NO. 11-0332

IN THE SUPREME COURT OF TEXAS

ROBERT MASTERSON, et al.,
Petitioners

v.

THE DIOCESE OF NORTHWEST TEXAS, et al.,
Respondents.

On Petition for Review from the
Third Court of Appeals at Austin, Texas
No. 03-10-900015-CV

Brief of Amicus Curiae The Episcopal Diocese of Forth Worth

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STATEMENT OF INTEREST

This Amicus Curiae Brief in support of Petitioners Robert Masterson, *et al*. is filed on behalf of The Episcopal Diocese of Fort Worth ("the Fort Worth Diocese"), which has paid all associated expenses and fees. The Diocese is an appellant in a direct appeal, *The Episcopal Diocese of Fort Worth v. The Episcopal Church*, Cause No. 11-0265, of which this Court noted probable jurisdiction on January 6, 2012. The Fort Worth Diocese's opponents in that case have already filed amicus briefs in this case: The Episcopal Church ("TEC") on February 16th, and the law firm representing TEC's allies in the direct appeal ("Certain Amici") on February 21st.

The Diocese urges the Court to adopt the Neutral Principles approach in church property disputes. In the words of the United States Supreme Court, it "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Jones v. Wolf*, 443 U.S. 595, 603 (1979). TEC is trying to reverse the unanimous national trend toward application of the Neutral Principles approach for a single reason — it cannot control church property it never owned or paid for if neutral legal rules are applied.

INTRODUCTION

There is much in the Third Court of Appeals' opinion with which the Fort Worth Diocese agrees. It agrees that in *Jones v. Wolf* ("*Wolf*") the U.S. Supreme Court allowed states to select either the Neutral Principles or the Deference approach, while at the same time noting "the advantages inherent in the neutral-principles approach."[1] It agrees that this Court's last church-property case, *Brown v. Clark* in 1909, is consistent with either approach.[2] And it agrees that because this Court has not addressed the issue since *Wolf*, "[t]he Texas Supreme Court has not expressly approved a particular method to adjudicate church-property disputes."[3]

The Fort Worth Diocese also agrees with the Third Court's implied holding that, in the unlikely event this Court rejects Neutral Principles (becoming the first state supreme court to do so in 20 years), under the Deference approach Texas courts should defer to the decisions of the bishop of the diocese. As the Third Court stated: "Because the trial court did not err in deferring to decisions ***of the Bishop or the Diocese*** in light of the hierarchical nature of the Episcopal Church,

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1 335 S.W.3d at 886, 887 (Tex. App.—Austin 2011, pet. granted).

2 *See id*. at 888 (noting that *Brown* deferred to general church on whether union between two denominations was proper, but only after analyzing the church's charters, so that "the analysis that the court conducted in *Brown* is consistent with the neutral-principles approach.").

3 *Id*. at 887.

we overrule the Former Parish Leaders' second issue."[4] As shown below, almost every Episcopalian property dispute for decades has involved only a local parish, bishop, or diocese; until the last three years, TEC never was a party and never claimed any interest.

But the Fort Worth Diocese disagrees with the Third Court of Appeals that courts can switch constitutional approaches on an *ad hoc* basis depending on which side a judge might prefer to favor.[5] *See part I*. Nor can they switch constitutional rules by declaring that a property dispute is really an "identity" dispute.[6] *See part II*. Nor was the Third Court correct that TEC's rules impose a valid trust under Texas law.[7] *See part III*. And the Third Court erred to the extent it declared TEC at the top of a hierarchical church.[8] *See part IV*.

From its early days, this Court has said that the rules of voluntary

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[4] *Id*. at 890 (emphasis added); *see also id*. at 892 ("According to Bishop Ohl's affidavit, he has, in his capacity as 'Bishop and highest Ecclesiastical authority in the Episcopal Diocese of Northwest Texas, ... recognize[d] the new vestry as the true and proper representatives of the Episcopal Church of the Good Shepherd.' Because we are bound by this pronouncement, we hold that the summary-judgment evidence conclusively establishes that the church property at issue is subject to possession and control by the Continuing Parish Leaders of Good Shepherd and the parishioners aligned with them.").

[5] *See id*. at 888 (holding that "the trial court was not required to adopt any particular approach in resolving the instant dispute").

[6] *Id*. at 891 ("Thus, the essence of the dispute before us can be seen as an inherently ecclesiastical question: which parishioners--the loyal Episcopalian minority or the breakaway Anglican majority--represent Good Shepherd, in whose name the disputed property is held?").

[7] *See id*. at 890 ("[T]he *Watson* rule would require that the trial court and this Court defer to ecclesiastical decisions made within the Episcopal Church hierarchy.").

[8] *See id*. at 889 ("These governing documents make clear that church property is held in trust for the Episcopal Church and may be subject to Good Shepherd's authority only so long as Good Shepherd remains a part of and subject to the Episcopal Church and its Constitution and Canons.").

associations are binding on all , and none can ask the courts to ignore those rules:

> When, therefore, persons enter into organizations for purposes of social intercourse or pleasure or amusement, and lay down rules for their government, these must form the measure of their rights in the premises, and ***it is vain to appeal to the Bill of Rights against their own agreements***.[9]

On precisely this ground, the Court should adopt the Neutral Principles approach, and not allow TEC to avoid its own rules.

