

CAUSE NO. 2015-CI-07858

FIRST PRESBYTERIAN CHURCH OF SAN ANTONIO	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
MISSION PRESBYTERY,	§	BEXAR COUNTY, TEXAS
	§	
Defendant.	§	
	§	
v.	§	
	§	
ED BONDURANT, et al.,	§	
	§	
Intervenors.	§	73 RD JUDICIAL DISTRICT

**PLAINTIFF’S BRIEF IN OPPOSITION TO INTERVENORS’
EMERGENCY MOTION FOR RECONSIDERATION OF INTERVENORS’
APPLICATION FOR TEMPORARY INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

**I.
INTRODUCTION**

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of liberty. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

NAACP v. Alabama, 357 U.S. 449, 460-61(1958).

1. The congregation of First Presbyterian Church of San Antonio (“FPC”) has been for several months studying their relationship with the PCUSA. FPC’s governing board, its Session, has now called a meeting of the entire congregation to determine if they should continue or terminate their voluntary affiliation with the PCUSA. This vote is to occur at a meeting on

Sunday, November 1, which meeting has been timely noticed to the entire congregation and allows for all members of the congregation to vote on this ecclesiastical issue. Mission Presbytery (“Presbytery”), sensing perhaps that most of the members of FPC no longer desire to worship as a PCUSA church, has now filed with this Court a pleading requesting relief not permitted by law or equity.

2. The congregation of FPC is entitled to exercise its constitutionally protected right of free association by voting to leave the Presbyterian Church (U.S.A.) (“PCUSA”).¹ Intervenor’s argue that this scheduled vote of the congregation on purely ecclesiastical issues is “new evidence” of imminent harm. This is false. FPC’s right to choose its religious affiliation is not “new evidence”, it is instead as old as the Constitution itself. As part of the existing status quo, FPC always had the right to leave the PCUSA and FPC’s denominational affiliation was never relevant to this case. This lawsuit is only about the ownership rights to FPC’s real and personal property. Under *Masterson v. Diocese of Northwest Texas*, FPC’s religious affiliation has no bearing on those rights. 422 S.W.3d 594, 601 (Tex. 2013). To the extent Intervenor’s and/or Mission Presbytery (“Mission”) can show *any* legally cognizable right to FPC’s property upon final judgment on the merits of the claims in this lawsuit, then that right will be determined by the Court, regardless of the outcome of any vote on November 1 by FPC’s congregation. The vote Intervenor’s seek to stop will **not** create or divest either party of any property rights they

¹ Intervenor’s motion uses a lot of harsh words and makes a lot of unsubstantiated accusations regarding the timing of the Session’s vote. However, while the orders of the Court reflect they were signed on October 12, 2015, FPC had no notice of the ruling until 3:14 pm on October 13, 2015 when the Court’s coordinator first faxed a copy to counsel for FPC, the day after the FPC Session had recommended that the congregation vote on its denominational affiliation. As shown herein, any such vote has no impact on the issues of this suit and in no way impacts this Court’s jurisdiction to determine the property rights of the parties.

otherwise may already have. That is the exclusive issue properly before this Court – not the ecclesiastical issue of how and with which denomination to worship.

II. INTERVENORS' PROPOSED REQUEST FOR RELIEF IS UNCONSTITUTIONAL

3. Presbytery's requested relief is blatantly **unconstitutional** and **outside** the **subject matter jurisdiction** of this Court – or any civil court for that matter. In America, congregations as well as individuals have First Amendment rights. The U.S. Supreme Court and many state supreme courts, including Texas, have long held that: (i) a congregation has a collective right under the free exercise, free speech, and freedom of assembly clauses of the First Amendment to associate or not associate with a given denomination as the congregation wills; (ii) this association is voluntary; and (iii) whatever authority a religious hierarchy may have over a congregation exists only by virtue of the consent of the governed. These are bedrock, axiomatic principles expressed in the following cases.²

4. As quoted in *NAACP v. Alabama* above, state action that curtails the freedom to associate based on one's belief is regarded with the closest scrutiny. 357 U.S. at 460-61; *see also*, *Robert v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Disabato v. South Carolina Association of School Administrators*, 404 S.C. 433, 445, 746 S.E.2d 329, 335 (2013); *accord Harris v. Quinn*, 134 S.Ct. 2618, 2629 (2014). Of course, the logical corollary of the right to associate is that one also has the right *not to* associate, just as one who decides to speak also has the right to decide what not to say.

² While Plaintiff provides this Court with numerous cases in support of its position, Intervenor's four page Emergency Motion fails to cite a single case, statute or other law.

