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SUPREME COURT  
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CASE NO. S \_\_\_\_\_

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Deputy

**SUPREME COURT OF THE STATE OF CALIFORNIA**

**EPISCOPAL CHURCH CASES**

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**PETITION FOR REVIEW**

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Court of Appeal, Fourth Appellate District, Division Three  
(Appeal Nos. G036096, G036408, G036868)

Orange County Superior Court (J.C.C.P. 4392; 04CC00647)  
The Honorable David C. Velasquez, Coordination Trial Judge

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JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, A CALIFORNIA

NONPROFIT CORPORATION; JAMES DALE; BARBARA HETTINGA; PAUL

STANLEY; CAL TRENT; JOHN McLAUGHLIN; PENNY REVELEY; MIKE

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## PETITION FOR REVIEW

Petitioners, Defendants and Respondents respectfully petition for review of the Opinion of the Court of Appeal, Fourth Appellate District, Division Three, filed on June 25, 2007. (Ex. "A").

### ISSUES PRESENTED

1. Should California courts use the "neutral principles of law" method commended by the U.S. Supreme Court (and followed by at least six modern California Court of Appeal decisions) in resolving church property disputes, or revert back to the "deference to hierarchy" approach of older cases (followed in the present case by the Fourth District, Division Three)?

2. Does Corporations Code section 9142(c) permit a religious denomination, which does not hold title to property, to create a trust in its favor over property owned by a separate religious corporation, without the latter's knowledge or express agreement? On this issue the present Opinion is expressly in conflict with *California-Nevada Annual Conference v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 757.

3. If so, does Corporations Code section 9142(c) violate the establishment and equal protection clauses of the United States and California Constitutions by permitting religious organizations, and

only religious organizations, to create trusts over property they do not own without the express consent of the owner?

4. When a corporation speaks out about the actions of a religious denomination by voting to disaffiliate from it, and the denomination then challenges the validity of the disaffiliation and claims ownership of the corporation's property, do those claims "arise from . . . act[s] in furtherance of the right of free speech in connection with a public issue" within the meaning of Code of Civil Procedure section 425.16?

#### **WHY REVIEW SHOULD BE GRANTED**

*First*, review should be granted to secure uniformity of decision and to settle an important question of law applicable to church property disputes. Cal. R. Ct. 8.500(b)(1).

For some sixteen years, a conflict has been growing among the Districts of the Court of Appeal in this State regarding the appropriate legal method of resolving church property disputes, as well as the proper interpretation of Corporations Code section 9142. Over that period, in the Court of Appeal's words in this case, "California intermediate appellate courts . . . have come to results that are sometimes difficult, if not impossible, to reconcile with each other." (Opinion, p. 3). There have been at least six such prior opinions, at least one of which acknowledges that it cannot be reconciled with another.

The present opinion makes matters critically worse. It expressly rejects the analytical method used by the Court of Appeal over the last three decades and adopts a throwback theory which has not been applied in California since 1952. Since then, however, the United States Supreme Court entered this arena four times, and commended “neutral principles of law” as the preferable theory. Following that commendation, the California Court of Appeal began using the “neutral principles” method, and this Court consistently denied review of those intermediate appellate decisions. The present Opinion, however, abandons this modern method in favor of the antiquated “deference to hierarchy” rule. Thus, the Opinion of the Fourth District, Division Three, here is in direct conflict with decisions of the First, Second, Fifth and Sixth Appellate Districts, and indeed, with another Division of the Fourth Appellate District – all of which at least purport to apply “neutral principles of law” rather than the “deference to hierarchy” rule resurrected by the Opinion.

The Opinion has thrown California law, which was already muddied, into further turmoil and uncertainty. California courts, corporations and citizens are now left with a patchwork of conflicting published decisions governing the ownership of church property upon a religious corporation’s secession from a larger organization. Religious entities – whether local churches or denominations – cannot now structure their affairs with any confidence that “neutral principles” will be applied to property disputes, nor can counsel effectively provide advice about the rights and duties surrounding church property.

It is time that this Court intervene and put to order the judicial chaos that currently exists by declaring explicitly that California courts are to apply “neutral principles of law” in resolving church property disputes.

*Second*, review should be granted to secure uniformity of decision and to settle important questions of law regarding the interpretation of Corporations Code section 9142(c). Cal. R. Ct. 8.500(b)(1). A conflict has been growing among the Districts of the Court of Appeal regarding the proper construction of Corporations Code section 9142(c) (hereinafter, “Section 9142(c)”)<sup>1</sup>.

The Fifth Appellate District in *California-Nevada Annual Conference v. St. Luke’s United Methodist Church* (2004) 121 Cal.App.4th 757, found that this provision and its legislative history, couched in limiting language (and understood in light of other general principles of trust and property law), does not permit a denomination to create a trust in the property of affiliated religious corporations simply by passing an internal rule to that effect. *St. Luke’s* acknowledges that it is in conflict with the Second Appellate District’s opinion in *Guardian Angel Polish National Catholic Church v. Grotnik* (2004) 118 Cal.App.4th 919.

The present Opinion now takes that conflict to a new and more critical level. The Fourth Appellate District, Division Three,

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<sup>1</sup> That statute protects local churches by providing that “[n]o assets of a religious corporation are or shall be deemed to be impressed with any trust . . . [u]nless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.”

interprets Section 9142(c) to permit a denomination to unilaterally create a trust over the property of affiliated but separate corporations by fiat, simply by amending its internal governing instruments. The Opinion allows this result even if the separate local church corporation purchased the property, holds the deed, and never assented to the trust. (Opinion, pp. 56-59).

Section 9142(c) governs every religious corporation in this State and the circumstances under which a trust interest can be created in that corporation's property. Because of the statute's wide reach, the conflicted jurisprudence surrounding its interpretation (exacerbated by the present Opinion) is especially pernicious, and warrants judicial review by this Court.

In addition, if the present Opinion's interpretation of Section 9142(c) is correct, religious denominations alone may have a State-conferred power to take the property of separate religious corporations without consideration – a power greater even than that of eminent domain. This poses an important constitutional question as to whether Section 9142(c) violates the establishment and equal protection clauses of the United States and California Constitutions by empowering religious bodies, but only religious bodies, to create trusts over property they do not own. The extent to which the State may preferentially grant religious denominations the power to usurp the property of other, separate corporations thus presents an important legal issue that needs to be resolved.

*Third*, an important question of law exists as to the scope of the first prong of California's statute governing "strategic lawsuits against public participation," Cal. Civ. Proc. Code § 425.16(b) (hereinafter,

the “Anti-SLAPP Statute”). The first prong of the statute is satisfied if claims “*arise from . . . an act in furtherance of the right of free speech.*”

Here, a religious corporation and its members spoke out publicly about the direction of the Episcopal Church by, among other things, voting to sever ties with that church in order to join another church of the worldwide Anglican Communion – of which the Episcopal Church is but one of thirty-eight members. The present suit stems directly from Defendants’ acts. Plaintiffs claim that the disaffiliation caused St. James Church to forfeit ownership of its property. Further, Plaintiffs’ two complaints *directly challenged* the corporation’s withdrawal from the Episcopal Church and sought a judicial decree invalidating and reversing it.

Notwithstanding this clear “but for” linkage between the claims and the underlying expressive activity of disaffiliation, and the Legislature’s command that the Anti-SLAPP Statute be construed broadly, the present Opinion found that the Anti-SLAPP Statute did not apply. In effect, the Opinion restricts the Anti-SLAPP Statute to causes of action where speech itself is a necessary element of liability (e.g., defamation, intentional interference with contract, etc.). This unduly restrictive interpretation of the statute is unwarranted and removes anti-SLAPP protection from cases where protected activity is expressly alleged to have been the *factual* basis for a cause of action.

This issue regarding the scope of the Anti-SLAPP Statute has particular cogency to church property disputes – which often arise out of a party’s exercise of free speech rights – but extends far beyond such disputes. Any citizen who may be subjected to a lawsuit alleging

that their speech triggered some liability, whether the speech is directly challenged or not, is endangered by the Fourth Appellate District's Opinion.

\* \* \*

The two-fold conflict created by the Opinion, concerning the appropriate analytical method of resolving church property disputes and the meaning of Corporations Code section 9142(c), leaves religious corporations, attorneys and trial courts in a quandary. No uniform law exists to determine whether a religious corporation can withdraw from a larger denomination or association and still retain the property the members of the corporation sacrificially gave to build or acquire. As churches in California and throughout the country confront historic shifts in membership and theology, and seek more flexible arrangements based on commonalities of interest, the legal status of local church property is an important issue affecting the rights of generations of Californians.

After thirty years of declining to review increasingly divergent decisions of the Court of Appeal, the time is ripe for this Court to step into the fray and provide further express guidance in this area of law.

## STATEMENT OF THE CASE

### A. Factual Background

St. James Church is, and at all times since March 1, 1949 has been, a California nonprofit corporation in good standing, operating under the name of “The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California, a California nonprofit corporation” (“St. James Church” or “Corporation”). (8 RA<sup>2</sup> 1540-45; Opinion, p. 6). Under the Corporations Code, St. James Church was and is governed by a board of directors elected by its voting membership. (4 AA 720; Cal. Corp. Code §§ 9210(a), 9220(a), 9310(a)). The clergy and volunteer board members sued in this action are The Rev. Praveen Bunyan, The Rev. Richard A. Menees, The Rev. M. Kathleen Adams, James Dale, Barbara Hettinga, Paul Stanley, Cal Trent, John Mclaughlin, Penny Reveley, Mike Thompson, Jill Austin, Eric Evans, Frank Daniels, Cobb Grantham and Julia Houten (the “Board”).

From its founding until mid-2004, St. James Church was affiliated with the national Episcopal Church, as reflected in its original articles of incorporation. (8 RA 1540-45). Unlike the Roman Catholic Church or the Church of Jesus Christ of Latter-day Saints, the Episcopal Church has chosen not to structure itself in a unitary

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<sup>2</sup> RA refers to “Respondents’ Appendix” and AA refers to “Appellants’ Appendix” filed in Appeal Nos. G036096 and G036408. The number preceding AA or RA indicates the volume and the number following indicates the page.

manner, but instead Episcopal congregations are generally separate self-governing corporations under civil law independently holding and maintaining their own property. (8 RA 1540-45). Thus, since 1950, St. James Church has held record title to its property in its own name, which was either donated to it or purchased by the Corporation directly with its own funds. (4 AA 721-22; 8 RA 1706, 1708).

As a corporation, St. James Church acts through votes of its Board and voting members. On July 22, 2004, the Board of St. James Church unanimously resolved to end ties with the Episcopal Diocese of Los Angeles (“Diocese”) and the national Episcopal Church and realign with another church of the worldwide Anglican Communion. (4 AA 723, 916-18; Opinion, p. 6). When this resolution was announced to the members of St. James Church at a special meeting on August 16, 2004, over 95% of the members then voted in favor of ratifying and approving St. James Church’s disaffiliation. (4 AA 724, 920-22; Opinion, p. 6). A duly-approved amendment to the Corporation’s articles was accepted for filing by the Secretary of State on August 17, 2004. (4 AA 888-89, 924-26).

The press coverage of St. James Church’s disaffiliation from the Diocese and Episcopal Church has been extensive, including over 300 print and wire stories, as well as national and international television coverage. (4 AA 930-31).

## **B. Procedural Background**

In the wake of the disaffiliation, on September 7, 2004, Plaintiffs, including the Diocese, filed suit to both reverse the

disaffiliation itself and to confiscate the Corporation's property on the theory that it was now ineligible to hold it. (1 AA 26-28). Both Plaintiffs' original Verified Complaint and their First Amended Complaint are rife with allegations that the Corporation has forfeited its property because of the disaffiliation. (1 AA 3-4; 1 AA 75). Both Complaints also seek judicial declarations essentially overturning the Corporation's disaffiliation and affirming that St. James Church remains Episcopalian notwithstanding the will of over 95% of its members. (1 AA 20, 27; 1 AA 94-95, 100).

St. James Church and the individual defendants filed a special motion to strike Plaintiff's First Amended Complaint as a strategic lawsuit against public participation. (3 AA 695). The trial court granted the special motion, and struck the First Amended Complaint without leave to amend. (7 AA 1427). It also sustained without leave to amend St. James Church's demurrer to the First Amended Complaint-in-Intervention filed by the national Episcopal Church, which intervened in the action. (4 IA 857).<sup>3</sup> The trial court entered a judgment of dismissal as to both Plaintiffs and Plaintiff-in-Intervention, and both appealed. (4 IA 860).

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<sup>3</sup> IA refers to the Appendix filed by the Intervenor, the national Episcopal Church, in Appeal No. G036868.

**C. The Court of Appeal's Opinion Expressly Conflicts With Other Appellate Opinions.**

On June 25, 2007, the Fourth Appellate District, Division Three, in an opinion authored by Presiding Justice David G. Sills, reversed the trial court's judgment. (Ex. "A").

The Opinion traces the history of church property dispute doctrines at the federal and state level, from the late 19<sup>th</sup> century to the present. (Opinion, pp. 9-73). The Opinion recognizes that the United States Supreme Court favored the "neutral principles of law" approach to deciding such disputes in a series of landmark decisions in the 1960s and 1970s. (*Id.*, pp. 21-33). Finally, the Opinion recognizes that every published California Court of Appeal decision since 1979 has adopted that approach, although with varying outcomes. (*Id.*, pp. 39-50, 60-75).

However, the Opinion self-consciously conflicts with other decisions of the Court of Appeal by expressly rejecting the "neutral principles of law" method of resolving church property disputes in favor of the older "deference to hierarchy" approach, which it dubs the "principle of governance" method. (Opinion, pp. 3-5, 76). In doing so, the Opinion conflicts with *every other* church property decision since 1979, all of which have at least acknowledged (if not always consistently applied) "neutral principles" as the governing law of California. Further, the Opinion expressly and knowingly conflicts with a decision of the Fifth Appellate District regarding the interpretation of Section 9142(c) of the Corporations Code. (Opinion, pp. 58-59, 73-74).

Petitioners petitioned for rehearing on July 11, 2007, and the Court denied the petition on July 24, 2007.

## **LEGAL DISCUSSION**

### **I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A DIRECT CONFLICT AMONG THE DISTRICTS REGARDING THE METHOD OF RESOLVING CHURCH PROPERTY DISPUTES AND THE CONSTRUCTION OF CORPORATIONS CODE SECTION 9142(C)**

#### **A. The Growing Split Among California Courts Regarding Church Property Disputes Has Now Become an Explicit Conflict Between “Neutral Principles of Law” and the “Deference to Hierarchy” Rule.**

Prior to the late 1960s, the only constitutionally-permissible method for resolving church property disputes was the so-called “hierarchical theory” or “deference rule” set forth in 1872 in the U.S. Supreme Court case of *Watson v. Jones* (1872) 80 U.S. 679. Under this approach, where a local church joined a larger religious denomination, it was bound by the decisions of that denomination’s tribunals with respect to church property, even though a different result might obtain under state law. “All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in

all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.” (*Id.* at 729).

Not surprisingly, as California courts encountered church property or corporate-control disputes over the next seventy-some years, they applied this “deference rule” in each case. (*See, e.g., Baker v. Ducker* (1889) 79 Cal. 365; *Wheelock v. First Presbyterian Church* (1897) 119 Cal. 47; *Horsman v. Allen* (1900) 129 Cal. 131; *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church* (1952) 39 Cal.2d 121).

In the late 1960s and 1970s, the U.S. Supreme Court began to hint that states might not need to defer to the determinations of denominational hierarchies in resolving church property disputes, but could employ “neutral principles of law developed for use in all property disputes.” (*Presbyterian Church in United States v. Mary Elizabeth Blue Hull* (1969) 393 U.S. 440, 449; *see also Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.* (1969) 393 U.S. 528).

In the seminal case of *Jones v. Wolf* (1979) 443 U.S. 595, the U.S. Supreme Court expressly held that state courts were not constitutionally required to defer to denominational hierarchies in church property disputes, but instead could employ “neutral principles of law” – considering deeds, articles of incorporation, state statutes, etc. – to resolve claims of ownership. Although the court left the “hierarchical theory” on theoretical life support, it heartily commended the “neutral principles” approach to the states as “completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The

method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.” (*Id.* at 603).

That same year, the California Court of Appeal, Fourth Appellate District, Division Two, began to apply the “neutral principles” approach instead of the “deference to hierarchy” rule. (*Presbytery of Riverside v. Community Church* (1979) 89 Cal.App.3d 910). Two years later, the Second Appellate District would exhaustively consider *Jones* and *Presbytery of Riverside* and conclude that “California law [is] squarely in the neutral-principles camp.” (*Protestant Episcopal Church v. Barker* (1981) 115 Cal.App.3d 599, 614, *cert. denied*, 454 U.S. 864).

Each and every subsequent church property decision, with the exception of the one at bar, has both acknowledged *Barker* as the seminal California case in this area and neutral principles as the law of the State. (See *Korean United Presbyterian Church v. Presbytery of the Pacific* (1991) 230 Cal.App.3d 480, 496 (*Barker* is “the latest [and] the most definitive appellate consideration of the legal principles concerning church property disputes in California”), *rev. denied*, 1991 Cal. LEXIS 4085 (Cal. Aug. 29, 1991); *Metropolitan Philip v. Steiger* (2000) 82 Cal.App.4th 923, 930; *Guardian Angel Polish Nat’l Catholic Church v. Grotnik* (2004) 118 Cal.App.4th 919, 930 (“[C]ourts must apply neutral principles of law.”); *California-Nevada Annual Conf. v. St. Luke’s United Methodist Church* (2004) 121 Cal.App.4th 757, 762 (*Barker* is “the leading case”), *rev. denied*, 2004 Cal. LEXIS 11372 (Cal. Dec. 1, 2004); *Concord Christian v.*

*Open Bible Standard Churches* (2005) 132 Cal.App.4th 1396, 1411, rev. denied, 2005 Cal. LEXIS 13806 (Cal. Dec. 14, 2005)). Most of these decisions were appealed to this Court, which has declined to grant review in every case.

However, even as these courts acknowledged and purported to utilize the “neutral principles” approach, their often divergent outcomes illustrated an incipient and growing conflict. Certain courts adulterated the “neutral principles” approach by relying, to one degree or another, on whether the religious corporation had been a member of a “hierarchical” denomination prior to the dispute and by allowing the denomination’s internal rules to trump state corporate law.

For example, in *Korean United*, the Second Appellate District purported to apply “neutral principles,” but reached a result opposite to that in *Barker* and *Presbytery of Riverside*. It did so by heavily crediting the “hierarchical” nature of the plaintiff denomination and allowing it to disenfranchise the majority of members of the religious corporation, even though those members remained qualified under state law. (*Korean United*, 230 Cal.App.3d at 500-01).

Similarly, in *Guardian Angel*, the Second Appellate District purported to apply “neutral principles of law,” but then embarked on a long paean to the “hierarchical” nature of the plaintiff denomination. (*Guardian Angel*, 118 Cal.App.4th at 921-23, 928-31). Although it ostensibly used “neutral principles,” the court in *Guardian Angel* ultimately held in favor of the denomination by crediting the rules of the general church over those of state law to find the defendant corporation’s board to be “unauthorized.” (*Id.* at 927-28).

Alarmed by this trend of allowing deference to the plaintiff's "hierarchy" to creep back into the well-established "neutral principles" framework, the Fifth Appellate District attempted to pull the line taut again in *California-Nevada Annual Conference v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 757. Of particular note is *St. Luke's* frank acknowledgment of its own conflict with *Guardian Angel*: "[W]e respectfully disagree with the view that acts of a board of directors of a lawfully formed corporation may be viewed by a civil court to be a nullity simply because those acts are deemed unauthorized not by any recognized rule of state law, but rather only by the general church's own rules." (*Id.* at 771). The *St. Luke's* court then cogently observed that "[a]lthough the hierarchical theory has supposedly been rejected in California, it will nevertheless live on under the label of 'neutral principles of law,' if a church's own rules are viewed as trumping state statutes." (*Id.*)

The Opinion of the Fourth Appellate District, Division Three, in the *Episcopal Church Cases* has now taken the incipient conflict to a new and critical level. The opinions discussed above at least all purport to apply "neutral principles of law," although several are tainted with continued deference to supposed "hierarchy." But the Fourth Appellate District has now *expressly* rejected "neutral principles of law" entirely. The Opinion holds that notwithstanding *Jones v. Wolf*, and the long line of California cases since *Presbytery of Riverside*, the antiquated "deference to hierarchy" rule expressed in the hundred-year-old *Baker-Wheelock* line of cases remains the law of California. (Opinion, pp. 2-5). Thus, the Opinion is impossible to reconcile with, and is indeed diametrically opposed to, the holdings of

the First, Second, Fifth and Sixth Appellate Districts – and even another division of the Fourth Appellate District itself.

Because of the Opinion, California church property law is conflicted and in turmoil. Religious corporations holding title to their property in their own names, but which nonetheless are affiliated with larger “general churches” or organizations which may lay claim to that property, cannot judge their rights and duties with any certainty. Likewise, larger church bodies and denominations face the same problem.<sup>4</sup> Attorneys practicing in the field of church property law and litigation can no longer offer informed advice and counsel to church clients in California regarding their property. The Second and Fifth Appellate Districts will apparently apply neutral principles, while the Fourth will not. Because of the conflict, however, trial courts throughout the state are free to pick and choose among the decisions under *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, and *Sears v. Morrison* (1999) 76 Cal.App.4th 577, 587, unless and until this Court resolves the conflict. That is precisely what is needed to ensure uniform decisions in church property disputes.