I. TEXAS SHOULD ADOPT THE NEUTRAL PRINCIPLES APPROACH

The choice between Neutral Principles and Deference comes down to whether Texas will decide church property suits by: (A) the same rules governing all property suits, or (B) special rules applicable only to churches. The former was approved by the U.S. Supreme Court in 1979 in *Jones v. Wolf* ("*Wolf*"),[10] and is usually called the Neutral Principles approach. The latter was approved by the U.S. Supreme Court in 1871 in *Watson v. Jones* ("*Watson*"),[11] and is usually called the Deference approach.

As TEC's allies admit in their briefs, the two approaches produce a different outcome in only one case: when a church wants to impose a result that

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[9] *Manning v. San Antonio Club*, 63 Tex. 166, 1884 WL 20384, at *5 (Tex. 1884) (emphasis added).

[10] 443 U.S. 595, 604 (1979) ("We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.").

[11] 80 U.S. 679, 725, 727 (1871).

is not in its rules.[12]

A. Almost Every State Has Adopted Neutral Principles

"A majority of states that have decided on a test following *Jones* have chosen the 'neutral principles' approach for addressing intra-church disputes."[13] Indeed, "majority" is an understatement — in the last 20 years ***every*** state supreme court that decided a church property dispute has employed the Neutral Principles approach.[14]

A table showing the current status of the law in the 49 states (omitting Texas) and the District of Columbia is attached as Tab A of the Appendix. As shown in that table, state courts have overwhelmingly chosen to employ Neutral Principles in church property disputes:

- 36 have adopted Neutral Principles;
- 1 has rejected it (West Virginia);

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[12] *See, e.g.*, TEC Amicus Brief p. 9 ("But in those instances where the hierarchical church does not have [rules ensuring that local church property will remain in the denomination], the outcomes under the two approaches may differ."); Certain Amici Amicus Brief p. 15 ("The Neutral Principles approach asks churches to take certain affirmative steps, such as adding language to their national or local charters or to local deeds, to indicate in advance how civil courts should resolve such disputes. These additional steps are not required under Deference." (citation omitted)).

[13] Benton C. Martin, *Comment, Protecting Preachers From Prejudice*, 59 EMORY L.J. 1297, 1322 (2010); *see also* Andrew Soukup, *Note*, *Reformulating Church Autonomy*, 82 NOTRE DAME L. REV. 1679, 1692 n.105 (2007) ("Following *Jones*, most states decided to adopt, in church property disputes, the neutral principles approach ….").

[14] *See* the following states listed in Tab B: Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Maine, Maryland, Mississippi, Montana, Nebraska, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, Utah, and Wisconsin.

- 3 are unclear or in flux; and
- 10 have yet to address the issue since *Wolf*.

It cannot be a coincidence that courts in red states, blue states, and purple states have uniformly moved toward Neutral Principles.

B. Texas Courts Have Been Using Neutral Principles

It is too late to argue that Texas courts must continue applying the Deference approach under principles of *stare decisis*. To the contrary, for many years they have been applying Neutral Principles of law. As the Fort Worth Court of Appeals expressly stated in 1999 and again in 2006:

> Notwithstanding the First Amendment's proscription, courts do have jurisdiction to review matters involving civil, contract, or property rights even though they stem from a church controversy. ***Neutral principles of law must be applied*** to decide such matters so that courts do not violate the constitutional prohibition against government established religion.[15]

The Second Court of Appeals was not alone; the First, Fifth, Tenth, and Fourteenth Courts of Appeals have held that Texas courts follow the Neutral Principles approach.[16]

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[15] *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.); *Smith v. N. Tex. Dist. Council of Assemblies of God & House of Grace*, No. 2-05-425-CV, 2006 WL 3438077, at *2 (Tex. App.—Fort Worth Nov. 30, 2006, no pet.) ("[C]ourts do have jurisdiction to review matters involving civil, contract, or property rights …. Neutral principles of law must be applied to decide such matters ….").

[16] *See Chen v. Tseng*, No. 01-02-01005-CV, 2004 WL 35989, at *6 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.) (applying Neutral Principles and church's by-laws to determine rights to property); *Hawkins v. Friendship Missionary Baptist Church*, 69 S.W.3d 756, 759 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (recognizing Neutral Principles but not apply it as church had no governing documents to construe); *Cherry Valley Church of Christ/Clemons v. Foster*, No. 05-00-10798-CV, 2002 WL 10545, at *3 (Tex.

The Certain Amici brief ignores these more recent cases and cites only older ones, like a 1986 Dallas case applying Deference.[17] What the brief fails to mention is that by 2002 the Dallas court recognized that Texas courts followed Neutral Principles.[18] Texas appellate courts, like virtually all other courts across the nation, have not found *stare decisis* a barrier once the Neutral Principles approach was approved and became widely accepted.

