

DISTRICT COURT, EL PASO COUNTY, COLORADO

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P.O. Box 2980

Colorado Springs, CO 80901

Phone Number: (719) 448-7577

**Plaintiff:**

GRACE CHURCH AND SAINT STEPHEN'S, a  
Colorado Nonprofit Corporation,

v.

**Defendant and Counterclaimants:**

THE BISHOP AND DIOCESE OF COLORADO, A  
Colorado Nonprofit Corporation

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Case No. 07CV1971

Div.: COM5

**COMMERCIAL DOCKET BRIEF IN SUPPORT OF  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant, Bishop and Diocese of Colorado, a corporation under Colorado law ("Diocese"), through Rothgerber Johnson & Lyons LLP, submits this brief in support of its motion for summary judgment as follows:

## INTRODUCTION

This is a case about the freedom of a Christian denomination to apply its own church law and whether a faction within one parish of that denomination may declare itself above such law, leave the denomination, and take church property with it. It is a case about the identities of ecclesiastical office holders within an hierarchical church and whether a civil court may trump the ecclesiastical hierarchy's decision regarding the identities of such officeholders.

This summary judgment motion seeks declaratory relief regarding two issues: (1) the ownership and control of church property,<sup>1</sup> and (2) the identity of parish officials. Colorado law requires the Court to determine the ownership and control of church property by applying the "neutral principles" methodology described in The Bishop and Diocese of Colorado v. Mote, 716 P.2d 85, 103 (Colo. 1986). Mote held that when a faction within an Episcopal parish seeks to secede from the Episcopal Church and attach, instead, to another denomination in the Anglican tradition, the property is held in trust not for the local church but for the general church. *See also Church of God of Madison v. Noel*, 318 S.E.2d 920, 924 (W. Va. 1984) (secessionist "members have every right to withdraw from doctrinal unity and membership with the general church, but they cannot take general church property with them").

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<sup>1</sup>Grace Church and St. Stephen's, and not the plaintiff, holds *legal* title to the real property identified in Appendix B to various bank and other financial accounts, and to a variety of personal property. Grace Church and St. Stephen's also holds legal or equitable interests in or has rights with respect to numerous trusts, trust accounts, restricted funds, and foundations. (All property and interests identified in this paragraph shall be referred to as the "Property.") Grace Church and St. Stephen's holds *legal* title to Property for the mission of and *in trust* for the Episcopal Diocese of Colorado and the Episcopal Church.

Constitutional law, as recognized in Colorado and elsewhere, requires the Court to determine the identity of ecclesiastical office holders within an hierarchical church by deferring to the determination made by the hierarchy. Levitt v. Calvary Temple of Denver, 33 P.3d 1227 (Colo. App. 2001); Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696 (1976).

## **I. SUMMARY JUDGMENT**

"Summary judgment is appropriate when the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Woodward v. Board of Directors of Tamarron Ass'n of Condominium Owners, Inc., 155 P.3d 621, 623 (Colo.App. 2007). "The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail." Peterson v. Halsted, 829 P.2d 373, 375 (Colo. 1992). "[S]ummary judgment serves the salutary goal of saving judicial resources that otherwise might be expended in protracted litigation." Mt. Emmons Min. Co. v. Town of Crested Butte, 690 P.2d 231, 239 (Colo. 1984).

"In determining whether summary judgment is proper, a court must accord to the non-moving party the benefit of all favorable inferences that may be reasonably drawn from all the undisputed facts and must resolve all doubts as to whether an issue of fact exists against the moving party." Sender v. Powell, 902 P.2d 947, 950 (Colo.App. 1995). "However, once the

moving party makes a convincing showing that there are no genuine issues of material fact, the opposing party must demonstrate with relevant and specific facts that a real controversy exists. Thus, the opposing party may not rest upon mere allegations or denials in its pleadings, but must provide specific facts demonstrating the existence of a genuine issue for trial." Id. When neither party disputes the competence or admissibility of the evidentiary materials offered in support of summary judgment, a court may consider all of that evidence in its analysis. Greenwood Trust Co. v. Conley, 938 P.2d 1141, 1149 (Colo. 1997).

## **II. STATEMENT OF FACTS**

For over 135 years, Grace and St. Stephen's Episcopal Church has served the Episcopal faithful as an entity within the Episcopal Diocese of Colorado ("Diocese of Colorado") and The Protestant Episcopal Church of the United States of America ("Episcopal Church"). For eight generations, almost every ministry and activity of this church have been subject to and ordered by the doctrine, liturgical practices, and laws of the Episcopal Church.