**B. California Courts Are in Conflict Regarding the Proper Interpretation of Corporations Code Section 9142(c).**

In addition to the conflict between the Districts over whether to apply “neutral principles” or “deference to hierarchy” to resolve

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<sup>4</sup> See the *amicus* letter filed on behalf of the Charismatic Episcopal Church by attorney Lu T. Nguyen, Ph.D.

church property disputes, the Opinion brings another already-extant conflict to a new crescendo. Section 9142(c), adopted in 1981, provides in relevant part that “[n]o assets of any religious corporation shall be deemed to be impressed with any trust . . . [u]nless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.” (Cal. Corp. Code § 9142(c)(2)).

In *Korean United*, the Second Appellate District perfunctorily described Section 9142(c) as creating a “presumption” of trust in the assets of a religious corporation if the internal rules of a larger organization, of which the corporation was a member, so provide. (*Korean United*, 230 Cal. App. 3d at 508-09). The Court of Appeal apparently viewed Section 9142(c) as authorizing such a trust even *ex post facto*, and without the consent of the religious corporation actually holding title to the property. (*Id.*)

The Fifth Appellate District reached the opposite conclusion in *St. Luke’s*. *St. Luke’s* exhaustively considered Section 9142(c), its legislative history, and secondary materials, concluding that the statute’s purpose “was to limit, and not to expand, the circumstances in which the assets of a religious corporation would be impressed with any trust.” Therefore, the *St. Luke’s* court held that Section 9142(c) “does not authorize a general church to create a trust interest for itself in property owned by a local church simply by issuing a rule declaring that such a trust exists”:

Such a statute would appear to be sharply at odds with other general principles of trust law . . . We know of no

principle of trust law stating that a trust can be created by the declaration of a nonowner that the owner holds the property as trustee for the nonowner.

Instead, the court held that Section 9142(c) should be interpreted to comport with traditional trust and property law principles:

The language of subdivision (c) of Corporations Code section 9142 indicates that its purpose was to limit, and not to expand, the circumstances in which the assets of a religious corporation would be “impressed with any trust, express or implied, statutory or at common law.” (citation). This limiting purpose is also apparent from various legislative history materials, such as the “digest” of the Assembly Third Reading of the bill (citation) . . . Nevertheless, *nothing in the statute appears to have been intended to create a new kind of trust which had not previously existed.*

(*St. Luke's*, 121 Cal.App.4th at 769-70 (emphasis added)). Further, *St. Luke's* held that “a local church’s creation of a trust interest in favor of the general church, including a trust interest created by the local church’s agreement to a general church’s rule calling for the local church to hold property in trust for the general church, may be revoked by the local church unless the local church has expressly declared that trust to be irrevocable.” (*St. Luke's*, 121 Cal.App.4th at 757; Cal. Prob. Code § 15400 (“Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor.”))).

The Fourth Appellate District’s Opinion takes the *Korean United* presumption to its logical conclusion – thereby expanding the growing conflict among the Districts – by expressly interpreting Section 9142(c) to create a new species of trust in which a non-owner

of property may settle a trust in its favor without the consent of the owner. (Opinion, pp. 56-57). According to the Opinion, a general church may create a trust in its favor in the property of separately incorporated local churches affiliated with it, merely by passing an internal rule, *ex post facto*, to that effect. (*Id.*, p. 58). Under Section 9142(c), the Opinion holds, such trust rules are enforceable whether or not the religious corporation that owns the property consents to, or is even aware of, the rule. The Fourth Appellate District freely acknowledges that its Opinion is in direct conflict with *St. Luke's*. (Opinion, p. 74).

Given the contradictory construction of Section 9142(c) expressed by the Second and Fourth Appellate Districts, on the one hand, and the Fifth Appellate District, on the other, religious corporations considering an alignment with or disaffiliation from a general church cannot predict how the statute will be applied in any given case. As a result, religious corporations cannot know whether their property will be forfeited upon a change of affiliation. This situation is intolerable for California churches and religious institutions that are attempting to structure their affairs, raise donations, acquire, mortgage or sell property, and so forth.

**II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN IMPORTANT QUESTION OF LAW REGARDING THE CONSTITUTIONALITY OF CORPORATIONS CODE SECTION 9142(C)**

If the Fourth Appellate District's construction of Section 9142(c) is correct, this Court must resolve its constitutionality, as religious organizations – and only religious organizations – would be exempt from the general precepts of trust and property law that apply to all other actors in the civil arena.

The First Amendment to the United States Constitution prohibits any establishment of religion, while the Fourteenth Amendment guarantees to all the equal protection of the laws. (U.S. Const., Amdts. I, XIV). The California Constitution contains similar guarantees. (Cal. Const., Art. I, Secs. 4, 7). By permitting hierarchical religious denominations or general churches to settle trusts over property they do not own simply by passing an internal rule to that effect, the Legislature would be privileging religious organizations over all other persons. No other person or organization – even the government – has such advantage. No other person or organization may create trust interests in their favor simply through their own say-so. If Section 9142(c) is so construed, the Legislature would be perpetrating an establishment of religion in violation of the First Amendment.

Similarly, Section 9142(c) deprives religious corporations that happen to be affiliated with larger religious organizations of the equal protection of the laws. A church congregation that has incorporated

under the California Religious Corporations Law and purchased and titled property in its own name obviously expects to have the same rights and freedoms with respect to that property as any other California corporation. Yet, the Opinion's interpretation of Section 9142(c) deprives only religious corporations affiliated with general churches of those benefits and rights by allowing the latter to simply take their property at will, even after the affiliation has ended. Indeed, under the reasoning of the Opinion, Section 9142(c) could allow a larger "general church" or "superior religious body" (whether or not "hierarchical") to enact a trust rule not only without the consent of member religious corporations, but without even their knowledge. A religious corporation might go on for years improving its property and paying for its maintenance, without any awareness that its property has been surreptitiously taken by a larger synod, conference or diocese with which the corporation is spiritually affiliated. If Section 9142(c) allows non-owners of property to create trust interests without the consent of the owner, then religious corporations affiliated with general churches alone out of all the nonprofit corporations in California have been deprived of the benefits of corporate self-governance and private property ownership, in violation of the federal and state constitutions.

**III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN IMPORTANT QUESTION OF LAW REGARDING HOW COURTS ARE TO DETERMINE WHEN THE FIRST PRONG OF THE ANTI-SLAPP STATUTE IS SATISFIED**

California Code of Civil Procedure section 425.16(b) provides for early scrutiny of claims “arising from [an] act . . . in furtherance of the right of petition or free speech in connection with a public issue.” (Cal. Civ. Proc. Code § 425.16(b)(1)). This Court has given extensive guidance to the lower courts in the field of anti-SLAPP jurisprudence in the form of twin cases decided on the same day: *Navellier v. Sletten* (2002) 29 Cal.4th 82, and *City of Cotati v. Cashman* (2002) 29 Cal.4th 69. In determining whether the “arising from” prong is met, “the critical consideration is whether the cause of action is based on the defendant’s protected free speech or petitioning activity.” (*Navellier*, 29 Cal.4th at 89 (emphasis added)). Put another way, “the defendant’s act underlying the plaintiff’s cause of action must itself have been an act in furtherance of free speech.” (*Cotati*, 29 Cal.4th at 78). As these cases show, a claim need not directly attack the act of free speech to qualify for anti-SLAPP scrutiny; rather, the relevant question is *whether the plaintiff’s claims would exist but for the protected act.* (*Navellier*, 29 Cal.4th at 92).

Despite the fact that the Plaintiffs’ Verified and First Amended Complaints in this case were based upon the disaffiliation of St. James Church from the Episcopal denomination and the events leading up to it (and indeed challenged the very disaffiliation itself as *ultra vires*),

the Opinion below held that the first prong of the Anti-SLAPP Statute was not met. Instead of crediting the Plaintiffs' own Verified and First Amended Complaints, which complain bitterly of St. James Church's public disagreement with The Episcopal Church and disaffiliation from it, and even seek declaratory relief proclaiming the corporate votes and amendment of articles invalid, the Fourth Appellate District applied a curious and erroneous tool – the “blue pencil” – to conclude that the first prong of the Anti-SLAPP Statute was not met. “[O]ne could blue pencil all of that background detail out of the complaints and they would still stand on their own: The Diocese claims that the property is held in trust for *it*, the national church supports the claim, and the local church rejects it.” (Opinion, p. 7).

This approach has no support in the Anti-SLAPP Statute or this Court's precedent, and would turn every SLAPP into a *non*-SLAPP. Under this reasoning, the “blue pencil” can be applied to any SLAPP suit to render it ineligible for early scrutiny. But the Fourth District, Division Three, did not apply the “blue pencil” in a prior SLAPP case involving a trespass claim brought by a shopkeeper whose premises were being picketed for a reason of concern to the community. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835 (first prong satisfied where business owner brought claims of trespass and nuisance against demonstrators picketing business due to display of North Vietnamese flag) (Sills, P.J., author)). It would be possible to “blue pencil” out all of the allegations listing the concerns of the community, the picketing, and the demonstration activity, leaving only the naked trespass and nuisance claims. But the very nature and purpose of the Anti-SLAPP

Statute is to discriminate among the same “garden variety” tort claims, subjecting them to early scrutiny in one setting but not in another. Simply put, if one trespasses on private property in connection with a public demonstration, the ensuing suit for trespass likely qualifies for anti-SLAPP evaluation; however, if one trespasses on property unconnected to any such protected act, no anti-SLAPP protection will lie. This judicial distinction is not only a hallmark of the statute, it was expressly intended by the Legislature so as to ferret out claims that arise from public speech and petition.

The Fourth Appellate District’s unprecedented “blue pencil” approach to the first prong of the Anti-SLAPP Statute would eviscerate the protections of the statute in virtually every case. Every SLAPP complaint could be “blue penciled” to remove the key allegations of protected activity, leaving only the conclusory and ultimate allegations of trespass, defamation, intentional interference, and so forth. This Court should grant review to square the Fourth Appellate District’s approach with *Navellier*’s “arising from” test under the first prong.

#### **IV. THE ISSUES PRESENTED IN THIS PETITION HAVE GREAT AND ABIDING PUBLIC IMPORTANCE, AFFECTING COUNTLESS LOCAL CHURCHES AND THEIR MEMBERS THROUGHOUT CALIFORNIA**

Over the past few decades, mainstream denominational churches in the United States and affiliated religious corporations have undergone historic shifts of membership and theology. No

longer are religious affiliations based principally on geography and history, but with the recent advent of rapid global communications, new international alignments and religious communities are forming based on common interests and beliefs.<sup>5</sup> Non-denominational churches have exploded in California in recent years, as membership in mainstream denominational churches has waned. As these new flexible church structures have quickly developed, the law governing church property disputes has not.

Religious corporations considering an alignment with a general church or denomination, or contemplating realignment with a new structure, have for almost thirty years been able to structure their affairs and plan for their future with the understanding that “neutral principles of law” would apply to any property dispute. With the Opinion of the Fourth Appellate District crystallizing the brewing conflict, however, religious corporations, attorneys and trial courts are now conflicted about the legal status of local church property. Indeed, if the Opinion is correct, thousands of separate religious corporations in California are at risk of losing the property they now think they own and whose members sacrificially gave to build. This risk is based not on their own decisions and votes, or on any voluntary conveyance of their property, but simply on the quiet passage of internal rules by distant denominations often headquartered in another

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<sup>5</sup> Contrary to the unsubstantiated statement in the Opinion, St. James Church and its members were not “changing their religion” by realigning their affiliation from one church of the worldwide Anglican Communion to another church of the same Communion. (Opinion, p. 8).

state. In fact, many religious corporations and their volunteer board members are defendants in recent cases either just commencing or on their way to appeal.<sup>6</sup> Thus, the legal status of local church property is an important, ongoing issue affecting the rights of generations of Californians. (*St. Luke's*, 121 Cal.App.4th at 757 (“We publish because Corporation Code Section 9142, subdivisions (c) and (d) do not appear to have been analyzed in any detail in any other published

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<sup>6</sup> For example:

Presbyterian: *Torrance First Presbyterian Church, a religious non-profit California corporation v. Presbytery Hanmi, a nonprofit California corporation.* (Los Angeles Superior Court Case No. BC332180).

Russian Orthodox: *The Most Rev. Archbishop Kyrill v. Holy Trinity Eastern Orthodox Church; Michael Avisov; Vivian Avisov; Tatiana Bublick; Orthodox Church of Greece, Holy Synod in Resistance; The Most Reverend Archbishop Chrysostomos* (Ventura County Superior Court Case No. CIV247865).

Episcopal: *Patricia Huber, The Right Rev. Sergio Carranza; The Protestant Episcopal Church in the Diocese of Los Angeles, a California nonprofit corporation; and The Right Rev. J. Jon Bruno, Bishop Diocesan of the Episcopal Diocese of Los Angeles v. The Rev. Dr. Ronald W. Jackson; The Rector, Wardens and Vestrymen of St. Luke's of the Mountains, a California nonprofit corporation; Tim Kelly, Burt Lehman; Chris Blakey; Ted Brenner; Mary Crosby; Dave de Vos; Alicia Greeley; Don Gunn; Debbie Kollgaard; Bob Lindstrom; Sue Ray; Lori Richardson* (Los Angeles Superior Court Case No. BC351287); *The Episcopal Diocese of San Diego, a California nonprofit religious corporation v. St. John's Parish (Episcopal), Fallbrook, California, a California nonprofit religious corporation; The Rector, Wardens and Vestry of St. Anne's Parish in Oceanside, California, a California nonprofit religious corporation; Holy Trinity Episcopal Parish, a California nonprofit religious corporation* (San Diego Superior Court Case No. 37-2007-00068521-CU-MC-CTL).

cases, and because the meaning of these subdivisions may well be of particular importance to churches which now are, or in the future will be, experiencing difficult doctrinal disputes among their members.”)).

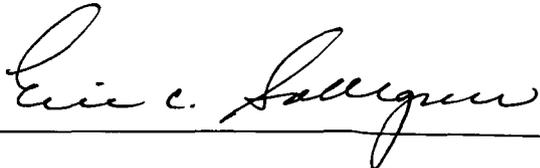
This case is being watched closely by many churches throughout the State – as evidenced by the interest of numerous *amici* and the brief of the Presbyterian Church U.S.A. in the case below – in the hope that this Court might settle the conflicted law in California and guarantee religious corporations the same rights vis-à-vis their property as are enjoyed by other, non-religious, nonprofit corporations. In an era of realignments of congregations and religious corporations, and after years of Supreme Court silence, the time is ripe for this Court to provide further guidance in this area of law.

### CONCLUSION

For the foregoing reasons, this Court should grant review of the Opinion of the Fourth Appellate District, Division Three, in the *Episcopal Church Cases*, filed on June 25, 2007.

DATED: August 3, 2007

PAYNE & FEARS LLP  
ERIC C. SOHLGREN  
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By: 

Attorneys for Petitioners  
THE REV. PRAVEEN BUNYAN, ET  
AL.

**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, Rule 14(c)(1))**

The text of this Petition consists of 6,683 words as counted by the Microsoft Word word-processing program used to generate the Petition.

DATED: August 3, 2007

  
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Daniel F. Lula

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Filed 6/25/07

**CERTIFIED FOR PUBLICATION**  
**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FOURTH APPELLATE DISTRICT**  
**DIVISION THREE**

EPISCOPAL CHURCH CASES.

G036096, G036408 and G036868

(JCCP No. 4392)

OPINION

Appeals from judgments of the Superior Court of Orange County, David C. Velasquez, Judge. Both judgments reversed.

Holme Roberts & Owen, John R. Shiner, Brent E. Rychener, Horvitz & Levy, Frederic Cohen and Jeremy Rosen for Plaintiffs and Appellants.

Goodwin Procter, David Booth Beers, Heather H. Anderson and Matthew J. Wilshire for Intervener and Appellant.

Payne & Fears, Eric C. Sohlgren, Benjamin A. Nix and Daniel F. Lula for Defendants and Respondents.

Law Offices of George S. Burns, George S. Burns and John C. Ashby as Amici Curiae for the Presbyterian Church (U.S.A.), The Synod of Southern California and Hawaii, and Presbytery of Hanmi on behalf of Plaintiffs and Appellants.

\* \* \*

## I. SUMMARY

This appeal stems from a classic dispute over church property where a local congregation of a general church seeks to disaffiliate itself from that general church and take the local church property with it. (See generally *Baker v. Duckler* (1889) 79 Cal. 365 (*Baker*); *N. L. Wheelock v. First Presbyterian Church of Los Angeles* (1897) 119 Cal. 477 (*Wheelock*); *Horsman v. Allen* (1900) 129 Cal. 131 (*Horsman*); *Committee of Missions v. Pacific Synod* (1909) 157 Cal. 105 (*Committee of Missions*); see also *Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church* (1952) 39 Cal.2d 121 (*Rosicrucian Fellowship*); *Providence Baptist Church v. Superior Court* (1952) 40 Cal.2d 55 (*Providence Baptist*).

But this appeal is about more than a church property dispute. It is also about the rule of stare decisis. As we shall explain below, in no less than six California Supreme Court opinions, our state's highest court, taking its cue from the United States Supreme Court decision in *Watson v. Jones* (1871) 80 U.S. 679 (*Watson*), consistently used a "principle of government" or "highest church judicatory" approach to resolve disputes over church property, an approach it applied to hierarchically organized churches and non-hierarchically organized churches alike.

However, in 1979, a panel of the intermediate California Court of Appeal came to the belief that this line of consistent California Supreme Court cases should be ignored, and that a new approach, called "neutral-principles analysis" was the appropriate California common law approach to church property disputes. (*Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910 (*Church of Palm Springs*). Neutral principles is a four-factor analysis for use in church property disputes, that typically examines (1) title, (2) articles of incorporation, (3) a church's constitution, canons and rules, and (4) state statutes.

The *Church of Palm Springs* court came to its conclusion based on its reading of a quartet of United States Supreme Court cases decided in the previous decade. (See *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440 (*Hull Church*); *Eldership v. Church of God at Sharpsburg* (1970) 396 U.S. 367 (*Eldership*); *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696 (*Serbian Orthodox*); and *Jones v. Wolf* (1979) 443 U.S. 595 (*Jones*).

In this opinion we shall explain in detail why those federal high court opinions did *not overrule* (either expressly or impliedly), or even alter in any way, the existing common law approach used by the California Supreme Court in *Baker*, *Wheelock*, *Horsman*, *Committee of Missions*, *Rosicrucian Fellowship*, or *Providence Baptist*. In this opinion we shall refer to these cases collectively as the “*Baker-Wheelock line*.”

Another panel of California’s intermediate appellate court followed *Church of Palm Springs* in the case of *Protestant Episcopal Church in the Diocese of Los Angeles v. Barker* (1981) 115 Cal.App.3d 599 (*Barker*). The *Barker* court, however, did not independently examine the United States Supreme Court authorities which the *Church of Palm Springs* court had cited as authority to ignore the *Baker-Wheelock line*, or the *Church of Palm Springs*’ reading of the California Supreme Court cases, particularly *Wheelock*. The *Barker* court simply assumed that the *Church of Palm Springs* decision had been correct in upsetting the stable legal universe that existed in California up until that time in the name of “neutral principles.”

Thereafter, California intermediate appellate courts have given lip service to “neutral principles,” but have come to results that are sometimes difficult, if not impossible, to reconcile with each other. In *Korean United Presbyterian Church v. Presbytery of the Pacific* (1991) 230 Cal.App.3d 480 (*Korean United*)<sup>1</sup> and *Guardian Angel Polish National Catholic Church v. Grotnik* (2004) 118 Cal.App.4th 919

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<sup>1</sup> *Korean United* was overruled on another point in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, footnote 11. The point on which it was overruled is consideration by an appellate court of an appeal from severed issues without a final judgment, a subject that has nothing to do with religious property disputes.

(*Guardian Angel*) the Court of Appeal applied the “neutral principles” approach to reach a result identical with what the traditional “principle of government” approach would have required, i.e., upholding the property claim of a general church. On the other hand, in *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke’s United Methodist Church* (2004) 121 Cal.App.4th 754 (*California-Nevada*), the court reached an opposite result (and also acknowledged that it could not be reconciled with *Guardian Angel*).

This case is also about statutory construction. In 1982, that is -- after the consistent *Baker-Wheelock* line and after *Church of Palm Springs* and *Barker* -- the Legislature, by passing Senate Bill 1178 (1981-1982 Reg. Sess.), added subdivisions (c) and (d) to Corporations Code section 9142<sup>2</sup> involving trusts on property held by religious corporations.

An examination of the history of Senate Bill 1178 shows that the Legislature had no intention of overturning or even changing the *Baker-Wheelock* line, or codifying *Barker* or *Church of Palm Springs*, as the *California-Nevada* court would later surmise. Rather, the expressed intent of the Legislature was to “fill a void” (the phrase consistently found in the legislative history) created by earlier legislation, Senate Bill 1493 (1979-1980 Reg. Sess.) in 1981, which, while it had stripped the California Attorney General of the ability to enforce trusts against religious corporations, left no one else with the ability to enforce such trusts.