C. Advantages Of Neutral Principles

In *Wolf*, the U.S. Supreme Court noted several advantages to the Neutral Principles approach, all of which this Court should consider.

Familiarity. Under Neutral Principles, church property suits are decided by construing the deeds, the national and local church charters (e.g., constitution, by-laws, or articles of incorporation), and state statutes.[19] As the *Wolf* Court noted, this approach "relies exclusively on objective, well-established concepts of

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App.—Dallas Jan. 4, 2002, no pet.) (not designated for publication) (recognizing but not applying Neutral Principles as church's articles and by-laws provided for officer selection "according to the custom and practices of the church"); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (applying Neutral Principles to determine entitlement to proceeds from sale of church building).

[17] *See Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 704-05 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

[18] *See Cherry Valley Church*, 2002 WL 10545 at *3 n.1 ("Ordinarily, we would construe the articles of incorporation of a Texas non-profit corporation according to the body of neutral legal principles that governs Texas corporations generally.").

[19] *See Jones v. Wolf*, 443 U.S. 595, 603 (1979).

trust and property law familiar to lawyers and judges."[20]

Implied Consent. The Deference approach is based on implied consent to a church's government.[21] But it is hard to imply consent when a church violates its own rules. Yet the only time Neutral Principles and Deference lead to different results is when a church has done precisely that. Courts have always been uneasy with the Deference rule in such circumstances; as the late Chief Justice Rehnquist put it: "If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness."[22]

Flexibility. The *Wolf* Court noted that Neutral Principles is "flexible," allowing parties the freedom to arrange affairs as they wish, thus taking advantage of "the peculiar genius of private-law systems."[23] Under Neutral Principles "the outcome of a church property dispute is not foreordained" by legal rules other than those a church has picked.[24] By contrast, under the Deference approach all outcomes are foreordained: the local majority always

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[20] *Id.*

[21] *See Watson v. Jones*, 80 U.S. 679, 729 (1871) ("All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.").

[22] *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 727 (1976) (Rehnquist, J., dissenting). The two dissenters in *Milivojevich* were in the majority in *Wolf*.

[23] *Wolf*, 443 U.S. at 603.

[24] *Id.* at 603, 606.

wins in congregational churches, and the hierarchy always wins in all the rest.

Less Entanglement. Neutral Principles involves less entanglement in matters of religious doctrine.[25] The Deference rule requires civil courts to decide what form of government a church practices, and which officer, committee, or convention has final authority to decide property questions.[26] By contrast, under Neutral Principles courts do not decide whether a church is hierarchical or congregational, they simply apply the same rules to all of them.[27]

Diversity. The Deference rule assumes churches come in only two types: hierarchical and congregational. Perhaps that reflected the American religious scene in 1871 — but not today. What if a church chooses to be hierarchical at the regional level but congregational at the national level? What if a church chooses to be hierarchical in some respects but congregational with respect to property? The Deference rule prohibits such choices.

Simplicity. Neutral Principles is easier to apply. Churches typically have only a handful of rules regarding property. But deciding a church's "polity" (its

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25 *Id*. at 605.

26 *Id*. at 604.

27 *See All Saints Parish Waccamaw v. Protestant Epis. Church in Diocese of S.C.*, 685 S.E.2d 163, 172 (S.C. 2009) ("Church disputes that are resolved under the neutral principles of law approach do not turn on the single question of whether a church is congregational or hierarchical. Rather, the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes.").

"total governmental organization as based on its goals and policies")[28] requires review of much more.

The Texas Constitution. Texas may have a special problem with the Deference rule under the state Constitution. Article I, section 6 of the Texas Bill of Rights provides that "no preference shall ever be given by law to any religious society or mode of worship." The Deference rule obviously treats hierarchical and congregational churches differently; Neutral Principles treats them the same. If the U.S. Constitution mandated Deference, it would not matter what the Texas Constitution said. But now that either is an option, one must ask whether Deference gives a preference to one form of church organization over another.

D. *Hosanna-Tabor* has nothing to do with property

The TEC-allied amicus briefs argue that the U.S. Supreme Court's recent decision in *Hosanna-Tabor*[29] indicates its "continued approval of the 'identity' approach for resolving church property disputes."[30] But that was no church property dispute. *Hosanna-Tabor* involved whether a Lutheran church could fire a teacher, not whether she could take her property with her.

Clearly, there are some "inherently religious function[s] with which civil

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[28] BLACK'S LAW DICTIONARY 1277 (9th ed. 2009).

[29] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012).

[30] TEC Amicus Brief p. 6; *see also* Certain Amici Brief p. 2.

courts should not generally interfere."[31] But property deeds are not "religious functions." Permitting parties to re-cast property disputes as religious issues would frustrate one of the main obligations the *Wolf* court sought to encourage, namely "the obligation of States, religious organizations, and individuals to structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."[32]

II. THERE IS NO THIRD "IDENTITY" APPROACH

The Supreme Court in *Wolf* identified two approaches to church property disputes: Neutral Principles and Deference.[33] Yet TEC and its allies consistently rely on something called the "identity" approach.[34] Why? Because they cannot win under the other two.

