the two.[186] Texas corporate law requires the Trustees to act in the "best interest" of the Corporation,[187] and for its "sole benefit."[188] Imposing duties on them to TEC would violate state law, requiring them to limit use of these properties to a tiny minority group too small to use or sustain them.[189]

Standing may be challenged by motion for summary judgment,[190] and must be granted absent a genuine of material fact.[191] The court below correctly concluded there was none here.

CONCLUSION

This case comes down to a question of law: can an unincorporated association or nonprofit corporation be hijacked by a minority group or a foreign entity contrary to the charters of both

186 *Id*.

187 *See* TEX. REV. CIV. STAT. art. 1396–2.28(A) (currently TEX. BUS. ORGS. CODE § 22.221).

188 *See Ritchie v. Rupe*, 443 S.W. 3d 856, 868 (Tex. 2014).

189 *See 30CR10532*–¶11.

190 *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000).

191 TEX. R. CIV. P. 166a(c).

organizations? Like many other cases, this one requires that courts apply the law to documents as they find them, not as prejudgment or appeals from a large institution would revise them. Applying law to facts is sometimes tedious, but it is what judges swear to do. Deferring to hierarchical church authorities might be quicker and easier, but then courts would be of little use. This Court has rejected that approach.

The neutral principles approach protects courts from charges of bias or prejudice in cases both large and small by requiring them to follow rules laid down before the dispute arose. They do not decide whether a hierarchical church or local worshipers should always win or always lose; at any time before a dispute erupts, the parties can state in legally cognizable form who will retain the church property.[192] Here, the church charters show that is the Defendants. The only valid trust benefitted congregations in union with the local Convention, and nobody objected to that rule for 25 years before this dispute arose. The Court should reject Plaintiffs' invitation to change it now.

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192 *Jones v. Wolf*, 443 U.S. 595, 606 (1979).

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CERTIFICATE OF COMPLIANCE

I certify that this Response to Cross- Petitioners' Conditional Brief on the Merits contains 11,396 words as calculated per Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

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