In fact, an examination of the plain language of (then newly-added) subdivisions (c) and (d) to section 9142 shows a *consistency* with the *Baker-Wheelock* line, as long as (to use the statutory phrases) a “general church” has a “governing instrument” that “expressly” provides for a trust against the property of a local church corporation which is a “member” of that general church.

Since, in the case before us, the general church *does* have a governing instrument so providing an express trust on the property of local parish corporations who

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<sup>2</sup> All references in this opinion to section 9142 will be to the Corporations Code.

are members of the general church, we are, in this opinion, spared the issue of any arguable conflict between the *Baker-Wheelock* line and the statute. (This issue might arise in a case where, say, a hierarchically organized church did not have a governing instrument “expressly” declaring a trust, but where it asserted such a trust some other way). In this case, the common law rule of the former and the plain language of the latter dovetail to require the same result.

And finally, this case is about anti-SLAPP motions.<sup>3</sup> In procedural terms, part of this appeal arises out of a dismissal, pursuant to an anti-SLAPP motion, of a lawsuit brought by the diocese of a general church against a disaffiliating local church corporation that had been a member of the general church. It is now well-established in California that anti-SLAPP motions are tested by a two-prong process, in which the court must first look at (1) whether the motion even qualifies for anti-SLAPP treatment, and (2) the merits. Readers by this point will have already grasped that the trial court erred as to (2). But we also explain that it erred as to (1) as well.

In a word, the lawsuit brought by the plaintiff general church is a property dispute -- basically over who controls a particular church building in Newport Beach -- and does not arise out of some desire on the part of the general church to litigate the free exercise rights of the local congregation. They are free to disaffiliate just so long as they do not try to take the parish property with them. Readers will look in vain in this opinion for any indication of what religious controversy may have prompted the disaffiliation. We may easily reach the merits of the case under both the “principle of government” standard of the *Baker-Wheelock* line, and the plain language of section 9142, without ever needing to mention the reason for the defendants’ disaffiliation. That controversy is irrelevant to this action.

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<sup>3</sup> See section 425.16 of the Code of Civil Procedure. SLAPP is an acronym for Strategic Lawsuit Against Public Participation.

## II. FACTS AND BACKGROUND

St. James Parish in Newport Beach began as a “mission” of the Episcopal Church in 1947. In requesting permission to upgrade the parish’s status from a “mission” to a full-fledged church, the founding members promised to be bound under the “Ecclesiastical authority of the Bishop of Los Angeles, and his successors in office, the Constitution and Canons of the Church now known as the Protestant Episcopal Church in the United States of America.”

As a full-fledged church, it was incorporated in 1949. The articles of incorporation expressed this purpose: “To establish and maintain a Parish which shall form a constituent part of the Diocese of Los Angeles in that branch of the Holy Catholic Church now known as the Protestant Episcopal Church in the United States of America.”

Under the canons of the Los Angeles Diocese of the Episcopal Church, each parish elects a board of directors known as the “vestry” for the local corporation.

In 1958, the canons of the Los Angeles Diocese also provided that all property held by each parish would revert back to the Diocese upon dissolution of the parish.

In 1979, the Episcopal Church enacted Canon I.7(4), which provides that “All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located.”

In 2004, the board of St. James Parish voted to cease all affiliation with the Episcopal Church. They amended the articles of incorporation to delete all references to the Episcopal Church. A majority of the congregation voted to support the decision, but a minority of 12 members voted against it. The Los Angeles Diocese appointed a new rector and requested that the board surrender the parish property. The board refused.

The Bishop of the Los Angeles Diocese, together with at least one of the 12 members voting against disaffiliation (Rasmussen), then filed this lawsuit in Orange County Superior Court against the rector leading the disaffiliation (Bunyan) and members of the board, alleging eight property-recovery-related causes of action. Also, the national

Episcopal Church successfully sought leave to intervene in the case, and filed its own complaint in intervention.

To be sure, the original and first amended complaint and complaint in intervention in this case have included a great deal of what in story writing is known as “local color,” that might make the case *seem* as if it arose from a particular theological controversy. However, one could blue pencil all of that background detail out of the complaints and they would still stand on their own: The Diocese claims that the property is held in trust for *it*, the national church supports the claim, and the local church rejects it.

After a first-amended complaint the defendants soon brought an anti-SLAPP motion to dismiss the case, which was granted. In the wake of the successful anti-SLAPP motion brought against the diocese’s action, the court also sustained a demurrer to the national church’s (by then amended) complaint in intervention. Appeals from both dismissals followed, which this court has consolidated on its own motion.

### III. THE FIRST ANTI-SLAPP PRONG

It is remarkable that the diocesan complaint in this case should come to this intermediate appellate court on a dismissal from an anti-SLAPP motion, as distinct from, say, a motion for summary judgment or trial. It seems safe to say that church property disputes are not the typical anti-SLAPP case. We are thus required to deal with the propriety of treating the diocesan complaint as a SLAPP suit before we address the merits of the property dispute (which we would be required to do in any event in the context of reviewing the propriety of the sustained demurrer to the national church’s complaint in intervention).

The first prong in anti-SLAPP analysis is to determine “whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

The theory behind the local church’s prosecution of an anti-SLAPP motion is that the local church is, in essence, the object of litigation (the “strategic lawsuit” part

of an anti-SLAPP motion) because of its theological differences with the diocese (and by extension, the national general church). The flaw in this thinking that it confuses the *motivation for the disaffiliation* with the claims made by the general church about the *use of church property*.

As the diocese points out in its briefing, it makes no difference *why* the defendants are disaffiliating, the point is they are being sued for asserting *control over the local parish property* to the exclusion of a *right to control asserted by the plaintiffs*. The fact that a religious controversy may have prompted the dispute over the right to control the property does not mean the defendants are being sued for the “protected activity” of changing their religion.

To illustrate: Suppose a married couple owning a house as community property were to split up because the husband suddenly decided to change religions. Would the wife’s ensuing petition for dissolution be a “SLAPP” suit because her claims to her community share of the house could be traced to her displeasure with her husband’s new-found religion? Hardly.

Or, to use another example, (this one based on an example from the diocese’s appellants’ brief): What if this case had arisen because the board of the local church had wanted to sell the property to a warehouse department store and, for all we know, donate the proceeds to the general church? Surely the issue of who actually *controlled* the parish property could still be asserted in a normal civil suit -- in our hypothetical, for example, the diocese or national church might prefer the parish property in its traditional use as distinct from the money from the sale, and still assert whatever legal or equitable rights it might have in favor of that traditional use.

Prong one is measured by whether “protected activity” is the “gravamen or principal thrust” of the complaint. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) This complaint could stand alone as a simple dispute over who controls certain real property, and hence does not implicate any protected activity on the part of the local church. The trial court therefore erred in concluding that the first prong was satisfied.

IV. THE SECOND  
ANTI-SLAPP PRONG  
AND THE MERITS OF  
THE COMPLAINT IN INTERVENTION

If the trial court had not erred on the first prong in finding that the plaintiffs' lawsuit qualified for anti-SLAPP treatment, it presumably would have stopped there and denied the motion. It would not then have proceeded to the second prong and determined that plaintiffs' lawsuit was susceptible to dismissal on the merits.

We cannot stop with prong one, however. The propriety of the sustaining of the demurrer to the national church's complaint in intervention depends solely upon the merits of the case. We now turn to the relevant authorities that govern the issue of disputes over church property in California. We will examine them in chronological order.

A. *The Law, Pre-Watson*

The law prior to the 1871 decision of the United States Supreme Court in *Watson, supra*, 80 U.S. 679 is of more than academic interest in this case, because the 1969 decision of the United States Supreme Court in *Hull Church*, and the 1981 decision of the intermediate California Court of Appeal in *Barker* would both be, in part, animated by a rejection of *that* law.

To be more specific, early 1800's decisions over church property in England developed an "implied trust" theory, which is usually attributed to then Chancellor, Lord Eldon. (See Note, *Judicial Intervention in Disputes Over the Use of Church Property* (1962) 75 Harv. L. Rev. 1142, 1145-1146.) Lord Eldon's implied trust theory required the court to decide the "nature of the original institution and the standard of faith it represented." (*Id.* at p. 1146.) The idea behind Lord Eldon's implied trust theory sought to most closely approximate the disposition of the property with the original intent of the donor: "Since the identity or character of a church was, he felt, embodied in the doctrines and usages believed and practiced by its founders, to allow a

body of worshippers to change its doctrine and yet retain control of its property would be tantamount to allowing a trust for the benefit of A to be diverted to B.” (*Ibid.*)

Lord Eldon’s implied trust theory would be later described by the *Hull Church* court as a “departure-from-doctrine” approach. (*Hull Church, supra*, 393 U.S. at p. 443, fn. 2; 449-450.)

Its flaw was pretty obvious: Given the First Amendment and the establishment clause, requiring civil courts to divine what was the “true” original doctrine of a given religion and then determine whether some development represented a departure from that true doctrine was simply untenable. Which brings us to *Watson*.

#### B. *Watson*

The United States Supreme Court was able to weigh in on the issue in *Watson*, a case arising out of a split in a Louisville, Kentucky, Presbyterian Church over slavery during the Civil War. Title to the property was held in the name of the trustees of the local church, and the general Presbyterian Church had recently required ministers in southern states to publicly oppose slavery. A pro-slavery minority, however, elected their own trustees and physically seized control of the property. When members of the anti-slavery faction sued, the Kentucky state court reasoned that the public anti-slavery opposition required of southern ministers was contrary to a provision in the constitution of the Presbyterian Church prohibiting intermeddling in civil affairs. The case eventually made its way to the United States Supreme Court based on diversity jurisdiction.

The court classified religious property disputes into three categories: (1) Where the property is held in express trust. (2) Where the property is held by a “religious congregation” that is “independent,” owing “no fealty or obligation to any higher authority.” And (3) Where the property is held by a “religious congregation or ecclesiastical body” which is a “subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.” (*Watson, supra*, 80 U.S. at p. 722.)

The *Watson* court then articulated and applied what may accurately be called the “principle of government” or “highest judicator[y]” rule for disputes. (See *Watson, supra*, 80 U.S. at pp. 725-727.) In a passage that would be quoted numerous times later, including by the California State Supreme Court, the *Watson* court said: “In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies *to the use of the property* must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property.” (*Ibid.*, italics added.)

By contrast, in a hierarchically organized church such as the one involved in the case before it (the court had just enumerated the various levels of organization in the Presbyterian Church) the *Watson* court said: “In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever 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.” (*Watson, supra*, 80 U.S. at p. 726, italics added.)

Because reference to the “highest . . . judicatories” of the church at issue in *Watson* proved the dispositive rule, the *Watson* approach is often seen as synonymous with the “hierarchy theory.” (See *Barker, supra*, 115 Cal.App.3d at pp. 611-613.)

But we hasten to add that the “hierarchy” description is a technical misnomer. As the passage just quoted about majority rule shows, *Watson*’s “principle of government” is in point of fact neutral toward any kind of church organization. It simply makes the decision turn upon the structure of governmental organization in a church, as distinct from some other criterion.

The *Watson* court also made very clear that its “highest judicator[y]” approach was “otherwise” from Lord Eldon’s implied trust approach. (*Watson, supra*, 80

U.S. at p. 727.) But that was to be expected given the First Amendment. The court said in *America* people are free to “organize voluntary religious associations” and “It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organization itself provides for.” (*Id.* at pp. 727-729.)

At the time of the *Watson* decision, the federal First Amendment had not been made binding on the states, so the *Watson* decision could not make law for the entire country (a point that will become important when we get to the *Hull Church* case decided about 100 years later). However, its persuasive force clearly influenced the common law of California, as articulated by the California Supreme Court, to whose decisions we now turn.

### C. *The California Supreme Court Cases*

#### 1. Baker

Just because a majority of a local congregation changes beliefs doesn't mean the property can change in use: That is the lesson of *Baker, supra*, 79 Cal. 365.

In *Baker*, a congregation of the Reformed Church incorporated as the First Reformed Church of the City Stockton. The articles of incorporation of the new church included a direct reference to the “Heidelberg Catechism.” (*Baker, supra*, 79 Cal. at p. 373.)

The corporation owned some land used as a parsonage. By the late 1880's, however, it appears that the majority of the members of the congregation had gone over to the Lutheran persuasion. (*Baker, supra*, 79 Cal. at p. 374 [“the defendants, even though they constituted a majority of the members”].) So the corporation's trustees changed the name of the corporation to the German Lutheran Zion Society, and used the parsonage for Lutheran ministers.

The remnant Reformed Church members sued to recover the property and the California Supreme Court affirmed a judgment in their favor. The court noted that the church property was originally dedicated to the use of the Reformed Church, that it

was held in trust by the corporation's trustees, and the trustees had no power to change its original purpose. "It is thus made clear that the property in question was held by the Reformed Church in trust for its members, and the defendants, even though they constituted a majority of the members, had no right and no power to divert it to the use of another and different church organization." (*Id.* at p. 374.) That is, there was no ipso facto doctrine of majority rule, or of corporate qua corporate control.

## 2. Wheelock

While *Baker* had only adumbrated the idea that local congregations who were members of a general church could not necessarily claim control of local church property based on title being in a local church corporation. The point would become explicit in *Wheelock, supra*, 119 Cal. 477, which fully embraced *Watson's* principle of government approach.

There, a dispute arose in the First Presbyterian Church of Los Angeles, which had been incorporated, as to where to spend the proceeds from a real estate sale -- location A or location B. The *corporation's trustees* followed the majority of the congregation and wanted location A. The supporters of location B took their case to a *church tribunal* within the Presbyterian Church -- one that the Supreme Court in its opinion would acknowledge as having "control and supervision of the Presbyterian Churches of the city of Los Angeles." (*Wheelock, supra*, 119 Cal. at p. 479.) The church tribunal partially sided with the supporters of location B, and ordered the First Presbyterian Church of Los Angeles split into two churches, with an equitable division of the fund by a commission. (The commission chose to apportion the money based on membership numbers.)

The supporters of location A didn't like the result, and refused to pay over any money. The supporters of location B went to court for their share under the tribunal's ruling, on the theory that they were enforcing a trust against the First Presbyterian Church of Los Angeles in favor of the new church at location B. They lost on demurrer and their appeal reached the state supreme court.

The Supreme Court began with the premise that civil courts had ultimate authority over the division of the money: “It may be conceded, for the purposes of the case, that neither the Presbytery nor the commission appointed by it had the power to divide and apportion the money held by the church corporation; and that the disposition of those moneys were matters for civil courts, and that ecclesiastical decrees bearing upon such disposition are not binding upon judicial tribunals.” (*Wheelock, supra*, 119 Cal. at p. 482.)

But then the high court immediately shifted gears, and noted that the decrees of the internal church tribunal *were* binding on the *incorporated* First Presbyterian Church of Los Angeles “as an ecclesiastical body”: “But the ecclesiastical court known as the Presbytery had the power to deal with the First Presbyterian Church in all matters ecclesiastical. The church as an ecclesiastical body was under the absolute control and dominion of the Presbytery, and the decisions and decrees of that body were as binding upon it as the decisions and decrees of this court are binding upon inferior judicial tribunals.” (*Wheelock, supra*, 119 Cal. at p. 482.)

Then came the punch line, in which the court explicitly used a principle of government approach: “Those decrees are not only binding upon the church as an ecclesiastical body, *but they are binding and conclusive upon courts wherever and whenever material to pending litigation.*” (*Wheelock, supra*, 119 Cal. at p. 482, italics added.)

That meant that the courts had to follow the rulings of the church tribunal as to the use of the property, even if supporters of location A -- who, we must remind readers, controlled the corporation -- didn't like its ruling. (*Wheelock, supra*, 119 Cal. at p. 482.) “It is apparent that many members were grieved at such results and deemed the treatment harsh, but all must bow to the law, and ecclesiastical law equally with civil law is binding in its own domain.” (*Ibid.*)

Significantly, in *Wheelock* the California Supreme Court was indifferent to the fate of the First Presbyterian Church of Los Angeles *qua corporation*. Inherent in following the church tribunal's decree the high court *distinguished* the corporation from

the “church proper”: “The spiritual or ecclesiastical body being dissolved, what becomes of the money held by the corporation? This question brings before us the consideration of the status of the corporation as relating to the church proper. The Civil Code of this state (original section 595) expressly permits religious bodies to incorporate, but such incorporation is only permitted as a convenience to assist in the conduct of the temporalities of the church. Notwithstanding incorporation the ecclesiastical body is still all important. *The corporation is a subordinate factor in the life and purposes of the church proper.* A religious corporation like the one at bar, under the laws of this state, is something peculiar to itself. *Its function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church.*” (*Wheelock, supra*, 119 Cal. at pp. 482-483, italics added.)

Later in the opinion the court returned to that distinction: “It is insisted that the First Presbyterian Church being incorporated the fact of incorporation stands as a lion in the path absolutely prohibiting any application of the doctrine of a *pro rata* division of the property. It is declared that the action of the Presbytery in dissolving the church . . . would result in an absolute dissolution of the corporation, and it is contended that a corporation under the laws of this state cannot be dissolved in that way. The trial court took this view of the case, and upon this ground sustained a general demurrer to the complaint. . . . But the solution of this contention does not appear to be material. A corporation composed simply of the trustees, or of all the members, is still a body separate and distinct from the church proper . . . .” (*Wheelock, supra*, 119 Cal. at pp. 485-486.)

The decision ended by rejecting the view of a Michigan court, expressed in *Wilson v. Livingstone* (1894) 99 Mich. 594, which had adhered to a simple majority-rule rationale independent of the principle of government in the Presbyterian Church: “The Michigan case especially declares that a majority of the members may control the property of the corporation, and practically that the title of the property of the corporation follows the majority wherever it may lead and however often and radical a change of

faith overtakes it. In this state we take the other view.” (*Wheelock, supra*, 119 Cal. at p. 487.)

Our Supreme Court had then only to note that the supporters of location B had a kind of consolation prize. Since they had not seceded from the Presbyterian Church, they were beneficiaries of the trust as much as the supporters of location A. (*Wheelock, supra*, 119 Cal. at p. 483.)

Further expounding on the problem of corporate ownership qua corporate ownership the court, in a series of quotes from other courts, included one from Indiana based on the locus of authority test: “It is declared by the supreme court of Indiana that ‘the title to the property of a divided church is in that part of the organization which is acting in *harmony with its own law.*’” (*Wheelock, supra*, 119 Cal. at p. 485, italics added, quoting *White Lick, etc. v. White Lick, etc.* (1883) 89 Ind. 136.)

### 3. Horsman

The United States Supreme Court in *Watson* had clearly wanted civil courts to be able to resolve church property disputes without becoming mired in religious controversy and so deferred to the internal government of whatever church happened to be involved. *Horsman, supra*, 129 Cal. 131 is, in fact, a vindication of that approach, demonstrating how the principle of government approach allows secular courts to deftly avoid entangling themselves in theological matters.

In 1841 the Church of the United Brethren in Christ had organized itself into a general conference and adopted a constitution. Forty-eight years later, in 1889, at the general conference, the church adopted a new constitution. But it wasn’t unanimous - - the vote was 110 to 20. The 110 became known as the “liberals” while the 20 were the “radicals.” (*Horsman, supra*, 129 Cal. at p. 134.)

In Tulare County, however, most of the members (75 out of 80) sided with the radicals. The radicals sued to recover two tracts of land given the church about 10 years prior to the 1889 split, and then occupied by the liberals. (See *Horsman, supra*, 129 Cal. at pp. 134-135.)

*Horsman* began, like *Watson*, with the same three-category topology of religious property disputes: “The courts are in no way concerned with the transactions of ecclesiastical bodies except in so far as tangible rights of person or property are affected. Questions relating to these are divided by the court into three classes: The first is where property, by the express terms of the grant, ‘is devoted to the teaching, support, or spread of some specific form of religious doctrine or belief’; the second, where it is held by or in trust for an independent congregation; and the third, where it is held by or in trust for a congregation or other association subordinate to some general church organization.” (*Horsman, supra*, 129 Cal. at p. 136.)

However, in framing the issue before the court, the *Horsman* opinion used a phrase that we will venture to opine was, in retrospect, not the most felicitous: “true church.” It said, “The sole question, therefore, is as to the identity of the church. If the radical is the true church, the plaintiffs are entitled to recover; otherwise not.” (*Horsman, supra*, 129 Cal. at p. 135.) When *Horsman* was decided T.S. Eliot had not yet written his famous parody of the “true church” in his poem “The Hippopotamus”<sup>4</sup> so the court was probably not as attuned to the dangers of wandering in the “miasmal mist” searching for the “true church” as later courts would be.

That said, it is clear from *Horsman* that our high court was not engaged in figuring out who was *theologically* correct in the dispute between the liberals and the radicals *within* the Church of the United Brethren in Christ. The liberals won, because the principle of government in the Church of the United Brethren in Christ was that the decisions of the General Conference were authoritative, and the General Conference had sided with the liberals.

