NO. 11-0265

IN THE SUPREME COURT OF TEXAS

THE EPISCOPAL DIOCESE OF FORT WORTH, et al.,
Appellants

v.

THE EPISCOPAL CHURCH, et al.,
Appellees

On Direct Appeal From the
141st District Court of Tarrant County, Texas
Cause No. 141-252083-11

AMICUS CURIAE BRIEF OF THE ANGLICAN COMMUNION INSTITUTE, INC. AND EPISCOPAL BISHOPS AND CLERGY

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STATEMENT OF INTEREST

The individual *amici curiae* submitting this brief are all bishops and clergy of The Episcopal Church. They are joined by The Anglican Communion Institute, Inc. ("ACI"), a Texas nonprofit corporation. All the officers and directors of ACI are clergy or members of The Episcopal Church. These *amici* remain in The Episcopal Church and submit this brief solely because they disagree with the characterization of the governance of The Episcopal Church as submitted in support of the motion for summary judgment that the trial court granted in this case. The *amici* oppose the decision by the Appellants ("Diocese of Fort Worth") to leave The Episcopal Church, but in its ruling against them the court has misunderstood, and thereby damaged, the constitutional structure of The Episcopal Church.

This brief is submitted by the following *amici curiae*:

The Anglican Communion Institute, Inc. is a Texas nonprofit corporation based in Dallas. It is an international think tank of bishops, clergy and other scholars dedicated to promoting the Anglican Communion. The Anglican Communion Institute has published numerous articles and sponsored conferences on the polity of The Episcopal Church and the Anglican Communion.

Bishop Maurice M. Benitez, now retired, was the Bishop of the Episcopal Diocese of Texas, a diocese of The Episcopal Church. He remains a member of the House of Bishops of The Episcopal Church.

Bishop John W. Howe retired in March 2012 as the Bishop of the Episcopal Diocese of Central Florida, a diocese of The Episcopal Church. At the time of his retirement he was the third most senior diocesan bishop in The Episcopal Church. He remains a member of the House of Bishops of The Episcopal Church.

Bishop Paul E. Lambert is the Suffragan Bishop of the Episcopal Diocese of Dallas, a diocese of The Episcopal Church.

Bishop William H. Love is the Bishop of the Diocese of Albany, a diocese of The Episcopal Church.

Bishop D. Bruce MacPherson is the Bishop of the Diocese of Western Louisiana, a diocese of The Episcopal Church. He is past chairman of the Council of Advice to the Presiding Bishop of The Episcopal Church. He previously served as Suffragan Bishop of the Episcopal Diocese of Dallas.

Bishop Daniel H. Martins is the Bishop of the Episcopal Diocese of Springfield (Illinois), a diocese of The Episcopal Church.

Bishop James M. Stanton is the Bishop of the Episcopal Diocese of Dallas, a diocese of The Episcopal Church. He is the senior Episcopal diocesan bishop in Texas and one of the most senior diocesan bishops in The Episcopal Church.

Christopher R. Seitz is an ordained priest in The Episcopal Church and Canon Theologian of the Episcopal Diocese of Dallas. He is Research Professor of Biblical Interpretation at Wycliffe College of the University of Toronto. He previously taught at

Yale University and St. Andrew's University in Scotland. He is President of the Anglican Communion Institute. He resides in Dallas.

Philip W. Turner is an ordained priest in The Episcopal Church. He previously served as Dean of the Berkeley Divinity School of Yale University, as Interim Dean and professor of Christian Ethics at the Episcopal Seminary of the Southwest in Austin, and as Professor of Christian Ethics at the General Theological Seminary in New York City, all seminaries affiliated with The Episcopal Church. He is Vice President of the Anglican Communion Institute. He resides in Austin.

Ephraim Radner is an ordained priest in The Episcopal Church. He is Professor of Historical Theology at Wycliffe College of the University of Toronto and Senior Fellow of the Anglican Communion Institute. He was one of two members of The Episcopal Church appointed by the Archbishop of Canterbury to serve on the Anglican Communion's Covenant Design Group, a body charged with reviewing and articulating the polity of the Anglican Communion. He is a priest canonically resident in the Episcopal Diocese of Colorado, a diocese of The Episcopal Church. He resides in Toronto, Canada.

The *amici curiae* submitting this brief have paid all associated fees and expenses. They are referred to hereafter as "ACI/Episcopal Bishops and Clergy."

SUMMARY OF ARGUMENT

The ACI/Episcopal Bishops and Clergy submit this *amicus curiae* brief in support of Appellants' petition to reverse the summary judgment entered below. These *amici curiae* support the traditional polity of The Episcopal Church founded on the autonomy of its constituent dioceses and therefore submit that the trial court erred both as a matter of fact and as a matter of law when it found that The Episcopal Church has a hierarchical authority superior to the diocese and its bishop.

This appeal presents two distinct questions: first, should Texas courts use neutral principles of law or a hierarchical deference standard in adjudicating church property disputes; and second, if the courts use a deference standard, to what church authority should they defer in this dispute.

The ACI/Episcopal Bishops and Clergy take no position on the first question whether Texas should require courts to use neutral principles of law in all cases or permit the use of a deference standard when constitutionally appropriate. On the second question, the ACI/Episcopal Bishops and Clergy submit that if the Court elects to use a deference standard, it is constitutionally required to defer to the diocese and its bishop, who is the highest authority identified in The Episcopal Church's governing instruments with respect to matters in his or her diocese. In the present dispute, that bishop is appellant Bishop Jack Iker.

