THE STATE OF SOUTH CAROLINA
In the Supreme Court

The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Christ the King, Waccamaw; Church of The Cross, Inc. and Church of the Cross Declaration of Trust; Church of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Matthews Church; St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. David's Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway; The Church of St. Luke and St. Paul, Radcliffeboro; The Church of Our Saviour of the Diocese of South Carolina; The Church of the Epiphany (Episcopal); The Church of the Good Shepherd, Charleston, SC; The Church of The Holy Cross; The Church of The Resurrection, Surfside; The Protestant Episcopal Church of The Parish of Saint Philip, in Charleston, in the State of South Carolina; The Protestant Episcopal Church, The Parish of Saint Michael, in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust; The Vestry and Church Wardens of St. Jude's Church of Walterboro; The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah; The Vestry and Church Wardens of The Church of The Parish of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens of The Parish of St. Matthew; The Vestry and Wardens of St.

Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens of the Episcopal Church of The Parish of Christ Church; Vestry and Church Wardens of The Episcopal Church of the Parish of St. John's, Charleston County, The Vestries and Churchwardens of The Parish of St. Andrews, Respondents.

v.

The Episcopal Church (a/k/a The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina, Appellants.

Appellate Case No. 2015-000622

Appeal from Dorchester County,
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27731
Heard September 23, 2015 – Filed August 2, 2017

REVERSED IN PART AND AFFIRMED IN PART

Allan R. Holmes, Sr. and Timothy O. Lewis, both of Gibbs & Holmes, of Charleston, David Booth Beers and Mary E. Kostel, both of Goodwin Procter, LLP, of Washington, DC, Blake A. Hewitt and John S. Nichols, both of Bluestein Nichols Thompson & Delgado, of Columbia, Thomas S. Tisdale and Jason S. Smith, both of

Hellman Yates & Tisdale, of Charleston and R. Walker Humphrey, II, of Waters & Kraus, of Dallas, Texas, for Appellants.

C. Alan Runyan and Andrew S. Platte, both of Speights & Runyan, of Beaufort, Henrietta U. Golding and Amanda Bailey, both of McNair Law Firm, of Myrtle Beach, C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough, of Columbia, Charles H. Williams, of Williams & Williams, of Orangeburg, David Cox, of Barnwell Whaley Patterson & Helms, of Charleston, Thomas C. Davis, of Harvey & Battey, of Beaufort, Harry Easterling, Jr., of Bennettsville, G. Mark Phillips, of Nelson, Mullins, Riley & Scarborough, of Charleston, W. Foster Gaillard and Henry Grimball, both of Womble, Carlyle, Sandridge & Rice, of Charleston, Keith McCarty, of McCarty Law Firm, of Charleston, William A. Scott, of Pedersen & Scott, of Charleston, Mark Evans, of Charleston, David B. Marvel and David L. DeVane, both of Prenner Marvel, of Charleston, John Furman Wall, III, of Mt. Pleasant, Allan P. Sloan, III and Joseph C. Wilson, IV, both of Pierce, Herns, Sloan & Wilson, of Charleston, C. Pierce Campbell, of Turner, Padget, Graham & Laney, of Florence, Robert R. Horger, of Horger, Barnwell & Reid, of Orangeburg, Saunders M. Bridges, of Aiken Bridges Elliott Tyler & Saleeby, of Florence, Lawrence B. Orr, of Orr Elmore & Ervin, of Florence, Francis M. Mack, of St. Matthews, Robert S. Shelton, of The Bellamy Law Firm, of Myrtle Beach, William A. Bryan, of Bryan & Haar, of Surfside Beach, Harry Oxner, of Oxner & Stacy, of Georgetown, Susan MacDonald and Jim

Lehman, both of Nelson, Mullins, Riley & Scarborough, of Myrtle Beach, Brandt Shelbourne, of Shelbourne Law Firm, of Summerville, Stephen S. McKenzie, of Coffey, Chandler & Kent, of Manning, John B. Williams, of Williams & Hulst, of Moncks Corner, George J. Kefalos and Oana D. Johnson, both of George J. Kefalos, P.A., of Charleston, Stephen Spitz, of Charleston and Thornwell F. Sowell, III and Bess J. Durant, both of Sowell Gray Stepp & Lafitte, LLC, of Columbia, for Respondents.

ACTING JUSTICE PLEICONES: This is an appeal from a circuit court order holding that the Appellants have no legal or equitable interests in certain real and personal property located in South Carolina, and enjoining the Appellants from utilizing certain disputed service marks and names. In this lead opinion I explain why I would reverse the entire order.

The Respondents are the Protestant Episcopal Church in the Diocese of South Carolina (Disassociated Diocese); the Trustees of the Protestant Episcopal Church in South Carolina (Trustees); and thirty-six individual parishes that have aligned themselves with the Disassociated Diocese (Parishes). The Appellants are The Episcopal Church a/k/a The Protestant Episcopal Church in the United States of America (TEC) and The Episcopal Church in South Carolina, the diocese that remains affiliated with the TEC (Associated Diocese).

After a lengthy bench trial, and based upon the application of "neutral principles of law," the circuit court found in favor of the Respondents on both the property and the service mark causes of action. Since the main purposes of this suit were requests for declaratory judgments and injunctive relief, I find that it sounds in equity.[1] *Doe v. S.C. Med. Mal. Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 557 S.E.2d 670 (2001). The Court is therefore free to take its own view of the facts. *Id*.

As noted above, much of the trial judge's decision making in this case was controlled by her interpretation of the "neutral principles of law" approach to deciding ecclesiastical disputes. *See Pearson v. Church of*

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[1] Acting Justice Toal maintains that because the declarations made in this case will determine the rightful ownership of property, the main purpose of this suit is legal. I, however, look not to the first paragraph of the complaint, but rather to the prayer for relief, which seeks a declaration (1) which of the competing entities is the true diocese, (2) that respondents' legal title to property trumps appellants' equitable claims, and (3) for other injunctive relief related to trade names. The main purpose is to enjoin appellants from "interfering" with the respondents in "church matters" and thus this suit sounds in equity. *Compare*, *e.g.*, *Williams v. Wilson*, 349 S.C. 336, 563 S.E.2d 320 (2002). To the extent the issues turn on property rights, the results turn on the validity and existence of certain trusts, matters which also sound in equity. *E.g.*, *Settlemeyer v. McCluney*, 359 S.C. 317, 596 S.E.2d 514 (Ct. App. 2004). Were Acting Justice Toal correct, and were the Court to find the main purpose of this suit were legal, then the Court would be compelled to reverse and remand for a new trial given the number of erroneous and prejudicial evidentiary rulings made by the trial judge and raised to us on appeal. I note none of the opinions that would uphold the trial court's order in whole or in part address these issues.

God, 325 S.C. 45, 478 S.E.2d 849 (1996) (adopting this approach). Specifically, she was guided by her reading of this Court's decision in *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 685 S.E.2d 163 (2009) (*All Saints*). In the trial judge's view, the admissibility of evidence and the resolution of the property disputes at issue here were properly adjudicated solely on the basis of state corporate, property, and trust law, and she was required to ignore the ecclesiastical setting in which these disputes arose. This error of law led, in turn, to a distorted view of the issues in this case.

Before discussing the merits of the appeal, I briefly review a simplified history of TEC, and the church's history in South Carolina. I next address, and would reverse, the circuit court's finding that TEC is a congregational rather than a hierarchical church. I then address misperceptions of the "neutral principles of law" approach resulting in large part from the trial court's reading of *All Saints*, which I would now overrule in part.[2] I conclude that the present property and church governance disputes are not appropriate for resolution in the civil courts and would reverse the order to the extent it purports to resolve these questions. Finally, I find the trial court erred in holding that the Respondents' state-registered trademarks prevail over

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[2] Acting Justice Toal misreads my opinion as retitling property owned by All Saints Waccamaw, ousting its vestry, and rewriting its charter. It is unclear to me how Acting Justice Toal derives that conclusion as that congregation is not a party to this suit.

TEC's federally-protected trademarks, and therefore would also reverse that portion of the order.

HISTORY

The Episcopal Church has a long history in South Carolina. *See All Saints*, *supra*. In 1789, four years after its formation, the Protestant Episcopal Church in South Carolina (South Carolina Diocese) and six other dioceses came together to form the national church (TEC). The South Carolina Diocese was voluntarily associated with TEC since that date, save for a five-year hiatus surrounding the Civil War. In 1841, Article 1 was added to the South Carolina Diocese's Constitution. This article, titled, "Of acceding to the constitutions and canons of the general convention," provided "The [South Carolina Diocese] accedes to, recognizes and adopts the general constitution and canons of [TEC] and acknowledges their authority accordingly." Similar language in which the Diocese acceded to TEC remained in the Diocese's governing documents until 2010. Further, for more than 200 years, a parish had to agree to conform to TEC's Constitution and Canons as well as those of the Diocese in order to become and remain a member of the South Carolina Diocese. Finally, the Trustee Corporation, which purports to be represented in this suit by the respondent Trustees, was chartered as a non-profit corporation in 1880 and again in 1902.

In 1923, after requesting permission from TEC to divide the state into two Dioceses, TEC's General

Convention agreed to the division and the state was divided into the Upper and Lower Dioceses of South Carolina. The Lower Diocese was incorporated in 1973, with this corporate purpose: "[T]o continue an Episcopal Diocese under the Constitution and Canons of [TEC]." Both the Disassociated Diocese and the Associated Diocese claim to be the successor to the Lower Diocese.

Overly simplified, the issue in this case is whether respondent Disassociated Diocese, the Trustees, and the Parishes or appellant Associated Diocese and its parishes "own" the real, personal, and intellectual property that the Appellants allege was held in trust for the benefit of TEC in 2009.

I. TEC Organization

In *All Saints*, the Court reiterated its previous definitions of a congregational and a hierarchical church structure: "A congregational church is an independent organization, governed solely within itself . . . , while a hierarchical [or ecclesiastical] church may be defined as one organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *All Saints*, 385 S.C. at 443, 685 S.E.2d at 171 fn. 9 (quoting *Seldon v. Singletary*, 284 S.C. 148, 149, 326 S.E.2d 147, 148 (1985)).

TEC is an unincorporated association comprised of subunits known as dioceses. Each diocese is, in turn, comprised of congregations known as parishes or missions. Every three years, TEC sponsors a General

Convention to which each diocese's standing committee sends a specified number of clerical and lay representatives to conduct TEC's business, including electing and confirming[3] new bishops.

The evidence in the record demonstrates TEC's organization is three-tiered, with the General Convention at the top, approximately one hundred dioceses created along geographical lines in the middle, and the individual parishes and missions affiliated with a particular diocese forming in the bottom tier. TEC is led by a Presiding Bishop, and each diocese is traditionally led by a bishop. The record establishes that the ultimate authority in TEC rests with the General Convention, and that the written sources of authority include TEC's Constitution and Canons, the Book of Common Prayer, and the Holy Bible. As noted above, until 2010, the Lower Diocese explicitly acceded to TEC's authority, and accession to both the Diocese and TEC was required of all parishes and missions. Further, until 2010, the Trustees' corporate bylaws stated it would carry out its duties under the authority of TEC's Constitution and Canons.

I find, based upon the evidence in this record, that TEC is a hierarchical church, and would therefore overrule the trial court's finding that it is, instead, a congregational church. *Doe*, *supra*. In reaching this decision, I join numerous other jurisdictions that have

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[3] Although a diocese (s)elects its own bishop, the bishop is not the ecclesiastical authority for the diocese until, *inter alia*, a majority of the standing committees for the remaining dioceses confirm his (s)election.

concluded that TEC is a hierarchical church. *See*, *e.g.*, *Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002); *In re Episcopal Church Cases*, 45 Cal.4th 467, 198 P.3d 66 (2009); *Parish of the Advent v. Protestant Episcopal Diocese of Massachusetts*, 426 Mass. 268, 688 N.E.2d 923 (1997); *Masterson v. Diocese of Northwest Texas*, 422 S.W.3d 594 (TX 2014); *Falls Church v. Protestant Episcopal Church in the United States*, 285 Va. 651, 740 S.E.2d 530 (2013). I turn next to a discussion of *All Saints*.

II. *All Saints*

As noted above, the trial judge's conduct of the trial and her rulings were governed, in large part, by her understanding of *All Saints*. As explained below, I would now overrule *All Saints* to the extent it holds that TEC's Dennis Canon and the Lower Diocese's own version of that Canon were ineffective in creating a trust over the property at issue here, and to the extent the opinion distorts the correct understanding of the neutral principles of law approach to resolving issues arising from a church schism. In so doing, I focus especially on the effects of corporate actions taken by ecclesiastical institutions.

In *All Saints*, the dispute was between the Lower Diocese and a congregation which sought to disaffiliate from the Diocese. The legal questions were which faction of the splintered Episcopal congregation owned the parish property, and which faction controlled the parish's vestry. *All Saints* decided the property issue

by holding that TEC's 1979 "Dennis Canon" was ineffective in creating a trust over real and personal property titled in the name of the All Saints Parish. Further, in deciding the "legitimate vestry" issue, the Court indicated that the "neutral principles of law" approach required that in order for a civil court to determine whether a church-related dispute could be adjudicated in that forum, the court must look **only** at state corporate and property law, ignoring the ecclesiastical context entirely. If the civil court could determine the dispute applying state law, then the case could be resolved by it. Thus, *All Saints* undertook to analyze the disagreement in that case by treating the "All Saints Corporation" as independent of the "All Saints Parish." I find this analysis to be a distortion of the neutral principles approach. *See Jones v. Wolf*, 443 U.S. 595 (1979).

In *All Saints*, the Court correctly explained "neutral principles of law" this way:

> A clear recitation of the neutral principles of law approach as adopted by this Court was enunciated in *Pearson v. Church of God*. In *Pearson*, we articulated the rule that South Carolina civil courts must follow when adjudicating church dispute cases. We reaffirm and more fully explain this rule here. The *Pearson* rule provides:
>
> > (1) Courts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration; (2) courts cannot avoid adjudicating

> rights growing out of civil law; (3) in resolving such civil law disputes, courts must accept as final and binding the decision of the highest religious judicatories as to religious law, principle, doctrine, discipline, custom, and administration.

325 S.C. at 52-53, 478 S.E.2d at 853.

> The *Pearson* rule establishes that where a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so. Nonetheless, where a civil court is presented an issue which is a question of religious law or doctrine masquerading as a dispute over church property or corporate control, it must defer to the decisions of the proper church judicatories in so far as it concerns religious or doctrinal issues. *See Serbian Eastern Orthodox Diocese*, 426 U.S. at 709, 96 S.Ct. 2372 (finding that the controversy before the Court "essentially involve[d] not a church property dispute, but a religious dispute the resolution of which . . . is for ecclesiastical and not civil tribunals.").

All Saints, at 444-45, 685 S.E.2d at 172.

Properly applied, the "neutral principles" approach requires that the civil court's initial inquiry be a "holistic" one. The court must first determine whether the property/corporate dispute will require the court to decide issues of religious law, principle, doctrine, discipline, custom, or administration – in other words, is the property/corporate dispute actually ecclesiastical in nature. If the dispute is "a question of

religious law or doctrine masquerading as a dispute over church property or corporate control," then the Constitution of the United States requires the civil court defer to the decision of the appropriate ecclesiastical authority. *All Saints*, *supra*. As explained below, this is the approach I expressly adopt and apply to decide the merits of the present dispute in § III, *infra*.[4] Before proceeding to that analysis, however, I reexamine the legal analysis applied in *All Saints* and the conclusions drawn there.

In 1979, the Supreme Court decided *Jones v. Wolf*, *supra*. Like the present case, *Jones* was a property dispute arising from a schism in a hierarchical church. The *Jones* Court acknowledged the ability of civil courts to resolve most church-based property disputes using deeds, state statutes, the local church charters, and the national church's constitution. The Court explicitly stated, however, that:

> Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be

[4] Acting Justice Toal contends I 'skip' this step entirely: I respectfully refer the reader to the penultimate sentence in the first paragraph under this section.

> resolved in accord with the desires of the members.
>
> . . .
>
> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Jones at 603-4, 606, 99 S.Ct. 3020.

In 1979, TEC, acting through the General Convention, responded to *Jones* by enacting the so-called Dennis Canon. This Canon provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the

> Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains part of, and subject to this Church and its Constitution and Canons.

The Dennis Canon (Canon 1.7.4) is followed by Canon 1.7.5, which provides:

> The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

In 1987, the Lower Diocese of South Carolina adopted a version of the Dennis Canon as part of its own constitution, as did many of the Parishes.[5] Recall that accession to TEC's Canons, which included the Dennis Canon, and to the Lower Diocese's Constitution, which from 1987 forward included a diocesan version, were conditions of a parish or mission's membership in the Lower Diocese. Recall also that

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[5] The diocesan version of the Dennis Canon states: "All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for [TEC] and the [Lower Diocese]. The existence of this trust, however, shall in no way limit the power and Authority of the Parish, Mission, or Congregation existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject to, [TEC] and the [Lower Diocese]."

until the 2010 Diocesan Convention, Article 1 of the Diocesan Constitution provided: "The Church in the Diocese of South Carolina accedes to and adopts the Constitution and Canons of [TEC] and acknowledges this authority accordingly."

In *All Saints*, this Court first addressed the validity of the Trusts created by the Dennis Canon and Diocesan Constitution as applied to property belonging to the All Saints Parish at the time the Parish sought to disaffiliate from the Episcopal Church. In resolving the issue of the effect of TEC's adoption of the Dennis Canon in 1979, and the Lower Diocese's incorporation of the Canon into its own constitution in 1987, the Court reviewed the history of the All Saints Parish, extensively reporting and resolving title issues from 1745 until 1903. On the merits, the *All Saints* opinion simply holds:

> Furthermore, we hold that neither the 2000 Notice [recorded by the Diocese in the county courthouse reflecting the trust created by the Diocese and that created by the Dennis Canon] nor the Dennis Canon has any legal effect on title to the All Saints congregation's property. A trust "may be created by either declaration of trust or by transfer of property. . . ." *Dreher v. Dreher*, 370 S.C. 75, 80, 634 S.E.2d 646, 648 (2006). It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another. The Diocese did not, at the time

> it recorded the 2000 Notice, have any interest in the congregation's property. Therefore, the recordation of the 2000 Notice could not have created a trust over the property.
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> For the aforementioned reasons, we hold that title to the property at issue is held by All Saints Parish, Waccamaw, Inc., the Dennis Canons [sic] had no legal effect on the title to the congregation's property, and the 2000 Notice should be removed from the Georgetown County records.

All Saints at 449, 685 S.E.2d at 174.

I would now overrule *All Saints* to the extent it held the Dennis Canon and the 1987 amendment to the Lower Diocese's Constitution were ineffective in creating trusts over property held by or for the benefit of any parish, mission, or congregation in the Lower Diocese. The result in *All Saints* was obtained without considering the religious documents and texts, including the Diocesan Constitution, which formed the foundation of the relationships between All Saints Parish, the Lower Diocese, and TEC, and by ignoring the premise of *Jones* that a hierarchical church could direct the disposition of property in case of a schism with a minimal burden. Specifically, *All Saints* failed to acknowledge that, as a matter of church governance and administration, All Saints Parish had agreed to be bound by the "trust terms" found in the Dennis Canon and the Diocesan Constitution through its voluntary promises of allegiance, upon which the hierarchical church is founded, and by its conduct in remaining

affiliated with TEC after 1979, and with the Lower Diocese after 1987. *All Saints'* failure to consider the entirety of these ecclesiastical relationships, the governing documents, and the parties' conduct, as well as the assurances given by the *Jones'* majority that a hierarchical church could direct the ownership of property in the case of a schism, led to a violation of the command of *Pearson* that a court look at the entirety of the dispute, including the hierarchal church's constitution, canons, and rules, before determining whether the dispute can be resolved purely by the application of state law.

Further, I find that *All Saints* fell into error when it created an artificial division between All Saints' authority as a parish to withdraw from TEC and the Lower Diocese, and All Saints parish's corporate authority to withdraw by amending its bylaws and articles of incorporation in compliance with South Carolina law. The *All Saints* decision focused only on the parish corporation's compliance with the provisions of the South Carolina Non-Profit Act, S.C. Code Ann. §§ 33-31-100, *et seq*. (2006 and Supp. 2016). The opinion concluded that the corporate formalities had been properly executed and thus the parish had effectively withdrawn from TEC. The flaw in this section of the *All Saints* decision is that it relies on a false dichotomy between parish as ecclesiastical unit and parish

as a corporate entity,[6] and fails to acknowledge the dispositive statute in the Non-Profit Act.