The split in the Church of the United Brethren in Christ had generated litigation all over the country, including Michigan (see *Bear v. Heasley* (1893) 98 Mich. 279, where the Michigan Supreme Court had held in favor of the radicals on the theory

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<sup>4</sup> See Eliot, *The Hippopotamus* (1920) [“The hippo’s feeble steps may err/ in compassing material ends/ while the True Church need never stir/ to gather in its dividends.”].

that the general conference of 1889 failed to observe the requirements of the constitution adopted by the general conference in 1841. The California Supreme Court used the Michigan decision as a foil, taking the opportunity to articulate a principle of government view. The general conference was to be “the highest legislative body . . . in the church” and our high court analogized the general conference of the church, in its powers, to the British Parliament. (*Horsman, supra*, 129 Cal. at p. 140.) In the process, the *Horsman* court expressly adopted the principle of government views propounded by dissenting Judge Grant in the Michigan case. (See *Horsman, supra*, 129 Cal. at pp. 137-138.)<sup>5</sup>

#### 4. Committee of Missions

*Committee of Missions, supra*, 157 Cal. 105 represents a fairly lengthy exploration by our Supreme Court into the mechanics of the church government of a group known as the Pacific Synod of the Cumberland Presbyterian Church. The opinion relates that the Cumberland Presbyterians broke off from the Presbyterian Church in the United States of America because the Cumberland group disagreed with predestinarian aspects of the Westminster Confession. (*Id.* at pp. 110-112.)<sup>6</sup>

However, in 1900, the U.S.A. Presbyterians repudiated the “offensive doctrines contained in the Westminster confession” (*Committee of Missions, supra*, 157 Cal. at p. 113.), and that led to a movement to unify the Cumberland and U.S.A. churches. A unification did indeed take place in 1906, which was challenged by dissenters in the Cumberland group. Those dissenters decided that there were “vacancies” in the board of trustees of the *corporation* that owned the Cumberland

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<sup>5</sup> There was, to be sure, a tiny bit of lingering implied trust theory reflected in the court’s long quotation with clear approval from Judge Grant’s dissent: Only if the governing body’s act “destroyed” the “identity” of the church so that it “thereby became a new and different church” could the act of the governing body not be dispositive. (See *Horsman, supra*, 129 Cal. at pp. 137-138.) Even so, the *Horsman* court noted, though, that such identity-destroying acts would only arise “in very extreme cases -- of which this is not one.” (*Id.* at p. 138.) (And for what it is worth, or research has yet to uncover any California case employing a “destruction-of-identity” rationale in order to depart from what would be the result under a principle of government theory.) Since destruction-of-identity is an *exception* to *Horsman*’s general approach of looking to the principle of government, it makes no difference for our purposes in this opinion whether that exception might be obviated by later United States Supreme Court cases that would caution against becoming involved in any religious controversy.

<sup>6</sup> To be sure, three times in the opinion the court used the word “fatalistic” to describe the doctrines of the U.S.A. group. (*Committee of Missions, supra*, 157 Cal. at pp. 112-113.) That makes no difference. As the recently popular saying went, *whatever*. Like the case before us, the *Committee of Missions* case would not turn on such local color.

church property (the official name was the “Permanent Committee of Missions of the Pacific Synod of the Cumberland Presbyterian Church in the United States”), and purported to elect their own slate. Then, in the name of the corporation, they sued the U.S.A church to deliver the Cumberland church’s property over to them. They lost at trial and the Supreme Court affirmed in a detailed exposition of the internal church government of the Cumberland church -- the point of which was that the unification had been duly approved by the *highest governing authority* of the Cumberland church, quoting *Watson’s* “highest of the church judicatories to which the matter has been carried” language. (*Committee of Missions, supra*, 157 Cal. at pp. 128- 129, quoting *Watson, supra*, 80 U.S. at p. 727.)

Indeed, in parallel with *Watson*, the California Supreme Court emphasized that the rule of looking to the highest church authority “although not accepted in England” was “the prevailing rule in this country.” (*Committee of Missions, supra*, 157 Cal. at p. 128.) Thus it made no difference that the unification hadn’t been put to a vote of the membership (*id.* at p. 122-123), or that the litigation involved donations made to the Cumberland church as such (*id.* at p. 126-127).

#### 5. Rosicrucian Fellowship

*Rosicrucian Fellowship, supra*, 39 Cal.2d 121, is not a case readily susceptible to a reader-friendly retelling of its basic facts. Suffice to say, though, that one point comes through loud and clear: In the tradition of *Wheelock*, the high court did not operate under a rule that corporate ownership was the end of all inquiries as to rights to church property (in that case, the property was called “Mt. Ecclesia”).

The case involved a religious organization that didn’t have *any* organized form of church government -- not hierarchical, not congregational, not *any*. (See *Rosicrucian Fellowship, supra*, 39 Cal.2d at p. 128 [“The judgment . . . declared . . . that the church has no ecclesiastical organization or system of church government . . . .”] and p. 133 [noting plaintiffs’ argument that the Rosicrucians were an “anomalous class” because it fit none of the three forms of church government (hierarchical, assembly or congregational)].)

Indeed, one of the arguments in the *Rosicrucian Fellowship* case was that in a religion that has no church government, by necessity the fact that a religious corporation owns title to property trumps any rights in mere followers of the church. The high court clearly rejected that point: (See *Rosicrucian Fellowship, supra*, 39 Cal.2d at p. 134 [“It appears that from the first, the unorganized church and its members through its leaders, the Heindels, have exercised property and civil rights incident to ecclesiastical functions which were not surrendered to plaintiff corporation.”].) Rather, our Supreme Court affirmed a judgment declaring that the corporation was a trustee for an “unincorporated church [which] was the basic group and owned most of the rights” to the property. (*Id.* at p. 135.)

#### 6. Providence Baptist

The problem of governance in the context of a congregationally organized church was confronted by our high court in *Providence Baptist, supra*, 40 Cal.2d 55. A Baptist pastor had incorporated a Baptist church in 1945, with a board of three trustees (himself and two others). One day in 1950, the two other trustees adopted a resolution removing him and the next day at a meeting of members of the congregation adopted the same resolution. The incorporated church and its trustees sued the pastor to get back certain funds and records. The trial court issued a decision that the trustees were entitled to those funds and records. However, it also concluded that neither the trustees nor the pastor could hold a fair election about removing him from office, and so appointed a referee to conduct an election among all the members after due notice. The pastor petitioned for writ relief on the theory that the court was intruding into ecclesiastical matters; his writ was denied in a published opinion.

The *Providence Baptist* court specifically noted that the church “is the congregational type in which its affairs are controlled by the members.” (*Providence Baptist, supra*, 40 Cal.2d at p. 61.) Hence there was “no tribunal but the congregation” to which the court might look, and, in that context, a civil court could indeed determine “whether the meeting at which a pastor was removed was properly conducted according

to the usage, contracts and rules of the society” insofar as the civil and property rights involved with the pastor’s office were involved. (*Id.* at pp. 61-62.)

As in all the previous cases (save maybe *Rosicrucian Fellowship*, the point of which was that corporate form was not dispositive), the California Supreme Court centered its decision on the proper locus of ecclesiastical authority -- in its phrase “the appropriate body of the church.” It was *that body* that would make the decision. (*Providence Baptist, supra*, 40 Cal.2d at p. 63 [“While we may not be dealing with the officer of a corporation in the strict sense (the pastor of a church is involved) the situation is similar and we see no reason why an election cannot be conducted where, as appears, a fair and proper election cannot be conducted by the church and the election previously held was irregular and of no effect. In other words the appropriate body of the church is assisted in acting within its proper sphere, according to its rules and regulations, to protect civil and property rights.”].) Such an activity was, of course, different from determining whether the pastor was “preaching a theology contrary to the denominational doctrine.” (*Ibid.*)

#### D. The United States Supreme Court Cases in the Decade Prior to Church of Palm Springs

As we shall see when we come to *Church of Palm Springs, supra*, 89 Cal.App.3d 910, that court read four United States Supreme Court cases of the previous decade as *requiring* that states use a four-factor approach that would come to be called “neutral principles analysis.” We now turn to the question of whether any of those cases really did so.

##### 1. Hull Church

*Hull Church* arose out of a secession of local Presbyterian Churches from the general Presbyterian Church, specifically involving two congregations in Georgia. Readers will recall that *Watson* was decided as a diversity case, so it did not announce a nationwide rule. Thus, it was possible, even by the late 1960’s, for a state like Georgia to still be using Lord Eldon’s implied trust theory in which a major component was whether

a religious organization had “departed from the tenets of faith and practice it held at the time the local churches affiliated with it.” (*Hull Church, supra*, 393 U.S. at p. 441.) And in the opinion United States Supreme Court expressly linked Georgia’s approach with the English implied-trust-departure-from-doctrine theory. (See *id.* p. 443, fn. 2 [saying that the Georgia theory “derives from principles fashioned by English courts” and citing the English opinions articulating those principles].)

Right from the beginning, the *Hull Church* court formulated the issue in terms of whether Georgia’s implied-trust-departure-from-doctrine theory offended the First Amendment: “Under Georgia law the right to the property previously used by the local churches was made to turn on a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it. The question presented is whether the restraints of the First Amendment, as applied to the States through the Fourteenth Amendment, permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine.” (*Hull Church, supra*, 393 U.S. at p. 441.) In two sentences the federal high court had pinpointed the entanglement inherent in the implied trust doctrine. So, of course, the answer was no -- the First Amendment did *not* permit the entanglement with religious controversy inherent in Georgia’s “departure-from-doctrine” approach.

The court devoted the next three paragraphs to quickly describing the litigation, the third of which returned to the theme that Georgia law required civil courts to determine departures from church doctrine. (See *Hull Church, supra*, 393 U.S. at pp. 443-444 [“the jury was instructed to determine whether the actions of the general church ‘amount to a fundamental or substantial abandonment of the original tenets and doctrines of the (general church), so that the new tenets and doctrines are utterly variant from the purposes for which the (general church) was founded’”].)

Having set up the issue for resolution, the court next turned to prior U.S. Supreme Court case law. The body of the opinion was then taken up with discussions of a prior quartet of federal high court cases, all of which had adhered to *Watson’s* principle

of government approach: *Watson* itself, then *Gonzalez v. Roman Catholic Archbishop of Manila* (1929) 280 U.S. 1 (*Gonzalez*); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America* (1952) 344 U.S. 94 (*Kedroff*); and finally *Kreshik v. St. Nicholas Cathedral* (1960) 363 U.S. 190 (*Kreshik*).

As the descriptions of all four cases by the *Hull Church* opinion indicated, the court *agreed* with the approach of those cases:

-- It pointed out that language from *Watson* left “the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes.” (*Hull Church, supra*, 393 U.S. at p. 447, original italics.)

-- It quoted with apparent approval Justice Brandeis’s point in *Gonzalez* that ““In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.”” (*Hull Church, supra*, 393 U.S. at p. 447.)

-- It also noted that the decision of the church in Moscow in a “Moscow-based” church was binding on North American churches in *Kedroff*. (*Hull Church, supra*, 393 U.S. at pp. 447-448.)

-- And it further noted that in *Kreshik* the federal supreme court had held that a legislature could not transfer control of a cathedral to churches away from the “central governing authority of the Russian Orthodox Church.” (*Hull Church, supra*, 393 U.S. at pp. 448-449.)

Having finished its canvass of prior authority, the *Hull Church* court then wrote a passage that would later become the main proof-text in the *Church of Palm Springs* opinion justifying a change to “neutral principles.” Here is that passage: “The Georgia courts have violated the command of the First Amendment. The departure-from-doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a ‘substantial departure’ from the tenets of faith and practice existing at the time of the local churches’

affiliation that the trust in favor of the general church must be declared to have terminated.” (*Hull Church, supra*, 393 U.S. at pp. 449-450.)

When read in context, however, the point of that paragraph was consistent with its main point of the *Hull Church* opinion: Use of the implied trust doctrine with its departure-from-doctrine element jeopardized “First Amendment values” by making property “turn on the resolution by civil courts of controversies over religious doctrine and practice.” (*Hull Church, supra*, 393 U.S. at p. 449.) That paragraph was clearly *not* intended to suggest that the principle of government approach offended First Amendment values, as shown by what had come just before -- an approving discussion of four decisions all of which had *used* the principle of government approach.

The rest of the paragraph and the next one were elaborations on the theme that the Georgia implied trust doctrine required civil courts to decide religious controversies, but -- and this is significant -- the *Hull Church* court went out of its way to *distinguish* the *Gonzalez* decision from the *Hull Church*'s condemnation of civil courts adjudicating religious doctrine. *Gonzalez* was a case where a will directed that a family member be appointed to a chaplaincy in the Roman Catholic Church, as if the governing authorities of that church had nothing to say in the matter. The trial court entered an order requiring the appointment. The United States Supreme Court affirmed a judgment of the Supreme Court of the Philippines *reversing* the trial court's upending of the proper ecclesiastical chain of command. (See *Hull Church, supra*, 393 U.S. at p. 447.) The *Hull Church* court acknowledged that *Gonzalez* involved a “marginal civil court review of ecclesiastical determinations” (*Hull Church, supra*, 393 U.S. at p. 447), an acknowledgement that is understandable given that Justice Brandeis left the door open in *Gonzalez* for civil court determinations of whether ecclesiastical determinations involved “fraud, collusion or arbitrariness.” The court said, though, that the *Gonzalez* opinion had not erred even under the *Hull Church* court repudiation of the Georgia implied trust doctrine, in language that once again emphasized *Watson*'s principle of government approach:

“Since the Georgia courts on remand may undertake to determine whether petitioner [the general church] is entitled to relief on its cross-claims, we find it appropriate to remark that the departure-from-doctrine element of Georgia’s implied trust theory can play no role in any future judicial proceedings. The departure-from-doctrine approach is *not susceptible of the marginal judicial involvement contemplated in Gonzalez*. Gonzalez’ rights under a will turned on a church decision, the Archbishop’s, as to church law, the qualifications for the chaplaincy. *It was the archbishopric, not the civil courts, which had the task of analyzing and interpreting church law in order to determine the validity of Gonzalez’ claim to a chaplaincy*. Thus, the civil courts could adjudicate the rights under the will without interpreting or weighing church doctrine but simply *by engaging in the narrowest kind of review of a specific church decision -- i.e., whether that decision resulted from fraud, collusion or arbitrariness*. Such review does not inject the civil courts into substantive ecclesiastical matters.” (*Hull Church, supra*, 393 U.S. at pp. 450-451, all italics added.) And with that distinguishment of *Gonzalez*, the *Hull Church* court reversed the judgment of the Georgia Supreme Court.

However, Justice Harlan, in concurrence, wanted to make a point about *express trusts*, that had not been issue in *Hull Church*: While he agreed with the majority that Georgia’s departure-from-doctrine doctrine meant unconstitutional entanglement with religion because it forced “civilian courts to weigh the significance and the meaning of disputed religious doctrine,” he saw nothing wrong with civilian courts enforcing express trusts. The example he gave was one where a donor “expressly gives his church some money on the condition that the church never ordain a woman as a minister or elder” or “never amend certain specified articles of the Confession of Faith” then “the church should not be permitted to keep the property simply because church authorities” have approved the “doctrinal innovation.” (*Hull Church, supra*, 393 U.S. at p. 452 (conc. opn. of Harlan, J.)). We will meet the spirit of Justice Harlan’s concurrence again when we discuss section 9142. But for the moment we now turn to the second of the four U.S. Supreme Court cases preceding *Church of Palm Springs*.

## 2. Eldership

The *Eldership* case had reached the U.S. Supreme Court's docket prior to the *Hull Church* case, and had been remanded for consideration in light of *Hull Church*. (*Eldership, supra*, 396 U.S. at p. 367, fn. 2.) It was, literally, a one-paragraph per curiam opinion dismissing an appeal "for want of a substantial federal question" because, on remand, the state court had gotten it right and not offended First Amendment principles by using a departure-from-doctrine approach. (*Id.* at p. 367.)

Specifically, on remand, the Maryland intermediate appellate court had "relied upon" four general sources, described only in the most general terms by the *Eldership* court: (1) state statutes; (2) language in deeds conveying the properties; (3) terms of charters of the corporations; and (4) provisions in the church's constitution pertinent to the ownership and control of church property. (*Eldership, supra*, 396 U.S. at p. 367.) Since the matter had been resolved in the state courts without "inquiry into religious doctrine," there was a "want of a substantial federal question" and the appellants' appeal was dismissed. And that was *all* the *Eldership* opinion said. (*Eldership, supra*, 396 U.S. at p. 368.)

However, there was a three-justice concurring opinion written by Justice Brennan who had authored the opinion for the court in *Hull Church*. Justice Brennan's concurring opinion was obviously intended to provide helpful guidance to state legislatures and courts. (See generally *Eldership, supra*, 396 U.S. at p. 368 (conc. opn. of Brennan, J.).)

Structurally, the concurring opinion was straightforward: There were three *permissible* ways for states to adjudicate church property disputes, even though in *Hull Church* the high court had said that departure-from-doctrine was not permissible:

(1) *The principle of government*: "Thus the States may adopt the approach of *Watson v. Jones* . . . and enforce the property decisions made . . . within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue . . . ." (*Eldership, supra*, 396 U.S. at pp. 368-369 (conc. opn. of Brennan, J.)

(2) *Neutral principles*: “[N]eutral principles of law, developed for use in all property disputes,’ [citation] provide *another* means for resolving litigation over religious property.” (*Eldership, supra*, 396 U.S. at p. 370 (conc. opn. of Brennan, J), italics added.)

(3) *Special Statutes*: “A third possible approach is the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine.” (*Eldership, supra*, 396 U.S. at p. 370 (conc. opn. of Brennan, J.)

But, with perfect parallel structure, for every permissible method, the three-justice concurring opinion in *Eldership* had a caveat:

(1) For the principle of government, the three justices cautioned that if the question of the identity of the governing body is *itself* a matter of “substantial controversy,” then “civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy.” (*Eldership, supra*, 396 U.S. at pp. 369-370 (conc. opn. of Brennan, J.)) We note that the question of identity *qua* identity of the governing body was not being made off-limits, only reference to “religious law and usage” to make the determination.

(2) For the neutral-principles-formal title approach, the warning was that “general principles of property law may not be relied upon if their application requires civil courts to decide doctrinal issues.” (*Eldership, supra*, 396 U.S. at p. 370 (conc. opn. of Brennan, J.))

(3) Finally, the statutory approach had to be “carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies,” (*Eldership, supra*, 396 U.S. at p. 370 (conc. opn. of Brennan, J.)), a formulation that obviously contemplated some deference to “ecclesiastical polity.”

Also, in addressing *Watson's* principle of government approach, it is worth noting that the three-justice concurring opinion in *Eldership* added a footnote to address the issue of *express* trusts that had been the subject of Justice Harlan's separate concurrence in *Hull Church: Express trusts* could not be “enforced if enforcement is

constitutionally impermissible under [*Hull Church*].” And then the three justices added: “Any language in *Watson, supra*, at 722-723, that may be read to the contrary must be disapproved. Only express conditions that may be effected without consideration of doctrine are civilly enforceable.” (*Eldership, supra*, 396 U.S. at p.369, fn. 2 (conc. opn. of Brennan, J.) (That last bit by a minority of three justices purporting to disapprove a previous majority opinion was unusual for a concurring opinion. The last we checked, three justices on a nine-justice court cannot, in a separate concurring opinion, disapprove of language in a previous majority opinion, but since the issue doesn’t arise in the case before us -- even the three justices in the *Eldership* concurrence recognized the legitimacy of the principle of government approach -- we need not go any further into the matter.)

*Watson’s* approach (and by extension, California’s *Baker-Wheelock* line), had easily survived *Eldership*. That approach would actually be specifically reapproved in the next case.

### 3. Serbian Orthodox

If the three judges who had concurred in *Eldership* had any thought of rejecting *Watson’s* principle of government approach, it was clearly dispelled in the *Serbian Orthodox* case, where Justice Brennan, this time writing for the majority, wrote a ringing affirmation of the *Watson* highest judicatory tribunal rule, quoting large swaths of the *Watson* opinion with gusto, including its “‘right to establish tribunals . . . among themselves’” language that we have already quoted above. (See *Serbian Orthodox, supra*, 426 U.S. at pp. 710-711.)

To the degree that *Serbian Orthodox* represented any departure at all from previous United States Supreme Court case law, it was in the direction of squeezing out that little bit of wriggle room that Justice Brandeis had left when he wrote an introductory clause in *Gonzalez* using the words “In the absence of fraud, collusion, or arbitrariness . . . .” (*Serbian Orthodox, supra*, 426 U.S. at p. 711.)

That is, *Serbian Orthodox* was all about whether there was an arbitrariness exception to the principle of government approach. If there had been one before based on

language in *Gonzalez*, there weren't any more after the *Serbian Orthodox* court got through with it. The highest tribunal in the Serbian Orthodox Church -- and there was no question on the point -- had demoted, then defrocked, a particular bishop. The Illinois state Supreme Court, however, had determined that the bishop's removal had been "arbitrary" (see *Serbian Orthodox, supra*, 426 U.S. at pp. 708, 718) because (quoting *Serbian Orthodox* quoting the Illinois Supreme Court) "a detailed review of the evidence discloses that the proceedings resulting in [the bishop's] removal and defrockment were not in accordance with the prescribed procedure of the constitution and the penal code of Serbian Orthodox Church." (*Serbian Orthodox, supra*, 426 U.S. at p. 718.)

That review conducted by a state was beyond the pale -- the Supreme Court was quite clear that the civil courts were not to play amateur canon lawyers and second-guess the decisions of a church's highest tribunal. In effect, the Illinois Supreme Court had impermissibly engaged in a "judicial rewriting of church law." (*Serbian Orthodox, supra*, 426 U.S. at p. 719; see also *id.* at pp. 712-713 ["The conclusion of the Illinois Supreme Court that the decisions of the Mother Church were 'arbitrary' was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures in arriving at those decisions."].)