The Deference approach requires an ***official church court decision***. The *Wolf* court said the approach requires courts to "defer to the resolution of an authoritative tribunal."[35] This Court in *Brown v. Clark* said it means courts are

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[31] *See Jones v. Wolf*, 443 U.S. 595, 604 (1979); *Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007).

[32] *See Wolf*, 443 U.S. at 604 (quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969)).

[33] *Id.* at 597 ("The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.").

[34] *See, e.g.*, Respondents' Brief on the Merits, pp. 12, 16, 19; TEC Amicus Brief pp. 2-12.

[35] *Wolf*, 443 U.S. at 597.

"bound by the orders and judgments of the courts of the church."[36] TEC and its allies point to no such tribunals or judgments in their briefs — because there are none.

Instead, they re-define the Deference approach as requiring that church property goes "to those persons remaining loyal to the hierarchical denomination."[37] Loyalty requires no notice, hearing, proof, or judgment; it requires only the *ipse dixit* of whoever hired the lawyers to file suit in the church's name. As Respondents concede in their brief, the rule they rely on does not reflect "deference to any case-specific decision"; it is simply a rule that under no circumstances can property ever leave any established church but the Baptists.[38]

This is actually a third approach — the so-called "English approach" — an approach the Supreme Court has expressly rejected. The English approach uses "a theory of implied trust, whereby the property of a local church affiliated with a hierarchical church organization was deemed to be held in trust for the general church, provided the general church had not substantially abandoned the tenets

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[36] *Brown v. Clark*, 116 S.W. 360, 365 (Tex. 1909).

[37] Respondents' Brief p. 12; *see also* TEC Amicus Brief p. 4; Certain Amici Amicus Brief pp. 8, 38.

[38] *See* Respondents' Brief p. 20 ("The decision thus reflects not so much "deference" to any case-specific decision of a hierarchical church body, but recognition of the fact that local congregations of hierarchical churches cannot unilaterally withdraw or alter the character of the local church by majority vote. … [T]he hierarchical structure of the general church ensures that its constituent local church will remain, for the benefit of those who wish to continue to worship as a part of that denomination.").

of faith and practice as they existed at the time of affiliation."[39] That approach may be fine in the English system with a state-established church, but the First Amendment bars both establishment and entanglement in church affairs.[40] TEC and its allies have simply taken the first half of the English approach (the implied trust) and made it absolute: local church property is held in trust for the established church, period.

Both the U.S. Supreme Court and this Court have rejected the idea that one can win a property dispute by simply re-casting it as an "identity" dispute. In *Wolf*, the U.S. Supreme Court held that Georgia's courts need not defer to a church judgment regarding the "identity" of a church owner, but could decide the owner based on Neutral Principles of state property law.[41] And this Court in *Jones v. Maples* affirmed that Texas courts ***must*** decide "identity" disputes in a nonprofit association when "incident to the question of proper custody of money and property."[42]

Surely Texas courts would not defer to TEC if it declared that its adherents were entitled to possession of First Baptist Church in Dallas. Why not? Don't courts have to defer in "identity" disputes? The answer is because even under

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[39] *Jones v. Wolf*, 443 U.S. 595, 599 & n.1 (1979) (internal quotation omitted) (citing *Presbyterian Church v. Hull Church*, 393 U.S. 440, 443 & n. 2 (1969)).

[40] *See Hull Church*, 393 U.S. at 449.

[41] *Wolf*, 443 U.S. at 602-03.

[42] 184 S.W.2d 844, 848 (Tex. App.—Eastland 1944, writ ref'd).

the Deference rule courts look behind such claims to see if they are supported by mundane matters like membership rules, by-laws, and valid elections. The reason Respondents seek to redefine the approach as merely a question of "identity" or "loyalty" is because their claims cannot withstand that kind of scrutiny.

III. TEC HAS NO PROPERTY CLAIM UNDER STATE LAW

TEC and its allies claim they hold an express trust based on a single sentence, the so-called "Dennis Canon," which states: "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located." The Fort Worth Diocese agrees with Petitioners that this purported trust is invalid because Texas courts cannot disregard Texas statutes that: (1) prevent a beneficiary from unilaterally imposing a trust on property it does not own,[43] (2) bar enforcement of a trust that fails to comply with the statute of frauds,[44] and (3) allow a trust to be revoked unless it is

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[43] *See* TEX. PROP. CODE § 112.002 ("A trust is created only if the settlor manifests an intention to create a trust."); *see also id.* § 111.004(4); *State v. Rubion*, 308 S.W.2d 4, 10 (Tex. 1957); *Best Inv. Co. v. Hernandez*, 479 S.W.2d 759, 763 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) ("Declarations of the purported beneficiary of the trust are not competent to establish the trust."); *Wise v. Haynes*, 103 S.W.2d 477, 483 (Tex. Civ. App.—Texarkana 1937, no writ) ("[T]he declarations of the cestui que trust are not competent to establish the trust."); RESTATEMENT (SECOND) OF TRUSTS § 351 ("A charitable trust is created only if the settlor properly manifests an intention to create a charitable trust.").