This is a case of first impression. No court has finally adjudicated a dispute presenting the question whether there is any body or office in The Episcopal Church with hierarchical supremacy over the diocesan bishop. If this Court affirmed the summary judgment ruling of the trial court it would be the first Supreme Court in any jurisdiction to hold that there is such a supreme authority in The Episcopal Church higher than the diocesan bishop.

The position of the ACI/Episcopal Bishops and Clergy is that the summary judgment ruling by the trial court violated the First Amendment to the United States Constitution because it necessarily immersed the court in an impermissible "searching" and "extensive inquiry into religious polity." Under the Supreme Court's First Amendment jurisprudence, courts may constitutionally apply a deference standard only if they can identify the appropriate ecclesiastical authority without conducting such an extensive inquiry. In the case of The Episcopal Church, its governing constitution specifies that the diocesan bishop is "the Ecclesiastical Authority" in the diocese. Acceptance of Appellees' claim that there are bodies or offices with hierarchical supremacy over the diocesan bishop would require the Court to become embroiled in a searching historical analysis of difficult questions of church polity without any explicit language in the church's governing instrument on which to base its conclusion. The First Amendment does not permit such a result.[1]

[1] We adopt the usage specified in Appellants' Brief: the "Diocese of Fort Worth" refers to Appellant, "TEC" refers to Appellee The Episcopal Church; "Local TEC" refers to the other Appellees. The Clerk's Record will be cited as "[vol.] CR [page]."

I. COURTS CAN USE A DEFERENCE STANDARD ONLY IF THEY CAN IDENTIFY THE HIGHEST ECCLESIASTICAL AUTHORITY WITHOUT AN "EXTENSIVE INQUIRY" INTO CHURCH POLITY.

As articulated in *Jones v. Wolf*, 443 U.S. 595 (1979), the most recent United States Supreme Court case adjudicating a church property dispute, the Court's First Amendment jurisprudence on this subject can be summarized as follows:

- First, "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." (Citing *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. at 368 (Brennan J., concurring.) 443 U.S. at 602.
- Second, "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." 443 U.S. at 604.
- Third, if a state uses a deference approach the First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the **highest court** of a hierarchical church organization" because the "Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." 443 U.S. at 602 (emphasis added).
- Finally, the Court noted the following constraints on use of the deference approach:
  a) When applying the deference standard, "civil courts would always be required to examine the polity and administration of a church to determine **which unit of government** has ultimate control over church property";
  b) "In some cases, this task would not prove to be difficult."

c) "But in others, the locus of control would be ambiguous, and 'a careful examination of the constitutions of the general and local church, as well as other relevant documents, would be necessary to ascertain the form of governance adopted by the members of the religious association.'"

d) In such cases the deference rule is inappropriate because it would require "**a searching and therefore impermissible inquiry into church polity**." 443 U.S. at 605 (internal citations omitted; emphasis added).

The dispute now before this Court implicates these constraints on the use of the deference approach in an acute way. Appellee TEC over-simplifies the deference standard by suggesting it is merely a two-step approach: that first, the court determines if the church is "hierarchical"; then, the "loyal" faction wins. Br. at 49. But this simplification defies both logic and the Supreme Court's First Amendment jurisprudence. A court cannot give deference unless it first determines *which* ecclesiastical authority it should defer to. A church property dispute by definition involves two competing factions, each with its own authority. As *Jones* notes, the first step is to examine church polity to determine which authority is identified as **highest** in the hierarchy.[2] Only when this is done can the court determine who is "loyal" since each faction is loyal to a different authority. In some churches the highest authority is the local congregation, not a broader

[2] TEC concedes that this Court followed this procedure in *Brown v. Clark*, 102 Tex. 323,331-33, 116 S.W. 360, 363-64 (1909): "*Brown* reviewed [the denomination's] Constitution in order to ascertain the governmental structure of the denomination." Br. at 21, n. 8. That task was straightforward in *Brown:* the church constitution stated explicitly, *inter alia*, that "The General Assembly is the highest court of this church…." This Court noted that "It would be difficult to make a more ample expression of authority conferred and duty imposed than is found in the language used in this constitution.102 Tex. at 329-30, 333.

association of which it may be a member. In others, the highest authority may be a national or international body or office. In The Episcopal Church, as we show below, the highest authority is the diocese, particularly its bishop.

The First Amendment imposes significant constraints on how courts can identify the highest ecclesiastical authority and apply the deference standard. This opening section of our brief outlines the First Amendment jurisprudence on this issue. We then apply that jurisprudence to the record in this case in Sections II and III.

The key issue in applying the deference standard is whether the court can identify the highest ecclesiastical authority without becoming embroiled in "difficult" questions of church polity. The First Amendment constraint that courts cannot become immersed either in questions of religious doctrine or of **ecclesiastical polity** was first articulated in *Maryland and Va. Churches v. Sharpsburg Church*, 396 U.S. 367 (1970) in an oft-cited concurring opinion by Justice Brennan. (It was this concurrence that was cited in the passage from *Jones v. Wolf* quoted above.) In *Maryland and Va. Churches*, the Maryland Court of Appeals had used neutral principles of law to decide a property dispute in favor of dissenting churches in a denomination claiming to be hierarchical (specifically one claiming to have a presbyterial polity). The Maryland court concluded that the denomination in fact had a mixed presbyterial/congregational polity that was congregational concerning use and control of local property. It then applied neutral principles of law to the dispute. The Supreme Court did not examine the polity question, but concluded instead that the use of neutral principles was constitutional without regard

to the complex polity issues. It therefore dismissed the denomination's appeal for want of a substantial federal question in a per curiam opinion.[3]

The Court's reasoning was more fully articulated by Justice Brennan in his concurring opinion. He noted the constitutional impediments that could arise in difficult cases from the use of a deference standard (which he called "the Watson approach"):

> To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a **matter of substantial controversy, civil courts are not to make the inquiry** into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the Watson approach is consonant with the prohibitions of the First Amendment **only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.** 396 U.S. at 369-70 (emphasis added).