We need only note further that the *Serbian Orthodox* opinion, besides invoking -- not rejecting -- the *Watson* principle of government or highest tribunal approach, contains a number of passages which unmistakably approve of looking to a church's organizational hierarchy as a principle for settling church property disputes, and in fact indicate that for states to *ignore* hierarchy creates First Amendment problems of its own: "For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a *church of hierarchical polity, but must accept such decisions as binding on them*, in their application to the religious issues of doctrine or polity before them." (*Serbian Orthodox, supra*, 426 U.S. at p. 709, italics added.)

And further, “In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, *the Constitution requires that civil courts accept their decisions as binding upon them.*” (*Serbian Orthodox, supra*, 426 U.S. at pp. 724-725, italics added.)

The two separate opinions from *Serbian Orthodox* should also be noted, since those opinions foretold future nuances to be developed in the last of the four cases, *Jones*. Chief Justice Burger (joined by Justice White) wrote a one-paragraph concurrence to make the point that *whether* a church was hierarchically organized was still a matter for the civil courts’ “ultimate decision.” (*Serbian Orthodox, supra*, 426 U.S. at p. 725 (conc. opn. of C.J. Burger).)

And Justice Rehnquist (joined by Justice Stevens) dissented in the name of state’s rights defending the Illinois state court approach. He also mixed in a little skepticism about the *Watson* rule, or at least the exception for arbitrariness that Justice Brandeis had inserted into it in *Gonzalez*, in this rhetorical flourish: “If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness.” (*Serbian Orthodox, supra*, 426 U.S. at p. 727 (dis. opn. of Rehnquist, J.).)

#### 4. Jones

The final movement in the quartet played before the *Church of Palm Springs* case came by way of *Jones v. Wolf* (1979) 443 U.S. 595, which might be styled the sequel to *Hull Church*. As we have seen, less than 10 years before Georgia had been using Lord Elton’s implied trust theory, that theory had failed constitutional scrutiny in *Hull Church*, and the state had been forced to develop an alternative approach. The approach chosen by the Georgia courts was described by *Jones* as a “neutral-principles

analysis.” (*Jones, supra*, 443 U.S. at p. 601.) (The evolution of Georgia law after *Hull Church* was traced in *Jones v. Wolf, supra*, 443 U.S. at pp. 599-601.)

Under the neutral principles analysis used by the Georgia courts, the numerical majority of a particular Presbyterian congregation had voted to secede from the general church (the split was 164 to go, 94 to stay), and the *Georgia* courts, finding no basis for an implied trust in state statutes, the corporate charter of the local church, or even in the Presbyterian Book of Church Order, held that “legal title to the property of the [local] Vineville church was vested in the local congregation,” and further held “[w]ithout further analysis or elaboration,” the local congregation was represented by the majority faction. (*Jones, supra*, 443 U.S. at p. 601.)

The central problem before the federal high court in *Jones* was whether Georgia’s relatively recent conversion to neutral principles analysis was *permissible* under the First Amendment. One must remember: Up to *Jones*, a majority of the United States Supreme Court had never clearly okayed neutral principles analysis. The closest it had come was that one-paragraph dismissal of an appeal from the Maryland state courts in *Eldership*.

Interestingly though (interesting in that it helps explain the nature of the issue that the court was tackling in *Jones*) the four dissenters did *not* include either Justice Rehnquist or Justice Stevens, who had favored a states’ rights position in their dissent in *Serbian Orthodox*. This time they stood in the five-justice majority, which is precisely what one would expect given the states’ right issue that was before the *Jones* court.

The split in the court was over whether the *Watson* highest tribunal approach was, in fact, *mandated* on the state law as a matter of First Amendment law (the dissenters’ position) or whether a state had the *option*, consistent with the First Amendment, of adopting the neutral principles approach. (See *Jones, supra*, 443 U.S. at p. 605 (maj. opn.) [“We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.”].)

Yes, said the majority. And they perceived that the neutral principles approach has some things going for it: “The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.” (*Jones, supra*, 443 U.S. at p. 603.) That meant states were “constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.” (*Id.* at p. 604.)

The *Jones* majority also appears to have been aware of an obvious problem with the fact of a *transition* from a highest tribunal approach to neutral principles analysis: Neutral principles analysis makes a church property dispute issue turn on the quality of legal drafting done years *prior* to the dispute, and drafting done in a different legal environment.

And so the majority added this -- well, it's not quite dicta because the point is to bolster the *permissibility* of using neutral principles analysis, but, strictly speaking, it does involve speculation involving permutations of the approach the court was approving -- language to round out its opinion: “Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.*” (*Jones, supra*, 443 U.S. at p. 606, italics added.)

Still, the case wasn't over -- the majority was not willing to merely affirm the result in the Georgia courts. That is, Georgia neutral principles might declare the property to be controlled by the local congregation, but that still left the question of exactly who was the “true representative” of that congregation? (See *Jones, supra*, 443 U.S. at p. 607 [“Petitioners earnestly submit that the question of which faction is the true

representative of the Vineville church is an ecclesiastical question that cannot be answered by a civil court.”].)

The Georgia courts, however, hadn't dealt with *that* problem. So the *Jones* majority assured them that a presumption of majority rule would be permissible under the First Amendment (*Jones, supra*, 443 U.S. at pp. 607-608), but also noted that there were strains in Georgia law that might allow courts to ascertain the true representatives of the local congregation based upon a *civil court's* analysis of the Presbyterian Church's Book of Church Order, and *that* analysis was definitely impermissible given that the hierarchical Presbyterian Church had *already* made that decision in favor of the minority. (See *Jones, supra*, 443 U.S. at p. 609 [“All this may suggest that the identity of the ‘Vineville Presbyterian Church’ named in the deeds must be determined according to terms of the Book of Church Order, which sets out the laws and regulations of churches affiliated with PCUS. Such a determination, however, would appear to require a civil court to pass on questions of religious doctrine, and to usurp the function of the commission appointed by the Presbytery, which already has determined that petitioners represent the ‘true congregation’ of the Vineville church.”].)

That worry dovetailed with an earlier concern expressed in the majority opinion (in the context of talking about the *advantages* of neutral principles analysis) that even neutral principles analysis might require civil courts to resolve religious controversies. If that happened, *then the principle of government rule was required as a matter of constitutional law*: “The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. *If in such a case the interpretation of the instruments of ownership would require the civil*

*court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.” (Jones, supra, 443 U.S. at p. 604, italics added.)*

E. The California Intermediate  
Appellate Court Cases Breaking  
With the State Supreme Court Cases

As it turns out, *Church of Palm Springs* and, ultimately, *Barker*, were preceded by two other decisions of the intermediate appellate court which paved the way for the break. We include those two decisions, *In re Metropolitan Baptist Church of Richmond, Inc.* (1975) 48 Cal.App.3d 850 (*Metropolitan Baptist*) and *Wilson v. Hinkle* (1977) 67 Cal.App.3d 506 (*Wilson*) because, after those four cases, California’s common law regarding church property disputes appeared dramatically different from what it had been since our state’s highest court had decided *Providence Baptist*.

1. Metropolitan Baptist

The very first California case to use the phrase “neutral principles” in any sort of church context was *Metropolitan Baptist, supra*, 48 Cal.App.3d 850. That fact turns out to be extremely ironic, because *Metropolitan Baptist* is probably the closest California case we have, or will review in this opinion, to employing a version of Lord Eldon’s implied trust approach. And in fact the court actually inquired into the nature of the teachings of particular churches to make its decision. To be specific, the *Metropolitan Baptist* court actually ended up ascertaining whether two Northern California Baptist churches were “fundamental” Baptist churches -- as distinct from, presumably, *non-fundamental* Baptist churches. (See *id.* at p. 856.)

There was a Baptist Church in Richmond, California whose membership, by 1970, shrank to six members, and three of those were the pastor, his wife, and his adult son. So all six members voted to dissolve the church corporation, and liquidate and distribute the corporation’s assets, consisting of about \$25,000. The six members wanted to split the assets one-third to a Dublin Baptist church, one-third to an Iowan Baptist Church, one-sixth to a Serviceman’s Center in Long Beach, one-twelfth to an Oakland

Baptist church, and one-twelfth to a Baptist seminary. (*Metropolitan Baptist, supra*, 48 Cal.App.3d at pp. 853-854.)

The Attorney General, however, became involved in the case (indeed, he was the respondent on appeal) and advocated a distribution more in keeping with the original intent of the incorporators (one of whom intervened in the case). The original articles of incorporation stated that the purpose was to form a Baptist church in Richmond, and extrinsic evidence was allowed in by the trial court that the founders also wanted that church to be “in essential accord with the beliefs of fundamental Baptist churches.” (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 855.) Several of the proposed distributees obviously did not qualify, such as the seminary and the Serviceman’s Center.

The trial court used an approach of trying to approximate the intent of the incorporators: The assets were intended to go to “fundamental” Baptist churches in Richmond, and, since there were no such “fundamental” Baptist churches in Richmond, the next best thing was to split them between the two geographically closest “fundamental” Baptist churches, the one in Oakland and the one in Dublin. (See *Metropolitan Baptist, supra*, 48 Cal.App.3d at pp. 855-856.) The six-member Richmond Baptist church appealed.

In affirming, the *Metropolitan Baptist* court devoted almost no attention to the problem that it had chosen the recipients of the assets based on a religious test -- whether they were “fundamental” or not, and certainly did not discuss the implications of a court being forced to make such a selection. The whole issue was taken care of in two paragraphs with no citation to any authority: “Our first inquiry is whether the superior court’s determination, that the Church’s purpose was to teach and preach the Scriptures, as a church in Richmond, Contra Costa County, in essential accord with the beliefs of fundamental Baptist churches, was supported by substantial evidence.” (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 856.)

That was one paragraph, setting up the issue. It was followed by a second paragraph merely saying that substantial evidence supported the trial court’s conclusion,

and which did not give any details. (It probably would have been productive if it had -- the very act of writing up why the Oakland and Dublin churches qualified as “fundamental” Baptist churches might have alerted the *Metropolitan Baptist* court that it was wandering in the miasmal mist searching for a “true” “fundamental” Baptist church.)

Next, however, came the main issue, which was in response to the assertion, raised by the remnant of the appellant Richmond church, that the court should follow the decision of the congregation, i.e., use the principle of government rule that *Watson* and the *Baker-Wheelock* line of California Supreme Court had used., though the *Metropolitan Baptist* did not give any indication that the principle of government rule was the product of Supreme Court decisions. (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 856.)

That point was refuted by the *Metropolitan Baptist* court in an analysis that went this way: Because the Richmond church was organized as a nonprofit religious corporation, it therefore “follow[ed]” that it held its property in trust “to carry out the objects for which the organization was created.” (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 857, quoting *Lynch v. Spilman* (1967) 67 Cal.2d 251, 260. (*Lynch* was a case involving a trust to establish a boys’ or youth club.) Hence, the distribution was proper under the *cy pres* doctrine as carrying out “original trust purposes . . . as nearly as possible.” (*Metropolitan Baptist, supra*, 48 Cal.App.3d at pp. 857-858.)

It was in that context -- that is, of justifying the application of *cy pres* to the liquidation of a congregationally organized church -- that the *Metropolitan Baptist* court made statements that resolution of church property disputes “may sometimes touch upon ecclesiastical concepts,” but then juxtaposed the comment against the development of neutral principles. (“To resolve the often delicate question of the First Amendment’s application to disputes concerning church property, a principle of state ‘neutrality’ has developed. This concept has been described as the application of ‘neutral principles of law, developed for use in all property disputes, which can be applied’ without establishing ‘religion . . . .’” (*Metropolitan Baptist, supra*, 48 Cal.App.3d at pp. 858-859, quoting *Hull Church, supra*, 393 U.S. at p. 449.)

The court did not address how the *cy pres* doctrine -- to be sure, a traditional and neutral principle of trust law in non-religion cases -- -- interacted with the need of courts to stay away from religious disputes, or differed from Lord Eldon's discredited implied trust doctrine when applied to church property disputes. Nor did the court mention, much less address, the line of California Supreme Court cases that adhered to a governmental principle approach. That lacuna is particularly conspicuous given that the Richmond Church had invoked it in order to justify their (not its, their -- it was a congregationally organized church, remember) proposed distribution. (See *Metropolitan Church, supra*, 48 Cal.App.3d at p. 856 [noting contention that the congregation's proposed distribution was an "ecclesiastical decision binding and conclusive upon the court" albeit "under the doctrine of separation of church and state" as distinct from prior California precedent].)

## 2. Wilson

The next case on the road to *Barker* was *Wilson, supra*, 67 Cal.App.3d 506. Strictly speaking, *Wilson* was not a property dispute case, except to the degree that a *purely* religious argument about whether a minister who *otherwise* would have control over church facilities implicated a property dispute. It was framed and written as a *jurisdiction* case.

In *Wilson*, there was a "former minister" of what appears from the facts as stated by the court to be local congregation (with church property) that was part of the "Unity Movement" and a "present minister" of the same congregation. The former minister and his followers sued the present minister for quiet title and return of the church property on the ground that the present minister had strayed from the (unnamed in the opinion) tenets of the Unity Movement. (See *Wilson, supra*, 67 Cal.App.3d at pp. 508-509.)

Judging from the opinion, the doctrinal straying was the *only* ground for the suit. There is no assertion by the former minister that, for example, the Unity Movement was a hierarchical religious organization and that its highest church adjudicatory had removed the present minister from his post.

Thus, anyone at all familiar with the repudiation by the federal high court in *Watson* of Lord Eldon's implied trust theory would know the case was doomed. It was thus no surprise that the *Wilson* court affirmed a judgment after demurrer to the complaint based on lack of jurisdiction. (See *Wilson, supra*, 67 Cal.App.3d at pp. 509-512.) *Wilson* involved precisely the kind of religious controversy framed in the guise of a church property dispute that *Watson* had tried to avoid.

However, the *Wilson* court also swept (or, to be precise, tried to sweep) from the field several cases from the *Baker-Wheelock* line on the theory that *Hull Church* had implicitly overruled it. First it opened a paragraph with this broad declaration: "The California cases cited by appellants are either inapposite or have been implicitly overruled by *Hull, supra*, and *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696 [no pinpoint page cite, parallel citations omitted]." (*Wilson, supra*, 67 Cal.App.3d at p. 511.) Alas, the *Wilson* court did not specify which "California cases" it was talking about, or why it thought they had been overruled.

Next followed a paragraph explaining that that a civil court could "accept jurisdiction" where ecclesiastical questions were only incidentally involved, thus distinguishing the recently decided cases of *St. James Armenian Church of Los Angeles v. Kurkjian* (1975) 47 Cal.App.3d 547<sup>7</sup> and *Metropolitan Baptist*, which we have just discussed. The paragraph, however, ended with these words: "However, we do note that the California Supreme Court cases cited in *In re Metropolitan Baptist Church of Richmond, Inc., supra*, especially *Rosicrucian Fellow., supra*, 39 Cal.2d at p. 131 -- or at least some of the language therein -- is governed and changed by *Hull*. (See also *Providence Baptist Church v. Superior Ct., supra*, 40 Cal.2d at p. 63.)"

The *Wilson* court did not elaborate, and it is not clear which precise "California Supreme Court cases" cited in *Metropolitan Baptist* the *Wilson* court was

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<sup>7</sup> Actually, as the *Wilson* court said, *St. James Armenian* involved "no dispute whatsoever" about "ecclesiastical doctrine." (*Wilson, supra*, 67 Cal.App.3d at p. 511.) There, a church sued the chairman of its parish council and a friend of his who was a real estate agent for not disclosing the agent's taking commissions on the sale of old church property and the purchase of new church property.

referring to. The *Metropolitan Baptist* court had cited *Rosicrucian Fellowship, supra*, 39 Cal.2d at pp. 131-132, and *Horsman, supra*, 129 Cal. at page 138, for the proposition that matters involving “creeds” “considerations of faith” and even “general polity” were “[e]cclesiastical matters” and then immediately cited *Hull Church* and the same page 131 of *Rosicrucian Fellowship* (plus two appellate opinions) for the proposition that “In such matters the state, and its courts, have no legitimate concern or jurisdiction.” (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 858.)

The only other California Supreme Court decision mentioned in *Metropolitan Baptist* (besides two non-religious charitable trust cases mentioned on page 860 of the opinion) was *Providence Baptist*, cited for the proposition -- apparently one with which the *Wilson* court agreed -- that courts may accept jurisdiction over property disputes when any “ecclesiastical questions” are only “indirectly involved.” (*Wilson, supra*, 48 Cal.App.3d at p. 859.)

### 3. Church of Palm Springs

A little bit of ground work having been laid, *Church of Palm Springs, supra* 89 Cal.App.3d 910 (also sometimes referred to as “*Presbytery of Riverside*”) struck off in a clearly different direction than the one used by the state Supreme Court in the *Baker-Whelock* line of cases.

Preliminarily, we should note that it is an interesting legal question of whether *Church of Palm Springs* might have reached the result it did -- affirming a trial court decision to let a local church have control over the property as against the claims of a hierarchical denomination -- by following the rule of stare decisis and applying the principle of government rule from *Watson* and the *Baker-Whelock* line. Years later, another panel of the intermediate appellate court, in *Guardian Angel*, would elegantly (elegant at least in the mathematical sense, and perhaps the stylist sense, but readers can judge that for themselves), distinguish *Church of Palm Springs* by noting that the local church in that case had had an independent existence *prior* to affiliating with a larger denomination, thus one might be able to say the substantive authority in the local church always was the local congregation: “In that case [*Palm Springs*], the local church had

been known for a number of years as the Community Church of Palm Springs, having no hierarchical affiliation. The church later affiliated with the Presbyterian Church, although it quickly discontinued the use of 'Presbyterian' in its name, reverting to 'Community Church of Palm Springs.' Moreover, throughout its history, the church had extended membership to all Protestant denominations. The church described itself as interdenominational and nondenominational." (*Guardian Angel, supra*, 118 Cal.App.4th at p. 929, citing *Palm Springs, supra*, 89 Cal.App.3d at pp. 916-917.)

In other words, as *Guardian Angel* would see *Church of Palm Springs*, the congregation was the original source of governing authority, and it never relinquished that authority upon affiliating with the larger denomination.

While the case might be so distinguished, the fact remains that the *Church of Palm Springs* opinion proceeded on the premise that the "neutral-principles" approach that had been approved for use in state courts in *Jones* was now mandatory and not just optional.

*Church of Palm Springs* involved a local community church that had been affiliated with the United Presbyterian Church in the United States of America (a national church). The national church was hierarchical, in "ascending representational levels of ecclesiastical authority" (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 915.) In 1967, disputes arose over unspecified "several doctrinal changes" and "a mandate for social action" adopted by the national church's general assembly; the disputes could not be resolved, and the members of the community church "voted to withdraw from the general church." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 917-918.)

Interestingly, the local church did not directly secede from the general denomination: In a manner reminiscent of the doctrine of exhaustion of administrative remedies, it presented a petition to 181st General Assembly of the general church to "withdraw with its property." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 918.) However, the administrative route was never completed, in the court's phrase, "its request was never considered or decided on the merits" because the matter was referred to a committee that determined the petition had been "filed by an independent body

which has renounced the jurisdiction of the United Presbyterian Church” and therefore, “cannot be considered.” (*Id.* at p. 919.) In subsequent litigation the trial court determined that the local church was the owner of the property.

It was the ambiguity of the internal proceedings that was the very first reason given by the *Church of Palm Springs* court for rejecting a disposition of the property in favor of the national church: “In the first place, there is a serious question whether the issue of ownership of the disputed property was ever finally determined on its merits by the judicatories of UPCUSA.” (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 919.)

The court’s second reason occupied most of the long opinion. The court began by acknowledging the truth of the proposition that decisions of the highest church judicatories must be accepted by civil courts as “final, and as binding on them.” (*Palm Springs, supra*, 89 Cal.App.3d at p. 919, quoting *Watson, supra*, 80 U.S. 679, 727.) But, said the *Church of Palm Springs* court, that rule was expressly *qualified* (not repealed) by the more recently announced rule that civil courts must adjudicate the property dispute “without attempting to resolve the underlying ecclesiastical controversy.” (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 920.)

The *Church of Palm Springs* court then found particularly salient a passage from *Hull Church, supra*, 393 U.S. at page 449 against the involvement of civil courts in religious controversy. As we have noted in this opinion, that passage did *not* mandate “neutral principles” as distinct from principle of government. (Read carefully, the passage said that the formal title doctrine was *one way* of avoiding entanglement in religious controversies; the only hard and fast rule was that civil court must not resolve disputes over church property in a way that requires them to resolve “controversies over religious doctrine.”)

Here are the salient parts of the passage from *Hull Church* quoted by *Church of Palm Springs*. The emphasis is ours: “[T]he first amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a

religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which *can* be applied without “establishing” churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes *without resolving underlying controversies over religious doctrine*. Hence, States, religious organizations, and individuals must structure relationships involving church property *so as not to require the civil courts to resolve ecclesiastical questions.*” (*Palm Springs, supra*, 89 Cal.App.3d at p. 920-921, quoting *Hull Church, supra*, 393 U.S. at p. 449, italics added by us, ellipses and brackets chosen by *Church of Palm Springs* court.)