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[6] I find persuasive this passage from Justice Lehrmann's dissent in *Masterson v. Diocese of Northwest Texas*, 422 S.W.3d 594, 617-18 (TX 2014):

> When deciding whether a matter invokes constitutional protection, I believe that we should err on the side of caution, upholding constitutional mandates when in doubt.
>
> The Court divides the questions of Good Shepherd *parish's* authority to withdraw from TEC and Good Shepherd *corporation's* authority to withdraw by amending its bylaws and articles of incorporation. . . . In my view, however, the two inquiries are inextricably linked. The Court goes on to conclude that, because the parish at issue was incorporated and because there was no specific TEC or diocesan restriction on the corporation's authority to amend its bylaws and articles of incorporation, the validity of Good Shepherd's withdrawal by amendment of those documents was *not* an ecclesiastical question. . . . I am unconvinced that the incorporated status of the parish removes the issue from the realm of church polity. If [the Bishop's] determination that the parish could not withdraw from TEC is a binding ecclesiastical decision, it does not cease to be so because of the corporate form taken by the parish. Such a determination permits civil courts to conduct an end-run around the First Amendment's prohibition against inquiry into and resolution of religious issues by effectively allowing the lower church entity's unilateral decision to trump the higher entity's authority over matters of church polity.
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> Notably, the Court recognizes that "what happens to the relationship between a local congregation that is part of a hierarchical religious organization and the higher organization when members of the local congregation vote to disassociate is an ecclesiastical matter over which civil courts generally do not have a

jurisdiction." *Id*. at 607 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976)). "But what happens to the property is not," the Court continues, "unless the congregation's affairs have been ordered so that ecclesiastical decisions effectively determine the property issue." *Id*. It follows that [the Bishop's] determination regarding the parish's authority (or, more accurately, lack of authority) to withdraw from TEC is a binding ecclesiastical decision, irrespective of the corporate form taken by the parish. In turn, since Good Shepherd did not validly withdraw from TEC, Good Shepherd remained a constituent thereof and consequently remained subject to TEC's and the Diocese's Constitutions and Canons.

There appears to be no dispute that, as a TEC parish, Good Shepherd could not pick and choose those portions of the governing documents by which it wished to be bound. And the Dennis Cannon [sic] and its diocesan counterpart expressly state that the church property is held in trust for TEC and the Diocese. Thus, if Good Shepherd had no authority to withdraw, it had no authority to revoke its adherence to the Canons or to revoke the trust placed on the property by virtue thereof. Moreover, the Canons condition Good Shepherd's authority over the church property on its "remain[ing] a part of, and subject to, this Church and its Constitutions and Canons." By purporting to withdraw from TEC, then, Good Shepherd took the very action that would strip it of its rights in the property. Good Shepherd may not avoid the consequences of its actions – consequences to which it had freely agreed – simply by voting to no longer be subject to those consequences.

The omitted statute, § 33-31-180 (2006)[7] provides:

> § 33-31-180. Religious corporations; Constitutional protections.
>
> If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine controls to the extent required by the Constitution of the United States or the Constitution of South Carolina, or both.

Once effect is given to § 33-31-180, and the disaffiliated parish's actions in *All Saints* are viewed through the proper constitutional lens, it is patent that the civil courts of South Carolina were obligated to accept the ecclesiastical decision that the so-called "minority vestry" were the *All Saints* parish's true officers. Had the *All Saints* Court analyzed the issue under all the relevant authorities, it would have been clear that the Court could not adjudicate the corporate legitimacy claim, as the question which group was the "true vestry" was a matter of religious law and doctrine, and both the Constitution and § 33-31-180 required that the Court accede to TEC's and the Lower Diocese's determination of the "true vestry." *See Pearson*, *supra*.

Here, the trial court sought to faithfully apply the flawed analytical framework created by *All Saints*. In so doing, she unwittingly violated the constitutional

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[7] This statute was the foundation of the trial court's order in *All Saints*.

precepts that underlie the "neutral principles of law" approach to the resolution of church disputes.

I now turn to the facts of this case in order to determine whether the trial court properly determined that the present property/corporate dispute was cognizable in the civil court.

III. Application

While *All Saints* deemed the reason(s) for the disaffiliated parish's corporate actions irrelevant to the dispute, I find that the underlying reasons for the schism here are relevant to the determination whether this dispute is, at its core, one grounded in "religious law, principle, doctrine, discipline, custom, or administration" and thus not cognizable in civil court. *See Pearson*, 325 S.C. at 53, 478 S.E.2d at 851-2. Although the trial judge understandably sustained respondents' objections to much of the evidence offered to explain the Disassociated Diocese's decision to leave TEC in light of *All Saints*, I find there is sufficient evidence in the record to support my finding that doctrinal issues were the trigger. *Doe*, *supra*. A brief overview of that evidence follows.

In 2006, the Lower Diocese of South Carolina convened to select a new bishop and the Diocesan Convention elected Mark Lawrence. There was evidence that Bishop Lawrence was understood to be disenchanted

with TEC's direction.[8] His 2006 election did not garner the support of a majority of TEC's other dioceses, however, a requirement for a bishop's election to be valid. In 2009, Bishop Lawrence was ordained as Bishop of the Lower Diocese following his reassurances to the other dioceses he would make the requisite vows of conformity to TEC's Canons and Constitution. The record reflects that Bishop Lawrence did make these vows.

The record demonstrates that Bishop Lawrence and others in the Lower Diocese determined to leave TEC and to take with them the property of those parishes in the Lower Diocese that were intending to disaffiliate. For example, a former president of the Lower Diocese's Standing Committee testified that the Diocese's bank accounts were moved to "friendly bankers" out of fear that the accounts might be frozen if Bishop Lawrence were to be disciplined by TEC. This witness testified he received a call in 2009 from another priest in the Lower Diocese who expressed concern that Bishop Lawrence was "not moving quickly enough to take the [Lower Diocese] out of [TEC]," and reminded

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[8] Prior to 2006, TEC's General Convention confirmed the selection of the first openly homosexual bishop in TEC. Bishop Lawrence testified the Disaffiliated Diocese had become "uncomfortable with the trajectory of the general convention of the Episcopal Church." In referring to the Presiding Bishop of TEC, Katharine Jefforts Schori, Bishop Lawrence testified she had gone "contrary to the historic teachings of the church and the Holy Scriptures" and admitted this involved "the sexuality issue."

the witness that they had elected Lawrence "to take us out of [TEC]."

Following this Court's opinion in *All Saints*, which held that the All Saints Parish was not bound by TEC's Dennis Canon or by the Diocesan Constitution's version of the Canon, and that a parish could disaffiliate from the Diocese simply by amending its corporate documents, Bishop Lawrence and his supporters undertook certain actions.[9] Among other things, the Diocesan Convention began the process of amending the Lower Diocese's governing documents, and began providing Parishes with quitclaim deeds purporting to disclaim any interest of the Diocese in each Parish's property. Parishes, however, were asked to delay recording these deeds until 2011 because, as a witness for respondents testified, there was fear TEC would discipline Bishop Lawrence if the quitclaim deeds were recorded and his actions became public.

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[9] Acting Justice Toal ignores the evidence in the record, and concludes that in creating and disseminating these deeds and in purporting to alter the Lower Diocese's governance documents, "Bishop Lawrence [was] clearly acting on the [TEC's] behalf. . . ." This astounding conclusion is supported by the equally stunning assertion that "[TEC] was fully aware of what Bishop Lawrence's intentions were when he was made a bishop. . . ." The evidence reflects, in fact, that TEC was (rightfully) concerned about the Bishop's intentions and that his 2006 election not receive the consent necessary from the diocesan standing committee for years, and then only after his written assurances (1) that he would make the requisite vows of conformity to TEC's Canons and Constitution and (2) that "[his] intention is to remain in the Episcopal Church, period."

Following the *All Saints* decision, certain leaders in the Lower Diocese, among the Trustees, and within the leadership of various parishes in the Diocese undertook to sever the relationship between themselves and TEC through corporate amendments. On October 19, 2010, Bishop Lawrence executed Nonprofit Corporation Articles of Amendment which purported to amend the language concerning the purpose of the Lower Diocese set forth in its 1973 incorporation. The amendment purportedly altered the purpose from "to continue the operation of an Episcopal Diocese under the constitutions and canons of the Protestant Episcopal Church in the United States of America" to "to continue operation under the Constitution and Canons of The Protestant Episcopal Church in the Diocese of South Carolina." Other corporate actions were taken during this period which purported to alter the governance structure of the Diocese, and many of the Parishes undertook similar corporate alterations. During 2010, the Trustees met to amend their corporate bylaws, which stated the corporation would carry out its duties under the authority of TEC's Constitution and Canons, to remove these references.

On December 5, 2012, Bishop Lawrence was informed that TEC's Presiding Bishop accepted his renunciation of orders, and shortly thereafter, a letter confirmed the action.[10] On January 4, 2013, the

[10] The letter stated in pertinent part: "In accordance with Title III, Canon 12, Section 7 of the Constitution and Canons of [TEC] and with the advice and consent of the Advisory Committee to the Presiding Bishops, I have accepted the renunciation of

Respondents filed this suit for a declaratory judgment seeking a declaration that respondent Disassociated Diocese was the true Diocese in the lower part of South Carolina, that all property at issue belonged to that faction, and for injunctive relief against the Appellants. On January 26, 2013, Charles vonRosenberg was elected and ordained as the Bishop of appellant Associated Diocese.

The finding that TEC is hierarchal requires that I defer to its highest ecclesiastical body. *Pearson*, *supra*. TEC's acceptance of Bishop Lawrence's renunciation of orders and the subsequent ordination of Bishop vonRosenberg are decisions that the civil court "must accept as final and binding. . . ." *Pearson*, 325 S.C. at 52-53, 478 S.E.2d at 853. Because TEC has recognized the Associated Diocese to be the true Lower Diocese of South Carolina with Bishop vonRosenburg as its head, a civil court cannot inject itself into this church governance dispute and reevaluate that decision applying state law principles because this is a question of church polity, administration, and governance, matters into which civil courts may not intrude. The circuit court erred in allowing itself to become entangled in the questions of which competing claimant was the true successor of the Lower Diocese.

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ordained ministry of this church made in writing on November 17th, 2012, by the Right Reverend Mark Joseph Lawrence, Bishop of South Carolina." Bishop Lawrence contends he never made such a renunciation. November 17, 2012, is the date the Disassociated Diocese held a Special Convention affirming the Diocese's disaffiliation from TEC.

Further, the civil courts in South Carolina cannot decide disputes which are governed by church polity and governance concerning property ownership. For the reasons given above, I have determined that the real and personal property disputes sought to be adjudicated in this civil lawsuit are "question[s] of religious law or doctrine masquerading as a dispute over church property [and] corporate control. . . ." *See All Saints* at 445, 685 S.E.2d at 172. I find, therefore, the Court "must defer to the decision of the proper church judicatories. . . ." *Id*. "What happens to the relationship between a local congregation that is part of a hierarchical religious organization when members of the local congregation vote to disassociate is an ecclesiastical matter over which civil courts generally do not have a jurisdiction." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Here, the church governing documents establish that as of 2010, the Lower Diocese had agreed since at least 1822 to be part of TEC and to be bound by its Constitution and Canons. These documents make clear that since at least 1979, and explicitly since 1987, the Lower Diocese, the Trustees, and the Parishes accepted that the property in dispute in this case was held in trust for TEC, and was controlled by the Diocese, the Trustees, and the Parishes only so long as they remained part of TEC. Here, both TEC and Lower Diocese had in place provisions governing the disposition of property in the event of a disaffiliation as contemplated by *Jones*. I believe the Court is "[constitutionally] bound to give effect to the result indicated" by TEC and the Lower Diocese, especially since both entities enacted these provisions "before the

dispute erupt[ed]." *Jones*, *supra* at 606. I would therefore reverse the circuit court's decision to the extent it declined to give effect to the Dennis Canon and its diocesan counterpart, and to the extent it held that the Disassociated Diocese, the Trustees, and parishes controlled or owned the disputed real and personal property.[11]

IV. Service Marks

The trial court upheld the Respondents' claim that state trademarks it began filing in 2010 were being infringed upon by the Appellants in violation of S.C. Code Ann. § 39-15-1160 (Supp. 2016) and §§ 16-17-310 and 320 (2016), leading to confusion. It therefore enjoined the Appellants from "using, assuming, or adopting"

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[11] As Acting Justice Toal acknowledges, the determination that this dispute is ecclesiastical is tantamount to recognizing the validity of the trusts. By denying the ecclesiastical nature of this dispute, Chief Justice Beatty, Justice Kittredge, and Acting Justice Toal free themselves from First Amendment constraints and, among other things, impose a requirement that each local church must specifically accede to the Dennis Canon before it can be bound. Such a requirement entangles the civil court in church matters, for TEC's Canons specifically provide that "no such action shall be necessary for the existence and validity of the trust." Canon 1.7.5, and the Diocesan Constitution expressly provided for accession to, adoption of, and acknowledgment of the authority of TEC's Constitution and Canons. *Jones* requires only that "a religious organization . . . ensur[ing] that a [church property] dispute . . . will be resolved in accord with the desires of the members. . . ." indicate those desires in "some legally cognizable form. . . ." *Jones* does not require that these "cognizable forms" be created in a way that satisfies the specific legal requirements in each jurisdiction where the church property is located.

certain "names, styles, emblems, or marks" claimed by the Respondents. I agree with the Appellants that in light of the evidence of the confusion created by the Respondents' use of the term 'episcopal,' with TEC's federally-registered trademarks, which include "The Episcopal Church" and "The Protestant Episcopal Church in the United States of America," state law dictates that the Appellants right to these marks is superior, and that therefore the Respondents' state marks must be cancelled. *See* S.C. Code Ann. § 39-15-1145(3)(f) (Supp. 2016). I would therefore reverse the injunctive relief granted by trial court.

CONCLUSION

I would overrule *All Saints* to the extent it held the Dennis Canon and the diocesan equivalent did not create effective trusts in South Carolina, and to the extent that it holds that corporate actions taken by Episcopal dioceses, parishes, missions, and related corporations can be reviewed without reference to TEC's Constitution, Canons, and other authorities, and without reference to § 33-31-180. Further, the question of which diocese is "legitimate" is a question of church governance and not a matter to be resolved in the civil courts of South Carolina. I would therefore reverse the circuit court's order to the extent it rejected the efficacy of the Dennis Canon and the Diocesan Constitution, and to the extent it declined to accept TEC's recognition of the Associated Diocese as the true Lower Diocese of South Carolina. In addition, I would reverse the

injunction granted to respondents on their service mark claim.

Finally, while all **individuals** are guaranteed the freedom to disassociate from a religious body, here the question of the disposition of ecclesiastical property following the disaffiliation from the TEC by the Disassociated Diocese, the Trustees, and the Parishes, is a question of church governance, which is protected from civil court interference by the First Amendment.

For the reasons given above, I would reverse the circuit court's order and also join Justice Hearn's opinion.

HEARN, J., concurring in a separate opinion. BEATTY, C.J., concurring in part and dissenting in part in a separate opinion. KITTREDGE, J., concurring in part and dissenting in part in a separate opinion. Acting Justice Jean H. Toal dissenting in a separate opinion.

JUSTICE HEARN: I concur fully with Acting Justice Pleicones's thorough and well-reasoned lead opinion, but write separately because of the magnitude of this case and its far-reaching effects not only on the Episcopal Church ("the National Church") but also all other hierarchical religious organizations.[12]

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[12] I emphasize that our holding does not, as the dissent claims, affect *all* trusts in South Carolina; rather, our holding is

The primary issue before the Court is which of two competing dioceses is the true Episcopal diocese in the lower half of South Carolina and thus has the right to control the property at issue which consists of thirty-six parish churches and Camp Saint Christopher on Seabrook Island. Because the National Church has ordained Charles vonRosenberg and recognizes him as the Bishop in the Lower Diocese, this Court, under long-settled principles, must defer to that decision. Consequently, I would find the actions of the breakaway bishop, Mark Lawrence, and his followers in leaving the National Church and attempting to take its property with them, are ineffective. Additionally, consistent with the majority of state court decisions which have considered this issue, under neutral principles of law, the Dennis Canon[13] controls and imposes an express trust on the property in favor of the National Church. Therefore, I concur with the lead opinion and would confirm title to the property at issue in the National Church and reverse.[14]

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limited to ecclesiastical decisions protected by the First Amendment, as will be explained herein.

[13] A canon is "[a] law, rule, or ordinance in general, and of the church in particular. An ecclesiastical law or statute." *Black's Law Dictionary* 206 (6th ed. 1990).

[14] At the outset, I find the trial was permeated by errors which necessarily dictated the outcome. The threshold issue in resolving this dispute was an analysis of the structure of the National Church – whether it is hierarchical or congregational – and the nature of the relationship between the thirty-six parishes and the National Church. After repeatedly stating on the record that the church's structure was "irrelevant," and refusing to admit evidence on this issue, insisting that South Carolina was not a

As the lead opinion thoroughly explains, there can be but one conclusion based on the record before us and the overwhelming consensus of our sister jurisdictions, and that is the National Church is hierarchical in nature.[15] With that in mind, I turn to the claims raised by the respective parties.

"hierarchical state," the trial court found in its order that the National Church "is not organized in a fashion that its governance controls the Dioceses or the parish churches. Authority flows from the bottom, the parish churches, up." Additionally, although there can be no question that the individual parishes have been affiliated with the National Church for decades, the trial court found in its order that "[n]one of the Plaintiff parish churches have ever been members of [the National Church]."

The significance of this error in refusing to recognize the National Church's hierarchical design and the historical relationship of the individual parishes to the National Church cannot be overstated. By mischaracterizing the structure of the National Church and the nature of the relationship between it and the individual parishes, the trial court employed an erroneous framework in resolving this dispute.

[15] *See, e.g.*, *Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002) ("Our examination of this record, and our study of the organization and operation of the Episcopal Church, compels the determination that the court was correct in both its analysis and in its conclusion: The Episcopal Church is hierarchical."); *Episcopal Diocese of Massachusetts v. Devine*, 797 N.E.2d 916, 921 (Mass App. Ct. 2003) ("Based on our review of the record we conclude . . . that the Episcopal Church is hierarchical."); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 921 N.Y. (2008) ("The National Church has a hierarchical form of governance. Its governing body, the General Convention, adopted – and periodically amends – a constitution and canons that manifest its doctrinal law.").

ANALYSIS

I. ECCLESIASTICAL DEFERENCE

I believe it is clear this dispute arises out of doctrinal differences between the National Church and the Breakaway Diocese. I therefore find that we are required in this instance to exercise restraint and defer to the highest ecclesiastical body of this hierarchical church. Though the Breakaway Diocese has attempted to frame this as a matter of simple corporate law fit for resolution in civil court, we are bound by the Constitution and our own precedent from interjecting ourselves into religious matters masquerading as disputes over property or corporate control. *See Serbian E. Orthodox Diocese for U.S. and Canada v. Milivojevich*, 426 U.S. 696, 709-10 (1976); *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 445, 685 S.E.2d 163, 172 (2009).

The use of the word "masquerade" by the United States Supreme Court in *Milivojevich* is particularly germane here. Whether used as a noun ("a disguise or false outward show")[16] or as a verb (to "have or put on a deceptive appearance"),[17] the word aptly describes the actions of Bishop Lawrence and the Breakaway Diocese. Despite the vows and written assurances made by Bishop Lawrence concerning his loyalty to the National Church, within a few short years of his

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[16] THE AMERICAN HERITAGE DICTIONARY 770 (2d College ed. 1982).

[17] *Id.*

ordination, the masquerade began.[18] Bishop Lawrence and his followers provided parishes with quitclaim deeds designed to disclaim any interest of the Diocese in each parish's property. In furtherance of a pretense of loyalty, these quitclaim deeds were not made public; rather, parishes were asked to delay their recording. Bishop Lawrence's group also quietly changed the Diocese's bank accounts, seeking out "friendly bankers" who would provide assurances that the accounts would not be frozen when litigation commenced. Importantly, the fuse which ignited this powder keg was without question the divergent views on the doctrines and teachings of the National Church.