When the identity of the governing body is substantially disputed or extensive inquiry into church polity would be required, Justice Brennan noted that:

> States following the Watson approach would have to find another ground for decision, perhaps the application of general property law, when identification of the relevant church governing body is impossible without immersion in doctrinal issues or extensive inquiry into church polity. 396 U.S. at 370, n. 4.

The Local TEC Appellees confirm the likelihood of the Court's becoming impermissibly immersed in doctrinal issues in this case when they note that: "church polity, structure, and discipline are at the core of First Amendment concern. Choices about forms of church governance have deep theological bases, and they were the subject

[3] Dismissal for want of a substantial federal question is a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

of warfare and martyrdom during the wars of religion." Br. at 22-23. The expert on whom TEC places primary reliance makes both this doctrinal nexus and the extent of the necessary inquiry explicit when he characterizes his own testimony as "an extended historical and theological analysis of the development of the Church's hierarchical structure from its earliest days to the present." 22 CR 4525.[4]

The significance of Justice Brennan's concurring opinion in *Maryland and Va. Churches* lies not just in its influence on subsequent cases, but also in the fact that he was the leading justice in developing the Court's jurisprudence on this topic in the major cases of the 1960s and 1970s.[5] His concurrence in *Maryland and Va. Churches* indeed relied on his earlier opinion in *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969), in which he delivered the opinion of a unanimous Court and articulated the neutral principles of law standard for the first time. In *Hull Church*, the Court reversed the Georgia Supreme Court, which had applied a departure from doctrine standard to a church property dispute, and held that "States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." *Id*. at 449. Although the ecclesiastical question in *Hull Church* involved religious **doctrine,** Justice Brennan's later concurrence in *Maryland and Va. Churches* emphasized, citing *Hull Church*, that the same constitutional restraint applies to questions concerning ecclesiastical **polity.**

[4] The Diocese of Fort Worth refutes TEC's analysis with an extended historical and theological analysis by its own expert. 29 CR 6283-6365. The Diocese's positive case, however, does not depend on theological analysis, but on a plain reading of the church's governing constitution. See Section II below.

[5] Justice Brennan authored the Court's opinions in the *Hull Church* and *Serbian Orthodox Diocese* cases and was part of the majority in *Jones.*

Justice Brennan also authored the majority opinion in the most recent case to use the deference method, *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Quoting the above language from *Maryland and Va. Churches* and citing *Hull Church*, the Court ruled in *Serbian Orthodox Diocese* that the state courts should defer to a central body, the Holy Assembly of Bishops, that was given express hierarchical authority in the church's governing constitution over the very disputes in that case. After quoting in detail the church instruments giving the Holy Assembly explicit authority—indeed that authority was so clear it was not disputed by the parties—the Court rejected polity interpretations proffered by the diocese because:

> The constitutional provisions of the American-Canadian Diocese **were not so express** that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity. *See Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. at 368-370 (Brennan J., concurring).

426 U.S. at 723 (emphasis added). Thus, the constitutional principles later summarized in *Jones v. Wolf* were applied in *Serbian Orthodox Diocese* to the facts of that case: designations of hierarchical authority that are **explicit** are recognized by the courts, but those that are not "express" and lead to an "impermissible inquiry" are not considered.

In fact, the explicit provisions of church polity that required deference in the *Serbian Orthodox Diocese* are startling in their clarity:

- The governing constitution of the Serbian Orthodox Church stated unambiguously: "The Holy Assembly of Bishops, as the **highest hierarchical body**, is legislative authority in the matters of faith, officiation, church order

(discipline) and internal organization of the Church, as well as the **highest church juridical authority** within its jurisdiction." 426 U.S. at 716 (emphasis added).

- Also: "All the decisions of the Holy Assembly of Bishops and of the Holy Synod of Bishops of canonical and church nature, in regard to faith, officiation, church order and internal organization of the church, are valid and final." 426 U.S. at 716-17.
- The Supreme Court also concluded that "various provisions of the Diocesan constitution reaffirm the subordinate status of the Diocese." 426 U.S. at 722, n.12.
- It also relied on the diocese's submission of corporate bylaws, proposed constitutional changes, and final judgments of the Diocesan Ecclesiastical Court to the Holy Synod or Holy Assembly for approval. 426 U.S. at 715, n.9.
- The bishops swore an "Episcopal-Hierarchical Oath" that they would "always be obedient to the Most Holy Assembly," the very body identified in the constitution as "the highest hierarchical body." 426 U.S. at 715, n.9.
- The identity of the authority was so clear that "all parties agree that the Serbian Orthodox Church is a hierarchical church, and that the sole power to appoint and remove Bishops of the Church resides in its highest ranking organs, the Holy Assembly and the Holy Synod." 426 U.S. at 715.[6]

[6] The Court also found that its hierarchy determination was "confirmed by the fact that respondent corporations were organized under the provisions of the Illinois Religious Corporations Act governing the incorporation of religious societies that are subordinate parts of larger church organizations." 426. U.S. at 715, n.9. That factor is not applicable in the present case. TEC's citation of Section 2.102 of the Texas Business Organizations Code is irrelevant because its language concerning holding property in trust for an affiliated organization is on its face permissive. TEC Br. at 40.

