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IN THE SUPREME COURT

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OF CALIFORNIA

EPISCOPAL CHURCH CASES

Deputy

APPLICATION FOR LEAVE TO FILE AND

AMICUS CURIAE BRIEF UNDER CRC 8-520 BY APPLICANTS THOMAS

LEE AND REV. PETER MIN

After a Decision by the Court of Appeal Fourth Appellate District
Division Three (Appeals Nos. G0360996, G036408, G036868)

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THOMAS LEE, REV. PETER MIN

CASE: S155094

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OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF PETITIONERS UNDER CRC 8.520(f):
TO THE HONORABLE JUSTICES OF THE CALIFORNIA
SUPREME COURT.

=1. Pursuant to CRC 8.520(f) (fka Rule 29.1), leave is requested from this honorable Court to file an amicus brief in regard to this case. The amicus brief is filed in support of Petitioners.

=2. The Supreme Court has specified three issues for consideration taken from the Supreme Court web site. The first can be summarized as whether California should follow the neutral principles doctrine approved by the United States Supreme Court in **Jones v. Wolf**, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed. 2d 775 (1979) in review of property disputes between a national denomination and a local church. The second involves the application of California Code of Civil Procedure Section 425.16 commonly referred to as the Anti SLAPP statute and whether the public disaffiliation in protest of the Episcopal Church was expressive speech. The third issue taken from the Supreme Court web site reads as follows:

={3} “What role does California Corporation Section 9142 play in the analysis and resolution of church property disputes?”

=3. The Amicus Brief which the filing party seeks to file essentially is directed to issue number 3 with some roll over discussion to a limited degree on issue 1.

=4. The constitutionality of Corporation Code Section 9142 is pending in another civil action, Los Angeles Superior Court, BC332180. However, that action is in the process of resolution.

=5. It is the applicant's position that Section 9142 is unconstitutional on many grounds: (i) Free Exercise Clause in the California Constitution, (ii) Establishment Clause in the California Constitution, (iii) No Preference Clause in the California Constitution, and (iv) the Equal Protection Clause, and (v) Due Process Clause Taking Without Compensation. As to each, the argument also relies on the respective provisions in the United States Constitution elaborated in the Amicus Brief.

=6. In regard to certain of the constitutional arguments, they were the subject of a constitutionality brief submitted by special counsel Robert Post, Professor of Constitutional Law at the Yale Law School who argued that Section 9142 is unconstitutional. A copy of his brief submitted in BC332180 is submitted as part of the Amicus Brief. As such, this is a very important presentation to this honorable Court.

=7. The purpose of the Amicus Brief is to assist this honorable Court in the review of this complex issue by presenting a complete review of the constitutional issues why Section 9142 is unconstitutional. It will provide this Court with the work product of hundreds of hours of research and review regarding Section 9142 and will seek to avoid duplication and overlap. It appears that it will be the only significant brief on that issue number 3 which as noted is critical.

=8. The applicant respectively points out that many national denominations have filed suit not only against the local church but also against the members of the Board of Directors of the local church when they cause the local

church to withdraw from the denomination and seek to take the property of the local church usually acquired with assets of the local church. These unpaid volunteers as Board members then become victims of the litigation process. Regardless of CCP Section 425.15 (which purports to try to protect such persons but which falls woefully short due to the fact that it can easily be overcome with allegation of intentional conduct), they are sued and subjected to enormous claims of damages for breach of trust, and related claims based on the inclusion of a one word trust word in the governing documents of a national denomination.

=9. Applicant Rev. Peter Min was a minister at a local church who was sued in Los Angeles Superior Court Case Number 332180 by a national denomination and all of its governing bodies claiming that the local church could not disaffiliate and sought to impose a one word trust and enforce Corporation Code Section 9142.

=10. This case is extremely important and presents the Court with the opportunity not only to follow existing viable law in California and **Jones v. Wolf** and adopt the neutral principles doctrine for all time and rule that the one word alleged trust (which violates many code sections in California) must be interpreted under neutral principles, but more importantly to declare that Section 9142 is unconstitutional.

=10. Furthermore Section 9142 seeks arguably to set up a presumption and is a barrier to freedom of religion in California. As a result, local churches and Board members, many who have contributed funds for the improvement of their local churches for years and years, and acquired their own property in the name of the local church, have to make a Hobson's choice of

either exercising the right to religious freedom, or disapproving the trust word and object to any attempt by the national denomination to claim a trust, or face claims for damages for breach of trust and protracted litigation. These invidious lawsuits must end and they will end once the Court declares Section 9142 unconstitutional which is the basis for the anti St. Luke's argument. Without 9142 there would be religious freedom under St. Luke's which represents a practical balance for churches. Section 9142 right now is the key provision utilized to block local churches from seeking to change denominations, withdraw, and exercise freedom of religion.

=11. Thomas Lee is a member of a local church who falls into this category. He filed suit seeking to declare Corporation Code Section 9142 unconstitutional. Los Angeles Superior Court BC340492.

=12. Applicants are extremely familiar with the issues before this Court and the scope of their presentation will benefit this honorable Court in terms of review of the issues many of which are hidden, or not otherwise been presented.