Although the trial court barred the National Church from introducing evidence as to the reason for the Breakaway Diocese's actions, it is clear from the record that doctrinal issues concerning marriage and the role of women were the trigger. A witness for the dissociated parishes testified that it was "a doctrinal issue" which prompted St. Andrew's in Mt. Pleasant to leave the National Church. Another parish witness stated that the National Church "seemed to be moving away from the Christ teaching [sic] that marriage is between a man and a woman." Other parish witnesses testified they were leaving the National Church

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[18] Although the dissent takes issue with my recitation of Bishop Lawrence's role in this rift, the facts contained herein are undisputed in the record and many are based upon direct admissions from Lawrence himself. Moreover, I find these facts highly relevant – if not essential – in addressing Bishop Lawrence's alleged breach of fiduciary duties owed to the National Church, as discussed *infra*.

because of the way it was treating Bishop Lawrence, obviously referring to the National Church's discipline of Bishop Lawrence as a result of his actions in leading the Breakaway Diocese out of the National Church. Bishop Lawrence testified the Breakaway Diocese had become "uncomfortable with the trajectory of the general convention of the Episcopal Church." In referring to the then-Presiding Bishop of the National Church, Katharine Jefforts Schori, Bishop Lawrence testified she had gone "contrary to the historic teachings of the church and the Holy Scriptures" and admitted this involved "the sexuality issue."

Given this background, I find this case is factually distinguishable from our holding in *All Saints* and more analogous to the dispute in *Milivojevich* where the Supreme Court found the issues were inextricably tied to "a matter of internal church government, an issue at the core of ecclesiastical affairs." 426 U.S. at 721. Furthermore, our holding is not wholly contradictory to *All Saints*; rather it is grounded in one of the very principles that case reaffirmed. 385 S.C. at 445, 685 S.E.2d at 172 (finding that if a question of religious law or doctrine is masquerading as a dispute over property or corporate control, the court must defer to the ecclesiastical body).

In essence, resolving this dispute would require us to decide which faction is the "true" Episcopal Church. Because the National Church has recognized the remaining diocese to be the true Lower Diocese of South Carolina with Bishop vonRosenburg at its head, we cannot inject ourselves into this dispute in such a

manner as to overrule that determination. *See Milivojevich*, 426 U.S. at 721. This Court has repeatedly acknowledged its constitutional mandate to refrain from wading into matters of internal organization, or ecclesiastical rule, custom or law. *All Saints*, 385 S.C. at 445, 685 S.E.2d at 172; *Pearson v. Church of God*, 325 S.C. 45, 49-50, 478 S.E.2d 849, 851-52 (1996). This decision is unquestionably a matter of church polity and governance, matters into which civil courts should not intrude. On this basis alone, I would reverse the decision of the trial court.

With the guarantees of the First Amendment in mind, the National Church purposely and consciously decided to structure its organization in the manner espoused in its constitution and canons. Dating back to the early 19th century, churches were built, congregations grew, and members attended services, all with voluntary acceptance of the National Church's governing framework. In fact, Title II, Canon 6.1 of the National Church's constitution and canons states, "No Church or Chapel shall be consecrated until the Bishop shall have been sufficiently satisfied that the building and the ground on which it is erected are secured for ownership and use by a Parish, Mission, Congregation, or Institution **affiliated with this Church and subject to its Constitution and Canons**." (Emphasis added.) Thus, by these very terms, houses of worship cannot be members of the "Episcopal Church" unless they are subject to the National Church's governing authority.

The National Church's constitution and canons are as much a part of its identity as a religious organization as the scriptures themselves. As a Court, we can no more decide what it means to be part of the "Episcopal Church" than we can dictate how the National Church chooses to worship. The inextricable link between the National Church's religious structure and the dispute before the Court is supported by abundant evidence. Accordingly, I find the current litigation before the Court is, at its heart, controlled by matters of religious doctrine, and therefore I would defer resolution to the ecclesiastical authorities of the National Church.

Nevertheless, in light of the Breakaway Diocese's insistence that the case is ripe for resolution in this Court, I continue to address equally compelling grounds to support the lead opinion's holding.

II. NEUTRAL PRINCIPLES

Even were we to wade into this dispute and resolve it solely on neutral principles as the dissent insists, I would still find the trial court erred in holding the Dennis Canon ineffective and in giving effect to Bishop Lawrence's attempts to change the corporate charter and form. More importantly, I believe the writings, conduct, and relationship between the parties all evince the necessary intent to create a legally cognizable express trust, enforceable in favor of the National Church.

In considering the application of neutral principles, I turn to *Jones v. Wolf*, 443 U.S. 595 (1979), and the response of the National Church and the Lower Diocese to its holding. In *Jones*, the four dissenting Justices would have gone even further than the majority to hold that a rule of compulsory deference was necessary in order to protect the free exercise rights of those who had formed a religious association. The majority's response to that criticism resulted in this passage which is critical to our resolution today:

> At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. **Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound** to give effect to the result indicated by the parties, provided it is in some legally cognizable form.

Id. at 606 (emphasis added).

Two months after the decision in *Jones*, and in obvious response to the invitation contained therein, the National Church adopted the Dennis Canon, which recites an express trust in favor of the denominational church. That same year, the National Church also adopted a companion canon which stated, "The several

Dioceses may, at their election, **further confirm** the trust declared under the [Dennis Canon] by appropriate action **but no such action shall be necessary for the existence and validity of the trust**." (Emphasis added.) Significantly, in 1987 the Lower Diocese did exactly that – confirming its acknowledgement of the trust by adopting its own mirror image of the Dennis Canon.[19] The dissent fails to mention the Diocesan canon or analyze its importance in its opinion, perhaps for the same reason it does not discuss the hierarchical nature of the National Church and why that is critical to the resolution of the case before us.

There is no question that South Carolina adheres to neutral principles in resolving church property disputes. *See Pearson*, *supra*; *All Saints*, *supra*. However, that does not mean we are "not a hierarchical state," as the trial court repeatedly stated. Adherence to neutral principles does not require us to ignore the clear language of the United States Supreme Court in *Jones* as to how hierarchical churches like the National Church may protect their property, nor the actions of the Plaintiffs before us. In fact, the proper application

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[19] That canon stated, "All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for the Episcopal Church and the Protestant Episcopal Church in the Diocese of South Carolina. The existence of this trust, however, shall in no way limit the power and Authority of the Parish, Mission, or Congregation existing over such property **so long as the particular Parish, Mission, or Congregation remains a part of, and subject to, the Episcopal Church and the Protestant Episcopal Church in the Diocese of South Carolina**." (Emphasis added.)

of neutral principles entails a holistic analysis of deeds, corporate charters, and the constitution and governing documents of the general church. In 1841, the delegates to the Diocesan Convention of South Carolina voted unanimously to accede to the National Church's constitution and canons. When the Diocese of South Carolina wished to divide into two dioceses, permission was sought from the National Church to do so and was granted. When the Lower Diocese was incorporated in 1973, its stated corporate purpose was "to continue an Episcopal Diocese under the Constitution and Canons of the Protestant Episcopal Church in the United States of America." Representatives from the Diocese were present at the General Convention in 1979 when the Dennis Canon was adopted. In 1987, the Diocese adopted its own language reaffirming the trust imposed by the Dennis Canon. Accordingly, Respondents acted consistently both before and after the enactment of the Dennis Canon by the General Convention as though the National Church held a trust interest in the property at issue, going so far as to expressly acknowledge the existence of the trust in their own Diocesan canon.

The highest courts in many other jurisdictions have concluded that the Dennis Canon applies to defeat claims of ownership and control over church property by disassociated parishes, "even in cases in which record title to the property has been held in the name of the parish since before enactment of the provision." *Episcopal Church in the Diocese of Connecticut v. Gauss*, 28 A.3d 302, 321 (Conn. 2011); *In re Episcopal*

Church Cases, 198 P.3d 66, 84 (Cal. 2009); *Bishop & Diocese of Colorado v. Mote*, 716 P.2d 85, 108-09 (Colo. 1986); *Rector, Wardens, Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 718 S.E.2d 237, 254 (Ga. 2011); *Daniel v. Wray*, 580 S.E.2d 711, 719 (N.Ct. Ct. App. 2003); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) ("We conclude that the Dennis Canons clearly establish an express trust in favor of the Rochester Diocese and the National Church."); *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005); *Falls Church v. Protestant Episcopal Church in U.S.*, 740 S.E.2d 530, 540 (Va. 2013) ("In the present case, we need look no further than the Dennis Canon to find sufficient evidence of the necessary fiduciary relationship. As a number of courts in other states have noted, the Dennis Canon 'merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [the National Church] in 1789.'"). Unlike the dissent, none of these jurisdictions based the validity of the Dennis Canon on the formal execution of trust documents following its enactment.

In my view, the language in *Jones* that "[a]t any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property" by reciting an express trust in favor of the denominational faction has clearly been met here. As noted by the Connecticut Supreme Court in *Episcopal Church in the Diocese of Connecticut*, *Jones v. Wolf* "not only gave

general churches explicit permission to create an express trust in favor of the local church but stated that civil courts would be *bound* by such a provision." 28 A.3d at 325 (emphasis in original). The dissent ignores the United States Supreme Court's admonition that the "burden" on national churches in taking steps to impose an express trust over church property "**will be minimal**." *Jones*, 443 U.S. at 606 (emphasis added). There is no question but that the National Church more than met this minimal burden in enacting the Dennis Canon, and under *Jones*, this Court is bound to recognize the trust it created. The Dennis Canon, the Diocesan Canon, and the mandate found in the National Church's canons declaring that affiliated parishes are bound by its governing laws satisfy the legally cognizable form and the intent to create a trust which Acting Justice Toal claims are absent. *See Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 291 P.3d 711, 720 (2012) (explaining "the neutral principles approach does not free the courts from examining and potentially giving legal effect to church documents").

To suggest that to comply with the blueprint laid out by the United States Supreme Court, the National Church would be required to obtain a separate trust instrument from each of the thirty-six parishes would impose a constitutionally impermissible burden on the National Church and violate the First Amendment. As it stands now, the trial court's order shows no regard for the self-governance of the National Church and instead attempts to wrongfully supplant enforceable

religious canons. Thus, I join the lead opinion in departing from *All Saints* to the extent it held that the Dennis Canon and subsequent acquiescence by individual parishes were insufficient to establish a trust in favor of the National Church.[20]

I agree with Justice Kittredge's dissent in recognizing the unique nature of trusts as applied to religious organizations, but I cannot embrace his conclusion that the trust imposed by the Dennis Canon is revocable at any time – a finding unsupported by any authority. To give credence to the terms of the Dennis Canon only to conclude that it is revocable at the whims of the parishes surely renders this a trust in name only. I find compelling the language used by the majority in *Jones v. Wolf* that "the parties can **ensure**, if they so desire, that the faction loyal to the hierarchical church will retain the church property." 443 U.S.

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[20] I fear the approach urged by the dissent would ultimately lead to confusion, voluminous litigation, and uncertainty for religious organizations. Of what importance is it that a religious body be hierarchical in nature, if any individual church can choose to disassociate from the higher body and take all property with it? For decades, religious organizations have structured their affairs to comply with the roadmap drawn out in *Jones* where the Supreme Court expressly annunciated a minimal burden for them to ensure a continuing body. If we were to ignore this, it logically follows that any hierarchical church would struggle to maintain itself. At any doctrinal difference, an individual parish could decide it disagrees with the teachings of the national body, break away and proclaim itself the "true" church. In a hierarchical church, the individual parishes look to the head of the church to provide guidance and steer the course of worship, not the other way around. Were we to adopt the dissent's approach, the tail would be wagging the dog.

at 606 (emphasis added). If we conclude the trust is merely revocable, then certainly the parties cannot *ensure* the National Church retains the property, and *Jones v. Wolf's* clear effort to prevent property disputes in the wake of church schisms is rendered meaningless.

Justice Kittredge also posits that the provisions of the South Carolina trust code which unquestionably render the trust irrevocable are not enforceable here because, he argues, the National Church's entire case is based on the derogation of our trust code. At the outset, I find this to be a mischaracterization of the National Church's position because it did not contend strictly that the trust imposed by the Dennis Canon was wholly independent from South Carolina law; to the contrary, the National Church repeatedly argued for the existence of an express trust, created pursuant to our established trust law. Furthermore, I find this reasoning inconsistent with Justice Kittredge's subsequent claim that Respondents withdrew their accession to the Dennis Canon "in accordance with state law." What we cannot do is pick and choose which state laws to apply in order to justify a desired result. Thus, I would not be so selective in adhering to one law addressing the manner in which Respondents may revoke the trust, while at the same time disregarding the very statute that controls whether the trust, once created, is revocable.

Respectfully, I disagree with my colleague and would apply the appropriate statute which resolves the issue: South Carolina Code Section 62-7-602(a) (Supp.

2016) (common law default rule of irrevocability applies to trusts created before the effective date of the statute [January 1, 2006]). When faced with a similar schism in the Presbyterian Church, the Supreme Court of Oregon – also applying the Uniform Trust Code and adhering to neutral principles – found the express trust in favor of the denominational church was irrevocable because it was created before Oregon's adoption of the UTC. *See Hope Presbyterian Church*, 291 P.3d at 726-27. I would follow the approach taken by Oregon and look to our statutory code, which provides this simple answer to any question of revocability: the trust is irrevocable because it was created prior to the implementation of the SCTC. S.C. Code Ann. § 62-7-602(a).

With regard to the dissent's proposition that eight[21] of the dissociated parishes formerly affiliated with the National Church were nevertheless free to ignore the provisions of the Dennis Canon, I believe this issue is not properly before the Court because, from my review of the record, the argument was not raised by Respondents at the trial court level, nor was it argued on appeal before this Court. To base its opinion on such reasoning now signifies the dissent's departure from this Court's longstanding adherence to issue preservation rules. *See I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

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[21] There is a discrepancy as to the precise number of parishes alleged to fall within the scope of this argument.

Justice Kittredge suggests that I am ignoring Rule 220(c) by insisting that the Court should not reach this issue of the seven or eight churches. I am aware of the language in subsection (c) which provides that the "appellate court *may* affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." (Emphasis added.) However, case law from this Court which interprets the Rule provides guidance on when this provision should be utilized. In *I'on* this Court streamlined the procedure for the use of additional sustaining grounds, and held only that the basis for a respondent's additional sustaining grounds "must appear in the record on appeal." 338 S.C. at 420, 526 S.E.2d at 723. Here, Acting Justice Toal purports to satisfy that principle by plucking this argument concerning the seven or eight churches, not from anything mentioned by Respondents in the pleadings, the record, or the brief, but rather from the post-trial motion filed by the National Church. In doing so, she ignores this language from *I'On* which I view as critical to an appellate court's decision as to whether or not to exercise the discretion afforded by the Rule to affirm on this basis: "Of course, a respondent may abandon an additional sustaining ground under the present rules – just as a respondent could under the former rules – by failing to raise it in the appellate brief." *Id.* This is precisely what I believe occurred here, and while I agree that this Court *may* affirm on any ground contained in the record on appeal, as provided by Rule 220(c), I believe this is surely one of those instances where it "would be unfair or unwise to resolve a case on a ground never mentioned by the respondent," given

the dearth of evidence on this issue in this voluminous record. *See* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 62 (2d ed. 2002). Quite simply, too many discrepancies exist to resolve the issue on this record, the most glaring being the actual number of entities to be affected – by the National Church's count the number is seven while Acting Justice Toal asserts it is eight. Accordingly, it is not the case, as Justice Kittredge posits, that I am ignoring the language in Rule 220(c), but rather that I would honor the language in *I'On* and elect not to reach this issue where it was never raised by Respondents and doing so injects an alarming degree of uncertainty into this case.

Moreover, I fear the dissent mischaracterizes the National Church's argument regarding the twenty-nine parishes with documentation reaffirming their allegiance to the National Church. In my view, the National Church is correct in its assertion that even without these individual reaffirmations made post-Dennis Canon, the relationships between the National Church and the parishes reveal that an express trust exists, created as the majority envisioned in *Jones v. Wolf*. That the National Church could locate twenty-nine reaffirmations made after the enactment of the Dennis Canon simply serves to point out the magnitude of the trial court's inexplicable error in finding no express trust was *ever* created by any of the parishes. However, the creation of a trust was never contingent upon the presence of these documents. Likewise, the dissent fails to give any effect to the trust imposed by the Diocesan canon. If the Dennis Canon has no effect

on these seven parishes because it was unilateral, the same cannot be said about the Diocesan canon, which unequivocally bound its affiliated parishes. Even without the Dennis Canon, the hierarchical structure of the National Church results in the Diocesan canon binding all affiliated parishes, including the seven in question.

Lastly, even accepting *arguendo* the dissent's assertion there was no writing to create an express trust binding the remaining seven parishes, I would find South Carolina's doctrine of constructive trusts would operate to impose a trust in favor of the National Church. A constructive trust arises "whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title." *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987). The impetus to impose a constructive trust "results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Id.* Importantly, in construing whether a constructive trust exists, this Court acts as the finder of fact in accordance with its own view of the evidence. *Id.* at 530, 354 S.E.2d at 561. For decades, if not longer, these parishes very clearly held themselves out as being affiliated with the National Church, agreed to be bound by its constitution and canons, attracted new members based on their affiliation with the Episcopal faith, participated in church governance, and in all other ways acted consistently with the National Church's structure. As mentioned earlier, parishes must agree to be bound by the National Church's

constitution and canons before their buildings can be consecrated as churches of the Episcopal faith. In light of the evidence presented by both parties, I believe equity requires that a constructive trust be imposed, lest this Court condone the seven parishes camouflaging themselves as loyal adherents to the National Church without objection for nearly 30 years after the Dennis Canon was adopted, only to pivot and proclaim that relationship never existed when it no longer suited them. This is precisely the type of bad faith which constructive trusts were designed to reconcile.[22]

In sum, regardless of the effects, if any, of the absence of reaffirmations given by the seven parishes in response to the Dennis Canon, the record is rife with evidence that the National Church and Respondents

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[22] Justice Kittredge conscientiously questions the propriety of declaring the National Church the rightful holder of the parish property and depriving the disassociated parishioners of the churches where they once worshipped. I answer his question with another equally compelling question: May we deprive the remaining constituents of the National Church of this same property when, for decades, they attended services, donated funds, and invested time and labor into their respective parishes, all the while acting with the knowledge that the property was held in trust for the National Church in accordance with the organization's widely-known religious canons? The dissenting justices attempt to answer these questions looking narrowly at state property law, but it comes at the expense of the First Amendment freedoms guaranteed by the Constitution. Justice Kittredge perceives an inequity in requiring the breakaway constituents to leave their property behind, but as a Court we must be equally mindful of the past and present parishioners who devoted their time and talents to the individual parishes and relied on the fact that they were indivisible parts of the National Church.

structured their relationship in such a manner that Respondents were to act as trustees on behalf of the National Church. This Court must give effect to this trust under the neutral principles approach. The dissent's suggestion that there were no written documents evincing a trust executed by Respondents is not supported by the record. Even beyond its clear accession to the Dennis Canon by its actions in remaining affiliated with the National Church upon its enactment, the Lower Diocese indisputably manifested its acknowledgement that all parish property was held in trust for the National Church through its adoption of its Diocesan version of the Dennis Canon in 1987. Through the hierarchical structure of the organization, the adoption of the Diocesan canon was binding upon all of its parish affiliates. Only by ignoring the hierarchical framework of the National Church could one believe the parishes were not bound by this Diocesan canon.

Lastly I note, even if this Court resolved the matter solely under state corporate law, Bishop Lawrence disregarded corporate form and governance and therefore his actions were ineffectual.[23] In 1973 the

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[23] Interestingly, a recent decision from a California appellate court affirmed title to disputed property in the National Church following a similar series of events in the Diocese of San Joaquin, where, as a parish rector, Lawrence joined an attempt to lead the diocese out of the National Church prior to his election as bishop in South Carolina. *See Diocese of San Joaquin v. Gunner*, 202 Cal. Rptr. 3d 51 (Cal. Ct. App. 2016). In that case, the court resolved the dispute based on state corporate principles, finding the

nonprofit corporation was chartered, establishing the governance of the diocese. This is significant for two reasons.