Because religious institutions almost always have parallel ecclesial and civil forms and because the law affecting religious institutions involves an interplay between church law and civil law, an early word about terminology may be helpful. The Diocesan ecclesial entity is called is the "**Diocese of Colorado in the Episcopal Church.**" The Colorado corporation that assists it is the defendant, "**The Bishop and Diocese of Colorado, a corporation under Colorado law.**" These entities--one created under canon law, the other civil law--overlap in purpose, and in many functions. They, jointly, shall be called the "**Diocese of Colorado.**" The parish ecclesial entity

has done ministry by a number of names, most recently: "**Grace and St. Stephen's Episcopal Church.**" The Colorado religious society and corporation that serves it is called: "**Grace Church and St. Stephen's.**" There is a dispute regarding the leadership of the parish entities because both the plaintiff and one of those seeking intervention claim to have authority over Grace Church and St. Stephen's. The parish entities--one created under canon law, the other civil law--also overlap in officeholders, in purpose, and in many functions. They, jointly shall be called "**Grace Episcopal Church.**"

#### DIOCESAN, PARISH, AND CORPORATE HISTORY

The Episcopal Church is hierarchical. Its hierarchy first had jurisdiction over the Colorado faithful beginning in 1859 through the Missionary District of the North West. In 1865, the General Convention of the Episcopal Church divided this Missionary District into a number of geographical jurisdictions, including the Missionary Diocese of Colorado led by The Right Rev. George Randall, the first Episcopal Bishop of Colorado. Thus, the Diocese of Colorado's initial canonical status was that of a missionary diocese.

The forbears of Grace Episcopal Church began worship in Colorado Springs in 1872. In short order, they began a capital campaign to build a church. Bishop Randall made the first donation, a gift of \$500. In 1873, the Missionary Diocese established this congregation as "Grace Church Mission." This placed it under direct authority of the Colorado Bishop and made it eligible to receive its financial and other support. In time, the Diocese of Colorado upgraded its canonical status to that of a parish.

These entities--the Missionary District, the Missionary Diocese, Grace Mission, and Grace Parish--were at all times subject to the The Book of Common Prayer, the *Constitutions and Canons for the Government of the Protestant Episcopal Church in the United States otherwise known as the Episcopal Church* ("National Canons"), and the *Constitution and Canons for the Government of the Episcopal Church in the Diocese of Colorado* ("Colorado Canons").

Grace Episcopal Church and its leaders have repeatedly acceded to the hierarchical authority of the Diocese of Colorado and the Episcopal Church and to the National Canons and Colorado Canons. During the 1873 organizing meeting of its first Vestry, the Vestry: "solemnly promise[d] and declare[d] that the said Parish shall forever be held and incorporated under the ecclesiastical authority of the Bishop of Colorado and his successors in office;" placed it under the authority of the "Missionary Jurisdiction of Colorado"; and promised for themselves "and [their] successors corporate obedience and conformity" to the National Canons, the Colorado Canons, and the "Doctrine, Discipline, and Usages" of the Episcopal Church.

Grace Episcopal Church's 1874 corporate predecessor incorporated under the Colorado Territorial laws. Its articles ensured that it was "in communion with" the Episcopal Church. Upon St. Stephen's Episcopal Church's 1923 merger with Grace Episcopal Church, Grace Episcopal Church recorded a new Affidavit of Incorporation in accordance with the Act for Incorporation of Religious, Educational and Benevolent Societies under Compiled Laws of Colorado (1921) §§ 2384-2399. This corporate organizing document, still in effect today, was drenched with Episcopal Church connection and governance. It stated, *inter alia*:

1. The corporation hereby created does hereby expressly accede to all the provision of the constitution and canons adopted by the General Convention of the Protestant Episcopal Church in the United States of America, and to all of the provisions of the constitution and canons of the Diocese of Colorado";
2. Those who elected the 1923 vestry were "members of the Protestant Episcopal Church in the United States" and that the Episcopalians "convened according to the usages and customs of said Church";
3. One of the purposes of the Parish corporation was "to administer the temporalities of the Protestant Episcopal Church in the United States in the parish and to carry on and conduct religious, educational and benevolent institutions and works";
4. "[T]he Wardens and Vestrymen of the parish [had] powers and duties . . . according to the rules and usages of the Protestant Episcopal Church in the United States";
5. The successors to the initial Wardens and Vestry members must be chosen in accordance with the Colorado Canons;
6. The selection and powers of the Rector are those conferred according to the National and Colorado Canons and the "rules and usages of said Church"; and,
7. The merger of the two parishes was accomplished according to the Colorado Canons.

Grace Episcopal Church's current Bylaws, similarly, are "subject to" the National and Colorado Canons, and they require that Grace Episcopal Church's Wardens and Vestry members must be "in good standing" with the Episcopal Church.