[44] *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….").

expressly irrevocable.[45]

Petitioners are also correct that Texas law would not impose a trust on one church's property for the benefit of another, as Respondents request.[46] Texas recognizes the *cy pres* doctrine, but only when a charitable purpose completely fails.[47] The doctrine does not allow those who place money in an offering plate to demand a refund or transfer of past gifts whenever they disagree with the pastor. Respondents cite no evidence that parishioners contributing to Good Shepherd intended to benefit TEC generally rather than their own church. If the *cy pres* doctrine were as restrictive as Respondents suggest, the March of Dimes would have been compelled to close after polio was conquered.

According to the Respondents, this Court should enforce the Dennis Canon because that is what the "courts of numerous states" have done.[48] The TEC-allied briefs quote extensively from recent opinions in Georgia and Connecticut, but not so much from South Carolina, where Chief Justice Toal's

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[45] TEX. PROP. CODE § 112.051(a) ("A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it."); *Ayers v. Mitchell*, 167 S.W.3d 924, 930 (Tex. App.—Texarkana 2005, no pet.) ("Trusts created under Texas law are revocable, unless made specifically irrevocable.").

[46] *See* Respondents Brief pp. 46-49; Certain Amici Brief p. 41.

[47] *See Foshee v. Republic Nat. Bank of Dallas*, 617 S.W.2d 675, 678 (Tex. 1981); *Coffee v. Wm. Marsh Rice Univ.*, 408 S.W.2d 269, 285 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

[48] Respondents' Brief p. 36.

opinion for a unanimous court rejected every argument they make.[49]

But the opinions of other state courts cannot be dispositive of Texas law. Other states obviously have other state laws. Some states have statutes expressly allowing a national church to impose a trust on property it doesn't own (including California[50] and New York[51]); Texas does not. Others say the Dennis Canon merely codifies an implied trust already existing under state law,[52] which Texas law would not.[53]

But it is not just state laws that vary across the country. The rules adopted by each diocese also differ. For example, in Fort Worth all real property is held in the name of diocesan corporation; that is apparently not true in the Diocese of Northwest Texas. Anyone reading through the out-of-state cases listed in Respondents' brief will encounter a host of different diocesan rules. This is precisely what one would expect of a church governed from the diocese level,

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49 *See All Saints Parish Waccamaw v. Protestant Epis. Church in Diocese of So. Car.*, 385 S.C. 428 (S.C. 2009).

50 *See* Cal. Corp. Code § 9142 ("Assets of a religious corporation are or shall be deemed to be impressed with a trust if the governing instruments of a general church of which the corporation is a member, so expressly provide.").

51 *See* N.Y. Relig. Corp. art. 3, § 42-a (stating that properties of Episcopal churches are "subject always to the trust in which all real and personal property is held for the Protestant Episcopal Church and the Diocese thereof.").

52 *See, e.g., In re Church Of St. James The Less*, 888 A.2d 795, 810 (Pa. 2005) ("the Dennis Canon merely codified in explicit terms a trust relationship that was implicit in St. James' Charter." (internal quotations omitted)); *Episcopal Diocese of Mass. v. Devine*, 797 N.E.2d 916, 923 n.21 (Mass. 2003); *Bishop & Diocese of Colorado v. Mote*, 716 P.2d 85, 105 n.15 (Colo. 1986).

53 *See* Petitioners' Brief p. 23.

but not from one governed from the national level.

It is true that a few courts have misinterpreted *Wolf* to impose a constitutional rule that states must enforce the Dennis Canon.[54] They point (as do Respondents) to the following excerpt from *Wolf*:

> Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, ***provided it is embodied in some legally cognizable form***.[55]

In its amicus brief, TEC disingenuously omits the "provided" phrase.[56] That is misleading the Court for a reason. What *Wolf* says is that courts are bound to give effect to such a trust "***provided*** it is embodied in some legally cognizable form." A trust declared by a non-owner may be legally cognizable in some states — but not in Texas. Had the Supreme Court intended to impose a constitutional rule on the property and trust laws of all 50 states, it would not have added the "provided" clause.

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[54] *See, e.g., Episcopal Church v. Gauss*, 28 A.3d 302, 325 (Conn. 2011) ("*Jones* thus not only gave general churches explicit permission to create an express trust in favor of the local church but stated that civil courts would be *bound* by such a provision, as long as the provision was enacted *before* the dispute occurred." (emphasis in original)).

[55] *Jones v. Wolf*, 443 U.S. 595, 606 (1979).

[56] *See* TEC Amicus Brief p. 14.

In its amicus brief in this case, TEC complains that this would be too much trouble,[57] that Neutral Principles can apply state laws only if the requirements are "minimal." Similarly, the Certain Amici claim *Wolf* does not require compliance with the "formalities" and "technicalities" applicable to private trusts.[58] But there is another word for the "formalities" and "technicalities" of a state statute: law. If the Supreme Court intended to exempt churches from state statutes, it would not have approved a Neutral Principles approach that specifically enforces them.[59]

Why, for example, has the Texas Legislature said for 80 years that trusts are revocable unless they state otherwise? Because of its policy decision that many people will agree to a trust with exactly that understanding. TEC and its allies may disagree with that policy, but their complaint must be addressed to the Legislature. There is nothing unconstitutional about this long-standing policy decision. And nobody can possibly argue that the burden of adding the word "irrevocable" to a trust document is anything but minimal.