First, the articles of incorporation expressly proclaimed the purpose of incorporation was "to continue the operation of an Episcopal Diocese under the Constitution and Canons of The Protestant Episcopal Church in the United States of America." Under a plain reading of the articles, the stated purpose incorporates by reference its alignment with the National Church, thereby subordinating the Diocese to the constitution and canons of the National Church. This stated intent to align and subordinate to the National Church is further supported by the Legislature's expressed intention to allow religious doctrine to control over corporate form. *See* S.C. Code Ann. § 33-31-180 (2006) ("If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine controls to the extent required by the Constitution of the United States or the Constitution of South Carolina, or both."). As such, the nonprofit corporation and those acting on its behalf are subject to all oaths and canons of the National Church. The exception for religious governance is critical here; while the trial judge found, and Justice Kittredge agrees, that Bishop Lawrence and the Breakaway Diocese made legally effective changes to the nonprofit corporation, that result can be reached only by disregarding section

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attempts to amend the diocese's articles of incorporation and transfer property were ineffective. *Id.* at 65-67.

33-31-180 and relying on the default provisions of the nonprofit code. However, because the National Church has promulgated its own set of rules concerning corporate governance, including changes to the bylaws, section 33-31-180 requires that those rules trump the default provisions of the nonprofit corporate code. Thus, the actions of Bishop Lawrence and the Breakaway Diocese – which indisputably did not comply with the National Church's governing rules – must be deemed ineffective.[24]

Second, as the director of a nonprofit organization, the bishop owes a fiduciary duty of care, loyalty, and good faith to the Protestant Episcopal Church in the Diocese of South Carolina. *See* S.C. Code Ann. § 33-8-300 (2006); *see also Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 531, 744 S.E.2d 178, 183 (2013) ("The duty of loyalty requires corporate officers and directors

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[24] I must part company with Acting Justice Toal in her dogged effort to impose South Carolina civil law at any cost, which in my view runs roughshod over the National Church's religious autonomy and indeed, elevates the concept of neutral principles to heights heretofore unknown. My own view of the appropriate application of neutral principles would honor the constitutional mandate to not disturb matters of religious governance in order to maintain religious institutions' independence from state intrusions, a principle repeatedly described by the United States Supreme Court as radiating "a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, [the] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 185-86 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

act in the best interest of the corporation and prioritize the corporation's interest above their own."). It is troubling that the dissent would base its holding on the application of corporate law, yet at the same time inexplicably fail to consider Bishop Lawrence's derogation of his fiduciary duties. Bishop Lawrence's actions in this matter undermined the very organization he was charged (and swore an oath) to serve, thereby ignoring his prescribed fiduciary duties.[25] This is evidenced by his issuance and delivery of quitclaim deeds[26] to disassociated parishes and instruction to those parishes not to immediately record the deeds; seeking out "friendly bankers" to discreetly handle church assets; and executing a formal residential lease of the diocesan property to himself in his individual capacity. Bishop Lawrence's subterfuge took place over the course of several years, all the while keeping his actions secret from the National Church to which he had vowed his loyalty. Further, the act of amending the corporate form was not in the interest of the corporation because it was contrary to the constitution and

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[25] In fact, when questions arose surrounding Bishop Lawrence's loyalty to the National Church and jeopardizing his potential ordination, he expressly represented to the National Church his intention to abide by its doctrines and teachings. In a letter dated March 7, 2007, Bishop Lawrence wrote, "I will heartily make the vows conforming to the doctrine, discipline and worship of the Episcopal Church, as well as the trustworthiness of the holy scriptures. So to put it as clearly as I can, my intention is to remain in the Episcopal Church, period."

[26] Indeed, if Bishop Lawrence himself believed the National Church held no interest in the property of the various parishes, there would have been no reason for him to issue quitclaim deeds.

canons of the National Church. Based upon both the articles of incorporation and the fiduciary duty owed to the nonprofit corporation, Bishop Lawrence acted outside his scope and authority in direct violation of his oath, the canons, and corporate governance. Therefore, any attempts by Bishop Lawrence to unilaterally alter the Lower Diocese's relationship with the National Church cannot be given any effect.

CONCLUSION

Based on our doctrine of deference to ecclesiastical authority, the Appellants represent the true Lower Diocese of the Protestant Episcopal Church in South Carolina and are therefore entitled to all property, including Camp Saint Christopher and the emblems, seals, and trademarks associated with the National Church. This holding is based on the National Church's recognition of Charles vonRosenberg as its Bishop and the express trust imposed on Respondents' property by the Dennis Canon, as well as on state corporate law principles.[27]

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[27] To clarify the dissent's summary of this case's resolution, I join Acting Justice Pleicones and Chief Justice Beatty in reversing the trial court as to the twenty-nine parishes that documented their reaffirmation to the National Church, but Chief Justice Beatty joins Acting Justice Toal and Justice Kittredge with respect to the remaining seven parishes. Four justices agree that the Dennis Canon created an enforceable trust as envisioned in *Jones*, but Justice Kittredge departs from the majority and would find that the trust was revoked at the time of the schism. Moreover, though Acting Justice Pleicones and I believe ecclesiastical

CHIEF JUSTICE BEATTY: Given the divergent opinions, I am compelled to write separately because I believe my position is that of a centrist between the members of the Court. While I agree The Episcopal Church ("TEC") is hierarchical, I disagree with the analysis and much of the result reached by the majority. Instead, applying neutral principles of law, I would find those parishes that did not expressly accede to the Dennis Canon should retain ownership of the disputed real and personal property.[28] Consequently, I concur in part and dissent in part.

As evident by all of the well-written opinions, this case evokes strong views from each member of this Court. I cannot deny that each opinion is impassioned and persuasive. Although I appreciate the merits of each view, I do not believe that emotion or religious doctrine should control purely legal analysis. Rather, distilled to its simplest form, this case involves a property dispute. Thus, irrespective of the doctrinal context in which the case arose, this legal issue is our sole concern.

In resolving this issue, I am guided by the neutral principles of law approach enunciated in *All Saints* and *Jones* and aptly discussed by former Chief Justice

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deference is required in this case, both of our opinions find that all thirty-six parishes acceded to the Dennis Canon such that a legally cognizable trust was created in favor of the National Church.

[28] I express no opinion concerning the rights to the service marks as I believe this determination should remain with the federal court.

Toal. *See All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 444, 685 S.E.2d 163, 172 (2009) (applying neutral principles of law in disputes arising between a congregation and its denomination over title to church property and between the congregation's members over corporate control; stating, "the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes"); *Jones v. Wolf*, 443 U.S. 595, 603-04 (1979) (holding that a state is constitutionally entitled to adopt neutral principles of law approach as a means of adjudicating church disputes; recognizing that "[t]he primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organizations and polity").

Based on the neutral principles of law approach, I believe our analysis requires a discussion of the following sequential questions: (1) what is the legal efficacy of the Dennis Canon?; (2) does accession to the Dennis Canon equate to a creation of a legally cognizable trust?; and (3) what is the import of a decision not to accede to the Dennis Canon?

The answer to each of these questions is not dependent on the doctrinal validity of the Dennis Canon or a determination that TEC is hierarchical. In fact, I look no further than our state's property and trust laws to determine whether the purported trust created by the Dennis Canon comports with the requirements of either an express or constructive trust.

Although this writing arguably complies with the statute of frauds, like Justice Toal, I would find that, standing alone, it is not sufficient to transfer title of property or create an express or constructive trust under South Carolina law. *See* S.C. Code Ann. § 62-7-402(a)(2) (2015) ("To be valid, a trust of real property, created by transfer in trust or by declaration of trust, must be proved by some writing signed by the party creating the trust. A transfer in trust of personal property does not require written evidence, but must be proven by clear and convincing evidence, pursuant to Section 62-7-407."). Significantly, in the instant case, the party attempting to create the trust was not the settlor. Instead, TEC was merely the drafter of the Dennis Canon as it had no interest in the property intended to comprise the corpus of the trust. Admittedly, there is no requirement that the drafter of a trust agreement be the settlor; however, in the absence of this status, TEC was nothing more than a demanding scrivener.

Further, in my view, the Dennis Canon, by itself, does not have the force and effect to transfer ownership of property as it is not the "legally cognizable form" required by *Jones*. *See Jones*, 443 U.S. at 606 (recognizing that courts must give effect to churches' intent when deeds and trust documents executed by the general church "provided [the documents] are embodied in some legally cognizable form"). While the Dennis Canon may use the term "trust," this word alone does not unequivocally convey an intention to transfer ownership of property to the national church or create an

express or constructive trust. *See Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) ("In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal.").

Yet, TEC argues that the parishes' accession to the Dennis Canon created the trust. Assuming that each parish acceded in writing, I would agree. In my view, the Dennis Canon had no effect until acceded to in writing by the individual parishes.

Thus, in contrast to the majority, I would find the parishes that did not expressly accede to the Dennis Canon cannot be divested of their property. Because there was no writing purporting to create a trust and they took no other legal action to transfer ownership of their property, I believe these parishes merely promised allegiance to the hierarchical national church. Without more, this promise cannot deprive them of their ownership rights in their property. However, I agree with the majority as to the disposition of the remaining parishes because their express accession to the Dennis Canon was sufficient to create an irrevocable trust.[29]

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[29] Additionally, I would find "The Trustees of the Protestant Episcopal Church" in the Diocese of South Carolina should retain title to Camp St. Christopher as my decision in no way alters the clear language of the 1951 deed conveying ownership of this property. The conveyance of Camp St. Christopher was for the explicit purpose of furthering "the welfare of the Protestant Episcopal Diocese of South Carolina." In my view, the disassociated diocese can make no claim to being the successor to the Protestant Episcopal Church in the Diocese of South Carolina.

In conclusion, I readily acknowledge the controversy surrounding this case and the ramifications of the Court's decision. Even so, my decision cannot be driven by personal beliefs or a desired result. Strictly applying neutral principles of law, which I believe this property dispute mandates, I would affirm in part and reverse in part the order of the circuit court.

JUSTICE KITTREDGE: Because I believe the proper application of "neutral principles of law," as enunciated in *Jones v. Wolf*,[30] demands that all thirty-six local parishes retain ownership and control of their property, I would affirm the trial court in result.[31]

This Court may – indeed, must – resolve this property dispute on the basis of civil law, without regard to religious doctrine or practice.[32] I first address the twenty-eight local churches that acceded in writing to

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[30] 443 U.S. 595 (1979).

[31] I join Justice Toal's opinion, save for Part II.C.1's conclusion that no trusts were created as to the twenty-eight churches that acceded to the 1979 Dennis Canon.

[32] By framing the issue before the Court as being which diocese is the "true" diocese of the national church, the lead opinion and concurrence preordain the result, for that is a question this Court clearly lacks authority to answer. *See id.* at 602, 99 S.Ct. 3020 ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."). Moreover, quoting from a case cited by Justice Hearn, "recognizing the Episcopal Church as hierarchical does not resolve a property dispute such as the one here." *Diocese of San Joaquin v. Gunner*, 202 Cal. Rptr. 3d 51, 63 (Ct. App. 2016).

the 1979 Dennis Canon. Justice Toal presents a scholarly analysis of South Carolina trust law. I take no exception to her presentation of general trust-law principles, and I join Justice Toal in result. However, for reasons I explain below, it seems to me that *Jones v. Wolf* creates some uncertainty as to what "neutral principles of law" means in the context of a church property dispute. As a result, I am not persuaded that a court may, within constitutional boundaries, simply apply general state trust law to decide this case. As best as I can interpret and apply *Jones v. Wolf*, it is my view that a trust was created as to the property of the local churches that acceded to the 1979 Dennis Canon. In what appears to be a pure application of neutral principles of law, Justice Toal would hold that accession to the 1979 Dennis Canon "was not a legally binding action to impose a trust under South Carolina law." While I agree the national church could not unilaterally declare a trust over the property of the local churches, I would join Chief Justice Beatty and hold that the local churches' accession to the 1979 Dennis Canon was sufficient to create a trust in favor of the national church. *See Jones v. Wolf*, 443 U.S. 595, 606 (1979) (noting that courts must give effect to churches' intent when churches structure property arrangements "in some legally cognizable form").

I focus my comments on express trusts in light of First and Fourteenth Amendment considerations, for that is the basis on which the national church seeks to acquire control over the property of the local churches. I do not depart from Justice Toal's position lightly, for

she faithfully interprets South Carolina's trust law as it applies to typical property disputes. Were the Court in the instant case permitted to apply the law of express trusts as we ordinarily would, the suggestion that *any* of the thirty-six local churches created a trust in favor of the national church would be laughable. Yet I find *Jones v. Wolf* teaches that a court must treat religious organizations differently in accordance with constitutional limitations and considerations. The burden the law imposes on a religious organization in creating a trust is reduced.

In resolving church property disputes, we learn from *Jones v. Wolf* that "neutral principles of law" is a bit of a misnomer, for it is not really "neutral" after all. If it were, why would the Supreme Court have taken pains to mandate that the burden imposed on a religious organization be "minimal"? *See id.* at 606. And why would the Supreme Court have specified ways churches could establish an express trust, without indicating concern for whether those methods were valid under any state's existing trust law? *See id.* at 603. I believe where there is a dispute involving a local church's property rights *vis a vis* a national religious society and an affiliated local religious body, constitutional considerations require courts to analyze and resolve the property dispute through the framework of a "minimal burden" on the national religious organization. *See id.* at 606.

Two passages from *Jones v. Wolf* lead me to this conclusion. First, the Court in *Jones v. Wolf* spoke

forcefully about the many advantages of the neutral principles of law approach:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, *well-established* concepts of trust and property law *familiar to lawyers and judges*. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general – flexibility in ordering private rights and obligations to reflect the intentions of the parties. *Through appropriate reversionary clauses and trust provisions*, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy.

Id. at 603 (emphasis added).

If this were the sum total of what *Jones v. Wolf* said about neutral principles, I would without hesitation join Justice Toal in full. But the *Jones v. Wolf* Court went further. Specifically, the majority in *Jones v. Wolf* addressed the dissent, which preferred a rule of compulsory deference.[33] In declining to mandate a rule of

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[33] In my view, Justices Pleicones and Hearn cast their votes based on the rule of compulsory deference that was rejected in

compulsory deference, the Court rejected the dissent's argument that the neutral-principles method would frustrate the free-exercise rights of the members of a religious organization. The Court explained:

> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal.* And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in *some legally cognizable form*.

Id. at 606 (emphasis added). It is this passage in particular that causes me to part company with Justice

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Jones v. Wolf. *See id.* at 604-05 (noting the dissent in that case "would insist as a matter of constitutional law that whenever a dispute arises over the ownership of church property, civil courts must defer to the authoritative resolution of the dispute within the church itself" (internal quotation marks omitted)).

Toal's adherence to the normal rules of the road concerning the creation of express trusts.

As I interpret the above passages, *Jones v. Wolf* imposes a minimal burden on a national religious institution in the creation of what courts must recognize as an express trust over the property of an affiliated local church. Thus, while general principles of law mark the starting point in resolving a church property dispute, the harder question is determining where to draw the finish line – just how much of the general law must a religious organization follow?

Here, as Justice Toal forcefully points out, the national church turns the law of express trusts on its head, as no local church (as "settlor") took steps to create a trust, but merely responded to ("acceded" to) changes to church governance documents proposed by the national church. Nonetheless, given the Supreme Court's imprimatur concerning the minimal burden that may be imposed on a religious organization, I conclude that a trust was created in favor of the national church over the property of the twenty-eight local churches that acceded in writing to the 1979 Dennis Canon.

The next question is whether these twenty-eight churches were irrevocably bound by the 1979 Dennis Canon. The national church accepted the invitation of *Jones v. Wolf* and created the equivalent of an express trust with a minimal burden. If the national church had followed state law as described by Justice Toal and actually created an express trust in the normal course,

the national church would have a strong argument on the issue of revocability. But the national church cannot escape the method and manner in which it chose to create a trust, that is, by placing the trust provision in a church governance document that is inherently amendable.

Justice Hearn invokes what she calls the "common law default rule of irrevocability" to argue that the local churches were eternally bound by the 1979 Dennis Canon. However, this "default rule" is a presumption that is susceptible of evidence of a contrary intent. In my judgment, as explained below, the circumstances here overcome the presumption of irrevocability.

"If the meaning of the trust instrument is uncertain or ambiguous as to whether the settlor intended to reserve a power of revocation, evidence of the circumstances under which the trust was created is admissible to determine its interpretation." Restatement (Second) of Trusts § 330 cmt. b (1959). Among the factors that could indicate a settlor intended to reserve a right of revocation are the character of the trust property, the relationship between the settlor and the beneficiary, and the reasons that induced the settlor to create the trust. *E.g.*, *id.* §§ 330 cmt. c, 332 cmt. a (1959). I believe these factors militate in favor of the trust's revocability.[34] The disputed property includes

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[34] I note that there is significantly less justification for adhering to the common law presumption of irrevocability where, as in this case, it is not consistent with the rationale behind the presumption – "[t]he theory . . . that most trusts are created by way of gift and a completed gift may not be rescinded by the donor

land and buildings to which the local churches have long held title, in some cases for centuries. And the impetus to create the trust came not from the settlors (the local churches), but the beneficiary (the national church). Furthermore, I would not myopically invoke the common law presumption of irrevocability where, as here, the national organization seeking to impose the trust placed the trust language in a document that is by its very nature subject to amendment. As the legislature observed in a comment to the South Carolina Trust Code, "An unrestricted power to amend may also include the power to revoke a trust." S.C. Code Ann. § 62-7-602 reporter's cmt. (Supp. 2016).

In my view the circumstances described above – a trust provision drafted by a beneficiary and placed in an amendable church governance document – combine to overcome the common law presumption of irrevocability. As a result, I would hold as a matter of South Carolina law that under these facts the local churches were not forever bound by the trust provision, and they retained the authority to withdraw their accession to it.[35] That is precisely what they did – through proper

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merely by reason of a change of mind." Mary F. Radford, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 998, at 235 (3d ed. 2006). Here, the trust was clearly not intended to effectuate a gift *to* the beneficiary (the national church); rather, the trust was drafted *by* the national church (the beneficiary) to benefit the national church. In addition, the settlors (the local churches) retained ownership of and continued to exercise exclusive control over the property.

[35] I reject any argument that the national church would be required to consent to any amendment of the trust provision, for the national church would never consent and the result would be

action, by those with proper authority, the Diocese and local churches withdrew their accession to the 1979 Dennis Canon in accordance with state law prior to the filing of this litigation.[36] Therefore, I would affirm the trial court in result and hold that those churches that

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a de facto irrevocable trust. Chief Justice Beatty accurately describes the national church as "nothing more than a demanding scrivener." Allowing the national church to invoke the "minimal burden" approach of *Jones v. Wolf* in the creation of a trust is not a license to completely turn our back to neutral principles of law. If it is determined that a settlor retains the right to revoke a trust and the manner of revocation is not specified, the trust may be revoked "'*in any manner* which shows a clear and definite purpose *on the part of the settlor* of the trust to revoke the same.'" *Peoples Nat'l Bank of Greenville v. Peden*, 229 S.C. 167, 171, 92 S.E.2d 163, 165 (1956) (emphasis added) (quoting *Broga v. Rome Tr. Co.*, 272 N.Y.S. 101, 106 (Sup. Ct. 1934)); *see also* S.C. Code Ann. § 62-7-602 reporter's cmt. ("Where the right to revoke [is] reserved and no particular mode [is] specified, any mode sufficiently showing an intention to revoke [is] effective.").

[36] There is no question that Bishop Lawrence and the local churches had the *legal* authority at the time to take the actions they did. Justice Hearn's reliance on *Diocese of San Joaquin v. Gunner* is misplaced. In that case the attempted transfers of diocesan property by Bishop Schofield were ineffective because they "occurred after Schofield had been removed as bishop of the Diocese." *Diocese of San Joaquin*, 202 Cal. Rptr. 3d at 59. Not only that, but the entity to which Bishop Schofield attempted to transfer the property did not exist because he lacked authority under California law to change the diocese's corporate name. *Id.* at 65-67. Conversely, notwithstanding the unrelenting vilification of Bishop Lawrence, it is manifest that Bishop Lawrence was duly ordained, appointed, and authorized to act at the time the property transfers and corporate amendments occurred, and they were conducted in accordance with South Carolina law.

had previously agreed to the 1979 Dennis Canon are no longer bound by it.[37]

I turn now to the eight churches that *never* acceded to the 1979 Dennis Canon. Today, this Court allows (by a three-to-two vote with Chief Justice Beatty casting the deciding vote) the eight churches that were never subject to the 1979 Dennis Canon to keep their property. That is remarkable, for by a single vote the rule of law is preserved and property ownership is protected.