The Rev. Donald Armstrong was Grace Episcopal Church's rector when he and others in his faction voted for Grace Episcopal Church to secede from the Episcopal Church on March 26, 2007. To be eligible to hold office as rector, Father Armstrong had to be ordained, first, as a deacon, and, subsequently, as a priest. During those ordinations he solemnly vowed that his

ordained ministry would be "according to the Canons of the [Episcopal] Church" and that he would "reverently obey [his] Bishop and other chief Ministers, who, according to the Canons of the Church, may have charge and government over" him.

Canon law is for the Episcopal Church what civil law is for citizens of a state. It organizes and defines relationships, identifies leaders, provides rights, imposes responsibilities, and creates remedies--all within the framework of the values of the lawmaker. Canon law provided this gift and discipline for Grace Episcopal Church from its inception. Indeed, as late as January 3, 2007, those Vestry members who subsequently decided to declare themselves above this law assured the parish they served that they would exercise their responsibility "[p]ursuant to Canon law."

As set forth in the Undisputed Material Facts, there are many relevant canons in this dispute. One of the more important is the Dennis Canon or Title I, Canon 7.4 of the National Canons. It 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<sup>2</sup> and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its *Constitution and Canons*."

Another such canon is Title I, Canon 7.3 of the National Canons which requires parishes to acquire consent of the Bishop and Standing Committee before alienating or encumbering any

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<sup>2</sup>The preamble to the National Canons defines "Church" as the Episcopal Church.

property. Grace Episcopal Church complied with this procedure for transactions in 1958, 1984, and 1989.

Throughout every year of its history, Grace Episcopal Church and its parishioners have participated in the ministry, worship, and governance of the Diocese of Colorado and the Episcopal Church. Grace Episcopal parishioners and clergy have used the National and Colorado Canons to define its governance; served as delegates to the Diocesan Conventions annually and to the General Convention of the Episcopal Church frequently; and served on the Diocesan Standing Committee. Grace Episcopal Church has provided the Diocese of Colorado with annual reports regarding its sacramental rites, census, clergy salaries, financial condition, and property, and it hosted the annual Diocesan Convention in 1941, 1953, 1974, and 1994.

#### THE ECCLESIASTICAL DISCIPLINE OF FATHER ARMSTRONG

In late 2005, the Diocese became concerned that Father Armstrong may have engaged in financial wrongdoing with regard to the finances of Grace Episcopal Church. Consistent with his canonical authority, The Right Rev. Robert J. O'Neill, Bishop, caused the Diocese of Colorado to engage a forensic accountant, Sheri Betzer of Betzer, Critchfield & Call, LLP, so she might review Grace Episcopal Church's financial records. Based on the findings in Ms. Betzer's subsequent report, Bishop O'Neill temporarily inhibited Father Armstrong according to canon law on December 27, 2006.<sup>3</sup>

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<sup>3</sup> An "inhibition" is a form of canonical administrative leave, placed upon an ecclesiastical officer in the Episcopal Church, during an ecclesiastic investigation or disciplinary process.

Grace Episcopal Church's Vestry appears to have anticipated this possibility because it caused its attorney, Derry Adams, to provide them with a memorandum of advice about the canonical disciplinary process for an Episcopal priest on December 8, 2006. In addition to such advice, Attorney Adams' memorandum informed the Vestry members that:

- "The Vestry's authority is derived from" the National Canons, the Colorado Canons, the Colorado Nonprofit Corporation Act, and Grace Episcopal Church's articles and Bylaws;
- "The Parish is required to abide by the terms of the national and state Constitutions and the Canons of the Episcopal Church";
- "The property of Grace Church is . . . subject to the trust imposed upon it by the national church"; and
- "All real and personal property held by the Parish is held in trust for the national Church and for the Diocese in which the Parish is located."

The December 27, 2006 canonical inhibition, *inter alia*, prohibited Father Armstrong from appearing or holding himself out as a priest, performing any priestly ministrations or pastoral care; preaching; participating in leading any worship service; discussing the allegations against him other than with a list of approved persons; coming onto the grounds of Grace Episcopal Church; and communicating with Grace Episcopal Church staff, vestry members, or parishioners.

On January 16, and 17, 2007, the Diocesan Review Committee reviewed the Betzer Report, found that it identified potential grounds for the discipline of Father Armstrong, and voted unanimously to appoint a "Church Attorney" to conduct a canonical investigation. As this investigation began, Father Armstrong, the Wardens, and those aligned with him began moving more rapidly toward secession.