Putting title to all church property in a single entity is not that hard — the

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57 *See* TEC Amicus Brief pp. 16-18.

58 Certain Amici Brief p. 29.

59 *See, e.g., Wolf,* 443 U.S. at 603 (describing the Neutral Principles approach as deciding property suits based on "the language of the deeds, the terms of the local church charters, ***the state statutes*** governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." (emphasis added)).

Fort Worth Diocese has done precisely that. The burden is minimal ***if the parties agree*** to it; the only reason it would be difficult for TEC is that many dioceses ***would not*** agree to it based on the church's structure and history. The section from *Wolf* quoted above addresses what "the parties" agree to do together; it cannot be twisted by one party to insist on a takeover with "minimal" trouble. Indeed, if that were part of the Episcopalian tradition, the Respondents would owe allegiance to the Church of England, or of Rome.

IV. IS THIS CHURCH "HIERARCHICAL"?

Were this Court to become the first state supreme court in 20 years to reject Neutral Principles, it would then face another difficult question: what proof is there that TEC is "hierarchical"?

In defining the Deference approach (which it calls the "polity approach"), Black's Law Dictionary describes it as requiring courts to "examine[] the structure of the church to determine whether the church is independent or hierarchical."[60] The structure of a church is not an easy question, and often a doctrinal one.

Courts cannot simply take the word of the representatives appearing

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[60] BLACK'S LAW DICTIONARY 1277 (9th ed. 2009).

before them; church structure must be proved.[61] Churchmen would of course never lie, but they might not actually be speaking for the church. For example, in the direct appeal on file in this Court, TEC's allies who filed that suit claimed in their petition that they represented the Fort Worth Diocese — until the real representatives of the Fort Worth Diocese showed up and proved otherwise. *See In re Salazar*, 315 S.W.3d 279 (Tex. App.—Fort Worth 2010, orig. proceeding).

In this case, who do the lawyers that filed the TEC amicus brief actually represent? Were they hired and authorized by the church's General Convention, or just the administrators in its national office? And the Certain Amici representatives, what exactly is their authority to declare definitively the structure of the Methodist and Lutheran Churches? National church officials will of course normally claim that nobody leaves the building with their property; but would the "church" actually say the same?

In this church, the word "Episcopal" itself means "bishop,"[62] which does not suggest a national hierarchy. TEC has no authority to appoint a bishop, or even a parish priest. For 200 years the church operated without a Dennis Canon. While TEC's allies scoff at the idea that Petitioners could unilaterally adopt

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[61] *See, e.g, Brown v. Clark*, 116 S.W. 360, 363 (Tex. 1909) (looking to church constitution to see who had authority to decide propriety of re-unification).

[62] *See* BLACK'S LAW DICTIONARY 615 (9th ed. 2009) ("**episcopacy** . . . 1. The office of a bishop"); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 764 (2002) ("fr. *episcopus* **bishop** . . . 1: of, being, or suited to a bishop.).

corporate or church rules that change the parties' historical relationship, the same might be said of TEC's unilateral adoption of the Dennis Canon without sending it to the dioceses for their consideration.

The amicus briefs argue that TEC's "hierarchy" should be taken for granted, because "[e]very court in the nation … has determined that The Episcopal Church is hierarchical."[63] Actually, "The Episcopal Church" wasn't a party in most of the cited cases. As shown in the table in Tab B of the appendix, until 2009 TEC ***almost never*** participated in Episcopal property lawsuits.

Why? Because the historical tradition in this church has been that TEC has no property interest; only the dioceses or parishes do. Respondents here repeatedly cite to "the Diocese's Constitution and canons,"[64] and clauses that sales cannot occur without "consent of the diocese."[65] That may be consistent with a regional hierarchy, but not the national one advocated in all these briefs.

Certain Amici argue that the Deference rule is "simple, predictable, and constitutional." That's odd, because the Supreme Court in *Wolf* said it was ***not*** simple and ***too*** predictable.[66] This Court should consider carefully before

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63 TEC Amicus Brief p. 1, n.1; Certain Amici's Brief pp. 21, 38.

64 *See* Respondents' Brief pp. 3-4, 44.

65 *See* Respondents' Brief pp. 4, 5, & 30.

66 *Id*. at 605 ("The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes."); id at 606 ("Under the neutral-principles approach, the outcome of a church property dispute is not foreordained.").

adopting an approach to church property disputes that has been rejected in virtually every other state.

CONCLUSION

The Deference approach pushes all church property cases into one of two categories: hierarchical and congregational. But some churches may want a hierarchical rule for ministerial discipline and a congregational rule for property ownership. The Deference approach says that cannot be done — which is constitutionally awkward, to say the least.