Wherefore, this Honorable Court is asked to grant leave to file the attached Amicus Brief.

Dated: May 22, 2008



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AMICUS CURIAE BRIEF

IN SUPPORT OF PETITIONERS UNDER CRC 8.520(f):
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SUPREME COURT.

I

THE UNITED STATES SUPREME COURT IN JONES V. WOLF,
443 U.S. 595 RULED THAT THE NEUTRAL PRINCIPLES
DOCTRINE IS CONSTITUTIONAL

We start off with the fact that the United States Supreme Court in **Jones v. Wolf**, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed. 2d 775 (1979) approved the application of the neutral principles doctrine in review of property disputes by and between national denomination and a local church. The Court pointed out that the neutral principles doctrine was completely secular in operation and removed the Court from entanglement in tricky questions of religion. It noted that it was flexible and could “accommodate all forms of religious organization and polity.” (Id. at 603; XR Pet.Hearing, pages 13-14). It concluded that the method relies exclusively on “objective, well established concepts of trust and property law familiar to lawyers and judges. . . .” (Id. at 603). It is crystal clear that the neutral principles doctrine followed in earlier cases such as **Presbytery of Riverside v. Community Church** (1979) 89 Cal. App,3d 910, and **Protestant Episcopal Church v. Barker** (1981) 115 Cal. App. 3d 599, 614, cert denied 454 U.S. 864 should be followed by this Honorable Court. The holding in **California –Nevada Annual Conf. v. St. Luke’s United Methodist Church** (2004) 121 Cal. App 4th 757 (“**St. Luke’s**” case)

The important part of the case is that the Court adopted the neutral principles and applied them, and concluded that there was a trust created for certain of the properties but not all. If one substitutes a new Court for the Court of Appeal that heard the **St. Luke's** case, it is fair to say that any other Court would come to the same conclusion because the neutral principles provide objective standards, and the factors for consideration by the Court. It should be emphasized that the Court made this ruling despite the fact that it applied **Evidence Code Section 662** which imposed a clear and convincing evidence standard on the general church, a very high burden but one applicable to everyone else in California. Not only that the case law seems to contend that there is a presumption involved. (See **Korean United Presbyterian Church v. Presbytery of the Pacific**, 230 Cal. App. 3d 480, 509) despite the fact that the word presumption does not appear anywhere in Section 9142.

The Court applied the objective standards and ruled substantially in favor of the general church but not all. Five of the nine deeds in that case included an express trust clause. (To the same effect, see the **Barker** case, 115 Cal. App. 3d at 625 where the Court ruled that 1 was held in trust and three were not).

Even the Court in **Korean United Presbyterian Church v. Presbytery of the Pacific** (1991) (230 Cal. App. 3d 480, at 511-512 applied the neutral factors although they erroneously included the by laws of the local church which is not correct. (See infra, by laws are not one of the four **Jones** factors.)

The doctrine of neutral principles works well in the light of day and provides for the correct balance between religion and judicial review. However, this honorable Court is aware of this. It is no secret.

The issue which this Court needs to be aware of is the issue of attempt to change the four factors adopted by the Supreme Court in **Jones** that courts use to review and apply the neutral principles of law.

“In determining the presence or absence of an express trust in specific church property a court will look at four general sets of facts: (1) the deeds to the property, (2) the **articles of incorporation of the local church**, (3) the constitution, canons, and rules of the general church, and (4) relevant state statutes, if any, governing possession and disposition of such property. In *Jones v. Wolf* [*supra*, 443 U.S. at pp. 600, 603, 99 S.Ct. 3020], the United States Supreme Court noted approvingly that both the Georgia Supreme Court and the *764 Maryland Court of Appeals employed these factors to resolve church property disputes.” (*Barker, supra*, 115 Cal.App.3d at p. 621, 171 Cal.Rptr. 541, fn. omitted.)”
(Id. at 763; emp. added)

The critical point is that the four factors were delineated by the Supreme Court. The word “by laws” of the local church is **not** a factor. By laws are fleeting and can be changed easily while Articles of Incorporation require very tough standards and approval usually by the membership to change. If it is in the Articles, then it is evidence that can be used. Adopting by laws which purport to change the balance appears to have been rejected by the **Jones** Court and rightfully so.

The place where virtually all of the alleged one word trust clauses are located are in the By Laws later adopted. This is important because many local courts imply the word by laws in place of the second factor articles when it is not a factor for consideration. This honorable Court should adopt the factors as precisely set forth in the **Jones** decision, not as changed by later decisions. (See **Protestant Episcopal Church etc. v. Barker**, 115 Cal. App. 3d 599, 614 (1981) expressly adopted the neutral principles of law standard and the four factors virtually verbatim.

But in **Korean United Presbyterian Church v. Presbytery of the Pacific** (1991) 230 Cal. App. 3d 480, 507) the Court appears to have incorporated elements not found in 9142. This includes the presumption argument, and a change in the four factors:

“The second set of facts involves the *articles of incorporation and other organizational documents*”

(Id. at 507).