## PRESENTMENT, PURPORTED SECESSION, AND THE TAKING OF THE PROPERTY

During this period, it became evident, that Father Armstrong, a majority of the Vestry, and other officers of Grace Episcopal Church had decided to cause Grace Episcopal Church to secede from the Diocese of Colorado and the Episcopal Church and attach, instead, to a group known as the Convocation of Anglicans in North America ("CANAN") that itself was affiliated with the Anglican Church of Nigeria. Vestry member, Tim Fuller, resigned on January 21, stating that Vestry members were violating the terms of the inhibition by communicating with Father Armstrong and noting that he had learned at the January 20 Vestry "meeting that a significant movement is underway in the parish to take the parish out of the Episcopal Church and to bring Father Armstrong back." On March 9, the locks were changed on Grace Episcopal Church's offices and only those identified as loyal to the cause of secession were given keys. Attorney Adams resigned on March 16. Vestry member, Jon Newsome, resigned on March 19.

On Monday, March 26, 2007, the Diocesan Review Committee evaluated the investigative report from the Church Attorney and issued the canonical equivalent of an indictment against Father Armstrong called a presentment. The presentment charged Father Armstrong on six counts, including: theft of \$392,409.93 from Grace Episcopal Church; the receipt of \$548,097.27 in personal income that Grace Episcopal Church did not report to the Internal Revenue Service; unlawful extension and receipt of loans, of which, almost \$100,000 remained unpaid; failing to maintain proper books of account; violating the temporary inhibition; and other matters.

On this same day, nine of ten Vestry members (Father Donald Armstrong, Robert Balink, Dr. Michael Barber, Jack Gloriod, Dr. Rip Hollister, Jason Huntley, Emily Kline, Dr. Keith

Stampher, and Craig Whitney), and the Junior and Senior Wardens (Jon Wroblewski and Chad Friese) met and voted unanimously:

- To amend Grace Episcopal Church's 1974 Bylaws;
- For Grace Episcopal Church "to leave the Episcopal Church" including the Diocese of Colorado;
- For Grace Episcopal Church to affiliate with CANA; and
- To recall Father Armstrong to lead the Secessionist Congregation even though he was under still inhibition.

(These nine Vestry members, along with Messrs. Wroblewski and Friese shall be referred to as "the Wroblewski Vestry.") Vestry member, Robert McJimsey, was absent, and promptly after learning of this vote, repudiated it, and reconfirmed his loyalty to the Diocese of Colorado and the Episcopal Church.

As an expert in Episcopal Church canon law, Robert C. Royce attests that the individual Wardens and Members of the Vestry disqualified themselves from holding ecclesiastic office in Grace Episcopal Church by virtue of their secessionist acts taken in contravention of well established canon law. The day after the secession vote, Bishop O'Neill declared the offices of the Wroblewski Vestry members, the office of Senior Warden, the office of Junior Warden, the office of Treasurer, and the office of Clerk vacant, by force of canon law.<sup>4</sup> Bishop O'Neill's declaration

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<sup>4</sup>The pre-secession Treasurer, Charles Brown, and Clerk, Susan Spencer, had supported the actions of Father Armstrong and the Wroblewski Vestry. According to the 1974 Bylaws of Grace Episcopal Church, their actions supporting the secessionists disqualified them from office, as stated by Robert Royce.

was subsequently affirmed by the Standing Committee. Bishop O'Neill and the Standing Committee are the two highest ecclesiastical authorities to address the above referenced individual's rights to ecclesial offices at Grace Episcopal Church.

Two days after the secession vote, on March 28, 2007, over 100 members of Grace Episcopal Church met with Bishop O'Neill and Parish leaders to plan for the care of the congregation exiled by the secessionists from the Tejon Street property. At this meeting, Bishop O'Neill recognized Robert McJimsey, Grace Episcopal Church's sole remaining Vestry member. The following Sunday, over 500 faithful Episcopalians gathered as Grace Episcopal Church to worship on Palm Sunday at Colorado College's Shove Chapel. They continue to gather each Sunday under the hospitality of the First Christian Church.

On March 28, 2007, Grace Episcopal Church's sole Vestry member, Robert McJimsey, began filling vacancies on the Vestry by appointing Clelia DeMoraes, Amy Duell, Timothy Fuller, Helen Hazelton, and David Watts, to fill various vacancies (collectively, the "McJimsey Vestry"). Bishop O'Neill and the Standing Committee, the highest ecclesiastical authority to address the issue, have recognized the McJimsey Vestry as licit.

Following the secessionist vestry's actions, Grace Episcopal Church and the Diocese of Colorado demanded and continue to demand that the Secessionist Congregation hand over possession of the Property. It refuses to do so.