It is readily apparent, therefore, how deference could be accorded in *Serbian Orthodox Diocese* without violating the First Amendment prohibition on "extensive inquiry into church polity" or "a searching and therefore impermissible inquiry into church polity." The parties agreed as to the nature of the church hierarchy, and the church constitution plainly stated in explicit language that the Holy Assembly of Bishops was the "highest hierarchical body" and "highest church juridical authority" whose decisions were "final."[7]

Some argue that *Serbian Orthodox Diocese* stands for the proposition that courts may not determine the identity of the highest ecclesiastical authority, but must defer to the church's determination of that issue. But this position founders both on logic and on an examination of the method the Court actually used in that case. In a case in which both sides claim to be the highest authority, how can a court apply the deference standard if it does not first decide to whom to defer? It cannot merely defer to one of the parties to the lawsuit based on allegations in the pleadings. Nor can it engage in "a searching and therefore impermissible inquiry into church polity." In some cases, the courts may be unable to use a deference standard for these reasons.

But an examination of the Supreme Court's analysis in *Serbian Orthodox Diocese* shows that in fact it looked at express provisions in the church's governing instruments to identify the "highest church juridical authority." And the Court's practice in that case

[7] Because there was no dispute as to the identity of the "highest authority" the dispute instead involved an attempt by the faction disappointed in the decision of the "highest ecclesiastical authority" to seek judicial review of the decision. The analogue in this case is the attempt by those who were disappointed in the decision of the Diocese of Fort Worth and Bishop Iker, the highest authority in this dispute, to overturn that decision through judicial review.

shows the kind of inquiry that can be made without becoming impermissibly immersed in questions of ecclesiastical polity. To apply the deference standard the highest judicatory must be identified plainly in explicit legal language. Courts have ample experience making just this kind of review in routine cases in which they enforce arbitration or choice of forum clauses in contracts. But to go beyond this and sift through detailed evidence or decide difficult questions of polity goes beyond the First Amendment boundary.[8]

It is significant that TEC relies most heavily not on the recent First Amendment jurisprudence of the Supreme Court discussed above, but on a nineteenth century pre-*Erie Railroad* case decided as a matter of federal common law, *Watson v. Jones*, 80 U.S. 679 (1871). TEC notes that the Supreme Court recently stated (in a case that involved an employment discrimination claim, not a church property dispute) that *Watson* "radiates…a spirit of freedom for religious organizations"; but to the extent *Watson* radiates constitutional principles applicable to property disputes they are subsumed in the recent Supreme Court jurisprudence directly on point.[9] In any event, *Watson* is consistent with our analysis of the recent cases decided on constitutional grounds. It emphasized that courts do not defer merely to "a hierarchical church" without further

[8]Similarly, the other case often cited as applying a deference standard, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), did not involve a dispute as to the identity of the hierarchical church authority. The Court noted: "This controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America. No one disputes that such power did lie in that Authority prior to the Russian Revolution." 344 U.S. at 115. The issue was not the identity of the "Supreme Church Authority," but the power of the New York legislature to transfer that authority from the agreed "supreme" authority to another entity by statute. That intentional rejection of the agreed ecclesiastical authority by the legislature was held to be unconstitutional. The analogue in this case would be a Texas statute or the trial court's decision that tries to pass control of the Fort Worth Diocese and Bishop Iker to other bodies within The Episcopal Church.

[9] *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 704 (2012).

ado, but to a "supreme judicatory" with "ultimate power more or less complete" or, put differently, to the "highest of these church judicatories." 80 U.S. at 722-23, 727. In *Watson*, the Supreme Court criticized the state court decision in a companion case because "it went into an elaborate examination of the principles of Presbyterian church government, and ended by overruling the decision of the highest judicatory of that church in the United States." 80 U.S. at 734. In contrast, the Supreme Court's own finding that the General Assembly was the highest judicatory required no such "elaborate examination" of church polity; indeed, the conclusion was inescapable: the church constitution stated explicitly "The General Assembly is the highest judicatory of the Presbyterian Church….To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline."[10]

This Court relied on virtually identical language in the constitution of another Presbyterian body in deferring to the General Assembly in *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909). In fact, the church constitution at issue in *Brown* could not have been clearer: "The General Assembly is the highest court of this church….The General Assembly shall have the power to receive and decide all appeals, references and complaints regularly brought before it from the inferior courts." 102 Tex. at 329-30. In

[10] 80 U.S. at 682. In his summary of the record, the reporter in *Watson* paraphrased the first section of the chapter of the church constitution on the General Assembly, combining the first three sentences into one: "The General Assembly, consisting of ministers and elders commissioned from each Presbytery under its care, is the highest judicatory of the Presbyterian Church, representing in one body all of the particular churches of the denomination." He then quotes verbatim from other sections of that chapter. The exact wording of the first sentence of the chapter was: "The General Assembly is the highest judicatory of the Presbyterian Church." *See Westminster Presbyterian Church v. Trustees*, 142 App. Div. 855, 862-63, 127 N.Y.S. 836 (1st Dept. 1911); THE CONSTITUTION OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, 429 (Presbyterian Board of Publication: 1839).

deferring to this church authority, the Court emphasized the explicit nature of the constitutional language:

> To the General Assembly was committed the supreme legislative, judicial and executive power of the church. It was declared to be the highest court of the church and was authorized to pass all necessary laws, rules and regulations for the whole church….**It would be difficult to make a more ample expression of authority conferred and duty imposed than is found in the language used in this constitution.** We conclude that the General Assembly of the Cumberland Church was the embodiment and expression of the sovereign power of the whole church and its membership…. 102 Tex. at 333 (emphasis added).

