

R.E. "Tuck" Duncan
Attorney at Law LLC
212 SW 8th Avenue, Suite 202
Topeka, Kansas 66603
785.233.2265
www.tuckduncanlaw.com

To: House Judiciary Committee
From: R.E. "Tuck" Duncan
RE: HB2161 — Relating to disputes involving church congregations.
Date: February 18, 2016

I appear here today on behalf of the Episcopal Diocese of Kansas and I bring you greetings from the Right Reverend Dean E. Wolfe, Bishop of the Dioceses of Kansas.

The Episcopal Church in America is governed by a General Convention and consists of 99 dioceses in the United States proper, of which there are 2 in Kansas. There are over 6600 episcopal congregations in the United States, 44 parishes of which are located in cities across eastern Kansas in the Diocese of Kansas and home to over 11,000 parishioners. Each diocese is led by a bishop and the Episcopal Church in the United States is led by a Presiding Bishop. We are as described what can best be said is a hierarchal church.

I am here today, as a cradle Episcopalian, baptized and confirmed in my church, on behalf of my church hierarchy to ask you to respect our traditions that date back to before the founding of our republic.

This being a judiciary committee I expect you will hear from others about the law in the United States and Kansas relating to religious liberty. I make no pretense to being a scholar in the area of the Free Exercise Clause: "Congress shall make no law respecting an establishment of religion..." nor in the Kansas Bill of Rights, Section 7: "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship."

What I do know is that our own court has in recent years has written on the question of church autonomy and ecclesiastical abstention.

The Kansas Court has stated that: "The Establishment Clause of the First Amendment to the United States Constitution forbids excessive government entanglement with religion."¹

¹ Purdum v. Purdum, 106,181 (2013).

The Kansas Court has cited with approval the principle that the First Amendment to the United States Constitution gives to churches freedom² in managing their affairs in accordance with their own internal law and procedure, free from civil courts and governmental intervention.²

The US Supreme Court has discussed the “ecclesiastical abstention doctrine” on numerous occasions finding that hierarchical religious organizations have the right “to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.” *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. ___, 132 S. Ct. 694, 705, 181 L. Ed. 2d 650 (2012) (quoting *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724, 96 S. Ct. 2372, 49 L. Ed. 2d 151 [1976]). “Civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.” 426 U.S. at 713. Furthermore, civil courts are prohibited by the First Amendment from making “inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or [into] the substantive criteria by which they are supposedly to decide the ecclesiastical question.” 426 U.S. at 713.

The Kansas court has recognized, “[t]he jurisdiction of civil courts to address matters involving church affairs is limited.” *Church of God in Christ, Inc. v. Board of Trustees*, 47 Kan. App. 2d 674, Syl. ¶ 4, 280 P.3d 795 (2012). This jurisdictional limitation is necessary because religious organizations must have the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Hosanna-Tabor*, 132 S. Ct. at 704 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S. Ct. 143, 97 L. Ed 120 [1952]). In some instances, it is clear that secular courts must yield subject matter jurisdiction to ecclesiastical tribunals. For example, secular courts do not have the authority to determine matters relating to the selection of ministers. See *Hosanna-Tabor*, 132 S. Ct. at 706. Likewise, secular courts are to yield to ecclesiastical tribunals “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by . . . church judicatories” *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727, 20 L. Ed. 666 (1871) (fn.2).

On the other hand, when church-related controversies involve primarily civil or property rights, secular courts will ordinarily exercise jurisdiction to decide the merits of the case to assure regularity of business practices and to protect private property rights. See *Church of God in Christ*, 47 Kan. App. 2d 674, Syl. ¶ 6.

² Purdum, *supra*. Citing with approval:

“The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.” *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29, 20 L. Ed. 666 (1871)..

Nonetheless, our Court has further recognized in the *Church of God in Christ* case:

“The First Amendment permits hierarchical religious organizations to establish their own rules and regulations for internal discipline and government and to create tribunals for adjudicating disputes over such matters.

...

The jurisdiction of civil courts to address matters involving church affairs is limited. Neither state nor federal courts may undertake the resolution of quintessentially religious controversies, whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of the Church.”

As I read HB2161 it would direct the courts to use singularly the “neutral principles” doctrine in considering property disputes to the exclusion of all other doctrines, some of which I have discussed above, when it directs at line 5, that: “A court **shall** apply a neutral principles of law analysis...”³

That enactment is a departure from centuries of jurisprudence that recognizes church autonomy and ecclesiastical abstention. In that regard, please respect our hierarchical tradition and reject HB2161.

Thank you for your attention to and consideration of this matter.

³ A neutral principles of law analysis under subsection (a) shall rely on objective, well-established concepts of trust and property law. Such an analysis may include examination of a deed, local church charter, state statute or corporate governance documents in a completely secular manner, as would be conducted for any other property dispute. HB2161 lines 11-15.