The statements of fact in this section are supported by expert statements, affidavits, and exhibits attached to the Motion for Summary Judgment. All are incorporated.

### **III.**

## ARGUMENT

A. First Amendment Doctrine Defines the Methodology for Civil Courts to Resolve Either Church Property Disputes and Church Disputes Regarding the Identity of Church Leaders. While the state has a legitimate interest in resolving disputes regarding church property and disputes regarding the identity of church leaders, the First Amendment circumscribes how a civil court may proceed in such disputes. Jones v. Wolf, 443 U.S. 595, 602 (1979); Episcopal Church in the Diocese of Florida, Inc. v. Lebhar No. 16-2006-CA-002361, slip. op. at 6 (Fla. Cir. Ct., April 27, 2007) (copy attached).

The fountainhead of the civil law regarding church schism is Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). Watson involved a post-Civil War Presbyterian church that split over the issue of slavery. In Watson, the pro-slavery faction argued that the Court should follow the English methodology known as Lord Eldon's Rule. Under Lord Eldon's "departure from doctrine" test, the Court determines that the faction entitled to the church property is the one aligned with traditional church doctrine. Watson, 80 U.S. (13 Wall.) at 727. This methodology worked in England with its established church, but not in the United States. Id. at 728.

Noting that the Presbyterian Church was hierarchical,<sup>5</sup> the Watson court adopted *for hierarchical churches* a different methodology for adjudicating church leadership and church property disputes--a rule of deference.

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<sup>5</sup>The Presbyterian Church is hierarchically governed by ascending representative bodies--session, presbytery, synod, and general assembly. See Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 442 (1969).

[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them.

Id. at 727.

Watson's approach for resolving such disputes in hierarchical churches by deferring to the ecclesiastical hierarchy made sense for three reasons. First, it recognized that judicial competence was low with regard to matters of doctrine and other ecclesiastical subject matters. Id. at 729 (“It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to the one which is less so.”).

Second, it gave considerable weight to the fact that those who, like Father Armstrong and those in the Wroblewski Vestry, join a church expressly or impliedly consent to its governance.

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned. **All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.**

Id. at 728-29 (emphasis added). Watson also concluded that the deference approach was likely to involve the least possible entanglement of the civil judiciary with a church. Id. at 733.

While Watson was initially decided as a matter of federal common law, the United States Supreme Court subsequently recognized that it was based upon First Amendment principle protecting the freedom of the church.

[Watson] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.

Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94, 116 (1952). So successful was Watson's approach that the United States Supreme Court repeatedly applied it to decide both church leadership disputes and church property disputes in other hierarchical church cases. See Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929); Kedroff, supra, Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America, 363 U.S. 190 (1960); Serbian Eastern Orthodox for the United States of America and Canada Diocese v. Milivojevich, 426 U.S. 696 (1976).

The judicial methodology employed in these cases involved three steps. The court determined, first, whether the church or denomination was hierarchical. It next determined the position taken by the highest ecclesiastical official to decide the matter. Then it deferred to the hierarchy's decision.

B. In *Mote*, the Colorado Supreme Court Adopted an Alternative "Neutral Principles" Methodology for Church Property Disputes. In 1979, the United States Supreme Court, in a 5-4 decision, identified an optional methodology known as "neutral principles" for

deciding church *property* disputes. Jones v. Wolf, 443 U.S. 595, 600-601. The Supreme Court described this methodology by summarized two cases:

[In Presbyterian Church v. Eastern Heights Church, 167 S.E.2d 658 (1969), t]he court examined the deeds to the properties, the state statutes dealing with implied trusts, and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church. Finding nothing that would give rise to a trust in any of these documents, the court awarded the property on the basis of legal title . . ."

Jones v. Wolf, 443 U.S. at 600 (internal citations omitted).

The neutral-principles analysis was further refined by the Georgia Supreme Court in Carnes v. Smith, 222 S.E. 2d 322 (Ga. 1976). That case concerned a property dispute between The United Methodist Church and a local congregation that had withdrawn from that church. As in Presbyterian Church II, the court found no basis for a trust in favor of the general church in the deed, the corporate charter, or the state statutes dealing with implied trusts. The court observed, however, that the constitution of The United Methodist Church, its Book of Discipline, contained an express trust provision in favor of the general church. On this basis, the church property was awarded to the denominational church.

Jones v. Wolf, 443 U.S. at 600-01.

One of the advantages of the neutral principles approach identified by Jones v. Wolf was that churches, with a little planning, could simplify the resolution of secessionist property disputes by getting their documents in order.

"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.**"

Id. at 606 (emphasis added).

