CASE NO. S155094

SUPREME COURT OF THE STATE OF CALIFORNIA

EPISCOPAL CHURCH CASES

REPLY IN SUPPORT OF PETITION FOR REVIEW

Court of Appeal, Fourth Appellate District, Division Three
(Appeal No. 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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INTRODUCTION

The Answers filed by Plaintiffs and Plaintiff-in-Intervention (collectively "Respondents") rest essentially on two faulty precepts. First, the Answers claim that there is no conflict among decisions of the Court of Appeal with regard to the appropriate legal method for resolving church property disputes. Second, they assert that if there were any such conflict, the Opinion of the Fourth Appellate District, Division Three, has itself "remove[d] any uncertainty" and clarified the law. (Pl. Ans. at 5; ECUSA Ans. at 8.)[1] The pillars on which the Answers rest are not sound.

First, the Opinion holds that "hierarchical theory" (redubbed the "principle of governance" rule) is the law of California, while every other Court of Appeal decision in the past thirty years has held that the appropriate analytical method is "neutral principles of law." Further, the Fourth Appellate District itself acknowledges this conflict when it explains that prior appellate decisions cannot be reconciled with one another. (Opinion at 3.)

Second, the conflict between the Fifth Appellate District, on the one hand, and the Second and Fourth Appellate Districts, on the other, with respect to the proper interpretation of California Corporations Code section 9142(c) cannot be denied. No matter how hard Respondents try to paint it otherwise, the Opinion of the Fourth Appellate District is in direct conflict with *California-Nevada Annual*

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[1] "Pl. Ans." refers to the Answer filed by Plaintiffs and Respondents. "ECUSA Ans." will refer to the Answer filed by Plaintiff-in-Intervention The Episcopal Church.

Conf. v. St. Luke's United Methodist Church (2004) 121 Cal.App.4th 757 ("*St. Luke's*"), review of which this Court previously denied. This conflict regarding an important statute governing trusts in church property alone merits review.

Third, Respondents argue that review is unwarranted because the Fourth Appellate District has resolved any conflict. This is not possible. No decision of the intermediate appeal, however "thorough" or "comprehensive" (Pl. Ans. at 5), can perform the function of this Court. The fact that two trial courts may have chosen to follow the Opinion does not convert the Fourth Appellate District into the court of last resort. It is well-established in California that where conflicting appellate decisions exist, a trial court is free to follow any of them. Far from "resolving" any conflict – which it has no power to do – the Opinion is merely the latest and starkest example of it. Indeed, the recent decision of the Sixth Appellate District submitted by Respondents illustrates how confused the law has become. That decision both invokes "neutral principles" as the appropriate approach, and then cites and follows the Opinion. This palpable contradiction shows what the state of California church property law has become, and only this Court can ensure that such confusion does not continue.

Review of the Opinion of the Fourth Appellate District should be granted.

LEGAL DISCUSSION

I. THE OPINION ITSELF ACKNOWLEDGES 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 Numerous Published Decisions Breaking Between "Neutral Principles of Law" and the "Deference to Hierarchy" Rule Cannot Be Denied.

It is surprising that Respondents should assert in their Answers that, essentially, there is no conflict in California church property law. The Opinion of the Fourth Appellate District, Division Three, itself catalogues how the conflict arose when the Court of Appeal began to apply "neutral principles of law" in 1979, thus flouting (in its mind) prior California cases utilizing "hierarchical theory":

> 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.

(Opinion at 3, *citing Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910.) *Presbytery* was decided by the Fourth Appellate District, Division Two, and therefore the Opinion acknowledges that its holding is in conflict with another Division of its own District. (Opinion at 44.)

The Opinion then notes that the Second Appellate District followed *Presbytery* in "upsetting the stable legal universe" of hierarchical theory[2] that had previously existed:

> 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 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."

(Opinion at 3.) Both *Presbytery* and *Barker* remain good law, and are repeatedly cited by both trial and appellate courts as authoritative. (*See, e.g., 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); *St. Luke's*, 121 Cal.App.4th at 762 (*Barker* is "the leading case"), *rev. denied*, 2004 Cal. LEXIS 11372 (Cal. Dec. 1, 2004).