After the long passage from *Hull Church*, the *Church of Palm Springs* case addressed the *Serbian Orthodox* opinion, which, as we have seen, used the *Watson* rule. The court recognized that the *Serbian Orthodox* opinion “held the decisions of the ecclesiastical tribunals final and conclusive.” (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 921.) And that makes sense, given that the primary focus in *Serbian Orthodox* was on the right to ecclesiastical office, as distinct from control of church property.

But then the court took a turn that is harder to understand. After the passage dealing with *Serbian Orthodox* case, the *Church of Palm Springs* court read *Watson* the great dispositive enunciation of the organizational theory, as having really, and improperly, intruded into ecclesiastical doctrine. (See *Church of Palm Springs, supra*, 89 Cal.App.3d at p. 921.) Speaking of the *Watson* case, here is the passage from *Church of Palm Springs*, omitting parallel citations, and with our italics: “However, again

contrary to appellants' arguments, the decision in *Watson v. Jones* even in its pristine state did not preclude civil courts from adjudicating church disputes that are essentially property disputes only incidentally involving or arising out of ecclesiastical disputes. In *Watson v. Jones* the court was asked to decree the termination of an implied trust because of alleged departures from doctrine by the general church. (See *Presbyterian Church v. Hull Church, supra*, 393 U.S. at p. 445 . . . .) Thus the dispute involved in the case was purely ecclesiastical. The court would have been required to determine what the orthodox doctrine was, what changes in doctrine had been made, and whether such changes as were found constituted such substantial or fundamental departures from the orthodox doctrine as to constitute a violation of the trust. (See *Presbyterian Church v. Hull Church, supra*, 393 U.S. at pp. 449-450 . . . .) Thus the court was called upon 'to determine matters at the very core of a religion -- the interpretation of particular church doctrines and the importance of those doctrines to the religion.' (*Palm Springs, supra*, 89 Cal.App.3d at pp. 921-922, italics added.)

Now, that is a most novel reading of *Watson*, given that *Watson* had tried to get civil courts away from implied trust theory and toward a principle that would recognize "no heresy." (See *Watson, supra*, 80 U.S. at p. 728 ["The law knows no heresy, and is committed to the support of no dogma. . . ."].) And it does not do justice to the deference shown *Watson* by the United States Supreme Court in not only *Serbian Orthodox*, but in *Hull Church*, the concurring opinion in *Eldership*, and even in *Jones*. Indeed, it appears that *Church of Palm Springs* was using *Hull Church* to retroactively recast *Watson* solely as an ecclesiastical office case and not what it was -- a property dispute case. The *Church of Palm Springs* court also provided no original source citations from *Watson* for its idea that *Watson* was wading in to matters "at the very core of . . . particular church doctrines."

After the passage on *Watson*, the court next turned its attention to three of the main California Supreme Court cases, *Committee of Missions*, *Horsman*, and *Wheelock*, making the point that the first two (*Committee of Missions* and *Horsman*) involved "clearly ecclesiastical" disputes. (*Palm Springs, supra*, 89 Cal.App.3d at p.

922.) It appears that the *Church of Palm Springs* court was trying to convey the idea that *Committee of Missions* and *Horsman* were bad law in light of *Hull Church*. That interpretation is supported by the next passage, dealing with *Wheelock*.

*Wheelock*, according to the *Palm Springs* court, applied “general principles of trust law and concluded that the fund of money should be apportioned on the same basis as that suggested by the presbytery and its commission” and therefore it had followed ““neutral principles of law.”” (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 923.)

With the absolute greatest respect for the panel in *Church of Palm Springs*, we must conclude that its reading of *Wheelock* (as well as its summary dismissals of *Committee of Missions* and *Horsman*) was incorrect. As we have seen (and we have quoted the appropriate passages from *Wheelock*), the *Wheelock* court was applying the *Watson* principle of government to a dispute over a particular fund: Because the appropriate governing authorities had apportioned the fund in a certain way, the civil courts had to respect that apportionment.

From there the *Church of Palm Springs* court turned its attention to the case before it, recognizing that the property dispute “arose out of an underlying controversy involving largely questions of religious doctrine.” (*Palm Springs, supra*, 89 Cal.App.3d at p. 923.) Juxtaposing the religious origins of the dispute against the resolution of the dispute by the civil courts, the *Church of Palm Springs* court enunciated four propositions: “However, the dispute to be decided by the court in this case is essentially a property dispute; the only relationship between the religious controversy and the dispute in the case at bench is that the latter arose out of the former; the property dispute may be resolved without the necessity of becoming involved with or attempting to resolve the underlying ecclesiastical controversy; and the trial court acted with the propriety in determining the case on the basis of ‘neutral principles of law’ and ‘formal title’ doctrine.” (*Palm Springs, supra*, 89 Cal.App.3d at p. 923.)

The first three of those propositions seem correct, even if one uses the principle of government rule from *Wheelock*. The fourth proposition -- that the trial court acted correctly in deciding the case based on neutral principles and “formal title” -- does not follow under the rule of stare decisis. Whatever other merits the approach might have had, it was not the common law of California as articulated by our Supreme Court.

Things became curiously as the court rounded the bend and came to the top of page 924 in the official reporter, which is the part of the opinion which undertook to rebut the loser’s arguments. At this point, the court noted that the general church was trying to “analogize” its case to the “*Serbian Orthodox, Horsman, and Wheelock* cases.” (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 924.)

Well, yes, obviously. In each of those high court cases, the civil court had looked at the organizational structure of the church involved to determine the property dispute. If that rule were to be applied to the facts in *Church of Palm Springs*, the general church might -- and the “might” rather than a “would” is important -- win.

The *Church of Palm Springs* court then characterized the three cases this way: “As already indicated, the controlling questions in those cases *turned on* disputes directly involving religious doctrine or church polity, organization or structure.” (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 924, italics added.)

Again, with all respect for the *Church of Palm Springs* panel, that statement was not correct. None of those cases “turned” on “religious doctrine” as such, except insofar as *organizational structure* is seen to be itself a matter of religious doctrine. We note, though, that there is only one case in our entire survey of the case law in the area where organizational structure was an actual matter of *controversy*. (*Concord Christian Center v. Open Bible Standard Churches* (2005) 132 Cal.App.4th 1396 (*Concord Christian*)). And in that case the appellate court easily surmounted the issue without involvement in religious dogma, but that case is getting ahead of ourselves. In any event, it appears that the *Church of Palm Springs* court was conflating religious controversy with “polity, organization or structure.”

From this one might expect the coup de grace to be administered: The *Church of Palm Springs* court would flat out repudiate the principle of government as a guiding principle for civil courts, look to title, note that title was in the hands of the local church corporation, and affirm the judgment. But no. Mid-paragraph, the *Church of Palm Springs* court changed direction, and instead of repudiating the principle of government, embraced it in a kind of odd way, engaging in the sort of lengthy exploration of internal church structure that the California Supreme Court had undertaken in *Committee of Missions*. That is, the *Church of Palm Springs* court devoted the latter half of page 924 to making the point that, organizationally, the departure of the local church had been accepted -- practically ratified -- by the general church. (See *ibid.* [“When Presbytery acted on June 8, 1968, to suspend the powers of the Community Church session effective June 30, 1968, Community Church had *already* terminated its relationship with UPCUSA and withdrawn from the Presbyterian denomination. It is undisputed that a *local church within UPCUSA may withdraw and terminate its affiliation. . . .* Community Church has renounced its affiliation with the Presbyterian denomination and does not claim to be a Presbyterian church. . . . Community Church ended that controversy when it withdrew from UPCUSA and terminated its relationship with the Presbyterian denomination.” (*Palm Springs, supra*, 89 Cal.App.3d at p. 924.)

In short, the *Palm Springs* case was not being decided by simple title, but by the sort of technical twist on the loser’s position that would have made Shakespeare’s Portia proud: In effect, the *Palm Springs* court said to the general church: Oh, so you want this case decided by your own organizational rules, do you? Well fine. Under your own rules a local church may withdraw, and you are therefore stuck with that result.

At this point in the opinion (beginning with page 925), the organization of the *Church of Palm Springs* opinion again changes gears (the opinion is written without any subheadings), with the court going into the mode of batting down various arguments raised by the appellants, i.e., the general church.

First was an argument that a judgment for the local church would infringe on the general church’s free exercise rights. (*Church of Palm Springs, supra*, 89

Cal.App.3d at p. 925.) That one was easy, the court simply needed to allude to the various U.S. Supreme Court cases that said it was all right to resolve “property disputes involving religious organizations so long as that resolution does not depend on the court’s attempting to resolve ecclesiastical controversies.” (*Ibid.*)

Then came the argument that a “hierarchical structure” meant “as a matter of law,” that local church property was to be “held in trust for the general church.” (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 925.) The court waded into the *Wheelock* case and announced that the *Wheelock* rule “in fact supports the position of Community Church.” (*Id.* at p. 926.) The court referenced the language in *Wheelock* that had noted that the *members* of both churches that had split by the higher level of organization “were beneficiaries of the trust before the Presbytery divided the church and in justice and equity must stand in the same position after division.” (*Palm Springs, supra*, 89 Cal.App.3d at p. 926.) Hence, according to the *Palm Springs* court, “In essence what the [*Wheelock*] court was saying was that the directors or trustees of the corporation hold title to the property of the church in trust for the local church and every member thereof.” (*Ibid.*) And then later, “Thus, properly read, *Wheelock* stands for the proposition that the property of a local church, even one that is part of a general church organization of hierarchical structure, is held in trust by the religious nonprofit corporation for the benefit of the local church congregation.” (*Palm Springs, supra*, 89 Cal.App.3d at p. 927.)

Again, with respect to the *Church of Palm Springs* court, we must disagree with its reading of *Wheelock*. The *Church of Palm Springs* court confused the principle by which the *tribunal of a hierarchical church* had *itself* decided to apportion the fund in *Wheelock* with the rule of decision used by the court in deciding the *Wheelock* case. The rule of decision of the court in *Wheelock* was *deference* to the Presbyterian tribunal, not the (radical) idea that, as a matter of law, a local congregation of a hierarchically-structured church necessarily holds local property in trust for members of the congregation.

Next the *Church of Palm Springs* opinion addressed language in *Committee of Missions*, then *Horsman*, then *Watson* itself, all involving holding property in trust. This section of the *Church of Palm Springs* opinion is not the clearest in the opinion (there seems to be a kind of partial dialog with the appellant's briefs), but it appears that the main point is that none of those cases had embraced a "trust theory" of hierarchical structure. And of course that point was thoroughly correct, since, as the *Church of Palm Springs* court itself recognized, *Watson* had indeed broken with the implied trust theory that had dominated resolution of disputes since the early 1800's, and which had represented the British rule. Here is the passage: "Moreover, the effect of *Watson v. Jones* was the rejection or repudiation of the very doctrine that appellants appear to invoke -- the implied trust doctrine holding that church property was the subject of an *implied trust* in favor of those who adhered to the faith of the founders of the church." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 928, italics added.)

Obviously there was some confusion, either in the briefs or by the *Church of Palm Springs* court, between Lord Eldon's discredited implied trust theory and the principle of government approach that *Watson* had used to replace it.

Indeed, there is a good case to be made that the confusion was the product of poor briefing by the appellant general church. Apparently the general church there had advanced a tedious argument contending for an implied trust "with their contentions based on the First Amendment and the *Serbian Orthodox* and *Watson v. Jones* decisions" -- so much so that it was "difficult to organize" those arguments "for meaningful discussion." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 929.)

#### 4. Barker

In a moment, the decision in *Church of Palm Springs* had reversed about a hundred years of state and federal Supreme Court precedent, and disturbed what had been a stable legal universe in California involving the methodology by which California state courts would decide church property disputes. It had recast *Wheelock* for as standing for the principle of majority rule, and consigned *Horsman Watson* and *Serbian Orthodox* to the bin of cases solely confined to religious controversies qua religious controversy.

The next intermediate appellate decision regarding church property, *Barker*, built on the *Church of Palm Springs* foundation, but expressly did not examine it: It was prepared to accept the “comprehensive analysis” contained in *Church of Palm Springs* at face value. (See *Barker, supra*, 115 Cal.App.3d at p. 614 [“We next turn to California law to determine what legal principles California courts employ to resolve disputes over church property. Fortunately, we have the benefit of the comprehensive analysis of the problem in the court’s opinion written by Justice Kaufman in” *Church of Palm Springs*].) That is, the *Barker* court flat out rejected the principle of government approach (which it called “Hierarchical Theory”) because the *Church of Palm Springs* “opinion places California law squarely in the neutral-principles camp.” (*Barker, supra*, 115 Cal.App.3d at p. 614.)

The *Barker* court next rejected implied trust theory, but that was easy to do since the four U.S. Supreme Court cases preceding *Church of Palm Springs* had done so. (See *Barker, supra*, 115 Cal.App.3d at pp. 615-620 [ending with observation that the difficulties of the theory “remain insurmountable”].)

The *Barker* court reached its result by plying the four-factor neutral principles approach, which it considered “Express Trust” theory. (See *Barker, supra*, 115 Cal.App.3d at p. 620-624.) Applying the four factors, the *Barker* court held that three of four disaffiliating Episcopal congregations in the Los Angeles Diocese -- yes, the very same diocese who is the appellant here -- were entitled to have control of the local church property, because in the cases of those local parish corporations, they took title to the property before the 1958 local diocesan canon which asserted that local Episcopalian parishes held property in trust for the diocese. The property of the fourth corporation, however, was indeed held in trust because the articles of incorporation of that particular corporation acknowledged a trust. (See *id.* at pp. 625-626.)

The four-factor neutral principles approach requires an examination of not just the deeds and articles of incorporation, but also of the constitutions, canons and rules of the general church. Usually, of course, a hierarchical church is going to have at least a canon or rule, if not a full-scale provision in its constitution, subordinating property of

local church corporations to itself. By the time *Barker* was decided, the 1958 local diocesan canon had been promulgated. Why didn't it make a difference?

The issue was addressed on page 624 of the official reporter: The 1958 diocesan canon wasn't around when the three winning church parishes were incorporated, so there was "nothing . . . to create an express trust in local church property in favor of the general church." (*Barker, supra*, 115 Cal.App.3d at p. 624.)

It bears noting that Justice Roth dissented in *Barker*, and specifically recognized that, under the U.S. Supreme Court decision in *Jones*, the "hierarchical approach would also be acceptable." (*Barker, supra*, 115 Cal.App.3d at p. 627 (dis. opn. of Roth, J.)) He then pointed out that the majority "accomplish[ed]" the change from hierarchy to neutral principles "by virtue of the fact that the State of Georgia" had "availed itself of the neutral principles theory" together with the "assertion" that the *Church of Palm Springs* court had placed California in that "'camp.'" (*Ibid.*) For Justice Roth, the *Church of Palm Springs*' assertion was an "overstatement," though he did not elaborate. (*Ibid.*)

Turning to the merits, Justice Roth proposed that whether neutral principles or hierarchy should apply would "depend on the circumstances" (*Barker, supra*, 115 Cal.App.3d at p. 627 (dis. opn. of Roth, J.)), and the circumstances of the case were such that even if "no express trust affirmatively" appeared, the hierarchical structure of the Episcopal Church should be "the controlling consideration." (*Id.* at p. 628.)

## F. Statutory Developments

### 1. Section 9142

The next legal development in California's law in this area was statutory, namely the addition of subdivisions (c) and (d) to section 9142. (See Stats. 1982, ch. 242.)

There is no indication that in doing so the Legislature had any intention of codifying *Barker*, or of overturning California Supreme Court precedent as found in the

*Baker-Wheelock* line. The legislative history<sup>8</sup> of the addition to section 9142 reveals a rather different intent altogether: To make a technical correction to earlier (and pre-*Barker*) legislation (specifically, Stats. 1980, ch. 1324), which had precluded California's Attorney General from enforcing charitable trusts of religious corporations but left no one else with the ability to enforce such a trust either. That earlier legislation had left a "void" as far as the enforcement of property held in trust by religious corporations, and the 1982 additions to section 9142 were part of a package to "fill" that "void." (See, e.g., Policy Committee Memorandum re Bill SB 1178, Amended 3-8-82, from the Assembly Judiciary Committee, at p. 2 ["First Freedom, the sponsor of this bill, states that section one of the bill is intended to 'fill a void' left by the passage of SB 1493 (Petris), Ch. 1324, Statutes of 1980."].)

In more specific terms, the origins of the legislation that led to subdivisions (c) and (d) in section 9142 can be traced to events described by the court in *People ex rel. Deukmejian v. Worldwide Church of God, Inc.* (1981) 127 Cal.App.3d 547 (*Deukmejian v. WCG*).

In that case "certain members" of a "hierarchically structured" church contacted a New Jersey law firm "expressing their concern that officials of their Church might be guilty of malfeasance and misfeasance with respect to Church affairs." (*Deukmejian v. WCG, supra*, 127 Cal.App.3d at p. 550, and 550, fn. 2.) The New Jersey firm contacted a California lawyer for assistance.

The California lawyer determined that the complaining church members themselves had no "standing to sue," so he contacted the California Attorney General's office whose duties at the time included "surveillance of charitable trusts." (*Deukmejian v. WCG, supra*, 127 Cal.App.3d at p. 550) The Attorney General's office then "deputize[d]" the California lawyer as a "special deputy attorney general." The office and the California lawyer took the position the church's "property, assets and records

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<sup>8</sup> The court has already granted a request by parties in a related case to take judicial notice of the legislative history of Senate Bill 1178 which originated the addition of subdivisions (c) and (d) to section 9142.

were ‘public’ and that they were always and ultimately in the custody of and subject to the supervision of the courts upon application of the Attorney General.” (*Id.* at p. 551.) Based on that theory the California Attorney General’s office and the California lawyer were successful, for a while, in imposing a receivership on the church on the ground that the “Church property was being misappropriated.” (*Id.* at p. 552.)

However, as the receivership continued into the first half of 1979, the church obtained relief in the Legislature. Senator Nicholas Petris introduced Senate Bill 1493 which repealed the statutory basis (former section 9230) on which the Attorney General had acted. Old section 9230 was replaced with new legislation (also numbered section 9230) which provided, with certain exceptions, that “the Attorney General shall have no powers with respect to any corporation incorporated or classified as a religious corporation under or pursuant to this code.” (See *Deukmejian v. WCG*, *supra*, 127 Cal.App.3d at p. 554, fn. 5.) Senator Petris’ bill became law and was signed by the Governor in July 1980.

The *Deukmejian v. WCG* court would later note that “[e]ven though the legislation was not to become effective” until about a year later, “the Attorney General very wisely viewed that legislation as a declaration of public policy and a legislative objective to prevent the state from engaging in the very type of litigation” the Attorney General had brought. (*Deukmejian v. WCG*, *supra*, 127 Cal.App.3d at p. 555.) These events were memorialized by the court when the California lawyer sought fees from the church for having imposed a receivership on the church, the denial of which the appellate court affirmed, noting that the whole receivership enterprise was “from the inception constitutionally infirm and predestined to failure.” (*Id.* at p. 558.)

Senate Bill 1493 in 1980, which had proved decisive in the *Deukmejian v. WCG* litigation, was the stated reason for 1982’s Senate Bill 1178, also carried by Senator Petris. The legislative history of the bill shows that the original sponsoring organization was First Freedom (a fact noted, for example, on the Senate Judiciary Background Information form (“SB 1178 (Petris)”).

According to a memo from that organization (attached to the Judiciary Committee Background Information form), section 1 of the bill, amending section 9142, was to allow *some* litigation to enforce charitable religious trusts, since the earlier bill had stripped the Attorney General of that authority: “The Attorney General used the term ‘charitable trust’ as a means of arrogating unto [*sic*<sup>9</sup>] himself virtually a bsolute power over all charitable organizations (including churches). SB 1493 deprived him of such overreaching authority . . . . [¶] However, while SB 1493 impliedly addressed the question of what a ‘charitable trust’ is not, it did not address what a ‘charitable trust’ really is.” There really is such an animal, and attorneys who litigate in the area of gifts and bequests feel it’s a void that should be filled.” (Memorandum by Brent Barnhart to Burt McChesney, attached to Senate Judiciary Background Information form (“SB 1178 (Petris)”)).)

The void to be filled (and here we meet again the spirit of Justice Harlan’s concurring opinion in *Hull Church*) was the then-inability of church *members* to seek redress when their contributions were used in a manner contrary to the specific purpose for which the property was contributed. (See letter from Brent A. Barnhart, Legislative Advocate, to Governor Edmund G. Brown, on First Freedom stationary dated June 7, 1982 at p. 1 [“SB 1178 accomplishes two things pertaining to court actions to enforce the terms of donations to a church: [¶] (1) It defines when gifts and contributions to a church create an enforceable charitable trust; and [¶] (2) It creates a new cause of action for church members who have contributed money or property to their church for a specific purpose, where their contribution has been used in a manner contrary to the specific purpose for which it was contributed.” (Original underlining.)])