The high court issued its Jones v. Wolf decision on July 2, 1979. Two months later,<sup>6</sup> following the high court's recommendation, the General Convention of the Episcopal Church adopted the Dennis Canon that made clear the trust interests of the Episcopal Church and the relevant diocese in local church property. *See* Ex. G, Mullin Affidavit at ¶ 37; Ex. E, Wright Affidavit at ¶ 23.

After describing the alternative methodology available for church property disputes, the Jones v. Wolf court gave each state the option of whether to use the Watson deference approach or the neutral principles approach for resolving such disputes. Jones v. Wolf, 443 U.S. at 602. It warned, however, that neutral principles has its limits.

[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church.

Id.

In 1986, the Colorado Supreme Court elected the neutral principles approach for church property disputes in a case with facts materially indistinguishable from those here. Bishop and the Diocese of Colorado v. Mote, 716 P.2d 85, 96 (Colo. 1986). So similar are the facts in Mote that one must question the good faith basis for plaintiff's claim. This is especially so given that the former Grace Episcopal Church legal counsel advised those now on the secessionist Vestry that "[t]he property of Grace Church is . . . subject to the trust imposed upon it by the national

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<sup>6</sup>*See* Mote, 716 P.2d at 105 n.15.

church;" and that she resigned at the time it became evident that a faction of the Vestry members and Wardens intended to secede and take the Property.

In Mote, the corporation serving the Episcopal parish was incorporated by the Affidavit of Incorporation procedure available to religious societies and corporations at that time. The *legal* title to property was held in the name of the parish corporation. The Affidavit of Incorporation deeply connected the corporate entity to the Episcopal Church. Indeed, some of its provisions are word-for-word the same as the articles for Grace Church and St. Stephen's. The parish acceded to the National Canons and the Colorado Canons. The Diocesan ecclesial and corporate entities were the very same as here.

In Mote, as here, the secessionists made last minute changes to the parish corporation's organizing documents, and they took the church property from those parishioners who remained loyal to the Episcopal Church. Just as here, the secessionist faction sought to affiliate with an alternative Anglican denomination, "the newly formed Anglican Catholic Church. *See generally Mote*, 716 P.2d at 89.

After a long discussion regarding whether to adopt the neutral principles methodology, the Colorado Supreme Court held that a trust was imposed upon the local church property "in favor of the general church." Id. at 103. Mote also shows that the content of canon law was *the determinative evidence* in deciding this case.<sup>7</sup> Even though the Colorado Court of Appeals had

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<sup>7</sup>There are other many cases in which church law is the determinative law of the case. *See, e.g., Order of St. Benedict of New Jersey v. Steinhauser*, 234 U.S. 640 (1914) (case involving Benedictine priest determined by application of the Rule of St. Benedict); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) (terms of testamentary trust determined by

itself used the neutral principles methodology, it never discussed the content of the National or Colorado Canons. *See Bishop and Diocese of Colorado v. Mote*, 668 P.2d 948 (Colo. App. 1983). When the Supreme Court undertook an extended analysis of canon law, it reversed the Court of Appeals and found the trust interest in the Diocesan and national church. *Mote*, 716 P.2d at 105-107.

It is also important to note that the *Mote* court reached its result even though the Dennis Canon had not been adopted until after the evidence was fixed. *See Mote*, 716 P.2d at 105 n.15 (noting the 1979 addition of the Dennis Canon to the National Canons "did nothing but confirm the relationship existing among [the Episcopal Church], the diocese, and the parish").

C. Church Disputes About the Identity of Church Leaders Are Determined Exclusively by the Deference Approach. Resolving the property dispute here does not determine who controls Grace Episcopal Church, and, therefore, who can issue checks, enter contracts, conduct services, or even, as this case illustrates, sue on behalf of Grace Church and St. Stephen's. As there have been no conveyances of real property identified, this dispute is primarily about the identity of the leaders of Grace Episcopal Church. It is about who constitute the members of the Vestry, the Wardens, the Treasurer, the Clerk, or even the priest responsible for the pastoral care of Grace Episcopal Church parishioners.

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Catholic Code of Canon Law and subsequent modifications of such law); *Carnes v. Smith*, 222 S.E.2d 322 (Ga. 1976) (secessionist congregation has no claim to local church property because Methodist Book of Discipline stated a trust interest for the national church).

Civil courts resolve disputes regarding the identity of church leaders or church members exclusively by the deference approach. In Levitt v. Calvary Temple of Denver, 33 P.3d 1227, 1230 (Colo. App. 2001), for example, there was a dispute as to whether the plaintiff was a member of a church. The Colorado Court of Appeals held that "a civil court simply has no authority to reverse" the decision by the church hierarchy "no matter how arbitrary or unfair, to expel Levitt or any other member." Id.