The Opinion illuminates the conflict when it states that after *Barker*, "California intermediate appellate courts have given lip service to 'neutral principles,' but have come to results that are

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[2] Of course, as explained in the Petition for Review, it is no surprise that prior to the 1970s, California church property law was "stable" in its application of the "deference to hierarchy" rule, since that was the only constitutionally permitted method of adjudicating church property disputes until the United States Supreme Court opened the door to other methods in the late 1960s. (*See* Petition for Review at 12-13.)

sometimes difficult, if not impossible, to reconcile with each other." (Opinion at 3-4.) Similarly, the Fifth Appellate District in *St. Luke's* expressly noted that its holding could not be reconciled with that of the Second Appellate District's decision in *Guardian Angel Polish National Catholic Church v. Grotnik* (2004) 118 Cal.App.4th 919.

Respondents claim that the Opinion is "consistent" with all appellate cases after *Barker*, with the exception of *St. Luke's*. (Pl. Ans. at 7.) If "consistent" means "awards the local church property to the denomination," the statement might have some import. However, since *Korean United*, certain Districts of the Court of Appeal began to adulterate the "neutral principles of law" method with undue and unwarranted deference to whether the local church had been a member of a "hierarchical" denomination. This unnecessary exercise continued to one degree or another in subsequent decisions, until the Fifth Appellate District in *St. Luke's* attempted to pull the divergent lines taut again by reiterating that "neutral principles" pays no regard to "hierarchical" pronouncements. What Respondents do not explain, however, is that these decisions acknowledged *Barker* and "neutral principles" as the lodestar of church property law – even though they may have ultimately found in favor of the denomination. This is no mere "different nomenclature," as Respondents contend (Pl. Ans. at 7), but the use of an entirely different legal theory. Thus, while the confusion between "neutral principles" and "deference to hierarchy" has been growing since *Korean United*, the Fourth Appellate District has now expressly rejected "neutral principles" as the law of California by holding that the "deference to hierarchy" rule must be applied.

B. The Recent *Central Coast Baptist* Decision Illustrates the Confusion Created By the Fourth Appellate District's Opinion.

Respondents claim that the Sixth Appellate District's recent decision in *Central Coast Baptist Association v. First Baptist Church of Los Lomas* (Case No. H029958), filed on August 23, 2007, shows that the Opinion has settled California church property law.[3] In fact, it illustrates the future confusion that courts will face when confronted with both numerous appellate decisions describing "neutral principles of law" as the law of California, and the Fourth Appellate District's anomalous throwback decision.

In *Central Coast Baptist*, the Court of Appeal favorably refers to "neutral principles of law" no less than six times. (*Central Coast* Decision at 17, 18, 19, 23.) Moreover, the appellate court upheld the trial court's finding that the local church had "ceased to function as a Southern Baptist church" because the trial court had reached that conclusion through application of "neutral principles of law." (*Id.* at 17.) Indeed, five pages of the *Central Coast* decision are permeated with references to "neutral principles," as the Court of Appeal appears to assume that this method defines and limits its jurisdiction over church property questions. (*Central Coast* Decision at 18 (referring to "principles of jurisdiction in church property cases.").)

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[3] The Respondents filed a copy of the *Central Coast* decision with this Court in their correspondence dated August 27, 2007.

In mid-stream, however, the *Central Coast* court suddenly picks up on the Fourth Appellate District's Opinion and begins to apply the "deference to hierarchy" approach. (*Id.* at 21-22.) For the rest of the opinion, the Sixth Appellate District proceeds to hybridize the two legal theories, which are inherently immiscible.

What is astonishing about *Central Coast* is that it deals with a church which has heretofore been held up by courts as the very model of *non-hierarchical* congregationalism: the Baptist denomination. Therefore, one should not expect there to be *any* "deference to hierarchy" involved in resolving a church property dispute involving a Baptist church. (*See, e.g., First Independent Missionary Baptist Church v. McMillan*, 153 So. 2d 337, 342 (Fla. App. 1963) (noting that each Baptist church is a "pure democracy" with no "organic" connection to any higher ecclesial body).)

The Sixth Appellate District's application of the "deference to hierarchy" rule (under the name "principle of government") to strip away the property of a Baptist church is the outcome of the Fourth Appellate District's overreaching Opinion and the confused state of California law. No longer will even historically independent, congregational churches be secure in their own property ownership; as long as they belong to *any* larger "convention" or "association," a court could find that the "principle of governance" lies with the larger body and not the local church.