The **Korean United** case relied extensively on the by laws of the local church for its ruling when in fact this was not correct. The entire **Korean United** case is undermined by this one fact. (230 Cal. App. 3d at 511-512 referring to by laws and related code sections re by laws as evidence.) Without the tie in of the by laws it is fair to say that the ruling should have gone the other way. The big print tries to make it fair, and the added print tries to change the balance in favor of the general church.

It should be noted that Section 9142 ©(2) appears to try to change the list of factors to water them down to permit by laws to be reviewed. It refers to the term articles or bylaws. However, such reference differs from the approved factors in **Jones** and to that extent cannot be inconsistent with them.

II

VISIBLE BUT HIDDEN CONDITIONS UNDER 9142. THE LOCAL CHURCH MUST BE A MEMBER OF THE GENERAL CHURCH. THUS THIS IS ANOTHER REASON WHY THE NEUTRLA PRINCIPLES DOCTRINE MUST BE APPLIED TO DETERMINE MEMBERSHIP UNDER CALIFORNIA LAW

One can read Section 9142 and not notice that in fact it is conditioned on certain points:

“(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.” (Emp. Added)

Thus, a local church must also be a member of a general church or superior religious body. Does the term national denomination equate with general church

or superior religious body? More likely than not, they are intended to be used interchangeably. The key term is **member**.

First of all, **California Corporation Code Section 9310(a)** provides that unless it is expressly set forth there are members, there are **no members** in a California religious corporation. The issue is membership in a general church.

In fact, many national denominations in their Articles of Incorporation do not have members. The Articles of Incorporation such as the Presbyterian Church (PCUSA) incorporated in Pennsylvania in their restated Articles filed in 1985 or 1986 expressly states it has NO members and expressly excludes members. (See 15 Pa. CSA Section 5306(7), and Article 19, Section 41(7) of the Pennsylvania Code.)

This innocuous term was included in 9142 presumably to make sure that a non member would be subject to a trust based on religious affiliation. There are many local churches that are affiliated with a national denomination but **not** members. (Cf. **California Corporation Code Section 9332** provides that a religious entity may have affiliated entities which are not members and that calling them members does not make them members.) Whatever this honorable Court may do, it must emphasize this very critical distinction due to the fact that local courts do not distinguish between them. This point is raised because it undermines the notion that anything short of neutral principles is required for review of a trust issue since it also involves a membership issue which otherwise would be closed due to the argument that the issue is ecclesiastical. It is not ecclesiastical and the issue must be resolved by the local courts in conformity with California law.

Another issue deals with standing. If there is a trust usually one word somewhere, it can only be in favor of the general church or superior religious body. Many national denominations that have no members as a matter of law

and exclude them, try to have one of its lesser entities seek to enforce the trust claiming that the local church is a member of a Presbytery. The issue of membership also applies in this regard.

III

THE COURT OF APPEAL IN ST. LUKE’S CASE PROPERLY REVIEWED THE APPLICABLE LAW AND CONCLUDED THAT EVEN IF THERE WAS A TRUST DETERMINED UNDER NEUTRAL PRINCIPLES, SECTION 9142 DOES NOT PRECLUDE A LOCAL CHURCH FROM LEAVING A NATIONAL DENOMINATION AND TAKING ITS PROPERTY ALONG.

The holding in California –Nevada Annual Conf. v. St. Luke’s United Methodist Church (2004) 121 Cal. App 4th 757 (“St. Luke’s” case) is discussed in the Petition for Hearing, pages 18-20. The Court rejected the argument that 9142© authorized 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.” (Id. at 769).

It concluded that, even though there was sufficient evidence of an trust, the trust could be revoked. (Id. at 757). Thus, if a local church revokes the trust, that should be end of the trust issue unless it is marked irrevocable citing to Probate Code Section 15400 which provides that all trusts are revocable unless denominated irrevocable by the local church in the trust instrument—not the general church:

“Unless the trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor. . . . {additional language not included}.”

The St. Luke's case properly determined that the law applicable to everyone else in the State of California noted by the Court in Jones applies under neutral principles to review the issue and applied 15400 and determined that if there was a trust it was revocable, and it was revoked. What is even more interesting is the language of Corporation Code Section 9142(d):

“(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 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.” (Emp. added.)

Even assuming arguendo a trust created under 9142, it can also be dissolved or amended by way of amendment to the articles or bylaws. In fact, Section 9142(d) is consistent with the St. Luke's case and the Court so noted:

“Thus if the trust in favor of the United Methodist Church was a trust “created by paragraph (2) of subdivision (c)” (Corp.Code, § 9142, subd. (d)), that trust could be amended or dissolved by amending the St. Luke's articles of incorporation to expressly state that St. Luke's would not be “affiliated with” or “subject ... to the ... discipline ... of the United Methodist Church,” and that it would hold property “in trust for the sole benefit of this Corporation.” That is exactly what St. Luke's did.” (Id. at 771; emp added).