According to the same letter, the bill was the “product of extensive discussion and compromise between representatives of several religious organizations”

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<sup>9</sup> The King James era archaism is arguably in keeping with the religious liberty purposes of sponsoring organization, “First Freedom,” whose April 16, 1981 newsletter is part of the legislative history materials. (See First Freedom newsletter of April 16, 1981, p. 1 [“those concerned with religious freedom and the rights of churches, look to FIRST FREEDOM for support”].)

which included the Catholic Archdiocese of Los Angeles, the Jewish Community Relations Council of Los Angeles, and the Pacific Union Conference of Seventh-Day Adventists as well as First Freedom. (*Ibid.*)

It is apparent from the legislative history of Senate Bill 1178 that the Legislature's main focus was on the problem of what remedies individual contributors to religious corporations, no matter how ecclesiastically organized, might have for the misuse of their "specific purpose" contributions. The April 16, 1981 newsletter from First Freedom (on page 2) contained in the legislative history also contains a description of Senate Bill 1178, elaborating thusly on the issue of specific purpose contributions, and tying the effort to the Attorney General's perceived overreaching in the *Deukmejian v. WCG* case: "Senator Nicholas Petris, author of SB 1493, has introduced clean-up legislation which should lay to rest further misuse of the term 'charitable trust'. . . . [¶] SB 1178 declares what a charitable trust is, with respect to religious organizations. Enforceable charitable trusts will be those expressly established by donors in gifts to churches, *on condition that the gifts be used in specific ways.*" (Original underlining; italics added.)

However, it must be noted that (as one might expect given the origins of SB 1493 enacting a new section 9230), the power of an individual contributor to enforce a specific purpose gift against a religious corporation was somewhat restricted. (Recall from *Deukmejian v. WCG, supra*, 127 Cal.App.3d 547, that the California attorney sought out by the New Jersey law firm concluded that individuals had no standing to enforce their allegations of malfeasance.) A writing at the time of the donation expressly creating a trust would be required.

As we have noted, one looks in vain in the legislative history of subdivisions (c) and (d) for any reference to the *Barker* decision (much less any intent to codify it), or any intent to reverse the common law of California dealing with church property disputes arising in the context of a struggle over property between a local church and a general church that was the subject of so much California Supreme Court common law jurisprudence. Any impact that the legislation may have had on that common law

must therefore be by operation of the *plain language* of the statute, because there is certainly no indication of any legislative intent to do so. As our Supreme Court has declared, courts should not interpret a statute to “alter the common law” under there is “language or evident purpose of the statute” manifesting “a legislative intent to repeal” a common law rule. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.<sup>10</sup>)

With that principle in mind, let us now turn to the language of section 9142. Subdivisions (c) and (d) of section 9142 provide:

“(c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless *one* of the following applies:

“(1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution of its board of directors to so hold those assets in trust.

“(2) Unless, and only to the extent that, the articles or bylaws of the corporation, *or the governing instruments of a superior religious body or general church of which the corporation is a member*, so expressly provide.

“(3) Unless, and only to the extent that, *the donor expressly imposed a trust, in writing, at the time of the gift or donation.*

“(d) Trusts created by paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or *governing instruments creating the trusts*. However, nothing in this subdivision shall be construed

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<sup>10</sup> Here is the complete text of the relevant passage from *California Assn. of Health*: “As a general rule, ‘[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. . . . ‘A statute will be construed in light of common law decisions, unless its language ‘‘clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . .’’ Accordingly, ‘ [t]here is a presumption that a statute does not, by implication, repeal the common law. . . . Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws.’ . . . Thus, the Department’s position that the duties of long-term health care licensees are nondelegable under section 1424 is in accord with the common law of licensee liability, and we will presume it to be correct unless the language or evident purpose of the statute manifest a legislative intent to repeal the rule.” (*California Assn. of Health, supra*, 16 Cal.4th at p. 297, italics added.)

to permit the amendment of the articles to delete or to amend provisions required by Section 214.01 of the Revenue and Taxation Code to a greater extent than otherwise allowable by law.” (Italics added.)

The major phrases of the statute are important: The very footfalls of *Watson’s* reference to “subordinate member of some general church” echo in the statutory phrase “superior religious body or general church.” We note:

First, there are three possible ways for a religious charitable trust to be enforced, any “one” of which will do. This aspect is important because it means that there is more than one way a trust can be impressed on property held by a religious charitable corporation. The most obvious way, of course, is the one described in subdivision (c)(3): an individual donor expressly imposing a trust, in writing, on his or her donation.

However, under the canon of statutory construction that courts should not construe words in statutes to be redundant, the way described in subdivision (c)(2) -- a “superior religious body or general church” expressly providing for a trust -- must be considered meaningfully different from the imposition of a trust by an individual donor in writing as described in subdivision (c)(3).

Second, one must note the disjunctive “or” that separates the phrase, “the articles or bylaws of the corporation” from the words “governing instruments of a superior religious body or general church.” Under the ordinary meaning of the word “or” -- either of two alternative are sufficient -- it makes no difference if the “bylaws or articles” in a *church corporation* holding *title* to property expressly provide for a trust as long as the “governing instruments” of the “superior religious body or general church of which the corporation is a member” so provide.

Third, one should note the phrase “superior religious body or general church” in conjunction with the word “or.” The phrase clearly contemplates an intent by the Legislature to insure that hierarchically organized churches had the power to trump “local corporations” *when* the local corporation was a “member” of the hierarchically-organized church as to whether an enforceable trust might exist. If the Legislature had

wanted the local church corporations to have the power to prevent hierarchically-organized churches from imposing a trust on the property of the local church corporations, it would not have used the word “or.” The Legislature would have said “and,” thus requiring *both* local corporation and general church agreement.

Finally, we come to the critical phrase in subdivision (d), “governing instruments creating” the trust. The phrase raises the question of what, exactly, are those “governing instruments” that “create” the trust.

Now the importance of subdivision (c)(3) becomes apparent. Governing instruments can certainly, under subdivision (c)(3), include the “writing,” made by the donor at the time of the gift or donation. That is a logical reading of subdivision (c)(3).

However, since subdivision (c)(3) is not the exclusive way by which a trust may be enforced, the natural reading of subdivision (c)(2), when read together with subdivision (c)(3), is that “governing instruments” as used in the more general subdivision (d) *also* includes the “governing instruments of the superior religious body or general church” as the phrase is used in subdivision (c)(2). And that means that, yes, it is the general church or superior religious body that, indeed, creates the trust under subdivision (c)(2).

Of course, that very scenario -- the general church and not the local church as the actual trustor of the trust -- had been invited by the United States Supreme Court in *Jones*. Recall that *Jones* suggested an alternative to modification of deeds or corporate charters to insure that “the faction loyal to the hierarchical church will retain the church property.” (*Jones, supra*, 443 U.S. at p. 606.) Specifically, the alternative was that the “constitution of the general church can be made to recite an express trust in favor of the denominational church.” (*Ibid.*) The idea that a hierarchical general church could expressly provide in *its* rules that the property of a local church affiliated with that denominational church was held in trust for the denominational church thus does not seem to be as outlandish as the *California-Nevada* court would later find it.

We need not (and do not) in this opinion address issues arising out of subdivision (c)(3) scenarios (i.e., an individual suing to impress a trust based on a

specific purpose donation). What is abundantly clear, however, for our purposes in this case is that in a hierarchically organized church, the “general church” *can* impress a trust on a local religious corporation of which the local corporation is a “member” if the governing instruments of that superior religious body so provide.

In the case before us, the enactment by the national Episcopal Church in 1979 of Canon I.7(4) readily qualifies as a “governing instrument” expressly providing for a trust on property held by local church corporations. The language of the statute *perfectly* conforms with the result that would be otherwise required under a flat-out “principle of government” approach under *Watson* and the *Baker-Whealock* line of California Supreme Court cases. And the *Barker* case becomes readily distinguishable because it was decided before Senate Bill 1178, with its contemplation of express trusts to be found in the “governing instruments” of a “general church.”

Also, because of Canon I.7(4), we are spared in this case the thorny constitutional issue of whether section 9142 might be unconstitutional as applied to a hierarchically organized church whose governing instruments *didn't* have any express trust provision on the theory that the hierarchically organized church's own religious freedom to organize itself as *it* deemed fit is being subverted by the statute. We do not express any opinion on that question.

Now, the counter-analysis to what we have determined to be the plain language of section 9142, subdivisions (c)(2) and (d) is the proposition that it would be counter to ordinary state law trust principles, which in California start with the presumption that a trustor creating a trust retains the power to revoke it. To get ahead of ourselves, that would be the rationale latter used by the court in *California-Nevada*, *supra*, 121 Cal.App.4th 754.

There is nothing wrong with the trustor-may-revoke rationale of *California-Nevada* -- after all that is what subdivision (d) literally provides for -- just as long as one is clear about who, exactly, *is* the trustor. But, as we have just seen, a “general church” *is*, functionally, the trustor is a subdivision (c)(2) situation.

But that is only common sense anyway: In a general church that is hierarchically-structured, people do not organize local congregations as *substantively* independent entities. They organize local congregations in the context of membership in the overall church. In contrast to congregational organization, hierarchical organization makes the overall church the primer mover.

## 2. The Title Presumption of Evidence Code Section 662

As we shall see when we discuss *Korean United's* treatment of *Church of Palm Springs*, one can detect in *Church of Palm Springs* a very strong emphasis on legal title. Indeed, *Korean United* would ascribe the rationale of *Church of Palm Springs* almost entirely to a reliance on “bare title.” (See *Korean United, supra*, 230 Cal.App.3d at p. 498 [“Focusing instead on *bare title* to the property . . . .”] (italics added).)

That raises the question of how the title presumption in California law, now codified as section 662 of the Evidence Code, fits in church property disputes of this sort.<sup>11</sup> It is true that section 662 was enacted in 1965, after the Supreme Court's *Baker-Wheelock* line of cases. But there is nary a hint that the statute was enacted to change the common law involving church property disputes, in which, typically, *title* is never really disputed, only the *use* of the property. The Law Revision Commission Comment to the legislation points out, “Section 662 codifies a common law presumption recognized in the California cases.” (29B West's Annot. Evid. Code, p. 210.) And that presumption had been around prior to the *Baker-Wheelock* line. (E.g., *Roman Catholic Archbishop of San Francisco v. Shipman* (1889) 79 Cal. 288, 296 [“It must be presumed that Alemany held possession under the legal title vested in him by the deed. . . .”].)

Moreover, at least in this case, any arguable idea that section 662 somehow required departure from the result required by principle of government rule is untenable for three reasons.

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<sup>11</sup> The one-sentence statute provides in its entirety: “The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.”

First, section 9142 is a more specific statute, as well as a later one, and trumps any conflict with Evidence Code section 662. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476-477.) If the diocese and national church have valid claims under the plain language of section 9142, the more general Evidence Code section 662 cannot block them.

Second, particularly when read in conjunction with section 9142, Canon I.7(4) is clear and convincing evidence rebutting any presumption that the beneficial interest in the local church property is solely controlled by the local parish corporation.

And third, and most importantly, Evidence Code section 662 is substantially irrelevant to the dispute in this case. In precise terms, the diocese's and national church's claims are not that *they* have "beneficial title" to the property, but that the party who *does* have beneficial title, the local parish corporation, holds that beneficial title in trust for them.

And with that we now turn the decisions that followed after *Church of Palm Springs* and *Barker*.

G. The Latter-Day California Intermediate  
Appellate Decisions in the Wake of  
Church of Palm Springs, *Barker*, and Section 9142

Since *Barker* was decided and section 9142 was enacted, four cases from California's intermediate appellate court have directly dealt with disputes over church property in a way that implicates *Watson* and the *Baker-Wheelock* line's principle of government approach: *Korean United, supra*, 230 Cal.App.3d 480; *Singh v. Singh* (2004) 114 Cal.App.4th 1264 (*Singh*); *California-Nevada, supra*, 121 Cal.App.4th 754; and finally, *Concord Christian, supra*, 132 Cal.App.4th 1396.<sup>12</sup> A fifth case, *Berry v.*

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<sup>12</sup> One other case deserves mention as rounding out the law over church property disputes though it did not implicate the principle of government rationale of *Watson* and the *Baker-Wheelock* line. *Vukovich v. Radulovich* (1991) 235 Cal.App.3d 281, another chapter in the history of the Serbian Orthodox Church, is not *directly* significant for our purposes since its main point was that the trial court was correct in sustaining a demurrer brought by a minority of a local congregation opposing reaffiliation with the "Mother Church." However, the case does illustrate the point that looking to "by-laws" to resolve a property dispute (as in "neutral-principles analysis") may not always prevent a

*Society of Saint Pius X* (1999) 69 Cal.App.4th 354 (*Saint Pius X*), is also significant because, although it did not deal with a church property dispute as such (it dealt with who was the proper successor in a corporate sole), it marked a rediscovery of the Supreme Court's *Wheelock* opinion and (in our opinion) a correct reading and application of that opinion.

Also, while all four direct dispute cases *professed* to follow the four-factor neutral principles approach, at least two (*Guardian Angel* and *California-Nevada*) cannot be reconciled with each other. When we examine them, we also find that two cases are consistent with the *Watson* principle of government approach, and in fact *Korean United* actually used that approach as an alternative rationale. (The other is *Guardian Angel*.) One isn't consistent (*California-Nevada*), and one is neutral (*Singh*).

#### 1. Korean United

Against the backdrop of *Palm Springs* and *Barker*, *Korean United* represents a kind of counter-reformation, in which California courts were willing, once again, to defer to the highest governing tribunals of a church.

*Korean United* involved a local Presbyterian congregation, incorporated as a religious nonprofit corporation. A "schism" developed within the local congregation over the views of its pastor; the pastor had the support of the majority of the congregation, and the pastor sought to disengage himself and his supporters from the national Presbyterian church; the "dissent faction" went elsewhere to worship, but the local presbytery (equivalent to a Episcopal diocese) declared this "exiled" faction to be the "true Church" congregation (like *Horsman*, the court in *Korean United* showed no reticence to use the phrase), the local pastor fired the first shot with a quiet title action,

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civil court from entangling itself in religious controversy. In *Vukovich*, the congregational minority made an argument that, on its surface, was merely about voting procedure under the by-laws. The minority asserted that the votes of about 20 to 30 members of the congregation should have been counted on the vote on reaffiliation, but the board had improperly refused to count them. (*Vukovich, supra*, 235 Cal.App.3d at pp. 286-287.) The trial court refused to entertain their suit i.e., sustained a demurrer because the court lacked jurisdiction, noting that "this dispute clearly involves an essentially ecclesiastical dispute" (*Vukovich, supra*, 235 Cal.App.3d at p. 290.) Does that mean if property *were* involved the court would have had to wade into the by-laws? We need not deal with that problem in this case.

followed by a cross-complaint from the local presbytery for enforcement of an express trust. The trial court followed *Barker* and held there was no trust, declaring the local congregation corporation in control of the church property.

The appellate court reversed. The court was nice to the earlier *Barker* decision: That opinion represented, at the time, “not only the latest, but the most definitive appellate consideration of the legal principles concerning church property disputes in California.” (*Korean United, supra*, 230 Cal.App.3d p. 496. )

That said, the *Korean United* headed off in a direction fundamentally inconsistent with *Barker*. First of all, unlike *Barker* (or *Church of Palm Springs*), *Korean United* became the first California appellate court to recognize that *Jones* was permissive in its articulation of neutral principles analysis. State law could use the four-factor neutral principle test, and that was okay, but states could also defer to the rulings of the “authoritative ecclesiastical body” at least as far as religious controversies were involved. Here is the key passage: “The conclusion to be drawn from *Jones* is that a state court may resolve disputes over church property through use of neutral principles of law, focusing on sources such as deeds to church property, articles of incorporation, bylaws, state statutory law and the constitution and rules of the general church; but if a civil court is required to resolve a religious controversy, it must then defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.” (*Korean United, supra*, 230 Cal.App.3d at p. 498.)

The *Korean United* also confronted the ruling in *Church of Palm Springs* and politely and obliquely criticized it: That is, the *Korean United* said that the *Church of Palm Springs* court “accepted” the “invitation to resolve church property disputes through application of neutral principles of law” (*Korean United, supra*, 230 Cal.App.3d at p. 498) but noted its ruling was based on a rather constricted focus on bare title: “Focusing instead on *bare title* to the property, the [*Palm Springs*] court upheld the trial court’s ruling that ownership and possession of the disputed church property remained with the local church.” (*Ibid.*, our italics, citing *Church of Palm Springs, supra*, 89 Cal.App.3d at pp. 923, 933).

Later in the opinion, however, the *Korean United* court made it clear that the trial court had “misapplied” the four neutral principles factors to rule in favor of the local church, because the trial court “improperly looked at each of the factors separately to see if an express trust was present in any one of them. However, the court, as a matter of law, should have looked at these factors *collectively*, asking whether under the totality of the circumstances, they required a finding of express trust.” (*Korean United, supra*, 230 Cal.App.3d at pp. 509-510, italics added.)

The implication of *Korean United* is clear, if politely stated: If the trial court had erred in *Korean United* by looking at the four-factors separately, rather than collectively, then how much more did the *Church of Palm Springs* court err in only looking at one factor individually, that is, “bare title.” And if there is one mistake the *Korean United* court was determined not to make, it was to constrict its focus to one factor separately and base its decision to reverse only that factor.

Structurally, one can divine from *Korean United* a host of parallel rationales, all of which were rolled up into a ball and hurled toward an overwhelming resolution: The trial court erred.

The first rationale was based the re-discovery of the principle of government approach. Justice Fred Woods and his colleagues became the first jurists on the intermediate appellate court in decades to apply the rationale of the controlling precedent of the state’s highest court to a church property dispute. In a section of the opinion citing *Wheelock, Horsman, Kedroff, and Serbian Orthodox* (see *Korean United, supra*, 230 Cal.App.3d at pp. 500-503), the *Korean United* court held that the trial court had erred in “fail[ing] to defer” to the decision of the presbytery, which was authoritative under the Presbyterian constitution known as the “Book of Order.” (*Korean United, supra*, 230 Cal.App.3d at p. 502.)

However, as an independent alternative rationale the *Korean United* court then down the line on each factor of the four neutral principles (see generally *Korean United, supra*, 230 Cal.App.3d at pp. 503-513), including the operation of the Corporations Code sections that folded the rules of the national church into the bylaws of

the local corporation controlling the property, and creating the presumption of an express trust. (*Id.* at pp. 503-509.) Another rationale was the nature of the deeds, because the Presbytery had held the property in its own name before a 1983 loan. (*Id.* at pp. 509-510.) Further, the articles of incorporation had expressly noted a statute that itself recognized the power of “national” bodies over “subordinate” ones (old Civ. Code § 605dd, part of stats 1939 ch. 148 § 2, p. 1262). (See *Korean United, supra*, 230 Cal.App.3d at p. 511.)

And, finally, there was the national constitution of the Presbyterian Church embodied in its Book of Order that had been amended in the wake of *Jones* to provide that local congregations hold property in trust (*Korean United, supra*, 230 Cal.App.3d at p. 512).

## 2. Saint Pius X

About eight years after *Korean United*, the court in *Saint Pius X, supra*, 69 Cal.App.4th 354 had occasion to confront the issue of church property disputes in the context of the arcane subject of corporate soles (see Corp. Code, §§ 10000 through 10015).

The classic model for a corporate sole is an Archbishop in the Roman Catholic Church who is *himself* a corporate sole, owning property in a given diocese. (E.g., *Roman Catholic Archbishop of San Francisco v. Superior Court* (1971) 15 Cal.App.3d 405, 411 [“The Archbishop is a corporation sole under the California Corporations Code . . . .”]; see also Nadborny, “*Leap of Faith*” Into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese’s Bankruptcy Estate (2005) 13 Am. Bankr. Inst. L. Rev. 839, 848 (“Nadborny Bankruptcy Article”).) The basic idea is that a single individual, as a subordinate in a hierarchically organized church, can own church property in a given area yet the *church* still ultimately controls the property by controlling the officeholder. (See Nadborny Bankruptcy Article, *supra*, 13 Am. Bankr. Inst. L. Rev. at pp. 848, 850 [“The corporation sole was developed in England for the express purpose of passing the use of church property to successive generations at the parish level in order to prevent the monarch from seizing church

properties upon the death of the bishop . . . . [¶] The fact that legal title rests in the hands of the bishop as a corporation sole does not change the Canonical ownership as ordained by the Catholic Church.”].)

And it was precisely the problem of who exactly controlled a corporate sole that came to the fore in *Saint Pius X*. The case involved the followers of Archbishop Marcel Lefebvre, who in the words of the opinion, practice “Roman Catholicism as it existed before Vatican II,” that is, they were an “independent” church. (*Saint Pius X, supra*, 69 Cal.App.4th at p. 358) A particular priest had formed a corporation sole in 1976. The original articles of incorporation provided that any vacancy would be made by the “presiding Archbishop following the canons of the Roman Catholic Church.” (*Ibid.*) However, the priest later attempted to change the manner of succession so that he would control his successor.

Not so, said the *Saint Pius X* court after the original priest died, and two successors, the original priest’s hand-picked successor and one chosen by the larger church, vied for control of the church property: The appellate court focused on section 10010 of the Corporations Code governing corporate soles, which contemplates filling vacancies ““by the religious organization governed by the corporation.”” (See *Saint Pius X, supra*, 69 Cal.App.4th at pp. 366-367.)

The court first noted that a ““principal purpose of the corporation sole is to insure the continuation of ownership of property dedicated to the benefit of a religious organization which may be held in the name of its titular head.”” (*Saint Pius X, supra*, 69 Cal.App.4th at p. 367, quoting *County of San Luis Obispo v. Ashurst* (1983) 146 Cal.App.3d 380, 383 (*Ashurst*)). The court’s central point was that, under California law, a corporation sole and the religious organization using the corporation sole as a legal device are *not* one and the same, so that the individual office holder does not control the succession to the property, it is, instead, the larger religious organization. (See *Saint Pius X, supra*, 69 Cal.App.4th at p. 370 [rejecting argument that original priest was “synonymous with the religious organization governed by the corporation”].)