5. Many courts have acknowledged the voluntary nature of denominational membership by local churches. See *Presbytery of Beaver-Butler v. Middlesex*, 489 A.2d 1317, 1324 (Pa. 1985); *Accord, Presbytery of Donegal v. Calhoun*, 513 A.2d 531 (Pa. Commw. Ct. 1986); *Presbytery of Donegal v. Wheatley*, 513 A.2d 538 (Pa. Commw. Ct. 1986). See also, *First Presbyterian Church of Schenectady v. United Presbyterian Church*, 464 N.E.2d 454, 460 (N.Y.), *cert denied*, 469 U.S. 1037, (1984). See also, *Fluker v. Hitchens*, 419 So.2d 445, 447 (La. 1982) (“Whatever authority a hierarchical organization may have over associated local churches is derived solely from the local church’s consent.”).

6. In *Masterson*, the Texas Supreme Court stated:

The Free Exercise clause of the First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. The clause “severely circumscribes the role that civil courts may play in resolving church property disputes,” *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), by prohibiting civil courts from inquiring into matters concerning “theological controversy, church discipline, **ecclesiastical government**, or the conformity of the members of a church to the standard of morals required of them.” *Milivojevich*, 426 U.S. at 713–14, 96 S.Ct. 2372 (quoting *Watson v. Jones*, 80 U.S. 679, 733, 13 Wall. 679, 20 L.Ed. 666 (1872)). The First Amendment is applicable to the states through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). (emphasis added)

Masterson v. Diocese of Northwest Texas, 422 S.W.3d 594, 601 (Tex. 2013).

7. When the Intervenors seek, as they do here, to enlist the arm of the state through its civil courts to enjoin FPC’s freedom to associate or not associate according to its conscience, then the Intervenors are not only asking the Court to exercise subject matter jurisdiction it does not have (civil courts may not rule on inherently religious matters), but it also is attempting to enlist state action to violate rights protected by the United States Constitution.

III.
INTERVENORS' PROPOSED RELIEF IS CONTRARY TO
THE BOOK OF ORDER

8. In addition to being prohibited by the United States Constitution, Intervenor's requested relief further violates the denominational constitution of PCUSA, as found in The Historic Principles of Church Order included in the PCUSA *Book of Order*, which provides:

[W]e consider the rights of private judgment in all matters that respect religion, as universal and unalienable: **We do not even wish to see any religious constitution aided by the civil power**, further than may be necessary for protection and security, and at the same time, be equal and common to all.

PCUSA *Book of Order* F-3.0101.

The Historic Principles of the Book of Order go on to say:

[A]ll Church power, whether exercised by the body in general or in the way of representation by delegated authority, is only ministerial and declarative...

PCUSA *Book of Order* F-3.0107.

Since ecclesiastical discipline must be moral or spiritual in its object and not attended with any civil effects, it derives no force whatever...

PCUSA *Book of Order* F-3.0108.

9. In other words, church power, in the Reformed Tradition, does not have the force and effect of binding law but instead is to operate by moral suasion only. According to the Book of Order itself, the denominational constitution is a voluntary social compact, not an enforceable legal contract.

10. Combining the American context of fundamental guarantees of religious freedom with these historic Presbyterian principles means a congregation can act for itself and vote to disassociate (i.e., disaffiliate) from the PCUSA. To assert otherwise is to suggest that the PCUSA is a law unto itself. It is to assert that the PCUSA can act in abridgment of rights

protected by the Constitutions of the United States and Texas. This interpretation, advocated by the Intervenor, and previously by the Presbytery, is unsustainable.

11. The simple truth of the matter is that if a Presbyterian congregation wants to become a different brand of Presbyterian congregation, they are at liberty to do so in the United States without having to first obtain somebody else's permission. Such a view is not only the American view, it must be the Presbyterian view when the *Book of Order* is interpreted in a manner that is consistent with, and not contrary to, basic American constitutional freedoms and the Historic Principles of Church Order on which the *Book of Order* is based.

12. Intervenor is asking the Court to lock FPC into the PCUSA and abridge the congregation's fundamental rights under the free speech, free exercise, and assembly clauses of the First Amendment. It would convert FPC's present, voluntary affiliation with the PCUSA to judicial mandate, in radical alteration of the status quo. *Khaledi v. H.K. Global Trading, Ltd.*, 126 S.W.3d 273, 279 (Tex. App.—San Antonio 2003, no pet.) (“A temporary injunction serves to preserve the status quo of the litigation's subject matter pending trial on the merits.”); *Morgan Stern Realty Holdings, LLC v. Horizon El Portal, LLC*, No. 04-14-00208-CV, 2014 WL 2531980 at *2-3 (Tex. App.—San Antonio Jun. 4, 2014, no pet.) (mem. op.) (finding temporary injunction that required defendant LLC member to transfer to plaintiff all of its ownership interest in LLC impermissibly altered, rather than maintained, status quo). The status quo is and has been that FPC has control of its property through its session and trustees. Separately, FPC has always had a protected free exercise right to determine its own religious identity. Mission Presbytery and/or Intervenor never had any right to control the funds or real property of FPC, any right over the

property, or any right to hold a group of worshipers to their voluntary association with the denomination. Presbytery impermissibly seeks a radical change from the status quo.