The name "Deference" sounds like a good thing for a non-activist judge to do. But a non-activist judge actually defers to the peoples' representatives, the Legislature, and the statutes they enact. Deference expressly disregards those statutes based on judicial assumptions about what churches intended — perhaps hundreds of years ago. It may be more trouble to follow detailed laws enacted by the people than govern by judicial decree, but the former what courts are supposed to do. As with virtually every other state supreme court, this Court should not wade back into the Deference quagmire.

Respectfully submitted,

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I hereby certify that the foregoing Brief of Amicus Curiae was served upon counsel for all parties, as indicated on the attached service list, by electronic transmission, on this the 22nd day of February, 2012.

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Appendix

Tab A

States Adopting Neutral Principles

Alabama	*African Meth. Epis. Zion Church v. Zion Hill Meth. Church, Inc*., 534 So.2d 224, 225 (Ala. 1988)
Alaska	*St. Paul Church, Inc. v. Bd. of Trs.*, 145 P.3d 541, 553 (Alaska 2006)
Arizona	*Rashedi v. General Bd*., 54 P.3d 349, 353 (Ariz. Ct. App. 2002)
Arkansas	*Ark. Presbytery v. Hudson*, 40 S.W.3d 301, 306 (Ark. 2001)
California	*In re Episcopal Church Cases*, 198 P.3d 66, 79 (Cal. 2009)
Colorado	*Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85, 96 (Colo. 1986)
Connecticut	*Episcopal Church in Diocese v. Gauss*, 28 A.3d 302, 316 (Conn. 2011)
Delaware	*East Lake Meth. Epis. Church, Inc. v. Trs*., 731 A.2d 798, 810 (Del. 1999)
District of Columbia	*Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. 2005)
Florida	*Word of Life Ministry, Inc. v. Miller*, 778 So.2d 360, 362 (Fla. Dist. Ct. App. 2001)
Georgia	*Rector, Wardens, Vestrymen v. Bishop of Epis. Diocese*, 718 S.E.2d 237, 241 (Ga. 2011)
Illinois	*Marsaw v. Richards*, 857 N.E.2d 794, 800-01 (Ill. App. Ct. 2006)
Indiana	*Presbytery of Ohio Valley, Inc. v. OPC, Inc*., 940 N.E.2d 1188, 1194 (Ind. Ct. App. 2010)
Iowa	*Freedom Church v. Central Dist. Conf.*, 734 N.W.2d 487 (Table), at *4 (Iowa Ct. App. 2007)
Kansas	*Gospel Tabernacle Body v. Peace Publishers & Co*., 506 P.2d 1135, 1138 (Kan. 1973)
Louisiana	*Fluker Community Church v. Hitchens*, 419 So.2d 445, 447 (La. 1982)
Maine	*Attorney General v. First United Bapt. Church*, 601 A.2d 96, 99 (Me. 1992)
Maryland	*From the Heart Church Ministries, Inc. v. African Meth. Epis. Zion Church*, 803 A.2d 548, 565 (Md. 2002)
Massachusetts	*Maffei v. Roman Catholic Archbishop*, 867 N.E.2d 300, 310 (Mass. 2007)
Minnesota	*Piletich v. Deretich*, 328 N.W.2d 696, 701 (Minn. 1982)
Mississippi	*Schmidt v. Catholic Diocese*, 18 So.3d 814, 824 (Miss. 2009)

States Adopting Neutral Principles	
Missouri	*Presbytery v. Jaeggi*, 682 S.W.2d 465, 467 (Mo. 1984); *Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 526 (8th Cir. 1995).
Montana	*Hofer v. Montana Dept. of Pub. Health*, 124 P.3d 1098, 1103 (Mont. 2005)
Nebraska	*Medlock v. Medlock*, 642 N.W.2d 113, 128-29 (Neb. 2002)
New Hampshire	*Berthiaume v. McCormack*, 891 A.2d 539, 547 (N.H. 2006)
New York	*Blaudziunas v. Egan*, 2011 WL 6153103, at *1 (N.Y. 2011)
North Carolina	*Harris v. Matthews*, 643 S.E.2d 566, 570 (N.C. 2007)
Ohio	*Serbian Orthodox Church Congregation v. Kelemen*, 256 N.E.2d 212, 216 (Ohio 1970); *Hudson Presbyterian Church v. Eastminster Presbytery*, 2009 WL 249791, at *2-3 (Ohio Ct. App. 2009)
Pennsylvania	*In re Church of St. James the Less*, 888 A.2d 795, 805-06 (Pa. 2005)
South Carolina	*All Saints Parish Waccamaw v. Protestant Epis. Church*, 685 S.E.2d 163, 171 (S.C. 2009)
South Dakota	*Foss v. Dykstra*, 342 N.W.2d 220, 222 (S.D. 1983)
Tennessee	*Avondale Church Of Christ v. Merrill Lynch*, 2008 WL 4853085l, at *9 (Tenn. Ct. App. 2008); *Anderson v. Watchtower Bible & Tract Soc.*, 2007 WL 161035, at *7 (Tenn. Ct. App. 2007)
Utah	*Jeffs v. Stubbs*, 970 P.2d 1234, 1250-51 (Utah 1998)
Vermont	*no cases*
Virginia	*Reid v. Gholson*, 327 S.E.2d 107, 112 (Va. 1985)
Washington	*Kidisti Sekkassue Orthodox Tewehado Eritrean Church v. Medin*, 118 Wash.App. 1022, 2003 WL 22000635, at *9 (Wash. Ct. App. 2003)
Wisconsin	*Wisconsin Conf. Bd. of Trs. v. Culver*, 627 N.W.2d 469, 475-76 (Wis. 2001)