TEC also relies heavily on the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). But that case involved neither a church property dispute nor any other dispute between competing church factions. It concerned the application of the Americans with Disabilities Act to church ministers. In its survey of the cases discussed above, *Hosanna-Tabor* notes precisely the points we have made: *Watson* (deference to "the highest of the church judicatories to which the matter has been carried"); *Kedroff* (deference to "the Supreme Church Authority of the Russian Orthodox Church"); *Serbian Orthodox Diocese* (deference to "the highest ecclesiastical tribunals"). Not surprisingly, however, *Hosanna-Tabor* sheds no new light on **how** a court determines what is "highest" or "supreme" since that case did not involve a dispute between competing church factions. Indeed, of most significance to the present dispute is *Hosanna-Tabor's* reiteration of the injunction against the government's "lending its power to one or the other side in controversies over religious authority or dogma." 132 S. Ct. at704-705, 707 (citing

Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (in turn citing *Hull Church, Kedroff* and *Serbian Orthodox Diocese*)).

To conclude this section: the key First Amendment imperative—avoiding judicial entanglement in ecclesiastical questions—imposes substantial constraints on the use of the deference standard. The line of cases beginning with *Hull Church* and continuing through *Maryland and Va. Churches* and *Serbian Orthodox Diocese* to *Jones v. Wolf* elaborates the criteria courts must use if they adopt this standard. Where identification of the "highest judicatory" is not "difficult", courts may defer to such a body. Where that identification is "ambiguous" and a "searching" or "extensive inquiry" into church polity is required to make such a determination, use of the deference standard is constitutionally proscribed. Here quoted in full is the key paragraph from *Jones v. Wolf*, the last of these cases:

> The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious doctrine, practice, and administration. Under its approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." Post, at 619-620. In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." *Serbian Orthodox Diocese*, 426 U.S., at 723. 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.

Jones v. Wolf, U.S. at 605.

II. USE OF A DEFERENCE STANDARD IN THIS DISPUTE IS CONSTITUTIONALLY PERMITTED ONLY IF THE COURT DEFERS TO THE DIOCESAN BISHOP, BISHOP IKER.

Applying these First Amendment principles, including the criteria used in *Serbian Orthodox Diocese*, to the present dispute yields two conclusions: first, the Court could constitutionally use a deference standard if it deferred to the diocesan bishop, in this case, Bishop Iker; second, the Court could not use a deference standard to defer to any authority allegedly "higher" than the diocesan bishop because that is both contrary to the explicit provisions of The Episcopal Church constitution and would require in any event an impermissible extensive and searching inquiry into church polity. This section will address the first of these conclusions. Section III will address the second.

The criteria used by the Court in *Serbian Orthodox Diocese* to identify the highest ecclesiastical authority without engaging in an impermissible inquiry can be applied in this case, but point to the diocese rather than any central body as the highest authority. This should not be surprising since churches are free to organize themselves as they see fit. Courts cannot constitutionally presume that churches having a hierarchical polity must have that hierarchy concentrated in one central body rather than dispersed among diocesan bishops. In any event, the ecclesiastical facts are what they are, and courts cannot force church polities into only two preexisting pigeonholes, "congregational" and "central hierarchy."

Unlike *Serbian Orthodox Diocese*, there is no agreement in the present dispute as to the hierarchical structure of The Episcopal Church. Each of the sides claims to be the

highest ecclesiastical authority with respect to the dispute arising in Fort Worth. It is open to argument whether a deference standard can ever be used in such cases given the observation by Justice Brennan that "where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy." *Maryland and Va. Churches*, 396 U.S. at 369-70.

But the most important factor in reaching this determination should be the explicit language in the church's governing instruments. The key question, as worded by the Court in *Jones v. Wolf,* is whether the identification of the highest authority is "difficult." As already noted, courts are experienced in reviewing contracts to determine whether they contain recognizable legal language indicating a choice of forum or an agreement to arbitrate. When an ecclesiastical authority is identified in similarly clear legal language, courts should be able to recognize it without traversing First Amendment boundaries.

In this dispute, both sides do in fact agree that there is no **explicit** language in The Episcopal Church's governing constitution identifying in express legal terms of hierarchy or supremacy any central body or office allegedly superior to the diocesan bishop.[11] Indeed, none of the following terms routinely used in legal documents to indicate hierarchical priority is found at all in The Episcopal Church constitution: "supreme"; "supremacy"; "highest"; "hierarchical"; "subordinate"; "sole"; "preempt"; and "final."

[11] We consider TEC's expert testimony on this issue in Section III.