Prior to today's opinion, the national church's focus in this property dispute has been whether the 1979 Dennis Canon imposed an express trust on the property of the local churches. The national church throughout this litigation has relied on the 1979 Dennis Canon and the law of *express* trusts to support its claim of ownership over the church property of the thirty-six local parishes in question. But it is undisputed that eight of the local parishes were never subject to the 1979 Dennis Canon. Yet two members of this Court would go further and transfer to the national

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[37] Despite Justice Hearn's claim to the contrary, reaching this conclusion does not require me to ignore the Nonprofit Corporation Act's exception for religious organizations. *See* S.C. Code Ann. § 33-31-180 (2006). Section 33-31-180 grants supremacy to a religious corporation's governing documents only "to the extent required by the Constitution of the United States or the Constitution of South Carolina." *Id.* Therein lies the nub of this dispute, as "[t]he exact scope of constitutional [l]imitations is less than clear and is subject to debate." *Id.* § 33-31-180 official cmt. (2006). Justice Hearn and I simply disagree as to what the Constitution requires.

church ownership of the property of the eight churches that never agreed to the Dennis Canon. That is stunning. The effort by two members of this Court to strip the property from these eight churches confirms Justice Toal's observation concerning their motivation to "reach[ ] a desired result in *this* case."

I first address the concurrence's view that the Court may not even consider the status of the eight non-acceding churches on issue preservation grounds. The answer to this assertion is simple: "The appellate court may affirm any ruling, order, decision or judgment upon *any* ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR (emphasis added). The local churches, as winners at trial and respondents on appeal, were not required to play "what if we lose" in their briefs or during oral argument.

Moreover, as Justice Toal points out, the national church itself brought up the non-acceding churches. The national church acknowledged to this Court that only some of the thirty-six local churches involved in this litigation "made express promises in their governing documents to comply with the [n]ational [c]hurch's rules" after the national church adopted the 1979 Dennis Canon.[38] That obviously makes an issue out of the churches that did *not* make such promises. Although

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[38] The national church acknowledged in its brief that "29 of the 36 parishes made express promises in their governing documents to comply with the [n]ational [c]hurch's rules *after* those rules had been amended to include the Dennis Canon in 1979." Brief of Appellants at 38. The same point was repeated by the national church's counsel during oral argument.

the concurrence may feign surprise at a majority of this Court addressing the status of the eight non-acceding churches, the national church surely cannot.

As to the merits of the national church's claim to the property of the eight non-acceding churches, in my judgment the dissent on this issue (Justices Pleicones and Hearn) misreads the Supreme Court's *observation* in *Jones v. Wolf* that complying with state property and trust laws would not impose an undue free-exercise burden on religious organizations as a *command* that states completely ignore their existing laws to placate hierarchical national churches. Properly applied to the non-acceding churches, there is no neutral principle of law that supports the conclusion Justices Pleicones and Hearn desire. As Chief Justice Beatty and Justice Toal note in their respective opinions, the framework set forth in *Jones v. Wolf* makes clear that, because of well-established South Carolina law, an express trust[39]

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[39] I do not address constructive trusts, because *that* issue is not preserved for our review. The national church has relied exclusively on the law of express trusts throughout this litigation. The national church mentioned the term constructive trust just once in its fifty-one-page brief and not at all in its twenty-five-page reply brief. The sole reference to a constructive trust was a conclusory statement that "South Carolina's Trust Code and common law of constructive trusts" require the Court to enforce the Dennis Canon against all thirty-six parishes. Accordingly, the law of constructive trusts cannot serve as a basis to reverse the trial court. *See, e.g.*, *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014) (refusing to consider an argument in the appellant's brief that was "conclusory" and "not supported by any authority"); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting a claim is deemed abandoned when the appellant fails to support it

cannot be imposed on the property of those eight churches that never adopted the Dennis Canon. *See* S.C. Code Ann. § 62-7-401(a)(2) (Supp. 2016) (stating that express trusts in real property "must be proved by some writing signed by the party creating the trust"); *see also Beckham v. Short*, 298 S.C. 348, 349, 380 S.E.2d 826, 827 (1989) (noting that under the then-applicable statute, "trusts in lands not manifested and proved by some writing signed by the party declaring the trust are utterly void and of no effect" (citation and internal quotation marks omitted)).

Nonetheless, the national church, with two members of this Court in support, desires the property of these eight churches by virtue of a "trust" the churches never acceded to. In short, these eight churches have never agreed to anything in a "legally cognizable form" indicating the slightest intention of transferring ownership of their property. Yet if Justices Pleicones and Hearn had their way, these eight local churches would lose their property today. Under this approach, the 1979 Dennis Canon was unnecessary, for the national church would control the property of all local churches simply because the national church "said so." Perhaps

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with arguments or citations to authority); *cf. I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (stating that although an appellate court may *affirm* a decision on any ground appearing in the record, "[a]n appellate court may not, of course, *reverse* for any reason appearing in the record"). I add that the phrase "constructive trust" was never mentioned in the approximately hour-long oral argument before this Court. In any event, Justice Toal correctly explains why the law of constructive trusts provides no lifeline to the national church.

this explains the wisdom of the *Jones v. Wolf* majority in rejecting the rule of compulsory deference that Justices Pleicones and Hearn invoke today.

By a single vote, these eight local churches retain ownership of their property. The message is clear for churches in South Carolina that are affiliated in any manner with a national organization and have never lifted a finger to transfer control or ownership of their property – if you think your property ownership is secure, think again.

I dissent in part (concerning the twenty-eight churches) and concur in part (concerning the eight non-acceding churches).

ACTING JUSTICE TOAL: This is a very difficult dispute in which the trial court was asked by the plaintiffs to declare the status of title to church property. Just as the litigants in this matter are in disagreement about the legal issues raised in this case, so too our Court is sharply divided in our opinions about this matter. These divisions are the result of sincerely held views about the law, but we are united in our deep respect for each other's views and the sincerity which informs our opinions. The various writings are powerfully written and deeply researched. I am regretful that I cannot join my colleagues in the majority[40]

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[40] As there are five writings covering different aspects of this case, I refer to "the majority" when discussing the collective

whose legal ability I respect so highly. Therefore, I respectfully dissent.[41] With regard to the question of who owns the disputed real and personal property, I would hold that the plaintiffs are the title owners in fee simple absolute to this property under South Carolina law and would affirm the decision of the trial court. With regard to the question of whether the defendants infringed on the plaintiffs' service marks, I would narrowly affirm the trial court under state law and defer to the federal court to answer any issues in this matter in which federal copyright and trademark law may be applicable.

INTRODUCTION

The main points upon which I depart from my brothers and sister in the majority are as follows:

> (1) I would rely on over three hundred years of settled trust and property law in South Carolina to declare title to these disputed

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decisions of Chief Justice Beatty, Justice Hearn, and Acting Justice Pleicones.

[41] I likewise concur in the result reached by Justice Kittredge in his dissent. Justice Kittredge believes that in *Jones v. Wolf*, 443 U.S. 595 (1979), the United States Supreme Court dictated a national church need not strictly adhere to a state's neutral trust law to establish a cognizable property interest in its constituents' holdings. I cannot agree that complying with ordinary trust law requirements is overly burdensome, or that enforcing such requirements would violate the holding in *Jones*. However, Justice Kittredge nonetheless takes a reasoned approach to the applicability of our state's trust law in this instance. I therefore concur in the result he reaches.

properties in the plaintiffs' favor, as I believe the effect of the majority's decision is to strip a title owner of its property and give it to an organization with which the property owner has no affiliation, relying on documents and practices that do not create a trust under South Carolina law.

(2) The lead opinion and concurrence[42] (unsuccessfully) attempt to strip eight parishes of their titled property, despite the fact that these parishes have never agreed to or signed any document purporting to affect their ownership interests.

(3) I believe the lead opinion is not consistent with the provisions of South Carolina statutory law regarding the organization and management of non-profit and charitable corporations.

(4) I believe the lead opinion uses an equitable standard of review in this action which is not consistent with the pleadings in this matter, and thus, misstates the question before this Court.

(5) In my view, the lead opinion is contrary to settled First Amendment precedents from the United States Supreme Court.

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[42] For sake of clarity, I refer to Acting Justice Pleicones's opinion as the lead opinion and Justice Hearn's opinion as the concurrence. I refer to Chief Justice Beatty's opinion as the Chief Justice's partial concurrence. I refer to Justice Kittredge's dissent as the Kittredge dissent.

> (6) Although the lead opinion specifically relies on and upholds our prior precedents – most importantly *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 685 S.E.2d 163 (2009) – essentially the effect of its holding is to reverse the result in *All Saints*.

In my view, the result stemming from the majority's various decisions is a distinct departure from well-established South Carolina law and legal precedents, a departure which appears to be driven by a sole purpose: reaching a desired result in *this* case. However, the Court's decision here affects law governing *all* trusts and titles as well as the operation of *all* nonprofit and charitable corporations in this State. Thus, the effects of the majority's decision are sure to be pervasive, and for this reason, I feel compelled to write separately.

I. PARTIES AND POSTURE OF THE DISPUTE

The plaintiffs in this case are: (1) thirty-six individual church parishes, incorporated under South Carolina law and located in southeast South Carolina (the plaintiff parishes); (2) the Protestant Episcopal Church in the Diocese of South Carolina, a South Carolina corporation (the disassociated diocese); and (3) the Trustees of the Protestant Episcopal Church in South Carolina, a South Carolina corporation (the trustee corporation). It is undisputed that the individual plaintiff-parish corporations hold title in fee simple

absolute to their parish's real and personal property. It is also undisputed that the disassociated diocese is the title holder of its service marks, seals, and emblems; and that the trustee corporation holds title in fee simple absolute to Camp St. Christopher.

The defendants in this case are: (1) the National Episcopal Church, a voluntary unincorporated association (the national church); and (2) the Episcopal Church of South Carolina, a South Carolina corporation affiliated with the national church (the associated diocese). As to the relationship between the plaintiffs and defendants, the disassociated diocese was once a member of the national church, and the plaintiff parishes were and are affiliated with the now-disassociated diocese. The associated diocese is comprised of the parishioners and churches who chose to continue their association with the national church when the disassociated diocese disaffiliated from that organization.

Prior to the Revolutionary War, the South Carolina Commons House of Assembly created colonial parishes as part of the Church Act, granting the parishes both civil and ecclesiastical powers over the land and people. These colonial parishes were part of the Church of England, under the authority of the Bishop of London. However, the Church of England did not pay for the services provided to parishioners, nor did it pay for the properties used by the churches located within the parishes. Rather, the various colonial churches were locally funded, and the properties associated with them were titled in the local churches' names.

In 1778, the first state constitution disestablished the Church of England as the state church and empowered existing parishes to petition the legislature for incorporation. The local churches previously under the aegis of the Church of England disassociated from that Church, and many sought to be legislatively incorporated.

Later, in 1785, the disassociated diocese formed as an unincorporated association of former Anglican churches. In 1786, the twelve churches that then comprised the disassociated diocese adopted the first diocesan constitution.[43] In this constitution, the churches – some of which predated the formation of the diocese by more than 100 years – reaffirmed that they wished to remain independent from the Church of England in ecclesiastical and civil matters.[44] Three years later, in 1789, the disassociated diocese and six other states'

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[43] These churches included St. Philip's Church, Charleston; St. Michael's Church, Charleston; Prince Frederick, Plantersville; St. James' Church, Goose Creek; St. Thomas' Church, Berkeley County; St. Bartholomew's Church, Jacksonboro; Prince William's Church, Beaufort County; St. Andrew's Church, Mt. Pleasant; the Church of the Parish of St. Helena, Beaufort; the Episcopal Church of the Parish of Prince George Winyah, Georgetown; St. John's Parish, Colleton County; and the Episcopal Church of Christ Church Parish, Mt. Pleasant. Some of these churches are parties to this action.

[44] Thus, these plaintiff parishes did not transfer title to their properties to the disassociated diocese.

dioceses founded and voluntarily associated with the national church under terms dictated by the dioceses.[45]

Except for a five year hiatus during the Civil War,[46] the disassociated diocese continued its voluntary association with the national church until October 2012. Throughout the history of the disassociated diocese's voluntary association with the national church, the plaintiff parishes likewise voluntarily associated with the disassociated diocese, and therefore, were only affiliated with the national church through their membership in the diocese. Both before and after the association, the plaintiff parishes and their parishioners worshipped on property titled in the individual parishes' names, which the parishes owned in fee simple. Moreover, for as long as the disassociated diocese was affiliated with the national church, the national church and its dioceses, including the disassociated diocese, implemented various changes in their respective constitutions and canons, which are the governing documents for the organizations.

In 1973, the disassociated diocese incorporated, becoming a non-profit corporation. Initially, the diocese's corporate purpose was "to continue the operation of an Episcopal Diocese under the Constitution and Canons of [the national church]." Similarly, the trustee corporation's initial bylaws stated that it would carry

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[45] These states included New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and South Carolina.

[46] Title to the properties owned by the disassociated diocese and its churches did not change hands either before or after the Civil War.

out its duties under the authority of the national church's constitution and canons. Likewise, many of the individual plaintiff parishes had similar provisions in their governing documents.

In 1979, the national church enacted the so-called "Dennis Canon," which reads:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitution and Canons.

In 1987, the disassociated diocese adopted its own version of the Dennis Canon.[47] The defendants contend that twenty-eight of the plaintiff parishes "acceded," in some form or another, either to the local or national

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[47] That version of the Dennis Canon states: "All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for [the national church] *and the [disassociated diocese]*. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission, or Congregation existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject to, [the national church] *and the [disassociated diocese]*." (Emphasis added).

version of the Dennis Canon.[48] Eight of the plaintiff parishes never acceded to either Dennis Canon.[49] In all cases, however, the defendants concede that no formal trust documents were ever executed by the plaintiff parishes, the disassociated diocese, or the trustee corporation in favor of the national church specifying the title holder as the settlor or creator of the trust and the national church as the *cestui que* trust or holder of the beneficial title of the trust. Instead, the defendants maintain that the Dennis Canon and other specific actions of the plaintiffs in amending their governing documents throughout their history (including before the existence of the Dennis Canon) "imposed" a trust in favor of the defendants.

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[48] Some of these "accessions" occurred before the 1979 proclamation of the Dennis Canon by the national church. Some occurred before 1987 when the now-disassociated diocese adopted its own version of the Dennis Canon. Some occurred after both actions.

[49] The defendants do not reference any documentation of accession (and I have found none in the record) for the following plaintiff parishes: Christ the King, Waccamaw; St. Matthews Church, Darlington; St. Andrews Church-Mt. Pleasant Land Trust; St. Paul's Episcopal Church of Conway; The Episcopal Church of the Parish of Prince George Winyah, Georgetown; the Parish of St. Andrew, Mt. Pleasant; St. John's Episcopal Church of Florence; and St. Matthias Episcopal Church, Summerton. The defendants contend that St. Matthias and St. John's in effect "acceded" to the Dennis Canon because each was deeded some real property by the now-disassociated diocese that contained language tantamount to accession. However, neither of these churches ever directly acceded to the local or national version of the Dennis Canon, and the disassociated diocese disclaimed any interest in these churches' real property by quitclaim.

In 2009, with the General Convention's approval, Bishop Lawrence became the ecclesiastical head of the now-disassociated diocese. Shortly thereafter, a doctrinal dispute concerning marriage and the priesthood developed between the national church and the disassociated diocese, resulting in what was described as a "cold war" between the entities.

As a result, the disassociated diocese, the trustee corporation, and the plaintiff parishes began to make significant changes to their corporate organizational structures and governing documents, in accordance with the civil laws by which the disassociated diocese and the national church structured its affairs in South Carolina. For example, in March 2010, the trustee corporation amended its bylaws to remove all references and accessions to the national church's constitution and canons. Similarly, in October 2010 and February 2011, the disassociated diocese amended its constitution and canons to remove its accession to the Dennis Canon and other canons of the national church, and to adopt a new corporate purpose: "to continue operation under the Constitution and Canons of [the disassociated diocese]." While these changes were being made, Bishop Lawrence was the duly-elected (by the national church) corporate officer empowered with the authority to undertake these actions in South Carolina under state law.[50]

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[50] To the extent Justice Hearn's concurrence focuses on the alleged nefarious motives and actions of Bishop Lawrence and other parish officers and members of the disassociated diocese, as will be explained, *infra*, it is my opinion that such examination

During the same time period, the disassociated diocese issued a series of quitclaim deeds to the plaintiff parishes, disclaiming any interest it might have in the plaintiff parishes' properties. Further, the disassociated diocese applied to South Carolina's Secretary of State to register five "service marks"[51]: three similar names for the disassociated diocese, and two pictures of the diocesan seal.[52] All of the amendments and registrations were accomplished through publicly-recorded legal documents. Additionally, at some point during this time, the national church had actual knowledge of these changes, but chose not to revoke Bishop Lawrence's authority within the church.

In September 2012, the national church's disciplinary board found that Bishop Lawrence had abandoned the national church, and recommended disciplinary action against him. On October 17, 2012, upon discovering the disciplinary board's recommendation to sanction Bishop Lawrence, the disassociated diocese ended its association with the national church.

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and recitation is inappropriate. Because I believe this dispute should be resolved on neutral principles of law, reliance on this ecclesiastical and doctrinal background is improper to resolving this dispute.

[51] Service marks are similar to trademarks, but whereas trademarks identify and distinguish a person's or business's *goods*, service marks identify and distinguish a person's or business's *services*. *Compare* S.C. Code Ann. § 39-5-1105(7) (1976) (defining "service mark"), *with* S.C. Code Ann. § 39-5-1105(9) (1976) (defining "trademark").

[52] In 2011, several of the plaintiff parishes also registered service marks.

The disassociated diocese's standing committee then amended its corporate bylaws to add provisions prohibiting anyone from challenging the authority of the board of directors or removing any member of the board, including Bishop Lawrence, except by the process provided in the diocesan bylaws.

Thereafter, loyalists within the disassociated diocese who remained committed to the teachings of the national church called a meeting.[53] At this meeting, the defendants discussed replacing the disassociated diocese with a newly-created diocese – the associated diocese – and placing Bishop Charles vonRosenberg at its helm.

On November 17, 2012, the disassociated diocese held a Special Convention, at which the plaintiff parishes and their clergy overwhelmingly voted to affirm the diocese's disaffiliation from the national church, as well as voting to remove the diocese's accession to the national church's constitution. On January 26, 2013, following the national church's acceptance of Bishop Lawrence's renunciation of orders,[54] the associated diocese was created and subsequently voted to reverse most of the changes made to the disassociated diocese's

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[53] The defendants called the meeting by emailing clergy from the disassociated diocese and inviting them to a clergy day purportedly sponsored by the disassociated diocese. This is just one of several instances in which the plaintiffs claim the defendants improperly used the disassociated diocese's registered name and seal without permission.

[54] Bishop Lawrence contends that he never renounced his orders.

constitution and canons. That same date, Bishop vonRosenberg was officially installed as the national church's bishop to the associated diocese.

After the plaintiffs withdrew from the national church, the defendants claimed ownership over all of the property held by the plaintiffs, arguing the plaintiffs only held such property in trust for the benefit of the national church and its associated diocese, and that the associated diocese was entitled to control and govern the assets belonging to the plaintiffs because the plaintiffs acceded to the Dennis Canon.

II. Real and Personal Property

The question here is ultimately simple: what entities – the plaintiffs or the defendants – own the real and personal property at issue? I fundamentally disagree with how the lead opinion and concurrence answer that question, as we are not asked to determine the "legitimacy" of either diocese, nor are we permitted to do so by the United States Constitution or South Carolina law.

A. Standard of Review

First, I strongly disagree with the lead opinion's statement of the standard of review. The lead opinion contends that because the plaintiffs are seeking injunctive relief, this is an equitable matter. As a result, the lead opinion finds the Court is free to take its own view of the facts.