States Not Adopting Neutral Principles	
Kentucky	*Compare Bjorkman v. Protestant Epis. Church*, 759 S.W.2d 583, 585-86 (Ky. 1988) (applying Neutral Principles) *with Cumberland Presbytery v. Branstetter*, 824 S.W.2d 417, 419-22 (Ky. 1992) (applying both rules)
Michigan	*Lamont Community Church v. Lamont Christian Reformed Church*, 777 N.W.2d 15, 28 (Mich. Ct. App. 2009) ("Michigan law provides that courts should generally use the hierarchical method. However, the neutral principles of law method may be appropriate in situations ....")
New Jersey	*New Saint John Christian Meth. Epis. Church, Inc. v. Collier*, 2008 WL 2329971, at *1 (N.J.Super. Ct. App. Div. 2008); *cf. Scotts African Union Meth. Prot. Church v. Conf. of African Union First Colored Meth. Prot. Church*, 98 F.3d 78, 89-94, 94 n. 6 (3d Cir. 1996) (concluding that New Jersey courts follow the Deference approach but "show a decided progression ... toward adoption of a neutral-principles approach in resolving intrachurch property disputes")
West Virginia	*Original Glorious Church of God v. Myers*, 367 S.E.2d 30, 34 (W.Va. 1988)

States Yet to Address Neutral Principles

Hawaii	Oklahoma
Idaho	Oregon
Nevada	Rhode Island
New Mexico	Vermont
North Dakota	Wyoming

Tab B

Case	Year	Local Diocese or Bishop a Party?	TEC a Party?
Diocese of Sw. Va. of Protestant Epis. Church v. Buhrman, 1977 WL 191134 (Va.Cir.Ct. 1977)	1977	Yes	No
Tea v. Protestant Epis. Church in the Diocese of Nev., 610 P.2d 182 (Nev.)	1980	Yes	No
Protestant Epis. Church in the Diocese of N.J. v. Graves, 417 A.2d 19 (N.J.)	1980	Yes	No
Protestant Epis. Church v. Barker, 171 Cal.Rptr. 541 (Cal. Ct. App.)	1981	Yes	Yes
Bennison v. Sharp, 329 N.W.2d 466 (Mich. Ct. App.)	1982	Yes	No
Bishop and Diocese of Colorado v. Mote, 716 P.2d 85 (Colo.)	1986	Yes	No
Bjorkman v. Protestant Episcopal Church in U.S. of America of Diocese of Lexington, 759 S.W.2d 583 (Ky.)	1988	Yes	No
Rector, et al. of Trinity-St. Michael's Parish, Inc. v. Epis. Church in the Diocese of Conn., 620 A.2d 1280 (Conn.)	1993	Yes	No
Bd. of Managers of Diocesan Missionary v. Church of Holy Comforter, 628 N.Y.S.2d 471 (N.Y. Sup. Ct.)	1993	Yes	No
Parish of the Advent v. Protestant Epis. Diocese of Mass., 688 N.E.2d 923 (Mass.)	1997	Yes	No
Trustees of Diocese of Albany v. Trinity Epis. Church of Gloversville, 684 N.Y.S.2d 76 (N.Y. App. Div.)	1999	Yes	No
Dixon v. Edwards, 290 F.3d 699 (4th Cir.)	2002	Yes	No
Epis. Diocese of Mass. v. DeVine, 797 N.E.2d 916 (Mass. App. Ct.)	2003	Yes	No
Daniel v. Wray, 580 S.E.2d 711 (N.C. Ct. App.)	2003	Yes	No
In re Church of St. James the Less, 888 A.2d 795 (Pa.)	2005	Yes	No
New v. Kroeger, 84 Cal. Rptr. 3d 464 (Cal. Ct. App.)	2008	Yes	No
Epis. Diocese of Rochester v. Harnish, 899 N.E.2d 920 (N.Y.)	2008	Yes	No
In re Epis. Church Cases, 198 P.3d 66 (Cal.)	2009	Yes	Intervenor
All Saints Parish Waccamaw v. Protestant Epis. Church in Diocese of S.C., 685 S.E.2d 163 (S.C.)	2009	Yes	Yes
Schofield v. Superior Court, 118 Cal.Rptr.3d 160 (Cal. Ct. App.)	2010	Yes	Yes
Rector, et al. of Christ Church in Savannah v. Bishop of Epis. Diocese of Ga., Inc., 699 S.E.2d 45 (Ga. Ct. App.)	2010	Yes	Yes