As set forth below, if it applies only to a general church and no one else, then it violates the Equal Protection Clause, or the Establishment clause etc. or the No Preference Clause by preferring a general church (usually a non resident corporation) over a local church (usually a local entity). FN 1

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=FN 1: Probate Code 15206 sets forth the rule against perpetuities re non charitable corporations and limits them to 21 years. This Section may be applicable as well even if there is trust.

IV.

THE ST. LUKE'S CASE PROPERLY REJECTED THE ARGUMENT THAT CALIFORNIA CORPORATION CODE 9142 IMPOSES A TRUST ON LOCAL CHURCH PROPERTY

Corporation Code Section 9142 reads as follows:

“(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.”

The Court in St. Luke's properly concluded that the purpose of 9142 was to limit and not expand the circumstances under which the assets of a local church would be impressed with “any trust express or implied, statutory or at common law.” (Id at 770).

The Court in St. Luke's also cited to various Code Sections in support of the proposition that 9142 cannot create a trust that does not exist otherwise under the law. To facilitate discussion, numbers have been added:

PART 1: Probate Code Sections

=1. Probate Code Section 15200 (which applies to everyone else in California) which provides that a trust requires a declaration by the owner that the property is held in trust.

“A trust can be created by a “declaration by the owner of property that the owner holds the property as trustee.” (Prob.Code, § 15200, subd. (a); see also Rest.2d Trusts, § 17, p. 59.) 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.”

There are additional sections not noted in the **St. Luke’s** case which are applicable. Furthermore, there are Corporation Code Sections which apply since presumably most of the local churches are corporations (although some might well be unincorporated or sole corporations). They add a completely second layer of sections that apply and which negate as a matter of law the conclusion that 9142 imposes a trust as a matter of law.

=2. Probate Code Section 15201

“A trust is created only if the settlor properly manifests an intention to create a trust.”

The issue is particularly important where there is a unilateral attempt to create a trust by adding one word usually to a document in a corporate setting. These are referred to not as trust agreements, but a trust word in a governing document of a national denomination. Approval by the settlor in a Corporation means approval by the Board of Directors.

=3. Probate Code Section 15202 (which applies to all other corporations in California) provides that there must be property property at the time the trust was allegedly created:

“A trust is created only if there is trust property.”

This raises the point that there must be property in existence at the time the national denomination passed the one word trust. What happens if you acquire property afterwards (post)? That would appear not to fall under the trust based on 15202 unless one imputes a dragon after acquired property clause. Section 9142© c) does not appear to be inconsistent. It provides:

“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:”

However, local courts do interpret Section 9142 as applying to post acquisition property. Thus, to this extent if this honorable Court adopts Section 9142, it must be limited to property on hand at the time the alleged one word trust was created by the national denomination.

It must also be emphasized that a review of the various cases reveal that they were dealing with cases where the property was acquired by the local presbytery and in the name of the Presbytery (See eg., **Korean United**, 230 Cal. App. 3d at 491) where property was acquired in 1936 and 1937 and was never held in the local church’s name rather in the name of the Presbytery and the local church actually executed a deed to the Presbytery of all the church property in 1983 at the date of the alleged inclusion of a one word trust in the United Presbyterian Church/PCUSA Book of Order.

=4. Probate Code Section 15206 (which applies to everyone else in California) and (which applies to everyone else in California) which mandates that there be a writing (statute of frauds):

“A trust in relation to real property is not valid unless evidenced by one of the following methods:

- (a) By a written instrument signed by the trustee, or by the trustee's agent if authorized in writing to do so.
- (b) By a written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing to do so.
- (c) By operation of law.”

It would appear that a trust when dealing with real property is not valid unless there is an instrument (in addition to the trust) signed by the trustee. (Subsection a). Since subsection b deals with what appears to be a deed, it is

not applicable. Presumably subsection c deals with constructive trusts. This also ties in with Board of Director or membership approval if it is a corporation. See supra. **FN 2:**

=5. Probate Code Section 15207 (which applies to everyone else in California) and mandates that the clear and convincing standard applies to personal property in a trust.

- “a) The existence and terms of an oral trust of personal property may be established only by clear and convincing evidence
- (b) The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property.
- (c) In the case of an oral trust, a reference in this division or elsewhere to a trust instrument or declaration means the terms of the trust as established pursuant to subdivision (a).”

This is similar to Evidence Code Section 662 which imposes a clear and convincing evidence standard. In St. Luke’s the Court found applying 662 that there were some property in trust under the neutral principles doctrine.

=6. Probate Code 15208 (which applies to everyone else in California) provides that while no consideration is needed a promise to create a trust must be specifically enforceable in California.

“Consideration is not required to create a trust, but a promise to create a trust in the future is enforceable only if the requirements for an enforceable contract are satisfied.”

See also Part 3 re specificity requirements next section.

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FN 2: See also Probate Code Section 15210 which permits recordation of trusts re real property.

PART II. Civil Code Sections Related to Certainty Issue

=7. **Civil Code Section 3390(5)** provides that in an action to specifically enforce a contract there must be extra certainty. It is submitted that a one word trust in the governing documents of a national denomination which itself has no certainty is not sufficiently certain to specifically enforce.

=8. **Civil Code Section 3391** provides that a contract may not be specifically enforced if there is no adequate consideration or it is not just and reasonable.