However, by the terms of their complaint, the plaintiffs seek a declaratory judgment as to the rightful ownership, under South Carolina law, of the real, personal, and intellectual property of the disassociated diocese, the plaintiff parishes, and the trustee corporation.[55] The plaintiffs' request for injunctive relief is clearly confined to the defendants' use of the plaintiffs' names, seals, and emblems – which, as I explain further, *infra*, is ultimately a question of federal law.

"A suit for declaratory judgment is neither legal nor equitable; rather, it is determined by the nature of the underlying issue." *Sloan v. Greenville Hosp. Sys.*, 388 S.C. 152, 157, 694 S.E.2d 532, 534 (2010). Rather than looking to the relief sought, appellate courts must

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[55] Specifically, the opening paragraph of the plaintiffs' second amended complaint states:

> Plaintiffs, by and through their respective undersigned counsel, bring this action against the Defendants seeking a declaratory judgment pursuant to §§ 15-53-10 et seq. of the South Carolina Code of Laws (1976) that they are the sole owners of their respective real and personal property in which the Defendants, The Episcopal Church ("TEC") has no legal, beneficial or equitable interest. The Plaintiffs (except for St. Andrew's Church, Mt. Pleasant) also seek a declaratory judgment that the Defendants and those under their control have improperly used and may not continue to use any of the names, styles, seals and emblems of any of the Plaintiffs or any imitations or substantially similar names, styles, seals and emblems and that the Court enter injunctions prohibiting the Defendants and those under their control from such uses pursuant to §§ 39-15-1105 et seq. and §§ 16-17-310 and 320 of the South Carolina Code of Laws (1976).

look to the "main purpose" of the underlying issue to determine whether the action is at law or in equity. *Verenes v. Alvanos*, 387 S.C. 11, 16, 690 S.E.2d 771, 773 (2010); *Sloan v. Greenville Cnty.*, 356 S.C. 531, 544, 590 S.E.2d 338, 345 (Ct. App. 2003).

Here, the central issue of this dispute (as succinctly put by the lead opinion) is the determination of title to real property. Therefore, the action is one at law. *See Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006) ("Where, as here, the main purpose of the [declaratory judgment action] concerns the determination of title to real property, it is an action at law."); *see also Wigfall v. Fobbs*, 295 S.C. 59, 60, 367 S.E.2d 156, 157 (1988) ("The determination of title to real property is a legal issue."). In an action at law tried without a jury, this Court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013). "However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard." *Id.*

It is abundantly clear from the pleadings that the main purpose of this declaratory judgment action is the determination of title to real property. Thus, under South Carolina's jurisprudence, this is an action at law, and we must defer to the trial court's factual findings unless wholly unsupported by the evidence.

B. First Amendment Jurisprudence

The Establishment 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; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating the Establishment Clause applies to the States through the Fourteenth Amendment). Undeniably, "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). More specifically, "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian E. Orthodox Diocese for the U.S. & Canada v. Milivojevich*, 426 U.S. 696, 709-10 (1976); *Presbyterian Church*, 393 U.S. at 447 (discussing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871)); *accord Banks v. St. Matthew Baptist Church*, 406 S.C. 156, 160, 750 S.E.2d 605, 607 (2013) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). In other words, civil courts may not inquire into matters touching on "'theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.'" *Serbian E. Orthodox*, 426 U.S. at 713-14 (quoting *Watson*, 80 U.S. (13 Wall.) at 733).

However, "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment." *Presbyterian Church*, 393 U.S. at 449; *see also Jones*, 443 U.S. at 605 (rejecting the suggestion that the First Amendment requires states to adopt a compulsory rule of deference to religious authorities in resolving church property disputes when the dispute does not involve a doctrinal controversy). Instead, "a [s]tate may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Jones*, 443 U.S. at 602 (emphasis in original) (citing *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (per curiam) (Brennan, J., concurring)).

Thus far, the Supreme Court has expressly sanctioned two constitutionally permissible approaches for resolving church disputes: the deference approach and the neutral principles of law approach. *See All Saints*, 385 S.C. at 442, 685 S.E.2d at 171. Under the deference approach, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." *Watson*, 80 U.S. (13 Wall.) at 727; *see also Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Emp't Opportunity Comm'n*, 565 U.S. 171, 185-86 (2012). The deference approach used to be

the only approach taken by courts to resolve church disputes. *All Saints*, 385 S.C. at 443, 685 S.E.2d at 171. However, as First Amendment jurisprudence developed, criticism of a pure deference approach arose because the approach "is rigid in its application and does not give efficacy to the neutral, civil legal documents and principles with which religious congregations and denominations often organize their affairs." *See, e.g.*, *id.* at 444, 685 S.E.2d at 171.

As an alternative, in *Jones v. Wolf*, the United States Supreme Court explicitly sanctioned the neutral principles of law approach to resolving church disputes. 443 U.S. at 603 (holding a state is constitutionally entitled to adopt the neutral principles of law approach as a means of adjudicating church disputes); *accord Presbyterian Church*, 393 U.S. at 449 ("[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded.").

> Under the neutral principles methodology, ownership of disputed property is determined by applying generally applicable law and legal principles. That application will usually include considering evidence such as deeds to the properties, terms of the local church charter (including articles of incorporation and [bylaws], if any), and relevant provisions of governing documents of the general church.

Masterson v. Diocese of Nw. Tex., 422 S.W.3d 594, 603 (Tex. 2014). In *Jones*, the Supreme Court explained:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general – flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

443 U.S. at 603-04. At the most basic level, the neutral principles approach embodies notions of fairness, as churches – like other private and public entities – can avail themselves of the protections of our state and local laws,[56] and therefore, should be on an equal playing field when disputes arise under those laws. As far back

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[56] Here, the plaintiffs utilized local deed recordation systems and organized as corporations under state law.

as 1871 in *Watson* – which was the architect of the deference approach as we know it – the United States Supreme Court acknowledged this basic principle of fairness:

> Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, . . . we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.

80 U.S. (13 Wall.) at 714.

In *Pearson v. Church of God*, this Court first adopted the neutral principles approach. 325 S.C. 45, 478 S.E.2d 849 (1996). There, the Court articulated three general principles to assist the courts when resolving civil disputes involving a church. *Id.* at 52-53, 478 S.E.2d at 853. First, "courts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration." *Id.* at 52, 478 S.E.2d at 853. Second, "courts cannot avoid adjudicating rights growing out of civil law," such as disputes determined by contract or property law. *Id.* at 52 & n.3, 478 S.E.2d at 853 & n.3. Third, "in resolving such civil

law disputes, courts must accept as final and binding the decisions of the highest religious judicatories as to religious law, principle, doctrine, discipline, custom, and administration." *Id.* at 52-53, 478 S.E.2d at 853; *see also Jones*, 443 U.S. at 602; *Serbian E. Orthodox*, 426 U.S. at 724-25.

Prior to *Pearson*, this Court issued decisions resolving property matters using a purely deferential sapproach.[57] However, following *Pearson*'s pronouncements, South Carolina evolved into a State that exclusively applies a neutral principles approach to matters involving *secular* church disputes – and not just property disputes. *See, e.g.*, *All Saints*, 385 S.C. at 442, 685 S.E.2d at 170 (applying neutral principles of law in disputes arising between a congregation and its denomination over title to church property and between the congregation's members over corporate control); *Pearson*, 325 S.C. at 45, 478 S.E.2d at 849 (applying neutral principles of law in a contractual pension dispute); *see also Banks*, 406 S.C. at 156, 750 S.E.2d at 605 (effectively applying neutral principles of tort law to a dispute between church trustees and the church pastor when deciding that the trustees' claims of negligence, defamation, and intentional infliction of emotional distress could be litigated in a civil court).

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[57] *See, e.g.*, *Seldon v. Singletary*, 284 S.C. 148, 326 S.E.2d 147 (1985) (deferring to hierarchical authority of the church in case involving ownership and control of church property); *Adickes v. Adkins*, 264 S.C. 394, 215 S.E.2d 442 (1975) (same); *Bramlett v. Young*, 229 S.C. 519, 93 S.E.2d 873 (1956) (same).

Under the current analysis, a court must first determine if the dispute is ecclesiastical or secular.[58] If the dispute is secular in nature, we have – until now – applied the neutral principles approach. *See id.* If the dispute is ecclesiastical in nature, we have applied the deference approach. *See Knotts v. Williams*, 319 S.C. 473, 478, 462 S.E.2d 288, 291 (1995) (finding in a dispute about the ecclesiastical leadership of a church that "the courts' function is solely limited to interpreting the final action of the church"); *accord Pearson*, 325 S.C. at 52, 478 S.E.2d at 853 (stating "courts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration").

Only after deciding that the dispute is ecclesiastical should a court consider whether the church is hierarchical or congregational,[59] and then defer to the decision of the highest authority in that body to resolve the dispute. *See Pearson*, 325 S.C. at 53 n.4, 478 S.E.2d at 853 n.4 ("In religious organizations of a hierarchical nature, courts would interpret the final actions of the highest ecclesiastical tribunal or body. In religious organizations of a congregational nature, courts would interpret the final actions of the majority of congregations.").[60] Thus, ordinarily, if a dispute is deemed to be

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[58] The lead opinion agrees this is the correct starting-point in the analysis.

[59] *See generally Md. & Va. Eldership*, 396 U.S. at 369 n.1 (Brennan, J., concurring) (defining hierarchical and congregational organizations).

[60] The lead opinion criticizes *All Saints*, claiming it stands for the proposition that "the 'neutral principles of law' approach require[s] that in order for a civil court to determine whether a

a secular civil dispute, the question of whether a church is hierarchical or congregational does not even factor into the analysis. *See All Saints*, 385 S.C. at 444, 685 S.E.2d at 172 ("Church disputes that are resolved under the neutral principles of law approach do not turn on the single question of whether a church is congregational or hierarchical. Rather, the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes.").

Although the lead opinion states that it relies on this well-established framework, the lead opinion does not actually apply it. In fact, in both of their analyses, the lead opinion and the concurrence do not first consider the nature of the cause of action, instead skipping straight to making a factual pronouncement that the national church is hierarchical.[61] In so doing, both

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church-related dispute could be adjudicated in that forum, the court must look **only** at state corporate and property law, ignoring the ecclesiastical context entirely." This is a gross misstatement of the legal framework created by *Pearson* and perpetuated by the *All Saints* decision, in that both opinions clearly state that South Carolina still uses deference when appropriate – just not with respect to secular civil matters.

[61] As stated previously, I believe the lead opinion's exercise in fact-finding is wholly inappropriate under the proper "any evidence" standard of review, conveniently cast aside by the lead opinion to benefit its analysis. Under the correct standard of review, we are required to uphold the trial court's finding that the structure of the national church is ambiguous due to displaying aspects of both a hierarchical and congregational organization. In cases "where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy," the United States Supreme Court has declared that

opinions persist in committing a fundamental analytical error: failing to first assess the nature of the dispute itself. By applying the framework in reverse order and declaring the church hierarchical as an initial matter, it is the lead opinion and concurrence themselves that imbue this dispute with ecclesiastical qualities, because the finding carries with it the implication that all decisions with respect to this dispute over property ownership flow from this leadership structure. Thus, the lead opinion and concurrence essentially gut the neutral principles approach so carefully

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"civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy." *Md. & Va. Eldership*, 396 U.S. at 369-70 & n.4 (1970) (Brennan, J., concurring) (explaining that even when courts employ the deference approach and attempt to enforce the decision made by the highest ecclesiastical authority in a church, those courts "would have to find another ground for decision, *perhaps the application of general property law*, when identification of the relevant church governing body is impossible without immersion in doctrinal issues or extensive inquiry into church polity" (emphasis added)); *see also Jones*, 443 U.S. at 605 (stating that the deference approach is inappropriate when the locus of control is ambiguous (quoting *Serbian E. Orthodox*, 426 U.S. at 723)). Here, the record supports the trial court's finding that the national church's leadership structure is ambiguous. I contend this ambiguity provides an additional basis on which this Court should look to neutral principles of property law to resolve this dispute. *See Jones*, 443 U.S. at 605; *cf. Serbian E. Orthodox*, 426 U.S. at 714 ("[I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in civil court.").

developed since *Pearson*. Under their formulations, there will **never** be a civil law suit involving a church that can be resolved without reference to ecclesiastical doctrine, law, custom, or administration. In my view, the two opinions overrule *Pearson* and its progeny in all but name.[62]

In my opinion, the framework – properly applied – yields but one logical result. Because this is a dispute over title to property, we should apply neutral principles of South Carolina property and trust law.

C. Application

As noted previously, the lead opinion and concurrence declare this property dispute is ecclesiastical in nature based on their factual finding that the national church is a hierarchical institution. In doing so, they rely on directives from the national church unilaterally creating trusts in the plaintiffs' properties, claiming

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[62] I note that until today, our precedents have conformed with the overwhelming majority of state courts (not to mention the United States Supreme Court) that would apply a neutral principles approach to this title dispute. *See, e.g.*, *Jones*, 443 U.S. at 602 (upholding the neutral principles approach in a property dispute); *Md.& Va. Eldership*, 396 U.S. at 367; *Diocese of Quincy v. Episcopal Church*, 14 N.E.3d 1245, 1258 (Ill. 2014); *Masterson*, 422 S.W.3d at 602 n.6 (collecting state cases). Notably, the lead opinion does not cite any cases to support its novel analysis, and instead primarily supports its departure from well-settled law using the non-prevailing analysis contained in the dissent to a Texas state court case which resolved a church property dispute using the neutral principles approach. *See Masterson*, 422 S.W.3d at 614 (Lehrmann, J., dissenting).

these purported trust documents satisfy the requirements of *Jones*. This result is the exact opposite that I would reach in applying *Jones*'s neutral-principles approach.

Jones was a property dispute arising from a schism in a hierarchical church, in which the Supreme Court acknowledged the ability of civil courts to resolve most church-based property disputes using deeds, state statutes, the local church charters, and the national church's constitution. There, the Supreme Court explained:

> Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Jones, 443 U.S. at 603-04. I agree with the lead opinion that *Jones* offers religious institutions the ability to order their affairs and structure their property ownership through "appropriate" (i.e., secular) channels. However, the lead opinion and I diverge at the point in its analysis where it fails to recognize *Jones*'s mandate that any such undertaking must occur in a legally binding manner:

> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, ***provided it is embodied in some legally cognizable form***.

Jones, 443 U.S. at 606 (emphasis added). The lead opinion and concurrence not only misinterpret this passage from *Jones*, but ultimately dispense with it.

First, the lead opinion and concurrence extrapolate a requirement that any state law affecting a church's property rights may only be accomplished with minimal burdens on the national religious body. More accurately, the *Jones* Court was merely stating that only minimal efforts would be required on the part of national church organizations to bring their ownership interests within the ambit of state law and

ultimately, to avoid litigation over property ownership in the event of a doctrinal dispute or schism. *Jones* did not, as the lead opinion suggests, create a requirement that states amend their property laws so as to only minimally burden national religious organizations as they are attempting to structure their affairs with respect to property ownership in their member dioceses. Further, contrary to the lead opinion's implication, South Carolina law does not place undue burdens on religious bodies seeking to create trusts in this State. Our general trust law is similar to that of every other jurisdiction in this country, and therefore, it requires only minimal effort to comply with South Carolina trust law.

Next, the lead opinion and concurrence dismiss completely the requirements that trust documents – which "ensure . . . that the faction loyal to the hierarchical church will retain the church property" – must be adopted before the dispute begins and be "***embodied in some legally cognizable form***" in order to be enforceable under state law. To me, however, this language is the defining language of the *Jones* opinion with respect to this suit, and why the plaintiffs necessarily must prevail.

The lead opinion finds that not only is accession to the Dennis Canon not required, but that the defendants were not required to take any further action under South Carolina law to ensure the validity of these "trusts." Remember that eight parishes neither acceded to the Dennis Canon nor took any other legal action with respect to their property outside of

membership in the national church. Thus, the lead opinion finds trusts existed with respect to all of the plaintiff parishes merely because these parishes were members in a voluntary organization where that organization has unilaterally claimed ownership in their property.

By giving credence to this standard built only on "the national church said so," the lead opinion effectively ignores *Jones* altogether. *Jones* explicitly suggests state courts use "well-established concepts of trust and property law familiar to lawyers and judges" to resolve these disputes, "thereby promis[ing] to free civil courts completely from entanglement in questions of religious doctrine, policy, and practice." 443 U.S. at 603-04. In fact, in *Jones*, the United States Supreme Court remanded the case to Georgia to determine the property's ownership by applying Georgia's long-established property law. *Id.* at 609-10. Yet, in direct contravention of *Jones*'s directive to use state principles of property and trust law ingrained in the collective knowledge of our bench and bar to resolve church property disputes, the lead opinion instead does exactly what *Jones* warns against and dives headfirst into religious matters.

Under South Carolina law, there are only two ways to create a trust: either expressly or constructively. As will be explained, *infra*, it is my opinion that the defendants accomplished neither in this case.

1. Express Trusts

The South Carolina Trust Code[63] provides that an express trust may be created by either the "transfer of property to another person as trustee," or by a "written declaration signed by the owner of property that the owner holds identifiable property as trustee." S.C. Code Ann. § 62-7-401(a)(1); *see also All Saints*, 385 S.C. at 449, 685 S.E.2d at 174. However, it is axiomatic that the trust is created only if, *inter alia*, the settlor indicates an intention to create the trust. S.C. Code Ann. § 62-7-402(a)(2); *State v. Parris*, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005). Moreover, to satisfy the statute of frauds, "a trust of real property . . . must be proved by some writing signed by the party creating the trust." S.C. Code Ann. § 62-7-401(a)(2); *Whetstone v. Whetstone*, 309 S.C. 227, 231-32, 420 S.E.2d 877, 879 (Ct. App. 1992) (citing *Beckham v. Short*, 298 S.C. 348, 349, 380 S.E.2d 826, 827 (1989)). Proof of express trusts must be made by clear and convincing evidence. *Price v. Brown*, 4 S.C. 144 (1873); *cf.* S.C. Code Ann. § 62-7-407 (stating that the burden of persuasion for oral trusts is clear and convincing evidence).

In examining the efficacy of the Dennis Canon, I would find that it does not satisfy the requirements for creating an express trust under South Carolina law. First, there was no transfer of title. In fact, the defendants stipulated at trial that the property in dispute is (and has always been) titled in the plaintiff parishes' names. Thus, in order to create an express trust, the

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[63] S.C. Code Ann. §§ 62-7-101 to -1106 (2009 & Supp. 2016).

plaintiff parishes – as the title-holders – must have made a written, signed statement of intent to transfer their property into a trust for the benefit of the national church. *Cf. Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821 (1943) (examining the document creating a purported trust in order to ascertain which church faction was the beneficiary of the trust). However, the Dennis Canon is merely the *national church's* statement of interest in the plaintiff parishes' properties. "It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another." *All Saints*, 385 S.C. at 449, 685 S.E.2d at 174. Thus, I believe the only conclusion this Court could reach under South Carolina law is that the Dennis Canon is not a basis for asserting legal title to the plaintiffs' properties, nor does it create an express trust over the those properties. *Id.* (holding that the Dennis Canon does not create an express trust pursuant to South Carolina property law); *cf. Jones*, 443 U.S. at 606 (stating that civil courts must give effect to deeds and trust documents executed by the general church "provided [the documents are] embodied in some *legally cognizable* form" (emphasis added)).[64]

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[64] For this reason, I believe the lead opinion errs in reexamining our holding in *All Saints*. I am just as firmly convinced now – as the Court was in 2009 – that the Dennis Canon did not create an express trust under South Carolina law and that *All Saints* was correctly decided. To the extent the lead opinion contends that it is not seeking to overrule the result of *All Saints*, its analysis of the issue does not comport with this assertion.

With respect to the writing requirement, the defendants argue that twenty-eight of the thirty-six plaintiff parishes "made express promises in their governing documents to comply with the [n]ational [c]hurch's rules *after* those rules had been amended to include the Dennis Canon in 1979," and that "[t]hese writings fulfilled the writing and signature requirements of South Carolina's Trust Code."[65] I would reject this argument for two reasons.