**IV.
CONTRARY TO INTERVENORS' CONTENTION,
FPC'S VOTE TO DISAFFILIATE IS CONSISTENT WITH ITS PRIOR POSITION ON
THE USE OF ITS PROPERTY**

13. Intervenor argues that Plaintiff misrepresented their intentions to the Court by representing that it "had no intention to disaffiliate with the PC(USA)." As support for this assertion, Intervenor presents a deceptively abbreviated quote from Plaintiffs' Reply Brief to Court-Ruling Roadmap. The quote, in its entirety, is as follows:

First, there is no evidence that FPC has even considered using its property for the benefit of another denomination. To the contrary, the only testimony is that no other Presbyterian denomination has a trust clause or claim of interest in the property of a local church. **FPC's position has always been that it holds its property for its use and benefit and for the benefit of the other charities and missions it serves.**

Plaintiffs' Reply Brief to Court-Ruling Roadmap, page 6 (internal citations omitted; emphasis added).

14. When taken in context, it is clear that FPC never states that it will not disaffiliate. FPC only stated that, whatever the congregation's affiliation with a denomination, the local church owns its own property and uses the property for its own benefit. The Session's vote to ask the congregation to consider affiliating with ECO, and a possible affirmative vote by the congregation to do so, does not in any way mean that FPC will hold its property in trust for the benefit of another denomination. FPC will continue to have full, fee simple ownership and to use its property for the benefit of the congregation, just as it has for the last 169 years. *See Minutes*, 1981 PCUS General Assembly, admitted as Plaintiff's Exhibit 4 at the August 26-27,

2015 Temporary Injunction Hearing. (“The beneficial ownership of the property of a particular church of the [PCUS] is in the congregation[.]”).

V.

NO IMMINENT HARM/NO CHANGE IN THE STATUS QUO

15. Intervenors are employing misdirection to try to convince the Court that the ecclesiastical action of the FPC Session somehow affects a secular case involving property rights. But, in the end, while their emergency motion throws around a lot of inflamed phrases about “change in the status quo” and “imminent harm,” Intervenors fail to state how they are actually harmed. FPC always had the right to the use and enjoyment of its property. There has been no action by FPC to sell major assets and no radical change in spending of the congregation. If Intervenors can prove that their bogus trust theories entitle them to any right in FPC’s real or personal property, the property remains entirely intact pending the final judgment. Intervenors still fail to meet their burden on any element of a temporary injunction claim.

16. In marked contrast with the well-trod judicial path followed by the terms of the TRO and Temporary Injunction requested by FPC, the proposed, reasserted TRO submitted by Intervenors is without precedent. In seeking to enjoin FPC’s congregation from voting on its ecclesiastical affiliation, Intervenors ask this Court to do what no other judge in the history of the United States has ever done before, lock a particular congregation to a specific denomination and thereby abridge that congregation’s fundamental rights under the free speech, free exercise and assembly clauses of the First Amendment. In seeking such an extreme outcome, the Intervenors have not cited a single case or statute in support of their motion.

17. Ultimately, whether a denomination has a valid claim over a departing congregation's property is an entirely separate question from whether that congregation has a right to choose whether to depart from the denomination in the first place. The former is determined under Texas law by neutral principles and by the facts of the case. *Masterson v. Diocese of Northwest Texas*, 422 S.W.3d 594, 601 (Tex. 2013). The latter is protected by basic constitutional guarantees. In this case, Intervenors object to the internal ecclesiastical process that FPC has chosen for determining whether it should remain in the Presbytery and the PCUSA. These are matters outside this Court's subject matter jurisdiction as defined by the U.S. Constitution. Moreover, notwithstanding any action taken by the vote of the entire congregation, those for staying and those for leaving, the property rights that are the subject of this lawsuit will be totally unaffected and will remain subject to this Court's authority to ultimately determine.

18. What this means in practice is that a vote by the congregation of FPC on whether to stay with or leave the PCUSA is entirely lawful and effective regardless of what the Intervenors or Presbytery might prefer. Separate from the issue in the lawsuit as to who ultimately owns and controls the use of FPC's property, is the wholly fundamental and separate right to determine how and with which ecclesiastical denomination to worship. Any other reading would result in a religious form of indentured servitude that is not only unknown to a free people but is clearly contrary to the limitations that even the PCUSA Book of Order places on itself. Again, FPC reiterates to this Court that none of the voting actions Intervenors seek to stop will create or divest either party of any property rights they otherwise may already have, which is the only issue properly before this Court. The Court has no choice but to deny the Intervenors' requested temporary injunction.