24 CR 5129-37. The constitution does have provisions, however, that readily identify the diocesan bishop as the highest authority:

- The diocesan bishop is "the Ecclesiastical Authority" of the diocese. In the absence of a bishop, the diocesan standing committee, not some central body or officer, is "the Ecclesiastical Authority." 24 CR 5132. This fact is not disputed. In its "Statement of Undisputed Facts" in support of its motion for summary judgment, TEC states: "Each diocese also has a 'Diocesan Bishop' who is the 'Ecclesiastical Authority' of the diocese. Const. Art. II." 21 CR 4314.[12]
- No bishop, including the Presiding Bishop, can act within a diocese without the consent of "the Ecclesiastical Authority," the diocesan bishop. Bishops, including the Presiding Bishop at the "direction" of the House of Bishops, can act outside their own dioceses even when authorized by the House of Bishops only in "territory not yet organized into Dioceses of this Church." 24 CR5131.
- Dioceses do not send changes to diocesan constitutions to any central body for prior review or approval. In contrast, changes to the church's general constitution are sent to the dioceses for review prior to final approval. 24 CR5136.
- Diocesan bishops take no "hierarchical oath" nor do they pledge obedience to any other body or office. Priests pledge obedience at their ordination to their diocesan bishop, not to any other body or office. 23 CR4874, 4876.

[12] See also Canon IV.15 (2006): "Ecclesiastical Authority shall mean 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." 24 CR 5295.

- Both sides agree that the diocesan bishop is "the Ecclesiastical Authority" of the diocese. Their disagreement, with each side submitting extensive factual testimony, is over whether there is any body or office with hierarchical priority superior to the bishop.

Thus, when applied to TEC, the *Serbian Orthodox Diocese* factors point to the diocesan bishop, not a central body, as the highest authority.

Nor can this dispute be characterized as a matter of internal church discipline as TEC repeatedly attempts by citing what it characterizes as the "removal" of Bishop Iker. Br. at 8, 9, 27, 28. In fact, this emphasis only underscores the weakness in TEC's argument. First, as TEC itself concedes, the "removal" happened *after* the crucial event in this dispute, the vote of the Diocese of Fort Worth to disaffiliate. Br. at 9. At the time of the vote to disaffiliate, Bishop Iker was a bishop in good standing and presided as the Ecclesiastical Authority of the Diocese.

Second, by selectively referring to this act as "the Church's removal" as if it were a disciplinary matter or something that invoked "a church's right to select its own clergy," TEC mischaracterizes the record. Br. at 27-28. What TEC calls "the Church's removal" was actually a certification entitled "Renunciation of Ordained Ministry and Declaration of Removal and Release." In this certificate, the Presiding Bishop recites that she is acting pursuant to Canon III.12.7 and that she has "accepted" a written renunciation "by" Bishop Iker of his ministry within The Episcopal Church. 24 CR 5113. Canon III.12.7 required that the Presiding Bishop had to find both that Bishop Iker "is

acting voluntarily" and also that he "is not subject to" the church's disciplinary canons. 24 CR 5235.[13] The record in this case does not in fact contain a written renunciation by Bishop Iker, but that does not alter the significance of the certification by the Presiding Bishop that he had acted "voluntarily" and that at that time, *after* he presided as the Ecclesiastical Authority of the Diocese over the vote to disaffiliate, he was not subject to or "amenable" to the discipline of The Episcopal Church for any violation of its constitution or canons.[14]

III. ANY ATTEMPT TO IDENTIFY AN AUTHORITY ALLEGEDLY HIGHER THAN THE DIOCESAN BISHOP WOULD REQUIRE AN IMPERMISSIBLE EXTENSIVE AND SEARCHING INQUIRY INTO CHURCH POLITY.

We now turn to the second implication of the Supreme Court's First Amendment jurisprudence concerning the use of a deference standard: the Court cannot defer to any central body or office allegedly "above" the diocesan bishop in The Episcopal Church

[13] The canon referenced in the notice was 2006 Canon III.12.7, which required the Presiding Bishop to conclude that the bishop voluntarily renouncing his ministry in The Episcopal Church "is not subject to the provisions of Canon IV.8". Canon IV.8 applies to "any Bishop Amenable for" any canonical offense. Compare Canon IV.15 ("Amenable shall mean subject, accountable, and responsible to the discipline of this Church. Amenable for Presentment for an Offense shall mean that a reasonable suspicion exists that the individual has been or may be accused of the commission of an Offense"); Canon IV.1 (Offenses include "violation of the Constitution and Canons of General Convention"). 24 CR 5235, 5243, 5277; 5293.

[14] The Episcopal Church clearly has the constitutional right to select a new bishop and recognize those wishing to form a new diocese and remain part of its church. And the Presiding Bishop's actions in Fort Worth are consistent with the constitutional authority noted above of other bishops to act in "territory not yet organized into Dioceses of this Church" but inconsistent with the prohibition on any bishop acting within existing dioceses without the permission of the Ecclesiastical Authority, all of which confirms that the Presiding Bishop acted as if there was no longer an existing Episcopal Church diocese after the vote to disaffiliate. In any event, the selection and recognition of a new bishop and diocese are irrelevant to the dispute before the Court because (i) they occurred after Bishop Iker acted as Ecclesiastical Authority during the vote to disaffiliate and the subsequent certification that he was not amenable to church discipline; and (ii) this case concerns control of existing *legal* entities not the formation or recognition of new *ecclesiastical* bodies or officers.

because such a determination would entail an impermissible extensive and searching inquiry into church polity.