PART III: Corporation Code Sections

We now come to the Corporation Code Sections recognizing that most of the entities will be corporations:

=7. **Corporation Code Section 9633** (which applies to all other corporations in California) which provides that a religious corporation must give notice to the Attorney General 20 days before it can enter into a trust:

“A corporation must give written notice to the Attorney General 20 days before it sells, leases, conveys, exchanges, transfers or otherwise disposes of all or substantially all of its assets unless the Attorney General has given the corporation a written waiver of this section as to the proposed transaction.”

While the word trust does not expressly find itself in Section 9633, it does include prohibitions to conveyance, transfer or disposition of all or substantially all of the assets of a corporation unless there is approval by the AG. Thus before a local corporation can enter into a trust whereby all or substantially all of its property is ipso facto by reason of a one word trust in a document in a national denomination’s governing book it is submitted that notice to and approval by the AG is a condition precedent to protect the local

corporation and to make sure that the necessary approvals and notices took place. This watchdog duty is non delegable. Even if for the sake of argument only 9142 is valid, there has to be approval by the AG.

Then there are specific code sections which refer to 9142:

=8. Corporation Code Section 9611 Notice Requirements (which apply to all corporations and also to 9142) and mandate voting requirements and/or approval by membership.

“(a) Subject to the provisions of Section 9142, a corporation may sell, lease, convey, exchange, transfer or otherwise dispose of all or substantially all of its assets when the principal terms are:

- (1) Approved by the board; and
- (2) Unless the transaction is in the usual and regular course of its activities, approved by the members (Section 5034) and by any other person or persons whose approval is required by the articles or bylaws either before or after approval by the board and before or after the transaction.”

Thus, everyone else must have approval by the membership to a trust.

=9. Notice Requirements re Membership Approval (applicable to all corporations) mandate notice to the membership and approval by unanimous consent absent proper agendaing and notice.

There various sections involved ranging from membership approval required to agendaing the issue. Under **Corporation Code Section 9631** and 9411(e), there is an agenda requirement. As set forth by Witkin,

Summary of California Law, Corporations Section 394:

“4) *Notice of Specified Acts Required.* The approval of certain acts required to be approved by members is not valid in the absence of the **unanimous approval of those entitled to vote unless** the notice of the meeting at which those acts will be considered, or any waiver of notice, states their general nature. This

requirement applies to approvals required by Corp.C. 9150(b) (adoption, amendment or repeal of bylaws), Corp.C. 9222 (removal of directors without cause), Corp.C. 5812 (amendment of articles), **Corp.C. 9631(a)** (**disposition of substantially all corporate assets**), Corp.C. 9640(c) (approval of terms of merger), Corp.C. 6015(a) (amendment to merger agreement), and Corp.C. 9680(b) (voluntary dissolution). (Corp.C. 9411(e).)<<* p.1133>>” (Emp. added; at 1132)

In closing, Section 9142 purports to carve a special niche for a general churches usually not incorporated or having its principal place of business in California at the expense of local churches and millions of California residents and worshippers. It seeks to avoid every applicable statute enacted to protect the public from precisely this type of taking even to the point where it could violate the Fifth Amendment for taking without just compensation. It constitutes State sponsored support for general churches.

V.

DOCTRINE OF IN PARI MATERIA

This simple maxim of review provides that all statutes be interpreted in a fashion to blend them to avoid in effect wiping out the applicability of many code sections as noted above. (See **Woollomes v. Woody**, 79 Cal. App. 696, 700 (1947); See also *St. Luke’s*, 121 Cal. App. 4th at 769

VI.

CORPORATION CODE SECTION 9142 IS UNCONSTITUTIONAL

Assuming arguendo that this Court finds that Section 9142 is applicable, it is submitted that said Section is unconstitutional. It violates the equal protection clause, as well as the establishment clause and the no preference clause and the free exercise clause. As set forth in the Supplemental Brief filed in Los Angeles Superior Court BC 332180 by special counsel and Professor Robert Post, Professor of Constitutional Law at the Yale Law School. A copy of the Supplemental Brief (SB) is attached to the request for judicial notice.

“ The interpretation of Corp. Code. {Sections sign}9142©(2) and (d) submitted by the PCUSA Group renders the statute unconstitutional under the First Amendment of the United States Constitution as well as applicable provisions of the California Constitution, Article I, Section IV.” (Page 4 of SB).

Prof. Post goes on to support the application of neutral principles as set forth in Jones v. Wolf, 443 U.S. 595, 603.

PART 1: Violation of the Free Exercise Clause

California Constitution Article 1, Section 4 reads as follows:

“SEC. 4. Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. . . .”

Section 4 sets forth the free exercise clause, the no preference clause and the establishment clause. As the United States Supreme Court stated in Church of Lukumi Bablu Ave., Inc. v. City of Hialeah, 508 U.S. 520, 531-532, 113 S. Ct. 2217 (1993).

“The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof...*” (Emphasis added).”