**VI.
PRAYER**

WHEREFORE, Plaintiff First Presbyterian Church of San Antonio respectfully prays that the Court deny the Intervenor's Emergency Motion for Reconsideration on Intervenor's Request for Temporary Injunction and for all further relief to which it is entitled.

Respectfully submitted,

/s/ Kent C. Krause

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's Brief in Opposition to Intervenor's Emergency Motion for Reconsideration of Intervenor's Application for Temporary Injunction was served on all counsel of record via service through efile and EFP provider, and/or through some other permissible method, on the 21st day of October, 2015.

/s/ Kent C. Krause

Kent C. Krause

CAUSE NO. 2015-CI-07858

FIRST PRESBYTERIAN CHURCH OF
SAN ANTONIO

Plaintiff,

v.

MISSION PRESBYTERY,

Defendant,

v.

ED BONDURANT, *et. al.*,

Intervenors.

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IN THE DISTRICT COURT

BEXAR COUNTY, TEXAS

73RD JUDICIAL DISTRICT

ORDER GRANTING INTERVENORS' TEMPORARY INJUNCTION

On August 26, 2015, the Court heard Intervenors' application for temporary injunctive relief. Having considered the verified application of Intervenors, evidence, and argument of counsel, the Court determines that Intervenors have established a probable right to relief on the merits of Intervenors' claims against Plaintiff First Presbyterian Church of San Antonio's (hereinafter "Plaintiff" or FPC") regarding the establishment of a constructive charitable trust on funds and/or property donated to Plaintiff from November 18, 1988 to January 26, 2015. The Court finds that Intervenors made money contributions to FPC while FPC operated under a the limited corporate charitable purpose of a Presbyterian Church (U.S.A.) ("PC(USA)") congregation, as specified in FPC's November 18, 1988 articles of incorporation. The Court further finds that FPC received contributions from persons and entities that are not parties to this lawsuit while FPC operated as a charitable organization under the limited corporate charitable purpose of a PC(USA) congregation, and that a constructive charitable trust requiring that such

property and funds be used for the purposes of a PC(USA) congregation therefore exists with respect to all unrestricted contributions made by an person or entity to FPC between November 18, 1988 and January 26, 2015. The Court further finds that all such contributions described above have become intermingled with the entire res of FPC's estate, including all property owned by FPC, whether real or personal (hereinafter FPC's Real Estate and Other Property).

The Court further finds that Intervenors have established probable injury resulting from Plaintiff's actions, and that such injury is imminent and irreparable, and no adequate remedy for such injury exists at law. The Court finds probable injury is imminent and irreparable because Plaintiff, if not prohibited from doing so, has expressed its intent to transfer, use, or dedicate all of its property and funds to serve the interests of another denomination, outside of FPC's limited corporate charitable purpose.

The Court further finds that Plaintiff's transfer, use, or dedication of property and/or funds for the purposes of a denomination other than PC(USA) would cause incalculable and irreparable damage to Intervenors and all beneficiaries of the charitable trust because they will be deprived of the use and benefit of such property and funds as originally intended pursuant to FPC's limited charitable purpose for any period in which the property and funds are transferred, used, or dedicated for the purpose of another denomination. Further, if the property and funds are transferred to another denomination in whole or in part, Plaintiff in the future will not have at its disposal cash or proceeds thereof with which to reimburse the res encumbered by the charitable trust established in this case. These injuries are irreparable and Intervenors have no adequate remedy at law because once the property and funds are spent, transferred, or dedicated to the purposes of another denomination, Intervenors and all other beneficiaries will be deprived of the intended charitable use of the property and funds, and any such spending, transfer, or

dedication of the property and funds will also necessarily impede Intervenor's chance for recovery of same to restore the property and funds to their existing charitable purpose.

Accordingly, IT IS HEREBY ORDERED, that Plaintiff is temporarily enjoined for the period between the effective date of this Order and through the trial on the merits in this case from transferring, using, or dedicating its funds for the purpose of any denomination other than PC(USA).

IT IS FURTHER ORDERED, that Plaintiff is temporarily enjoined for the period between the effective date of this Order and through the trial on the merits in this case from transferring, using, or dedicating FPC's Real Estate and Other Property for the purpose of any denomination other than PC(USA).

IT IS FURTHER ORDERED that (i) trial on the merits of all claims of Intervenor is hereby set for March 7, 2016 at _____ a.m./p.m. in this Court; (ii) that this Order is effective immediately inasmuch as Intervenor has executed and filed with the clerk a cash bond, in conformity with the law, in the amount of \$_____; and (iii) the clerk of the above-entitled Court shall forthwith issue a temporary injunction in conformity with the law and the terms of this Order.

SIGNED this _____ day of September, 2015.

JUDGE PRESIDING

APPROVED AS TO FORM:

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