Even though Mote's neutral principles methodology was available, Levitt relied upon the deference approach articulated in Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696 (1976). The facts in Serbian parallel those here. In Serbian, the Serbian Eastern Orthodox Church ("Orthodox Church") began disciplinary proceedings against The Most Rev. Dionisije Milivojevich, Bishop of the Orthodox Church's Diocese for the United States and Canada ("American Diocese"). Id. at 703. After beginning the disciplinary proceeding, the Orthodox Church reorganized the American Diocese into three smaller dioceses. Id. In response Bishop Milivojevich refused to comply with canonical orders limiting his activity during the disciplinary process and asserted that he and his Diocese no longer recognized the governing bodies of the Orthodox Church. Id. at 704. The Orthodox Church then removed him from his position, and Bishop Milivojevich and his followers declared that the American Diocese had seceded from the Orthodox Church. The American Diocese changed its constitution and recalled Bishop Milivojevich to service. Id. at 705-06. Before the Orthodox Church completed its disciplinary proceedings, Bishop Milivojevich filed a pre-emptive civil

lawsuit to have him declared bishop and to enjoin the Orthodox Church from interfering with the property titled to the American Diocese. Id. at 706-07.

The Illinois Supreme Court entered judgment for Bishop Milivojevich utilizing the neutral principles methodology. Id. at 708-09. The United States Supreme Court reversed, reasoning:

Resolution of the religious disputes at issue here affects the control of church property in addition to the structure and administration of the American-Canadian Diocese. This is because the Diocesan Bishop controls the Monastery of St. Sava and is the principal officer of the respondent property-holding corporations. **Resolution of the religious dispute over [Bishop Milivojevich's] defrockment therefore determines control of the property.** Thus, this case essentially involves not a property dispute but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.

Id. at 709 (emphasis added).

Numerous other cases decline or reject neutral principles when the dispute involves a significant dispute over the identity of an ecclesiastical officeholder. In Kedroff, 344 U.S. 94 (1952), the United States Supreme Court used the deference approach, reasoning that the "[d]etermination of the right to use and occupy Saint Nicholas depends upon whether the appointment of Benjamin by the Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch for the American churches." Id. at 96-97.

Courts decide disputes regarding the identity of ecclesiastical officeholders by the deference approach. See Gonzalez, *supra* (deferring to the Archbishop's determination that ten year old Raul Gonzalez was ineligible for the office of chaplain and for the compensation designated for that office holder); St. Mark's Coptic Orthodox Church v. Tanios, 572 N.E.2d 283,

291-92 (Ill.App. 1991) (where the underlying dispute was about control and the identity of the board of directors, rather than strictly ownership of property, neutral principles analysis was impermissible and the rule of judicial deference must be applied); Episcopal Diocese of Massachusetts v. Devine, 797 N.E.2d 916 (Mass. App. 2003) ("[b]ecause the question of the right to use and possess the . . . property is inextricably intertwined with the question of which individuals hold authority to act on behalf of [the church,] we consider the matter to be inappropriate for determination by application of neutral principles of law"); Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific, 281 Cal. Rptr. 396 (Cal. App. 1991) (reversing local court's application of neutral principles where the core dispute was the identification of a religious body as the true church); Metropolitan Philip v. Steiger, 98 Cal. Rptr.2d 605 (Cal. App. 2000) (same); Church of God of Madison v. Noel, 318 N.E.2d 920, 924 (W. Va. 1984) (trial court erred in entertaining suit for control of church property brought by local secessionist trustees against successor trustees appointed by the general church because "the proper church authorities had already determined who were the proper trustees of the Church of God of Madison, [and] the civil courts were bound to abide by that decision"); Alexander v. Allen, 2005 WL 3369884 (Tex.App. 2005) (While resolution of the dispute would decide the issue of control of church property, "no one disputes CTAC owns the property held in the court registry. This dispute concerns who should run the church; that is, who comprises the official board of directors, and how the church should be governed.").

The Diocese has attached a copy of Episcopal Church in the Diocese of Florida, Inc. v. Lebhar No. 16-2006-CA-002361, slip. op. at 6 (Fla. Cir. Ct., April 27, 2007) decided just days

ago. Lebhar involves Episcopalian secessionists who affiliated to an Anglican province from Africa and sought to take Episcopal Church property with them. Applying Serbian, the Florida Circuit Court held that:

**At the heart of this property dispute, therefore, is a disagreement between the Plaintiff and the Defendants regarding who has the right to occupy the office of the Rector, Wardens and Vestry of the Church. The resolution of that religious dispute is for ecclesiastical authorities, not civil courts, to resolve.**

Id. at 7 (emphasis added).