Statutes which impose burdens on particular religious groups and which are not generally applicable are unconstitutional and violate the Free Exercise Clause of the First Amendment, and Article 1, Section 4 of the California Constitution unless there is a compelling government interest. (See **Church of Lukumi Bablu Aye, Inc. v. City of Hialeah**, 508 U.S. 520, 531-532 (1993))

“In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”

(Church of Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. at 531-32.)

Attached to Request for Judicial Notice is a Supplemental Brief filed by special counsel Robert Post, Professor of Constitutional law at the Yale Law School in Los Angeles Superior Court Case Number 332180. It is strongly asserted by Professor Post that the neutral principles doctrine should be applicable (Page 3, line 12-13), and that Section 9142 preempts rather than

applies generally applicable property law used in all property disputes. (Page 3, lines 25-28). Section 9142 is only applicable to a dispute between a general church and a local church. It is not a statute of general applicability.

Prof. Post also submits respectfully that Section 9142c(2) and (d) as interpreted by the general church would prevent local worshippers from disposing “according to the dictates of their faith the property that they have acquired, by virtue of their own effort and religious commitment” and that Section 9142 denies “local worshippers access to neutral and generally applicable rules of property that would otherwise enable them to order their ‘private rights and obligations’ so as to ‘reflect the intentions’ of their beliefs.” He goes on to argue:

“This is a serious burden on local religious practice.”

It is not only the rights of the local church that 9142 seeks to destroy it seriously impacts and negates the free exercise rights of local worshippers who will not provide property (through givings) if they know the funds will not support their local church but go to the general church. Prof. Post goes on to argue that California has “no constitutional interest in enacting a statute that is applicable only to religious groups and that has as its purpose the awarding of ‘victory’ to one side or another of a religious dispute” and that any such statute:

“. . . would paradigmatically violate the First Amendment.” (SB Page 5).

And:

“As currently interpreted, the Free Exercise Clause of the First Amendment prohibits a state from allocating to a hierarchical church either more or less than these {general} rules would provide.”

Prof. Post contends that a general church must comply with the same rules applicable to everyone else.

Part II. Violation of the Establishment Clause And No Preference Clause

The Establishment Clause prohibits the Government from establishing religion. (**Board of Education of Kryas Joel Special Village District v. Grument**, 512 U.S. 687, 114 S. Ct. 2491, 129, L. Ed 2d 546 (1994) The United States Supreme Court reiterated this point in **Jones v. Wolf**, supra, at page 599 stated as follows referring to an earlier decision:

“The Court did not specify what that method should be, although it noted in passing that “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.” 393 U.S., at 449, 89 S.Ct., at 606.”

The Government thus is establishing religion by enacting special laws which only favor general church at the expense of local churches that are corporate in structure, and also which change existing law applicable to everyone else in regard to property disputes. The focal point of Section 9142 are local corporate churches who are discriminated against in favor of general churches. It does not apply to unincorporated local churches. So it is even selective in terms of not following general applicable rules as to trust law or property law etc.

In addition, Section 9142 prohibits any preferences. California in particular includes a no preference clause in its Constitution, Article 1, Section 4:

“Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the state. The Legislature shall make no

law respecting an establishment of religion.” (Emp. Added.

There must be a compelling state interest in doing so. As the Supreme Court stated:

As the Supreme Court further stated:

“In addressing the constitutional protection of free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified **by a compelling governmental interest and must be narrowly tailored to advance that interest. . . .**” (Id. at 531-32; emp. added)

Section 9142 in fact is a law establishing religion and also preferring a general general church over local churches, and favoring unincorporated churches and charitable entities over a corporate religious local church with regard to property issues. It has no secular purpose. It is not a statute that is neutral toward religion, most significantly and telling it favors general churches over anyone else in the State and it **ONLY** applies **in property** disputes.

All of the factors set forth in **Lemon v. Kurtzman**, 403 U.S. 602, 612, 91 S. Ct. 2105 (1971) are satisfied. Section 9142 is not a statute that is neutral toward religion, it favors general churches over local corporate churches only in property disputes, there is no secular purpose, it advances the role of general churches at the expense of local churches, and it inhibits local churches and worshippers and it permits the Government to support national or general churches. Section 9142 is not constitutional and violates both the establishment

and no preference clause.

CHART

Level 1:

1. Local Church Corporate Penalized Local Church Non Corporate Not Penalized

Level 2:

2. General Church Benefit Local Church detriment corporate and to members

Level 3:

3. Other Non Profit Corporations Not Penalized Local Church and members penalized

The attempt to distinguish this from another case on the grounds this is no case that recognizes that favoring a general church over a local church is a suspect classification by the government is not compelling.

The United States Supreme Court struck down a Texas religious exemption from a generally applicable sales tax on the sale of periodicals in **Texas Monthly, Inc. v. Bullock** (1989) 489 U.S. 1, 18, 109 S.Ct. 890, 103 L.Ed.2d 1. The Court ruled that holding that the tax exemption violated the establishment clause of the First Amendment because there was no actual burden on free exercise rights and no "concrete need" to accommodate religious activity. The exemption had the effect of subsidizing the religious body in the distribution of its religious message:

"[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion ... it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community. [Citation.] This is particularly true where ... the subsidy is targeted at writings

that promulgate the teachings of religious faiths." *489 U.S. at p. 15, 109 S.Ct. 890*, fn. and italics omitted.).