The muddied analysis of the Sixth Appellate District in *Central Coast* – first invoking "neutral principles," and then applying the Opinion's "principle of governance" rule – illustrates the confusion caused by the Opinion. The Court of Appeal, let alone trial courts, do

not have clear guidance about when "neutral principles" is to be used, or if at all. Only this Court can bring solidity and order to the judicial landscape, so that parties and their attorneys can know whether traditional indicia of property ownership will matter in church property disputes, or whether all that is required is an *ex cathedra* pronouncement of a denomination that the property is theirs.

C. The Conflict Between the Second and Fifth Appellate Districts Regarding California Corporations Code Section 9142(c) Cannot Be Ignored.

No matter how much Respondents try to explain away the conflict in the law regarding "neutral principles" versus "deference to hierarchy," the fact remains that an express conflict exists over Corporations Code section 9142(c) ("Section 9142(c)).

As more fully explained in the Petition for Review, the Fifth Appellate District in *St. Luke's* 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." (*St. Luke's*, 121 Cal.App.4th at 757.) The Second Appellate District, on the other hand, had previously described Section 9142(c) as creating a "presumption" of a trust in favor of a denomination, based solely on the denomination's own enactment of an internal rule. (*Guardian Angel*, 118 Cal.App.4th at 930-31.) The Fifth Appellate District expressly stated that its ruling "appears to be at odds with the Second Appellate District's recent opinion" in *Guardian Angel*. (*St. Luke's*, 121 Cal.App.4th at 771.)

The Opinion takes this express conflict to an even more critical level. The Fourth Appellate District has fallen in line with *Guardian Angel* and interpreted Section 9142(c) to permit a denomination – a non-owner of property – to create a trust in its favor over local church property that it does not own, solely by passing an internal rule to that effect. (Opinion at 58 (holding that denomination is the trustor under Section 9142(c)).)

The Opinion is in direct conflict with *St. Luke's*, which it describes as "incorrect." (*Id.* at 71-74.) The conflict among published decisions – *Korean United*, *Guardian Angel*, *St. Luke's*, and the Opinion – regarding the proper interpretation of Section 9142(c) is pitched, and itself warrants review.

II. THE FOURTH APPELLATE DISTRICT, DIVISION THREE, HAS NOT SETTLED THE CONFLICT IN CALIFORNIA LAW, BUT EXACERBATED IT.

Respondents' second argument is that to the extent there were any conflict in the church property law arena, the Fourth Appellate District's Opinion "has settled the law" and "rights the ship." (Pl. Ans. at 5-6.) This sentiment has a certain ring to it, until one pries underneath and realizes what Respondents are actually saying: that this Court need not grant review because one Division of one District of the Court of Appeal has performed the functions of this honorable Court.

The problem with Respondents' assertion is obvious. No Court of Appeal decision can bind another District, or even another Division

within the same District. Moreover, when there is a conflict among California Court of Appeal opinions, superior courts are not only able to, but must, choose whichever opinion they find most persuasive. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 456 ("[W]here there is more than one appellate court decision, and such appellate decisions are in conflict . . . the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions."); *Sears v. Morrison* (1999) 76 Cal.App.4th 577, 587 ("Where California intermediate appellate court cases conflict, any trial court may choose the decision it finds most persuasive.").

Only this Court can resolve such conflicts among the Districts of the Court of Appeal, something the appellate court has itself recognized. (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 n. 4 ("This dilemma [of conflicting decisions] will endure until the Supreme Court resolves the conflict, or the Legislature clears up the uncertainty by legislation.").)

Respondents hope that a single appellate decision which happens to be favorable to them has usurped the province of this Court and "settled the law." Instead, if the Fourth Appellate District's Opinion is left to stand, it will be one more square in the patchwork of decisions whose conflicting nature has been growing since 1991. Trial courts in Fresno will allow local churches to depart from denominations with their own property, while trial courts in San Diego may not. Indeed, under *Auto Equity Sales*, it is quite possible that superior courts in the Fourth Appellate District may still choose to follow *St. Luke's*, and vice versa. No church or congregation, nor

its lawyers, will be able to predict with any certainty how its property is truly held. As the numerous letters of *amici* have shown, Presbyterian, Methodist, Episcopal, Charismatic Episcopal, and other churches are now unable to order their affairs with certitude. Potential donors have placed their gifts on hold due to the shifting legal landscape, and such donors have no way of knowing if gifts of funds or property made to a local church will really be the subject of some "trust rule" passed by a far-off denomination or convention in some other state. Only this Court can heal the fractured legal field and provide unified guidance to religious corporations, their members, and potential donors.