The deference methodology for resolving disputes regarding church officeholders is the same as set forth in Watson. The Court should inquire first, whether the Episcopal Church is hierarchical<sup>8</sup> and, second, whether the hierarchy has determined the identity of those holding ecclesiastical office. Then the Court must defer to the hierarchy's decision. When applying that approach here, the Court should affirm the determinations by Bishop O'Neill and the Standing Committee: that the Vestry positions previously held by the Wroblewski Vestry are vacant; that the offices previously held by Mr. Brown and Ms. Spencer; that the offices of Warden previously held by Messrs. Wroblewski and Frieze are vacant; that Father Armstrong remains under

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<sup>8</sup>Numerous courts have previously determined that the Episcopal Church is hierarchical. Parish of the Advent v. Protestant Episcopal Diocese of Mass., 688 N.E. 2d 923, 931 (Mass. 1997); Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn., 620 A.2d 1280, 1285-86 (Conn. 1993); Tea v. Protestant Episcopal Church in the Diocese of Nev., 610 P.2d 182, 184 (Nev. 1980); Protestant Episcopal Church in the Diocese of N.J. v. Graves, 417 A.2d 19, 24 (N.J. 1980); Bennison v. Sharp, 329 N.W.2d 466, 473 (Mich. Ct. App. 1982).

inhibition and has no powers or function in Grace Episcopal Church; and that those members of the McJimsey Vestry are the rightful members of the Vestry of the Grace Episcopal Church.

### **CONCLUSION**

For the reasons set forth above, the Diocese of Colorado respectfully requests that this Court deny Plaintiff's prayer for declaratory relief, and enter declaratory relief in favor of Defendant and against Plaintiff, as follows:

1. The Episcopal Church is an hierarchical church.
2. The hierarchy of the Episcopal Church has found as follows: that the office of each member in the Wroblewski Vestry is vacant; that the offices of Senior Warden and Junior Warden previously held by Jon Wroblewski and Chad Friese are vacant; that the offices of Treasurer and Clerk previously held by Charles Brown and Susan Spencer are vacant; and that Father Don Armstrong is under inhibition and cannot function as a priest or engage in any ministry activity or serve as Rector.
3. The hierarchy of the Episcopal Church recognizes the McJimsey Vestry as the lawful Vestry of Grace Episcopal Church.
4. The hierarchy of the Episcopal Church recognizes that Father Michael O'Donnell and Deacon Sally Ziegler as those persons who are responsible for the pastoral care of Grace Episcopal Church.
5. The office of each member in the Wroblewski Vestry is vacant; the offices of Senior Warden and Junior Warden previously held by Jon Wroblewski and Chad Friese are vacant; the offices of Treasurer and Clerk previously held by Charles Brown and Susan Spencer are vacant; and Father Don Armstrong is under inhibition and cannot function as a priest or engage in any ministry activity or serve as Rector.
6. The McJimsey Vestry is the lawful Vestry of Grace Episcopal Church.
7. Father Michael O'Donnell and Deacon Sally Ziegler are responsible for the pastoral care of Grace Episcopal Church.

8. Father Donald Armstrong, Jon Wroblewski, Chad Friese, Robert Balink, Dr. Michael Barber, Jack Gloriod, Dr. Rip Hollister, Jason Huntley, Emily Kline, Dr. Keith Stampher, Craig Whitney, Charles Brown, and Susan Spencer have no authority to direct, supervise, or act on behalf of the corporation known as Grace Church and St. Stephen's or the Parish its serves, and they have had no such authority since the acts of secession.
9. Father Donald Armstrong, Jon Wroblewski, Chad Friese, Robert Balink, Dr. Michael Barber, Jack Gloriod, Dr. Rip Hollister, Jason Huntley, Emily Kline, Dr. Keith Stampher, Craig Whitney, Charles Brown, and Susan Spencer and those they direct have no right or authority to possess or control the Property.
10. Grace Church and St. Stephen's holds *legal* title of record to the Property for the mission of and *in trust* for the Episcopal Diocese of Colorado and the Episcopal Church
11. The McJimsey Vestry and those they direct have right to possess and control the Property for the mission of and in trust for the Diocese of Colorado and the Episcopal Church.

Respectfully submitted,

ROTHGERBER JOHNSON & LYONS LLP

Original signature of L. Martin Nussbaum on file  
L. Martin Nussbaum, #15370

### **CERTIFICATE OF SERVICE**

On May 10, 2007, I served a copy of the foregoing by LexisNexis™ File & Serve on

J. Gregory Walta  
105 E. Moreno Avenue  
Colorado Springs, CO 80903-4039

Original signature on file  
Karen Lutterschmidt