Thus, the interaction between the free exercise clause and the Establishment clause is clear. The more interaction, the more likely it is that it violates the Establishment Clause. Here, it also violates the Free Exercise Clause. The manner in which the government will find ways to violate the Establishment Clause is not locked in stone. We have one more example here.

This Court has discussed the topic in **East Bay Asian Local Dev. Corp. v. California**, 24 Cal. 4th 693, 714 (2000) is inapposite. In that case, the Supreme Court of California ruled that the exemption in Government Code Section 25373 was valid and that the Legislature could create an exemption for all religious entities which seek to avoid the Historic Landmark Preservation provisions as to their non commercial property. The argument asserted was that the exemption offered to religious entities violates the Establishment clause and the Free Exercise and No Preference Clauses. The Court rejected the argument. Each church was vested with the opportunity to pursue the exemption and meet the high burden of proof. It benefits all churches and provides **a benefit not a detriment** to all who wish to take advantage of the opportunity:

“The exemption in question here seeks only to relieve religious entities of a potential burden on free exercise.” (24 Cal. 4th at 710).

This case is far different from our case which discriminates in favor of a general church against a corporate local church (and other corporate local churches) and seeks to replace the hierarchical standard found by the **Barker** Court to be invalid and not constitutionally permissible and seeks to eviscerate all

applicable law applicable to everyone else, and provide not only a benefit but an alleged presumption to a general church over a local church that is corporate in nature (but not to unincorporated local churches, or other charities) and eviscerates the clear and convincing evidence standard applicable under **Evidence Code 662** (see also **Probate Code Section 15400**). It picks sides in the dispute and applies favoritism to general churches at the expense of only corporate local churches. It is the discriminatory which seeks to reinstate the hierarchical theory which is unconstitutional which is cries out for rebuke. Those factors are not involved in the **East Bay** case which provides a benefit to all churches equally without discriminating amongst them, and gives them the power to obtain an exemption. It does not give one form of church or type of church any more rights or powers to obtain an exemption. Section 9142 involves express governmental involvement in and assistance to general churches at the expense of corporate local churches. The decision is completely different and understandable.

As noted earlier, it constitutes nothing less than State sponsored support for general churches.

PART III: Violation of Equal Protection Clause:

It is also submitted that Section 9142 violates the Equal Protection Clause found in **Article I, Section 7 of the California Constitution**, and the Federal Constitution for all of the reasons set forth above. It favors a general church against a local church, that local church must be incorporated (not an unincorporated local church), and it does not apply to other charitable entities, and it only applies to a property dispute, and does not apply to anyone else.

It should be noted that the Legislative Counsel back in 3-22-1981 indicated that it appears that Section 9142 violates equal protection. (Legislative History behind Section 9142). There is at least one superior court who has ruled it is more likely than not to violate equal protection.

PART IV: Violation of Fifth Amendment Due Process Taking Clause

Section 9142 provides for taking of local church property by permitting one word provisions in a document of a national denomination, one word. It is State sponsored taking. If so, then the State should be responsible for the amount taken. It would appear to violate Article Section 7 Due Process taking without just compensation.

VII

THE KOREAN UNITED CASE WAS WRONG TO IMPUTE THE WORD PRESUMPTION INTO 9142

The **Korean United** case (230 Cal. App. 3d 480) totally exacerbated the problem. That case could have easily been decided the same way based on existing law. Three out of the four properties were in the name of the Presbytery. The Court went out of its way to bless Section 9142. It used the four factors but it changed one to try to permit by laws as a factor in addition to the articles of the local church which substantially benefitted a general church. It also imputed a presumption into 9142 that does not exist based on speculative and erroneous analysis by a commentator as noted in **St. Luke's:**

“Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal.App.3d 480, 281 Cal.Rptr. 396 describes Corporations Code section 9142 as providing “presumptive rules for religious trusts.” (Korean United Presbyterian Church, at p. 508, 281 Cal.Rptr. 396.) This language appears to have come from a treatise (Ballantine & Sterling, Cal. Corporation Laws (4th ed.1962)) in which the authors state: “It is not always entirely clear to what extent the assets of a religious corporation are impressed with a trust beyond a somewhat generalized charitable religious trust for the general purposes of the organization. In an

effort to clarify this situation, Corp.Code § 9142 was amended effective January 1, 1983, to provide presumptive rules as to these trusts and to prescribe the circumstances under which they could be amended or modified.” (Ballantine & Sterling, *supra*, § 418.01(3)(c), pp. 19-477-19-476 and 19-478 (5/02) (fns.omitted).) **Nothing in the statute itself, however, uses the word “presumption” or “presumed.”** (Id. at 770; Emp. added).

There is no presumption. **Evidence Code Section 662** and the neutral factors must apply even if this honorable Court were to reject all other arguments.