TEC asks the Texas courts to go beyond the diocesan bishop, the authority explicitly identified in the church constitution as "the Ecclesiastical Authority," to identify another, allegedly higher authority. In support of its position, however, TEC does not point to any explicit language in the governing constitution identifying such a higher authority in standard legal language that could be readily recognized by courts. Indeed, as we have already shown, there is none.

Instead of pointing to explicit language identifying such an alleged authority, TEC has submitted a 70 page affidavit by an expert witness on TEC history accompanied by an affidavit from a church archivist sponsoring 700 pages of historical documents spanning over 200 years. 22 CR 4519-4774; 23 CR 4775-5039; 24 CR 5040-5369; 25 CR 5372-5375.[15] As noted above, the expert characterizes his testimony as "an extended historical and theological analysis of the development of the Church's hierarchical structure from its earliest days to the present." 22 CR 4525. The Diocese of Fort Worth in response submitted an 84 page affidavit from its historical expert contesting the evidence put forward by TEC. 29 CR 6283-6365. On these facts alone it is apparent that TEC is asking the court to undertake precisely the kind of "searching and therefore

[15] Appellees rely almost exclusively on these materials in making their argument concerning the hierarchical nature of the church. TEC Br. at 1-2, 27; Local TEC Br. at 1, 2, 15. At one point, TEC refers to the "ample history" in its evidence to dispute contentions by the Diocese of Fort Worth. Br. at 27.

impermissible inquiry into church polity" that repeatedly has been deemed unconstitutional by the United States Supreme Court.[16]

A closer examination of TEC's evidence in this case puts this point beyond question. TEC's historical expert acknowledges, as he must, that the church constitution contains no language identifying a supreme authority higher than the diocese in express legal terms. In a section bearing the heading "Lack of 'Federal' Language," TEC's expert concedes "the absence of any language of federalism in the Church Constitution." What he means by his carefully chosen formulation, "language of federalism," then becomes clear:

> Thus, the **assumptions** of the Church Constitution of 1789 were that the General Convention was to be the chief legislative authority and that state conventions would possess only that authority which the General Convention chose not to exercise itself, either expressly or implicitly.
>
> The assertion has been made that the Constitutions of certain other religious bodies appear to use **more intentional language of supremacy** than that found in the Church's Constitution in articulating the superior authority of the national body…." 22 CR 4548, 4550 (emphasis added).

Thus, the "absence" TEC's expert is acknowledging is that of "any language" of supremacy or hierarchical authority for The Episcopal Church's "national body." This absence forces him to contend that the purported hierarchical authority of the church's General Convention and the subordination of diocesan bodies were nonetheless the

[16]In its brief in support of its motion for summary judgment, TEC argued: "These undisputed facts show that the Church is a three-tiered structure, with the General Convention at the apex as the ultimate authority of the Church." 21 CR 4345. As noted, Appellants disputed this factual assertion with lengthy expert testimony. Given this factual dispute over the identity of the hierarchical authority in The Episcopal Church, summary judgment was not appropriate without regard to the First Amendment issues. Tex. R. Civ. P. 166a (c); *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 645-46, 44 Tex. Sup. Ct. J. 89 (Tex. 2000); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49, 28 Tex. Sup. Ct. J. 384 (Tex. 1985).

unspoken underlying "assumptions" of the church constitution. He then compares the absence of language of hierarchical authority in the Episcopal Church constitution with other denominations that have hierarchical bodies specified in recognizable legal language:

> In three often-cited Twentieth-Century church Constitutions, those of what is now the United Methodist Church, the Presbyterian Church USA, and the Evangelical Lutheran Church of America ("ELCA), **explicit language of supremacy was necessary**, because in each case the present church was a union of earlier churches with long traditions of legislative independence. The Methodist merger of 1939 represented the coming together of Southern and Northern branches (among others) that had been separate since 1844. Presbyterians similarly re-joined churches divided by the Civil War, while the ELCA represented the union of three churches (the Lutheran Church of America, the American Lutheran Church, and the Association of Evangelical Lutherans) that had been historically independent. When there have been competing traditions of legislative autonomy, language of supremacy may be necessary to delineate authority. **But in the case of The Episcopal Church in the 1780s, where no such competing authorities existed, language of supremacy in the Constitution was unnecessary and, indeed, inappropriate**. (Emphasis added.) 22 CR 4551.

In other words, the Episcopal Church constitution is totally devoid of "any language" explicitly expressing the hierarchical supremacy of a "national body" such as that readily found in other church constitutions. Given this "absence," TEC's expert can only claim that while it is "necessary" for other churches, in the case of The Episcopal Church—and it alone—such language is "unnecessary" and "inappropriate." By its own analysis, therefore, TEC's case rests on an attempt to prove through detailed historical

evidence that the claimed central hierarchy—so clearly expressed in other churches' governing documents—is found in The Episcopal Church only by implication.[17]

On the other side, the historian providing expert testimony for the Diocese of Fort Worth sets out a detailed account of the traditional understanding of Episcopal Church polity as that of diocesan autonomy. 29 CR 6283-6365. This testimony provides a persuasive refutation of the interpretation of the lengthy historical record offered by TEC's expert. But even considering TEC's evidence by itself, it could not be clearer that TEC's position requires the court to delve deeply into 200 plus years of ecclesiastical history and compare the relative independence of The Episcopal Church's founding bodies with those of the Methodist, Presbyterian and Lutheran bodies for whom "explicit language of supremacy was necessary." Such comparative historical ecclesiology is clearly well beyond anything the First Amendment permits.