III. PETITIONERS HAVE PRESENTED AN IMPORTANT QUESTION OF LAW REGARDING THE FIRST PRONG OF THE ANTI-SLAPP STATUTE.

Respondents argue that this Court need not review the Opinion's treatment of the first prong of California's anti-SLAPP statute, California Code of Civil Procedure section 416.25. (Pl. Ans. at 4-5.) Respondents claim that the Opinion's short shrift of this question "relied on well-established judicial interpretations of the statute." (*Id.*) This is demonstrably incorrect.

The Opinion does not, as the trial court did, apply this Court's "duo" of anti-SLAPP cases – *Navellier v. Sletten* (2002) 29 Cal.4th 82 and *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 – to answer the straightforward question of whether Respondents' claims "arose from" Petitioners' protected activity of publicly disaffiliating from the

Episcopal denomination because the claims would not exist "but for" the activity. (*Navellier*, 29 Cal.4th at 92.)

Instead, the Fourth Appellate District applied a new and entirely unprecedented tool to determine whether the first prong of the anti-SLAPP statute was met: the "blue pencil." Imported from the contract law arena, where it is used to strike out illegal provisions of a contract while leaving obligations that remain intact, the Opinion used the "blue pencil" to mentally remove from Respondents' Complaints all allegations that the local church had disaffiliated. (Opinion at 7.)

The problem with this approach is twofold. First, the "blue pencil" would remove the allegations in Respondents' Complaints directly challenging the validity and efficacy of the protected activity: St. James Church's corporate disaffiliation from the Episcopal Church. (1 AA 20, 27; 1 AA 94-95, 100.)[4] Second, the "blue pencil" approach could be used with regard to any strategic lawsuit against public participation, and would, if used skillfully, render any such suit a "non-SLAPP." Thus, the "blue pencil" flies in the face of the purpose of the anti-SLAPP statute (not to mention the Legislature's command that it be "construed broadly"), which is to accord early review to claims arising from free speech and petitioning activity, even though the same claims might not qualify for early review in a different setting. This Court should grant review of the Opinion to resolve an important question of law posed by the Fourth Appellate District's novel approach, namely whether an alleged SLAPP suit

[4] "AA" refers to Appellants' Appendix in the appeal below.

must first pass a "blue pencil" test rather than the "arising from" and "but for" tests articulated in *Navellier*.

CONCLUSION

For the foregoing reasons, this Court should grant review of the Opinion of the Fourth Appellate District, Division Three, in Appeal Nos. G036096, G036408, and G036868, filed on June 25, 2007.

DATED: September 4, 2007

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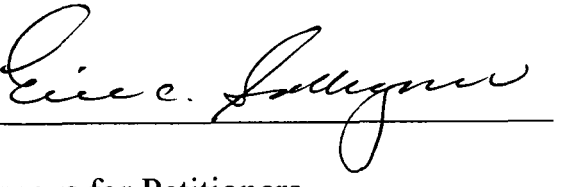
By: 

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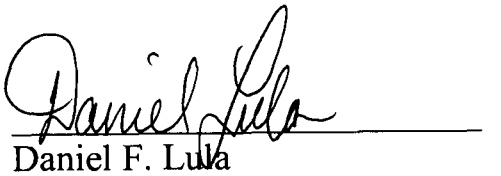
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1))

The text of this Reply consists of 3019 words as counted by the Microsoft Word word-processing program used to generate the Petition.

DATED: September 4, 2007



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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.

On September 4, 2007, I served the following document(s) described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes, addressed as follows:

SEE ATTACHED LIST

I then deposited such envelopes, with postage thereon fully prepaid, for collection and mailing on the same day at 4 Park Plaza, Suite 1100, Irvine, California 92614.

I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 4, 2007, at Irvine, California.

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