VIII

FREEDOM OF RELIGION AND PROPERTY MUST BE PROTECTED AND LOCAL CHURCHES MUST BE ABLE TO DISAFFILIATE WITHOUT RISK OF LOSING THEIR PROPERTY UNLESS THER IS AN EXPRESS TRUST THAT COMPLIES WITH ALL CALIFORNIA LAW LIKE EVERYONE ELSE

What is buried in this case is the right to withdraw from a national denomination. While it is not clear if it an issue here, it is an issue in most other cases and this is how the dispute arises. Here, it was over homosexuality and the dispute re same.

The most significant statement in this regard was made by the Court **Protestant Episcopal Church etc. v. Barker**, 115 Cal. App. 3d 599, 614 (1981). At page 622 the Court concluded that a local body affiliated with a national body, if it holds title in its own name, should be able to secede and the national body should have little basis to argue that there is a trust.

“Under neutral principles of law if a local body affiliated with a national body holds title to property in its own name and later secedes, the national body has **little basis to claim that such property is held in trust for it.** (**Evid.Code, s 662; Civ.Code, s 1105.**) If a local organization secedes from one national entity and affiliates with another, absent other factors no claim can be laid to property owned by and held in the name of the local organization. If a Kentucky Fried Chicken franchisee secedes from its national affiliation to join a Tennessee Fried Chicken operation, neutral principles of law do not recognize any claim by the

ex-franchisor against its departing franchisee's real property. In such instances**554 valid claims may exist for breach of contract, abuse of name, false pretenses, and the like, but ordinarily no express trust arises against the property of the local organization. Under neutral principles of law the same is true of a local church organization which **changes affiliation from one general church to another.**" (Emp. added)

The issue is actually freedom of religion by changing affiliation and not losing property which is not subject to an express trust. Local Churches should have the right to affiliate with whatever national denomination it wishes to do so (assuming approval by the membership). The one word trust and Section 9142 is destroying religious freedom of local churches and worshippers.

IX

THE TERM HIERACHICAL CHURCH IS NOT ACCURATE AS TO MANY NATIONAL DENOMINATIONS.

Some courts interchange the term national denomination with hierarchical church. (See discussion re issue in Concord Christian Center v. Open Bible Standard Churches, 132 Cal. App. 4th 1396). However, this is not accurate. For example, the Presbyterian denomination Presbyterian Church U.S.A. (PCUSA) expressly claims that it is not a hierarchical church. It is a representative church. It has lower governing bodies such as the presbyteries, and then a Synod made up of Presbyteries, and then it has the General Session which meets once a year. Yet, case law refers to it as a hierarchical church (which involves control by a Bishop) which is anathema to the religion. The reformation was all about this distinction. Yet, it may want to obtain the benefit of that concept in regard to property disputes.

However, the Court must be careful when dealing with this innocuous term in terms of national denomination.

Dated: May 22, 2008



Allan E. Wilion, Esq. 063195

Attorney for Applicants Thomas Lee and

Rev. Peter Min

CERTIFICATE OF WORD COUNT

The text of this Amicus Curiae Brief consists of 7,357 words as counted by the XP Microsoft word processing program used to generate this document

Dated: May 22, 2008



Allan E. Wilton

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age
4 of 18 and not a party to the within action. My business address is 5900 Wilshire Boulevard,
5 Suite 401, Los Angeles, California 90036.

6 On 5-22-08, I served the foregoing document described on the interested parties in
7 this action as follows:

- 8 =1. Application for Leave to File Amicus Curiae Brief Under CRC 8-520 by Applicants
9 Thomas Lee and Rev. Peter Min
=2. Proposed Amicus Curia Brief

10 Note:

- 11 =3. Request for Judicial Notice to be filed separately

12 By placing true copies enclosed in a sealed envelope addressed to each addressee as follows
13 on the attached mailing list:

14 Means of Service:

15 -1. () **MAIL:** I am "readily familiar" with the firm's practice for collection and processing
16 correspondence for mailing with the U.S. Postal Service. Under that practice, and in the
17 ordinary course of business, correspondence would be deposited with the U.S. Postal
18 Service on that same day with postage thereon fully prepaid at our business address in Los
19 Angeles, California. Each of the above envelopes was sealed and placed for collection and
mailing on that date following ordinary business practices. I am aware that on motion of the
party served, service is presumed invalid if postal cancellation date or postage meter date is
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20 -2. () **FAX:** By having a copy of the document being served FAXED to counsel at the
21 numbers disclosed them.

22 =3. () **By Hand Delivery:** I delivered a copy of the foregoing documents and left a copy
with the receptionist of the offices of the persons listed below:

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25 =5. () **By E Mail or Electronic Transmission.** Based on a court order or an agreement of
26 the parties to accept service by e mail or electronic transmission, I caused the documents to
27 be sent to the person(s) at the email addresses listed on the attached service list. I did not
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SEE ALSO LIST ATTACHED

Executed on 5-22-08 at Los Angeles, California.
State(X): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Federal: (x) I also declare that I am employed in the office of a member of the State Bar of California and whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed this 22th day of May 2008 at Los Angeles, California.

Allan Wilion
Type or Print Name


Signature

Episcopal Church Cases
Appeal Nos. G036096, G036408 and G036868

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