The *Saint Pius X* court relied heavily on the *Ashurst* decision, which was an execution sale case, based on a debt for medical services provided by a county to the wife of the office holder of a corporate sole. Writing for the court and quoting Blackstone, Justice Gilbert noted the “severability of title and ownership as between the unincorporated religious organization and the individual officeholder as the corporation sole.” (*Ashurst, supra*, 146 Cal.App.3d at p. 384.) That is, “the assets must remain with the religious organization” once title has vested in the office holder as corporate sole. The county thus could not obtain a writ of execution on the assets of the corporation sole to satisfy the debt for medical services of the office holder’s wife. (See *id.* at pp. 384-385.)

And, perhaps most important for our purposes, *Saint Pius X* continued with the rediscovery by California’s lower intermediate level appellate courts of the proposition from *Wheelock* that religious corporations are not to be confused with the ecclesiastical bodies to which the corporation may be ecclesiastically subordinate. Here is the key passage from *Saint Pius X*, noting the original “convenience” language from *Wheelock*, and adding its own emphasis: “As the trial court observed, in the early case of *Wheelock* . . . (although not involving a corporation sole) the Supreme Court explained the relationship of a religious corporation to the congregation or church membership as follows: ‘The . . . Code of this state . . . expressly permits religious bodies to incorporate, but such incorporation is only permitted as a convenience to assist in the conduct of the temporalities of the church. *Notwithstanding incorporation the ecclesiastical body is still all important.* The corporation is a subordinate factor in the life and purposes of the church proper. A religious corporation . . . is something peculiar to itself. Its function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church. . . . ‘The legislature never means by granting or allowing such charters to change the ecclesiastical status of the congregation, but only to afford them a more advantageous civil status.’” (*Saint Pius X, supra*, 69 Cal.App.4th at p. 371-372 (italics added by *Saint Pius X* court).)

### 3. Singh

*Singh, supra*, 114 Cal.App.4th 1264, is significant for several reasons, not the least of which is that it was the first California case since the U.S. Supreme Court's 1979 *Jones* case to *systematically* review the federal precedents, including *Watson*, *Hull Church*, *Serbian Orthodox* as well as *Jones*. (See *Singh, supra*, 114 Cal.App.4th at pp. 1275-1281.) *Church of Palm Springs* had cited those cases to be sure, but it hadn't taken them on one by one. Perhaps because of that systematic review, the *Singh* court declared that it did not "necessarily agree" with the idea that certain California cases "decided in the 1950's" -- which certainly included both *Rosicrucian, supra*, 39 Cal.2d 121 and *Providence Baptist, supra*, 40 Cal.2d 55 -- could *not* "be reconciled with the United States Supreme Court holdings." (*Singh, supra*, 114 Cal.App.4th at p. 1281, italics added.)

The case is also significant because it was, functionally, a homage to *Providence Baptist*, that is, it yielded exactly the result that a reading of *Providence Baptist* would predict for a congregationally organized church using the principle of government.

The *Singh* case was, of course, a little more complex than that: It arose out of the claims of two competing boards (called "the Supreme Council") in a Sikh Temple. The losing slate essentially contended that they had been elected for life, in accordance with what they claimed was the proper Sikh tradition. The temple was congregationally organized, with an elected board, but (shades of the British Parliament in the time of Charles I) the otherwise detailed bylaws did not address the question of how long the board was to serve. Since the temple had organized itself as a "nonprofit religious corporation" subject to the rules set for in section 9110 et seq. of the Corporations Code (*Singh, supra*, 114 Cal.App.4th at p. 1282), the trial court had looked to section 9220, which provides that in the absence of any provision in the articles or bylaws, the term of office for a board of directors is one year. That determination, in effect, validated the claims of one slate of directors. The trial court also -- in the tradition of *Providence*

*Baptist* that basically had done the same thing approved about 50 years before -- provided for a court supervised election.

The losing slate appealed; its core argument was that the trial court did not have *jurisdiction* to adjudicate the dispute at all. The bylaws did indeed make reference to “the Gurmat tradition” and the “Panj Pyaras” within the Sikh religion. (*Singh, supra*, 114 Cal.App.4th at pp. 1269, 1275.) It was in the context of discussing jurisdiction that the *Singh* court addressed the U.S. Supreme Court cases from the 1970’s, as well as *Rosicrucian* and *Providence Baptist*. The court ultimately held that the trial court’s decision to apply section 9220 was correct as an application of neutral principles. There was no conflict between a neutral principles approach and the principle of government approach, because the principle of government of the Sikh temple was the local corporation (controlled by a board elected by majority rule) specified in the bylaws.

That point, however, requires a little more elaboration. There was no doubt in *Singh* that the controlling board was to be elected by majority rule. However, the court also noted that an article in the bylaws also made a particular priest the “chief consultant” in “matters related to the Gurmat and Sikh Rehatmaryada.” (See *Singh, supra*, 114 Cal.App.4th at p. 1283, fn. 20.) Any “matter of doubt” was to be decided in a hierarchy of specified individuals. (*Ibid.*) That particular priest had not, however, spoken “regarding the term of office for the Supreme Council.” (*Ibid.*) Hence, the *Singh* court took care, in justifying the trial court’s decision to hold an election as *not* conflicting with any ecclesiastical hierarchy: “Further, the trial court did not determine who was qualified to be a member or who should be a member of the Supreme Council. Rather, the court’s ruling that an election should occur resulted from the application of neutral principles of law and the Corporations Code when interpreting the bylaws. We stress that this case is significantly different from those situations where a religious authority has spoken on the issue. Not only has no religious authority spoken, but the Sikh Temple has no viable means of resolving this issue.” (*Singh, supra*, 114 Cal.App.4th at p. 1285.)

In short, the *Watson* and *Baker-Wheelock* principle of government approach was beginning to recover the respect it had lost with the *Metropolitan Baptist, Wilson*,

*Church of Palm Springs* and *Barker* cases. The revival would continue with *Guardian Angel*.

#### 4. Guardian Angel

*Guardian Angel, supra*, 118 Cal.App.4th 919 is an example of how neutral principles analysis which properly takes into account the written *constitution* of a hierarchical church (plus its canons and rules) will often yield the same result as a highest tribunal analysis. The case is also totally congruent with *Saint Pius X's* iteration of the *Wheelock* doctrine that church corporations serve as agents for churches that use them for its temporal ends.

The split between the local and the general church in *Guardian Angel* does not appear to have been theological at all. Rather, it was over financial accountability of the local church to the general church.

In *Guardian Angel*, a parish operated for about 39 years “in union” with the local diocesan bishop of the general church that operated “in union” with the Prime Bishop of the church back in Pennsylvania. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 929.) When a new diocesan bishop was appointed in 1999, he requested the local priest to provide him certain financial information. The local priest failed to do so. A new local board of directors was soon elected, and that board severed ties with the general church, even to the point of hiring security guards to prevent those parishioners who remained loyal members of the general church from entering the premises. (The new board even refused donations from loyalist members. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 926.) The general church constitution, however, required diocesan approval of any newly elected board, but it was clear that this newly elected board never got it. (*Ibid.*) The trial court found the property belonged to the local church, but the appellate court reversed.

The *Guardian Angel* court began with the premise that courts “must” apply neutral principles analysis, for which it cited page 449 of the *Hull Church* case, but only quoted a fragmentary clause from the *Hull Church* opinion. Here is what the *Guardian Angel* court said: “In settling a church property dispute, such as that currently before us,

courts must apply ‘neutral principles of law, developed for use in all property disputes, which can be applied without “establishing” churches to which [the] property is awarded.’ (*Presbyterian Church v. Hull* (1969) 393 U.S. 440, 449 [parallel cites omitted].) (*Guardian Angel, supra*, 118 Cal.App.4th at p. 930.)

From there, it identified the usual four factors used in neutral principles analysis. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 930, citing *Barker, supra*, 115 Cal.App.3d 599, 621.)

It then quoted *Metropolitan Philip v. Steiger* (2000) 82 Cal.App.4th 923, 932 for the proposition that a general church’s constitution “‘can override any right the majority of a local congregation might otherwise have to control the local church property.’” (*Guardian Angel, supra*, 118 Cal.App.4th at p. 930.)

Having established that a general constitution can trump “any right the majority of a local congregation” have in local property, disposing of the case was an easy matter. The general church constitution required diocesan approval of a local church’s board of directors before that board was authorized to act. So the actions of the board in “expropriat[ing]” the local property were not authorized. (See *Guardian Angel, supra*, 118 Cal.App.4th at pp. 927, 930)

By the same token, the constitution of the general church (actually, there were two, a 1958 and a 1998 version) was clear that a parish only owns property “so long as” it conforms to the rules of the general church, and any dissolution of a parish will cause the property to revert to the national church. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 931).

The court further held that the reversion provision created a presumption of an express trust under section 9142, subdivision (c) of the Corporations Code. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 931, citing *Korean United, supra*, 230 Cal.App.3d at p. 508, itself quoting from § 9142, subd. (c)(2).) That presumption was un rebutted by the mere fact that the *local* articles of incorporation did not “expressly” provide for reversion upon dissolution. (*Guardian Angel, supra*, 230 Cal.App.3d at p. 929.)

Our own previous explication of section 9142 is wholly consistent with that conclusion. We have already shown, because of the “or” in subdivision (c)(2), that a trust may be enforced under the statute even if there is no provision for it in the local church’s bylaws or articles.

#### 4. California-Nevada

*Guardian Angel* was filed in late April of 2004; by mid-August, however, another case would be added to those intermediate appellate opinions which came down on the side of local control, *California-Nevada, supra*, 121 Cal.App.4th 754, sometimes also called “*St. Luke’s*.” Whereas *Saint Pius X* (quoting from *Wheelock*) and *Guardian Angel* (when provided for by the church constitution) had seen church corporations as distinct from and essentially subordinate to the religious organizations for which they were created, the *California-Nevada* court began with the local church corporation as the originating force behind subsequent property relationships.

Preliminarily, we must note that it is significant that the viability of the principle of government or so-called hierarchical approach was *not* before the court in *California-Nevada*. The court expressly noted that *neither party* was pressing such an approach and both parties operated on the assumption that it didn’t apply. (*California-Nevada, supra*, 121 Cal.App.4th at p. 763 [“The parties here also appear to agree that the neutral principles of law theory is applicable in California, or at least that the hierarchical and implied trust theories do not apply.”].)

It is clear from the opinion, though, that the *California-Nevada* court took it for granted that the “hierarchical theory” had been discredited, because that assumption played a role in its rationale, which was based on the proposition that a local church corporation in that case, like any trustor in California trust law, had the presumptive power to rescind a trust it had created. In direct contrast to *Guardian Angel* (see *California-Nevada, supra*, 121 Cal.App.4th at p. 771 [acknowledging the opinion to be “at odds” with *Guardian Angel*], the *California-Nevada* court explicitly rejected the idea that a general church’s constitution could be dispositive, and did so on the ground that it would merely re-import hierarchical theory back into California law. (See *id.* at p. 772

["Although the hierarchical theory has supposedly been rejected in California, it will nevertheless live on under the label of 'neutral principles of law,' if a church's own rules are viewed as trumping state statutes."].)

On the other hand, it is further noteworthy that the *California-Nevada* court assumed that hierarchical theory was discredited *despite* its use by *Korean United* court. To be sure, the *California-Nevada* court did make it clear that it disagreed with the *Korean United* opinion on the question of whether section 9142 created any *presumptive* trusts in favor of a general church, finding *Korean United's* reliance on the Ballentine & Sterling treatise misplaced, because the statute itself does not use any variation of the word "presumed." (*California-Nevada, supra*, 121 Cal.App.4th at p. 770 ["*Korean United . . . describes . . . 9142 as providing 'presumptive rules . . . .'* This language appears to have come from a treatise . . . . Nothing in the statute itself, however, uses the word 'presumption' or 'presumed.'"]).)

On the other hand, one doesn't find in the opinion any confrontation with the fact that *Korean United* had relied upon the organizational principle as one of its several independent rationales to decide in favor of the general church.

Rather, for the *California-Nevada* court, the analysis of the church property dispute was a relatively straight-forward trust problem: In 1948, a local Methodist church incorporated with the express purpose of holding the church property in trust for benefit of the *local* church, albeit also with the purpose of maintaining a local church "as a part of and affiliated with the Methodist Denomination." (*California-Nevada, supra*, 121 Cal.App.4th at pp. 757-758.) When an (unspecified) doctrinal dispute arose in the United Methodist Church in 1999 and 2000, the Methodist bishop attempted to replace the (apparently popular) existing local pastor. The local pastor (or his supporters) locked out the new pastor. The regional conference of the general church and related entities then sued the local church corporation for breach of charitable trust. (*Id.* at p. 760.) The trial court reasoned that (a) a trust did indeed exist in favor of the general church and (b) the trust could not be unilaterally revoked by the local church corporation. (See *id.* at p. 761.)

The appellate court agreed with (a) -- finding substantial evidence to support the idea that certain properties were indeed held by the local church corporation in trust for the general church. But, applying the traditional California rule that trusts are revocable unless expressly made irrevocable by the trust instrument (*California-Nevada, supra*, 121 Cal.App.4th at p. 767, quoting Prob. Code, § 15400), it disagreed with (b). It held that the local church could keep the property by revoking the trust.

The syllogism used by the court went this way: The local corporation put some property into a trust for the general church. The trust instruments (in *California-Nevada*, certain deeds<sup>13</sup>) had created trusts for the general church (the deeds going to the local church corporation), but those instruments did not contain any language making the trust expressly irrevocable. Under California trust law, that made them revocable. Moreover, the fact that the constitution of the general church expressly provided that local churches hold property in trust for the general church was of no significance. “We know of no principle of trust law stating that a trust can be created by the declaration of a nonowner that the owner holds the property as trustee for the nonowner.” (*California-Nevada, supra*, 121 Cal.App.4th at p. 769.) In essence, the *California-Nevada* court treated the local corporation as any other *initial* owner creating a revocable trust and wanting the property back.

The *California-Nevada* decision was also the first California decision in the church property dispute area to consider in any detail the impact of Corporations Code section 9142, enacted in 1982. (Although the statute had played a subsidiary role in the rationales of both *Korean United* and *Guardian Angel*.)

The *California-Nevada* court took the position that “various legislative history materials” including the digest of the Assembly’s Third Reading of the bill indicated that the purpose of the bill was ““to limit a religious corporation’s property

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<sup>13</sup> The case involved nine parcels, the deeds to five of which had trust language in favor of the general church. In an analysis that followed the four-step neutral-principles factors, the *California-Nevada* court found there was substantial evidence that the other four were intended to have such trust language and concluded that all parcels had been put into a trust for the benefit of the general church. (*California-Nevada, supra*, 121 Cal.App.4th at pp. 764-766.)

subject to a charitable trust. It requires certain actions to take place in order for a gift of property to be considered a charitable trust.” (*California-Nevada, supra*, 121 Cal.App.4th at p. 770, quoting Assembly Third Reading of Sen. Bill No. 1178 (1981-1982 Reg. Session.) Which was, as we have shown, correct.

However, the *California-Nevada* court also concluded, in construing subdivisions (c) and (d) in section 9142, that those subdivisions were enacted to, in effect, codify *Barker*. After pointing out that nonowners cannot create trusts in their favor, the court said: “A more reasonable reading of the statute is that subdivision (c)(2) was intended to be a codification or recognition of *Barker, supra*, 115 Cal.App.3d 599. This is especially so since subdivisions (c) and (d) were enacted shortly after *Barker* was decided. *Barker* was decided in January of 1981. Subdivisions (c) and (d) of Corporations Code section 9142 were enacted in 1982, and took effect in 1983.” (*California-Nevada, supra*, 121 Cal.App.4th at p. 769.) That is, the court was rejecting the notion that a general church can “create a trust, in favor of itself” by amending its constitution or rules to so provide. (*Ibid.*)

The *California-Nevada* court provided no authority for the idea that subdivisions (c) and (d) were enacted to codify *Barker*. We have already demonstrated in great detail that the idea is incorrect.

#### 5. Concord Christian

And now we come to the latest church property dispute in California to date, *Concord Christian, supra*, 132 Cal.App.4th 1396. *Concord Christian* is remarkable in that it confronted what appears to be the main (potential) difficulty with the *Watson* principle of government approach, namely whether it would require a civil adjudication of whether a church really was hierarchical or congregational. That adjudication might, in turn, implicate the civil court in theological controversy.

It bears emphasizing that in all the cases we have reviewed in this opinion, we have encountered no real disputes over the question of the *nature* of the church’s organization. In *Concord Christian*, however, there had been an actual dispute over whether the denomination with which the secessionist local church had been formerly

affiliated was hierarchical or congregational. The issue had been “vigorously dispute[d]” in the trial court with substantial evidence coming from “both sides.” (*Concord Christian, supra*, 132 Cal.App.4th at p. 1409.)

However, as it turned out, there was no occasion to wade into religious controversy at all: The constitution and by-laws of the general church plus the *history* of the local congregation and the “actions of the parties” (for example, by the secessionist pastor acknowledging the authority of the denomination before the split) provided not only substantial evidence to support the trial court’s finding that the denomination was hierarchical, but also established that the local congregation had never been a “strictly independent” church “free of other ecclesiastical associations.” (See *Concord Christian, supra*, 132 Cal.App.4th at pp. 1409-1411.)

Like other post-*Barker* appellate opinions, *Concord Christian* operated on the premise that California law is the “neutral principles of law” approach, but seemed to equate the principle of government approach *with* such neutral principles. Consider this passage: “California courts apply the neutral principles of law approach, taking care in resolving church property disputes not to make determinations of underlying controversies over religious doctrine and polity. [Citations.] Accordingly, even where the matter at issue in a church dispute involves questions of ownership of property and assets, *civil courts applying neutral principles of law must defer to the authoritative decisions of hierarchical ecclesiastical bodies on any matters of internal church polity necessarily involved in resolving the issue.* [Citations.]” (*Concord Christian, supra*, 132 Cal.App.4th at p. 1412, italics added.) The same sentiments might just as easily have been expressed by our state’s high court in *Wheelock, Committee of Missions*, or *Horsman*.

#### H. Application

The rule of stare decisis reminds us that that common law is usually not the product of any one particular decision only, but of many generations of jurists focusing on a particular problem. In the case before us, for example, we have now ascertained that the approach articulated by the highest court in this state -- directly in *Baker, Wheelock*,

*Committee of Missions, Horsman and Providence Baptist*, and indirectly in *Rosicrucian Fellowship* -- has never been overruled or occluded by decisions of the United States Supreme Court. We have demonstrated that the federal supreme court has done nothing to affect the viability of these cases.

Of course, as a matter of state law (apart from matters of constitutional law), the Legislature can supersede decisions of a state's highest court. And yet we have also seen that nothing the Legislature has done would affect the principle of government approach in this case, where clear and convincing evidence exists that the "governing instrument" of a "general church" expressly impresses a trust on the property of a local church corporation.

In short, both *stare decisis* (at least in this case with Canon I.7(4)), and the proper construction of section 9142, coterminously favor the position of the general church. It is clear, then, that the trial court erred as to the second prong, going to the merits, of the anti-SLAPP statute in dismissing the case.

Now, it is not uncommon for appellate courts to bolster the result in a case before them by explaining that an alternative rationale leads to the same result. That happened in *Korean United*, where the court used the approach dictated by *stare decisis* (the principle of government) and then also reached the same result under the four-factor neutral principles approach.

In this case, however, we have decided that we should not engage in that sort of overkill. To be plain: Under the California Supreme Court cases of *Baker*, *Wheelock*, *Committee of Missions, Horsman*, and *Providence Baptist* (which are consistent with *Rosicrucian Fellowship* as well), the right of the general church in this case to enforce a trust on the local parish property is clear, and that right has not been affected by intervening United States Supreme Court decisions or any statute enacted by the Legislature. To the degree that section 9142 alters the common law rule enunciated by these cases, that alteration *duplicates* the result required under the common law given the facts of this case.

## V. DISPOSITION

The judgments of dismissal against the diocese and the national church are both reversed. Further proceedings shall be consistent with this opinion. Appellants shall recover their costs on appeal.

SILLS, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J. /

**PROOF OF SERVICE**

*Episcopal Church Cases*  
Appeal Nos. G036096, G036408, G036868

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action; my business address is Jamboree Center, 4 Park Plaza, Suite 1100, Irvine, California 92614.

I am employed by Payne & Fears LLP. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service and common carriers promising overnight delivery. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service or the common carrier on the same day I submit it for collection and processing.

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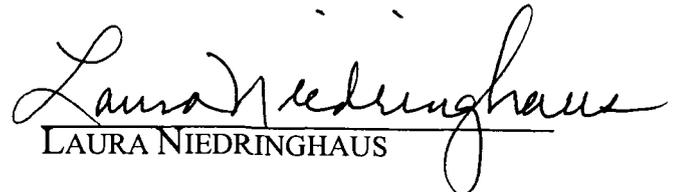
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Executed on August 3, 2007, at Irvine, California.

  
LAURA NIEDRINGHAUS

*Episcopal Church Cases*  
Appeal Nos. G036096, G036408 and G036868

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