First, the twenty-eight parishes that made this alleged express promise at most merely acceded to the national church's constitution and canons. However, their accession did not include a transfer of title in a form recognized under South Carolina law. Moreover, like the two prior disassociations – from the Church of England during the Revolutionary War, and from the national church during the Civil War – the plaintiffs associated and disassociated with the national church on their own terms, and at no point made a title transfer recognizable under South Carolina law. Thus, it is my opinion that the parishes' accession to the national church's rules does not constitute clear and convincing evidence that they intended to place their property in

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[65] A majority of the Court agrees with my analysis up to this point, finding we must apply neutral principles of South Carolina property law to resolve this dispute. However, on this argument, Chief Justice Beatty and I part ways. He agrees with the defendants' argument, finding "the Dennis Canon had no effect until acceded to in writing by the [twenty-eight] individual parishes." I explain, *infra*, why I respectfully disagree with him. Essentially, I do not believe mere accession meets the requirements of South Carolina law for the creation of a trust.

trust (either revocable or irrevocable) for the national church. *See Price*, 4 S.C. at 144 (requiring clear and convincing evidence of intent to place property in beneficial use for another).[66]

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[66] I note that the defendants ask that we resolve this title issue by deciding whether the parties complied with the rules set forth in their respective constitutions and canons – such as the Dennis Canon. While we *can* decide that the Dennis Canon (and other governing documents) are not legally binding trust documents because they do not comport with the secular formalities required by South Carolina law to impose a trust on the settlor's property, it would be completely improper under settled First Amendment jurisprudence for this Court to resolve this real property title issue by delving into the ecclesiastical doctrine of the national church. *See, e.g.*, *Presbyterian Church*, 393 U.S. at 449 ("States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.").

The concurrence suggests the Court does not have enough information to determine, applying long-standing state property principles, the statuses of the titles of the various properties, and that at best, a remand would be required to allow the parties to litigate the issue. However, this flies in the face of basic appellate principles. *Cf. Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (holding successive PCR applications are disfavored because they allow the applicant more than one bite at the apple). Here, each plaintiff painstakingly entered into evidence information about their individual titles. In response, the defendants did not attempt to refute or distinguish any of the individual plaintiff's title information, but instead proceeded entirely on ecclesiastical theory, i.e., that they owned *all* of the disputed properties, without exception, because "the national church said so." In my view, the plaintiffs clearly established each of their titles under our state's property, trust, and corporate law, and the defendants failed to grapple with the implications of those neutral principles of state law, to their detriment.

2. Constructive Trusts

Likewise, I would find that constructive trusts did not arise with respect to the property at issue.

"A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title." *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987); *see also Carolina Park Assocs., L.L.C. v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 879 (2012). "A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Lollis*, 291 S.C. at 529, 354 S.E.2d at 561; *Gordon v. Busbee*, 397 S.C. 119, 141, 723 S.E.2d 822, 834 (Ct. App. 2011). "In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal." *Lollis*, 291 S.C. at 530, 354 S.E.2d at 561.

According to the testimony adduced at trial, the plaintiffs obtained their properties through (1) grants from current or prior parishioners; or (2) purchase with their own funds, and not funds from the national church. The defendants made no effort to demonstrate that the parishioner grants were intended to be grants to the national church or the local diocese affiliated with the national church. In fact, the deed granting Camp St. Christopher to the trustee corporation expressly names the trustee corporation as beneficiary due to its "good works." Therefore, I would find no "clear, definite, and unequivocal" evidence of fraud on

the part of the plaintiffs in acquiring title to the properties.

The defendants argue Bishop Lawrence and the disassociated diocese acted deceptively and contrary to the national church's interests in issuing the quitclaim deeds, and that their amendment of the disassociated diocese's corporate charter was *ultra vires*. In the defendant's view, this provides evidence of fraud sufficient to make constructive trust appropriate in this situation. I disagree.

Essentially, the defendants ask that we determine the plaintiffs lacked the canonical authority to issue the quitclaim deeds and amend their corporate charters. However, the Supreme Court has expressly forbidden courts from making such determinations. *See Md. & Va. Eldership*, 396 U.S. at 370 (Brennan, J., concurring) (stating that even in applying the deference approach, "civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine.").

Rather, we may only determine whether the plaintiffs had legal authority and followed the appropriate

steps under South Carolina's corporate law to issue the quitclaim deeds and amend their corporate charters. I would find the plaintiffs had the legal authority and complied with the legal requirements to effectuate those changes, and the defendants do not argue otherwise to this Court. Remember, the national church never revoked Bishop Lawrence's authority over the disassociated diocese while the diocese was issuing the quitclaim deeds or amending its diocesan constitution, canons, and corporate purpose.[67] Indeed, the purported acceptance of Bishop Lawrence's renunciation of orders occurred after the amendments to the various constitutions and deeds were executed and publicly recorded. To me, this constitutes overwhelming evidence of the national church's acquiescence to the changes in the plaintiffs' corporate forms, constitutions, and bylaws.

Further, all actions by Bishop Lawrence were undertaken using the correct legal channels and proper corporate formalities under South Carolina law. Not only was Bishop Lawrence clearly acting on the national church's behalf at the time, but the record shows that the national church was fully aware of what Bishop Lawrence's intentions were when he was made a bishop and that he was executing these deeds by the authority vested in him by the national church.[68] Thus,

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[67] Likewise, the national church did not assert the plaintiff parishes lacked the authority to de-accede.

[68] This is in stark contrast to the facts underlying the recent California case cited favorably by the concurrence. In *Diocese of San Joaquin v. Gunner*, 202 Cal. Rptr. 3d 51 (Ct. App. 2016), the

whether or not trusts were created – which I contend they were not – the current status of the property is that it has been deeded back to the plaintiff parishes. That these various corporate amendments and deeds are embodied in a "legally cognizable form" is irrefutable.

The lead opinion utterly fails to account for the national church's subsequent action of quitclaiming the deeds back to the plaintiff parishes. Even though the lead opinion and concurrence declare this dispute "ecclesiastical," the fact remains that Bishop Lawrence – acting with the full authority of the national church – legally transferred the deeds to the plaintiffs, and the deeds continue to be held by the plaintiffs. No level of deference to the national church at this point can change this. Thus, it remains unclear what legal basis

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California Court of Appeals applied neutral principles of state corporate law and held the attempts to amend the breakaway diocese's articles of incorporation and transfer the property away from the national church were ineffective. However, importantly, in that case, the bishop of the breakaway diocese had already been deposed by the national church one month before attempting to amend the diocesan articles of incorporation under state law, and two months before attempting to transfer the disputed property titles to the new corporation formed by the breakaway diocese. This, of course, was not the case here, as Bishop Lawrence retained his full secular and religious authority over the disassociated diocese until well after all of the amendments were adopted and quitclaim deeds were issued. Thus, in my view, the analysis in *Gunner* supports my position, not the concurrence's. *See, e.g.*, *id.* at 63, 64 (including section titles to the court's opinion stating "Deference to the [national c]hurch does not resolve the dispute" and "The property was not held in trust for the [national c]hurch").

the lead opinion is using to declare the national church the rightful owner of the plaintiffs' property.

While I would decline to impose a constructive trust on the plaintiffs' properties, I would additionally find that the property at issue is now titled in the plaintiffs' names by its bishop's actions.

D. Conclusion as to Title of Plaintiff Parishes' Property

By applying neutral principles of South Carolina's longstanding property law, I would find that the national church has no "legally cognizable" interest in the plaintiff parishes' properties. *See Jones*, 443 U.S. at 606; *Md. & Va. Eldership*, 396 U.S. at 367-68 (dismissing the appeal for want of a federal question after the state court resolved a church property dispute by examining the deeds to the properties, the state statutes dealing with implied trusts, and the relevant provisions in the church's constitution pertinent to the ownership and control of church property, and found that nothing in those documents gave rise to a trust in favor of the general church). Despite the lead opinion's and concurrence's statements to the contrary, this is not an instance where a "property right follows as an incident from decisions of the church custom or law on ecclesiastical issues." *See Kedroff*, 344 U.S. at 120-21. Rather, the properties at issue here are titled in the plaintiff parishes' names (and some have been for over two hundred years), and the majority is permitting the defendants to circumvent South Carolina law in authorizing

this title-takeover, albeit not agreeing on the rationale for doing so.

Let us not forget the defendants stipulated that the real property at issue is titled in the plaintiff parishes' names, and that the *plaintiff parishes "are not members of the [national c]hurch."* (emphasis added). Aside from the fact that a majority of the parishes acceded to the Dennis Canon in some form or another – which I would find was not a legally binding action to impose a trust under South Carolina law – eight parishes **never acceded** in any form to either the national church's Dennis Canon or the diocesan version of the Dennis Canon created by the now-disassociated diocese.[69] Under the lead opinion's formulation, these

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[69] The concurrence takes Chief Justice Beatty, Justice Kittredge, and me to task for giving any credence to the fact that eight of the thirty-six plaintiff parishes did not accede to the Dennis Canon whatsoever. I first point out the national church contended in both its motion to reconsider and its brief to this Court that twenty-eight of the thirty-six plaintiff parishes "made express promises in their governing documents to comply with the [n]ational [c]hurch's rules after those rules had been amended to include the Dennis Canon in 1979," and that "[t]hese writings fulfilled the writing and signature requirements of South Carolina's Trust Code." (emphasis in original). While the argument only addresses the twenty-eight churches that allegedly acceded, it raises a direct question about the other eight churches, implying that they are somehow different from the twenty-eight who "made express promises." Second, and perhaps more importantly, the concurrence incorrectly construes our holding in *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), with regards to issue preservation as it relates to additional sustaining grounds. A prevailing party need never raise an additional sustaining ground below, nor secure a ruling on it, in order for the issue to be preserved for appellate review. *See* Rule 220(c), SCACR

parishes, like all of the other plaintiff parishes, must surrender their lawful titles to the national church for the mere fact that the national church is a religious organization. This is extremely troubling. The lead opinion offers no explanation or legal basis (and I know of none) that allows for an organization – religious or otherwise – to strip an individual, business, or charitable organization of title ownership because that organization unilaterally declares ownership in such property. However, the ramifications do not end there. The rationale underlying the lead opinion would place many heretofore validly-titled properties in legal limbo. If I were a member of a governing body of a religiously-affiliated hospital, for example, I would be gravely concerned, as the lead opinion declares today that different rules apply to religious organizations with respect to corporate organization and property ownership in this State.

In my opinion, because it would dispense with the ancient formalities of property and trust law and the prior esteem with which courts in this state afforded such formalities, the lead opinion's rationale would dramatically alter our property law as we know it. Accordingly, I would affirm the trial court's decision that

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(providing appellate courts may affirm the judgment of a lower court based on any ground appearing in the record). Undoubtedly, it is more prudent to raise an additional sustaining ground in the appellate brief, as it draws the appellate court's attention to the matter and encourages it to exercise its discretion to address the issue. However, explicitly raising the issue is not a prerequisite for the court to affirm the decision of the lower court on an alternative ground. *See* Rule 220(c), SCACR.

the defendants do not have an interest in the plaintiff parishes' real properties.

E. Camp St. Christopher

In some respects, the title to Camp St. Christopher presents the Court with a more straightforward analysis, in that the Dennis Canon, by its own terms, does not apply. Specifically, the Dennis Canon states, *inter alia*, "All real and personal property *held by or for the benefit of any Parish, Mission or Congregation* is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located." (emphasis added). It is undisputed the trustee corporation holds title in fee simple to Camp St. Christopher, and that it does so for the benefit of the disassociated diocese, rather than any individual parish, mission, or congregation. Because the trustees did not accede to the Dennis Canon, there is no basis in South Carolina trust law for the national church to claim an ownership interest in Camp St. Christopher. Moreover, although the trustee corporation's initial bylaws stated that it would carry out its duties under the authority of the national church's constitution and canons, the trustees later took steps, using appropriate corporate formalities, to amend the bylaws and remove all references to the national church *before the national church revoked Bishop Lawrence's authority*. Accordingly, similar to the other plaintiff parishes', I would declare title to Camp St. Christopher in the trustee corporation, held for the benefit of the disassociated diocese, just as the original deed conveyed the property.

III. INTELLECTUAL PROPERTY

Next, the plaintiffs assert their service marks are validly registered under state law and that they own the right to use the seals and symbols registered with the state. As a result, the plaintiffs claim the defendants' use of the plaintiffs' marks amounts to service mark infringement. The defendants take the position that the plaintiffs' service marks are too similar to the defendants' federally-registered service marks, and that because the defendants registered their marks with the United States Patent and Trademark Office (USPTO), the Lanham Act[70] expressly preempts state law with respect to the validity of the plaintiffs' marks.

I would narrowly affirm the trial court's finding that the plaintiffs' service marks are validly registered under state law. However, because there is already a pending federal case involving the applicability of the Lanham Act to these exact marks, I would defer to the federal courts regarding the applicability of federal copyright law.

A. Standard of Review

"Actions for injunctive relief are equitable in nature." *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). "In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence." *Goldman v. RBC, Inc.*, 369 S.C. 462, 465, 632 S.E.2d

[70] 15 U.S.C. §§ 1051-1141n (2006).

850, 851 (2006). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, appellants are not relieved of their burden of convincing an appellate court that the trial court committed an error in its findings. *Id.* at 387-88, 544 S.E.2d at 623.

B. Merits

Pursuant to federal law,

> Any registration issued under the [Lanham Act] . . . and owned by a party to an action shall be admissible as evidence and *shall be prima facie evidence* of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and *of the registrant's exclusive right to use the registered mark in commerce* on or in connection with the goods or services specified in the registration subject to any conditions or limitations stated therein.

15 U.S.C. § 1115(a) (emphasis added). Moreover,

> The ownership by a person of a valid registration under [the Lanham Act] . . . shall be a complete bar to an action against that person, with respect to that mark, that –

> (A) is brought by another person under the common law or a statute of a State; and
>
> (B)(i) seeks to prevent dilution by blurring or dilution by tarnishment; or
>
> (ii) asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark, label, or form of advertisement.

15 U.S.C. § 1125(c)(6).[71]

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[71] South Carolina law provides:

> The secretary shall cancel from the register, in whole or in part: . . . (3) a registration concerning which a court of competent jurisdiction finds that the: . . . (f) *registered mark is so similar, as to be likely to cause confusion or mistake or to deceive, to a mark registered by another person in the [USPTO] before the date of the filing of the application for the registration by the registrant under this article, and not abandoned*; however, if the registrant proves that the registrant is the owner of a concurrent registration mark in the [USPTO] covering an area including this State, the registration under this article may not be canceled for that area of the State. . . .

S.C. Code Ann. § 39-15-1145(3)(f) (Supp. 2016) (emphasis added). Similarly,

> A mark by which the goods or services of an applicant for registration may be distinguished from the goods or services of others may not be registered if the mark: . . . (5) consists of a mark which: . . . (b) when used on or in connection with the goods or services of the applicant is primarily geographically descriptive or deceptively misdescriptive of them. . . .

S.C. Code Ann. § 39-15-1110(A)(5)(b) (Supp. 2016).

"In the absence of an express congressional command, state law is preempted if the law actually conflicts with federal law, or if federal law so thoroughly occupies the legislative field as to make reasonable the inference that Congress has left no room for the states to supplement it." *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 401, 706 S.E.2d 6, 8 (2011). Under the Lanham Act, the USPTO must refuse to grant a subsequent mark if the "dominant element" of the subsequent mark is already registered in a previous mark. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1341-45 (Fed. Cir. 2004). Further, there are two "key considerations" in determining the dominant element of the previously-registered mark: (1) the similarities between the names of the previous and subsequent trademarks, and (2) the similarities between the previously and subsequently trademarked goods. *Id.* at 1341-42.

C. Conclusion as to Service Marks

I would find the trial court failed to address the effect, if any, of the Lanham Act on the plaintiffs' claims for service mark infringement. However, because there is a pending federal case filed by Bishop vonRosenberg addressing the same issue, I would decline to address the effect of federal law on the parties' service marks. Thus, I would narrowly affirm the trial court's determination that the plaintiffs' marks are validly registered under South Carolina law, and would leave the application of the Lanham Act to the pending federal case.

CONCLUSION

The lead opinion in this case is nothing less than judicial sanction of the confiscation of church property masquerading as an attempt to promulgate a new deference rule for determining title in this matter. With no discussion of why the neutral principles of law approach to resolving church title determinations should be abandoned by the State of South Carolina, the lead opinion advocates overruling a framework that has heretofore taken the courts out of ecclesiastical controversies, instead encouraging the Court to devolve to the civil court the authority to undo centuries of well-settled church titles by judicial fiat. Such an opinion, had it obtained the support of a majority of this Court, would have been a crushing blow to centuries of carefully crafted and well-reasoned South Carolina law.

Aside from the fact that I do not believe there were ever any legal trusts created with respect to the property at issue, the simple fact is that the national church, for whatever reason, never acted to take away Bishop Lawrence's legal authority to act for it and the disassociated diocese. Under the authority granted to him by the national church, Bishop Lawrence legally transferred the plaintiffs' property back to them. Thus, to the extent the lead opinion relies on deference to confiscate the plaintiffs' property, that concept cannot overcome the essential problem that the national church itself deeded the property back to the plaintiffs.

Further, many of the plaintiff parishes established their corporate existence under South Carolina

corporate law or by legislative charter years before the Dennis Cannon was adopted. Additionally, after *Jones*, all of the plaintiff parishes and the disassociated diocese made sure that they were organized as corporations under South Carolina law. None of these church corporations renounced or limited their ability to amend their charters and bylaws after initial adoption. With a stroke of a pen, the majority vitiates South Carolina's charitable corporation law and invalidates all of the plaintiffs' duly adopted corporate documents.

Because I cannot find any legal basis to support the majority's decision in this case, I would affirm the decision of the trial court. I respectfully dissent.[72]

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[72] As I stated at the outset, this is unfortunately a difficult case leading us to five different, strongly-held opinions. Because we all write separately, my summary of my understanding of the Court's holdings is as follows. A majority of the Court – consisting of Chief Justice Beatty, Justice Kittredge, and me – agree that *Pearson* and *All Saints* (and their progeny) remain good law in this state, and that in secular church disputes, our state courts should apply neutral principles of law to resolve the case. As it relates to this particular case, the same majority would find this is a secular church dispute, and the Court must therefore apply longstanding trust law to resolve the questions before us. I would find the parties' actions did not comply with the formalities required to create a trust in this state. In short, I believe the parties did not embody their intentions to create a trust in favor of the defendants in a "legally cognizable form." Justice Kittredge would find the parties created a revocable trust in favor of the national church, but the plaintiffs later took steps to revoke their accession to the trust. Therefore, both Justice Kittredge and I would declare all of the disputed titles in favor of the individual plaintiffs, with no trust formed in favor of the defendants. However, we are in the minority, because a different majority of the Court – consisting of Chief Justice Beatty, Justice Hearn, and Acting Justice Pleicones

– would reverse the trial court and transfer title of all but eight of the plaintiffs' properties to the defendants. While Justice Hearn and Acting Justice Pleicones would do so because they believe this is an ecclesiastical dispute and the Court must therefore defer to the national church's decision on the matter, Chief Justice Beatty would do so because he believes all but eight of the plaintiffs acceded to the Dennis Canon in a manner recognizable under South Carolina's trust law. Thus, the result reached on title is: 1) with regard to the eight church organizations which did not accede to the Dennis Canon, Chief Justice Beatty, Justice Kittredge, and I would hold that title remains in the eight plaintiff church organizations; 2) with regard to the twenty-eight church organizations which acceded to the Dennis Canon, a majority consisting of Chief Justice Beatty, Justice Hearn, and Acting Justice Pleicones would hold that a trust in favor of the national church is imposed on the property and therefore, title is in the national church; and 3) with regard to Camp St. Christopher, Chief Justice Beatty, Justice Hearn, and Acting Justice Pleicones would hold title is in the trustee corporation for the benefit of the associated diocese, whereas Justice Kittredge and I would hold that the trustee corporation holds title for the benefit of the disassociated diocese.

As to the second issue on appeal, involving the plaintiffs' claims for service mark infringement, Chief Justice Beatty, Justice Kittredge, and I would find the marks are validly registered under state law, but leave the ultimate resolution of the parties' conflicting claims to the pending federal case.