Indeed, while TEC acknowledges the "absence" of express hierarchical language in the church constitution and claims that an explicit designation of hierarchical supremacy was "unnecessary," it then asks the court to scour ambiguous historical evidence to find the missing hierarchical authority somehow "reflected" in various

[17] The expert's implication that the language of supremacy in other church constitutions was strictly a twentieth century phenomenon resulting from church mergers is plainly false as the case law already cited demonstrates. As noted above, both the United States Supreme Court in *Watson* and this Court in *Brown* considered pre-merger, nineteenth century Presbyterian constitutions with explicit language of hierarchical supremacy. As this Court concluded in *Brown*: "To the General Assembly was committed the supreme legislative, judicial and executive power of the church." The Court relied on the explicit constitutional language in deferring to the General Assembly. 102 Tex. at 333 ("It would be difficult to make a more ample expression of authority").

documents and actions over the 200 year history of the church. The main sections of the expert affidavit indicate the argument being put forward:

Section II, "The Hierarchical Nature of The Episcopal Church Was **Evident** During the Church's Organizational Period, 1784-1789";

Section III, "The Hierarchical Nature of The Episcopal Church Was **Reflected** in the 1789 Constitution and Canons";

Section IV, "The Supremacy of the General Convention Has Continued to Be **Reflected** in General Convention Actions from 1790 to the Present";

Section V, "Nineteenth Century Commentators Unequivocally **Viewed** the General Convention as the Supreme Authority in The Episcopal Church and Diocesan Accession as Irreversible."

22 CR 4536; 4546; 4559; 4578 (emphasis added) (these sections account for 50 of the affidavit's 70 pages).[18]

Most significant is the heading of Section III: TEC's own expert claims only that the hierarchical nature he advocates was "reflected," not stated, in the church

[18] For completeness, the other main sections of the affidavit are: Section I, "The Episcopal Church Is Hierarchical," which the expert characterizes as a "brief discussion of the English roots of The Episcopal Church and an overview of the hierarchical structure of the Church"; and Section VI, "The Case of the Protestant Episcopal Church in the Confederate States of America Does Not Support Present-Day Secessionist Claims," which is not relevant to questions about the nature of the hierarchy. 22 CR 4525-26, 4586. It is in his "overview" (qualified by "as I set out more fully below") that TEC's expert summarizes his theory of the "three tiers" cited by Appellees in their briefs. 22 CR 4530-32. His "highest tier" includes one body, Executive Council, not even authorized by the church constitution and mentioned only in passing, another body, General Convention, created in the church constitution but given no hierarchical priority over other bodies or offices, and an office, Presiding Bishop, given no constitutional jurisdiction or duties. 24 CR 5129, 5132. He places in his second tier the office, diocesan bishop, that the constitution designates "the Ecclesiastical Authority." 22 CR 4532-34.

constitution. We are offered "evident," "reflected" and "viewed," but no section headed "The Constitution States that the General Convention Is the Supreme Authority in the Church." Not surprisingly, the Diocese's expert sees something else reflected in the historical record and produces nineteenth century commentators who unequivocally viewed things differently. 29 CR 6311-12, 6323-36.

TEC's expert inadvertently emphasizes both the obscurity of what he deems "reflected" and the impossibility of the task TEC is asking the Court to perform when he concludes his lengthy survey of various historical actions with a discussion of the formation of the church pension fund. He claims: "Few actions by the General Convention show its authority over the temporal affairs of the Church as much as does the passage of the Canon forming the Church Pension Fund." 22 CR 4575-76. Courts cannot be asked to identify hierarchical authority from the formation of a pension fund, especially when warned that "few actions" of the church provide greater evidence of that authority.

It is apparent that TEC seeks to establish an alternative authority to that of the diocesan bishop by asking the Court to engage in "a searching and therefore impermissible inquiry into church polity." Indeed, TEC calls its primary evidence "an extended historical and theological analysis of the development of the Church's hierarchical structure from its earliest days to the present." The First Amendment does not permit the Court to sift through 200 years of ecclesiastical history pursuing "assumptions" allegedly made in the 1780s and never stated explicitly but only

"reflected" in an ambiguous historical record—especially when the objective of this inquiry is to override the one office expressly designated as "the Ecclesiastical Authority," the diocesan bishop. To repeat the instruction of Justice Brennan noted at the outset: "States following the [deference] approach would have to find another ground for decision, perhaps the application of general property law, when identification of the relevant church governing body is impossible without immersion in doctrinal issues or extensive inquiry into church polity." *Maryland and Va. Churches*, 396 U.S. at 370, n. 4.

CONCLUSION

The ACI/Episcopal Bishops and Clergy respectfully submit that if this Court decides that use of a deference standard is permissible in Texas, it may then choose either of two options in light of the record in this case and First Amendment constraints. It can apply a deference standard and defer to the Diocese of Fort Worth and its Ecclesiastical Authority, Bishop Iker, or it can conclude that the nature of the hierarchical authority in TEC cannot be determined without an impermissible extensive and searching inquiry and apply neutral principles of law to this dispute. In either case, the erroneous and unconstitutional grant of summary judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellants' Brief was served upon counsel for all parties, as indicated on the attached service list, by electronic transmission, on this the 23rd day of April, 2012.

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