The Supreme Court of South Carolina

The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Christ the King, Waccamaw; Church of The Cross, Inc. And Church of the Cross Declaration of Trust; Church of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Matthews Church; St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. David's Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway; The Church of St. Luke and St. Paul, Radcliffeboro; The Church of Our Saviour of the Diocese of South Carolina; The Church of the Epiphany (Episcopal); The Church of the Good Shepherd, Charleston, SC; The Church of The Holy Cross; The Church of The Resurrection, Surfside; The Protestant Episcopal Church of The Parish of Saint Philip, in Charleston, in the State of South Carolina; The Protestant Episcopal Church, The Parish of Saint Michael, in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust; The Vestry and Church Wardens of St. Jude's Church of Walterboro; The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah; The Vestry and Church Wardens of The Church of The Parish of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens of

The Parish of St. Matthew; The Vestry and Wardens of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens of the Episcopal Church of The Parish of Christ Church; Vestry and Church Wardens of The Episcopal Church of the Parish of St. John's, Charleston County, The Vestries and Churchwardens of The Parish of St. Andrews, Respondents.

v.

The Episcopal Church (a/k/a The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina, Appellants.

Appellate Case No. 2015-000622

ORDER

Respondents have filed a motion to recuse Justice Hearn from participating in the decision on the petitions for rehearing in this case and to vacate Justice Hearn's opinion or, in the alternative, to vacate all opinions in this case. Respondents request consideration of this motion by the full Court. With the exception of the request for the full Court to consider the motion, the motion is denied. *See Davis v. Parkview Apts.*, 409 S.C. 266, 762 S.E.2d 535 (2014) (citing *Duplan Corp. v. Milliken, Inc.*, 400 F.Supp. 497, 510 (D.S.C. 1975) ("Timeliness is essential to any recusal motion. To be timely, a recusal motion must be made at counsel's

first opportunity after discovery of the disqualifying facts.")).

/s/ D. W. Beatty C.J.

/s/ Kaye G. Hearn J.

/s/ Costa M. Pleicones A.J

Kittredge, J., concurring in separate order in which Toal, A.J., joins in part

Toal, A.J., concurring in separate order

I write separately to state my position on the rehearing matters before the Court. Because I remain firmly convinced that this Court's majority decision as to the so-called twenty-eight "acceding churches" reaches the wrong result and is fundamentally flawed, I vote to grant rehearing. I have signed the Court's order reflecting my vote.

In connection with the requested recusal of Justice Hearn, because the motions are untimely as they relate to the Court's opinion(s), I join the Court in denying the vacatur and recusal motions. The Court need not address the recusal motion on a prospective basis, for Justice Hearn has elected, to her great credit, to recuse herself prospectively and not to participate in the resolution of the rehearing petitions.

For the purpose of resolving the rehearing petitions, I requested that a fifth justice be appointed to fill the absence created by Justice Hearn's recusal so that a *full* Court could decide this matter of great importance. My request was rejected, which I find shocking. Under these circumstances, to disallow a full Court from considering the rehearing petitions is deeply troubling and, in my judgment, raises constitutional implications as the Court has blocked a fair and meaningful merits review of the rehearing petitions.

/s/ John W. Kittredge J.

I have voted to grant rehearing. I join Justice Kittredge's separate writing and submit this additional separate writing concerning this matter.

With regard to the motion for recusal and the associated motion for vacatur, I agree wholeheartedly with the other members of the Court that these motions are untimely. The respondents did not challenge Justice Hearn's participation in the five months between this Court's certification of the case from the court of appeals and the oral arguments before us. While the respondents may have surmised she would recuse herself during that five-month span, any possible reason for their not filing a formal motion for her recusal vanished after she participated in the oral arguments. Nonetheless, in the two years between the arguments and the issuance of the Court's opinion, the respondents again took no action. Only after receiving an

adverse decision on the merits from a majority of the Court did the respondents challenge Justice Hearn's participation in the matter. However, an adverse decision is no reason to excuse a nearly two-and-a-half year delay in making a request for recusal. Moreover, Justice Hearn is not participating in this matter on a prospective basis, remedying any possible future question about her participation in the matter. While I make no criticism of the respondents' lawyers for filing the motions to recuse and for vacatur, I am disappointed in the tone of these filings. They are unreasonably harsh criticisms of a highly accomplished judge and a person of great decency and integrity. The respondents' legal points could have been made without such unnecessary language. I concur in the Court's decision to deny the motions for recusal and vacatur.

With regard to the request to appoint a fifth justice to fill the vacancy left by Justice Hearn's prospective non participation, I believe that this could have been accomplished without significant delay or undue burden on the Court or an appointed acting justice. In any event, the Court's collective opinions in this matter give rise to great uncertainty, in that we have given little to no coherent guidance in this case or in church property disputes like this going forward. Given our lack of agreement, I have no doubt the Court will see more litigation involving these issues and similarly situated parties. I am comforted in the knowledge that there will be ample opportunity for the Court to

resolve these issues in a more definitive manner in the future.

/s/ Jean H. Toal A.J.

Columbia, South Carolina
November 17, 2017

cc:
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John S. Nichols, Esquire
Thomas S. Tisdale, Jr., Esquire
Jason S. Smith, Esquire
Allan R. Holmes, Sr., Esquire
David Booth Beers, Esquire
Mary E. Kostel, Esquire
Andrew Spencer Platte, Esquire
Henrietta U. Golding, Esquire
Charles H. Williams, Esquire
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Timothy O'Neill Lewis, Esquire
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Matthew Terry Richardson, Esquire
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D. Reece Williams, III, Esquire
John Carroll Moylan, III, Esquire
Christopher Ernest Mills, Esquire
Steffen N. Johnson, Esquire
The Honorable Diane Schafer Goodstein

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT
The Protestant Episcopal Church In The Diocese Of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Christ The King, Waccamaw; Church Of The Cross, Inc. and Church Of The Cross Declaration Of Trust; Church Of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; Saint Matthews Church; St. Andrews Church-Mt. Pleasant and The St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. Davids Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway;	Case No. 2013-CP-18-00013 **FINAL ORDER** (Filed Feb. 3, 2015)

The Church Of St. Luke and)
St. Paul, Radcliffeboro; The)
Church Of Our Saviour Of)
The Diocese of South Carolina;)
The Church Of The Epiphany)
(Episcopal); The Church Of)
The Good Shepherd,)
Charleston, SC; The Church)
Of The Holy Cross; The)
Church Of The Resurrection,)
Surfside; The Protestant)
Episcopal Church, Of The)
Parish Of Saint Philip, In)
Charleston, In The State)
Of South Carolina; The)
Protestant Episcopal Church,)
The Parish Of Saint Michael,)
In Charleston, In The State)
Of South Carolina and St.)
Michael's Church Declaration)
Of Trust; The Vestry and)
Church Wardens Of St. Jude's)
Church Of Walterboro; The)
Vestry and Church Wardens)
Of The Episcopal Church Of)
The Parish Of Prince George)
Winyah; The Vestry And)
Church Wardens Of The)
Episcopal Church Of The)
Parish Of St. Helena and The)
Parish Church of St. Helena)
Trust; The Vestry and Church)
Wardens Of The Episcopal)
Church Of The Parish Of St.)
Matthew; The Vestry and)

Wardens Of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church – Wardens Of The Episcopal Church Of The Parish Of Christ Church; Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. John's, Charleston County, The Vestries And Churchwardens Of The Parish of St. Andrew	)
PLAINTIFFS,	)
v.	)
The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of America); The Episcopal Church in South Carolina	)
DEFENDANT.	)

I. Introduction

This action is brought by thirty-eight South Carolina non-profit corporations, whose business is religious, against a New York unincorporated association, The Episcopal Church ("TEC") and a South Carolina unincorporated association, The Episcopal Church in South Carolina ("TECSC"). The Defendants' business is also religious.

Aligned in interest, the Plaintiffs seek resolution of their real and personal property rights (including intellectual) by invoking this Court's declaratory and injunctive powers arising out of three South Carolina statutes.[1] The Defendants, also aligned in interest, in addition to defenses raised, seek the resolution of counterclaims which, in effect, seek to have the real and personal property rights placed at issue by the Plaintiffs, declared in their favor.

Many of the facts in this case derive from the early history of South Carolina and the United States. The Plaintiff parish churches have existed since as early as 1680. Their buildings, land, names and heritage are at the core of the history of lower South Carolina extending well before the creation of the United States. Likewise, the Diocese has been a part of the religious heritage of South Carolina for 229 years and TEC of the nation's, for 225 years.

II. Procedural History

On January 4, 2013, the Protestant Episcopal Church in the Diocese of South Carolina ("Diocese"), the Trustees of the Protestant Episcopal Church in South Carolina ("Trustees") and sixteen other South Carolina non-profit corporations filed this action against TEC for declaratory and injunctive relief. On January 22, 2013, Plaintiffs amended their complaint, adding

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[1] S.C. Code Ann. §§ 15-53-10 et. seq. ("Uniform Declaratory Judgments Act"), §§ 39-15-1105 et. seq. ("Trademarks and Service Marks") and §§ 16-17-310 & 320 ("Improper Use of Names")

17 additional South Carolina non-profit corporations as Plaintiffs. That same day, the Diocese and the Trustees moved for a temporary restraining order which this Court granted on January 23, 2013 subject to the posting of a $50,000 bond. Prior to the hearing set by the restraining order to consider the issuance of a preliminary injunction, TEC appeared through its counsel, Thomas S. Tisdale, Jr., and consented to the entry of a temporary injunction that incorporated the terms of the January 23, 2013 restraining order. The restraining order and the temporary injunction prohibited all except officers, directors, trustees and employees of the Diocese and Trustees from using the registered names and marks of the Diocese.

Thereafter, Plaintiffs amended their complaint pursuant to this Court's order of February 28, 2013, to add three additional South Carolina non-profit corporations as Plaintiffs and TECSC as a Defendant. The Defendants were served with the Second Amended Complaint on March 5, 2013. On that same day, Charles vonRosenberg, an agent of TECSC and a Bishop in TEC, filed a parallel action in federal court.

The Defendants then filed their respective answers and counterclaims on March 28, 2013 and April 3, 2013. On April 3, 2013, TECSC with TEC's consent removed this action to federal court. Plaintiffs moved to remand it to this Court on April 10, 2013. On June 10, 2013, the United States District Court (Houck, J.) remanded this action. The District Court also dismissed the parallel action brought by Bp. Charles vonRosenberg on August 23, 2013 under the abstention doctrine

finding that the relief sought in federal court was "the same relief as TEC's counterclaims in the state action" and also was relief which "directly conflicts with a state court temporary injunction." Or. Granting Mot. to Dismiss, 2:13-cv-587-CWH (D.S.C. Aug. 23, 2013).

Between June 10, 2013 and July 8, 2014, there was extensive document production. However, with the exception of one deposition taken on September 10, 2013, discovery by deposition was only taken in the six weeks before trial. The Plaintiffs sought to take depositions beginning in December 2013. However between January 13, 2014 and May 13, 2014, the Defendants refused to engage in discovery contending that discovery was stayed because of TECSC's appeal of a discovery order.

TECSC appealed that discovery order on January 13, 2014. Plaintiffs moved to dismiss the appeal on January 15, 2014 and also moved the South Carolina Supreme Court to certify the appeal from the Court of Appeals on February 6, 2014. On March 28, 2014, the Court of Appeals granted Plaintiffs motion to dismiss TECSC's appeal. TECSC then filed a petition for a rehearing that was certified by the State Supreme Court on April 4, 2014. The Supreme Court denied TECSC's petition for a rehearing on May 7, 2014.

On June 23, 2014, TECSC again filed an interlocutory appeal of an order denying its motion to join additional parties. It also sought a supersedeas on July 3, 2014, the Friday before the scheduled Monday start of the trial. The appeal was denied and the supersedeas petition was dismissed that same day.

The case was tried to the court without a jury in St. George, South Carolina. Commencing on July 8, 2014 and concluding on July 25, 2014, the 2,523 page official transcript of record[2] created during this fourteen day trial records the testimony of 59 witnesses and the admission into evidence of over 1,200 exhibits.

The Court has carefully considered the evidence and, pursuant to Rule 52, SCRCP, makes the following findings of fact and conclusions of law.

II. Findings of Fact

A. Plaintiff Diocese

1. The Diocese was formed on May 12, 1785 as an unincorporated association by former Anglican churches. Since then it has met in convention, annually more or less, for 229 years.

2. When the Diocese was formed, it was named the "Protestant Episcopal Church in the State of South Carolina." Since its formation, it has used the following names at various times in its history: "The Protestant Episcopal Church in South Carolina," "The Protestant Episcopal Church in the Diocese of South Carolina," "The Protestant Episcopal Diocese of South Carolina," "The Diocese of South Carolina," and "The Episcopal Diocese of South Carolina."

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[2] The official transcript was completed on September 25, 2014.

3. The first constitution of the Diocese was adopted at its 4th convention on May 31, 1786. The following Plaintiff churches were signatories: St. Philip's, St. Michael's, St. Andrew's (Old St. Andrew's), St. Helena's, Trinity Edisto Island, St. John's (Charleston County) and Prince George.

4. Articles 1, 2 and 6 of that Constitution provide:

> Art. 1. That the Protestant Episcopal Church in these states is, and ought to be, independent of any foreign authority, Ecclesiastical or Civil.
>
> Art. 2. That it hath, and ought to have, in common with all other religious societies, full and exclusive powers to regulate the concerns of its own communion.
>
> Art. 6. That no power be delegated to a General ecclesiastical Government except such, as cannot be exercised by the clergy and vestries, in their respective congregations.

5. When executed in 1786, Article 4 of the Diocese's Constitution provided that it would not have a Bishop. This provision was deleted in 1795 when the Diocese elected its first Bishop. TEC's Constitution does not require that member dioceses have a bishop.

6. Initially, the Diocese was governed by delegates meeting in convention and then, starting in 1790, by its Standing Committee between conventions.

7. Between May 1785 and October 1789, the Diocese held seven conventions.

8. At its 19th Convention in 1806, the Diocese adopted "Rules and Regulations for the Government of the Protestant Episcopal Church in the State of South Carolina." Rule 14 provided that:

> No Article, canon, rule or other regulation of any general in State Convention, shall be obligatory on any Episcopal Church within this state, where the same shall be found to infringe on its chartered rights.

9. In 1841, the Diocese meeting in convention added the following sentence to its Constitution:

> "The Protestant Episcopal Church in South Carolina accedes to, recognizes and adopts the general Constitution and Canons of the Protestant Episcopal Church in the United States of America, and acknowledges their authority accordingly."

10. The term "accede" means: To consent or agree. *Black's Law Dictionary* (9th ed. 2009).

11. Between 1861 and 1866, the Diocese withdrew its association with TEC, immediately declaring "null and void" any of its constitutional or canonical provisions inconsistent with that disassociation. Then, together with other dioceses who were formerly associated with TEC, formed and voluntarily joined an unincorporated association called "The Protestant Episcopal Church in The Confederate States of America." Finally, the Diocese withdrew its association with

The Protestant Episcopal Church in The Confederate States of America and voluntarily re-associated with TEC immediately declaring any inconsistent provisions of its Constitutions and Canons "to be henceforth of no force" and "be changed" immediately "to conform to the legislation adopted at this Council."

12. The Diocese has operated for most of its existence using two principal governing documents, a "Constitution" and "Canons". Both of these documents can be, and repeatedly have been, amended by the Diocese meeting in convention without any approval by TEC. After the Diocese was incorporated in 1973, the Constitution and Canons operated as its bylaws. Supplemental bylaws were adopted in October 2010.

13. When the Diocese meets in convention, it exercises corporate authority, among other things, by approving budgets, electing bishops, electing other persons to fill positions in Diocesan governing bodies, including the Standing Committee and voting on resolutions. The Diocese's Bishop serves as President of the convention, or if absent or there is no Bishop, then the President of the Standing Committee serves as President.

14. Between 2009 and 2012, when the Diocese has met in convention, there have been approximately 200 laity and 100 clergy in attendance. During this period, there has always been a quorum. Each clergy has seat, voice and one vote. Each parish through its lay delegates has seat, voice and one vote. Each mission through its lay delegates has seat, voice and one-half

vote. The most common form of voting is a voice vote where a majority prevails. If requested, a vote by orders will be taken. Such a vote is also required for some decisions such as the amendment of a Canon. On vote by orders, the clergy vote separately from the parish and missions. A roll call records the vote of all clergy, parish and missions and the required vote is determined within each order, clergy and lay (parish/missions). After each convention, a journal of the proceedings is published.

15. Between its conventions, the Bishop, the Standing Committee and the Diocesan Council carry out the business of the Diocese.

16. Mark Lawrence is the Chief Operating or Chief Executive Officer of the Diocese and is also its Ecclesiastical Authority. The Diocesan Convention, according to provisions in its Canons, elected him and the Diocese employed him. In order for him to become a member of TEC, TEC's other members, the Bishops and the Dioceses (by their Standing Committees), had to consent to his ordination.

17. The Standing Committee is vested with overall management of the affairs of the Diocese. It is the only governing body, other than the convention itself, provided for in the Diocese's Constitution. It is the only Diocesan body that can make decisions for the whole Diocese. It typically meets monthly. In civil matters it acts as the Board of Directors. The Bishop is an *ex officio* member with seat and voice but with no vote. Between conventions of the Diocese, the Standing

Committee replaces officers who can no longer serve, which is a function typically exercised by a Board of Directors. It employs counsel, and it is the signatory on the Bishop's employment contract. It is the body responsible for approving and executing sales of Diocesan titled real property.

18. The Diocesan Council oversees the budgeted finances of the Diocese.

19. On October 27, 1973 the Diocese, meeting in convention, passed a resolution authorizing and directing that certain named agents make application to the South Carolina Secretary of State for its incorporation.

20. On November 14, 1973 the Diocese through those authorized agents filed a Declaration and Petition with the South Carolina Secretary of State asking that the Diocese be incorporated with its purpose stated to be "to continue the operation of an Episcopal Diocese under the Constitution and Canons of The Protestant Episcopal Church in the United States of America." The Declaration and Petition contained a list of "all the Managers, Trustees, Directors and other officers" which were stated to be by name and title "The Rt. Rev. Gray Temple, Bishop", "Rt. Rev. Canon George I. Chassey, Jr., Secretary", "Thomas E. Myers, Treasurer" and "18 members elected by Convention, Members of Bishop and Council."

21. On November 14, 1973, the South Carolina Secretary of State issued a Certificate of Incorporation incorporating the Diocese.

22. On February 19, 1987, the Diocese filed a notice in the Charleston News & Courier of its intent to amend its articles of incorporation to change its name by a resolution of the Diocese meeting in convention. The Right Reverend C. F. Allison, the Bishop at that time, signed the notice as its "President".

23. On February 20, 1987, the Diocese meeting in convention passed a resolution authorizing and directing that its authorized agents file an application with the South Carolina Secretary of State to amend its articles of incorporation to change its name from "The Protestant Episcopal Diocese of South Carolina" to "The Protestant Episcopal Church in the Diocese of South Carolina." On March 13, 1987, the South Carolina Secretary of State issued articles of amendment changing the name of the Diocese.

24. From 1987 to October 2010, the Diocese had the following paragraph, frequently referred to as the "Dennis Canon," in its Canons:

> All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for the Episcopal Church and the Protestant Episcopal Church in the Diocese of South Carolina. The existence of this trust, however, shall in no way limit the power and Authority of the Parish, Mission, or Congregation existing over such property so long as the particular Parish, Mission, or Congregation remains part of, and subject to, the Episcopal Church and the

Protestant Episcopal Church in the Diocese of South Carolina.

25. Between 2009 and 2011, during the time the Diocese was still associated with TEC, the Diocese meeting in convention, passed a number of resolutions dealing with its relationship with TEC. These included resolutions rejecting TEC's Presiding Bishop's efforts to hire counsel in South Carolina on behalf of the Diocese, passing a Canon making the Diocese's Ecclesiastical Authority (Mark Lawrence or the Standing Committee) the final authority in any dispute over the Diocese's Constitution and Canons; amending the Diocese's Constitution removing any accession to the Canons of TEC but retaining accession to its Constitution;[3] making amendments to its Canons consistent with that constitutional amendment; making the Diocese's Constitution and Canons the prevailing authority for any inconsistent constitutional provisions of the General Convention; removing the canon relating to trust in property; and amending the Articles of Incorporation changing its purposes clause.

26. Prior to October 15, 2010, the Diocese's Standing Committee sitting as its Board of Directors unanimously voted to amend its Articles of Incorporation to restate its corporate purpose to "continue operations

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[3] The Diocese stated the removal of its accession to TEC's 2009 Canons was the result of TEC's General Convention vote to replace the Title IV Disciplinary Canon found in the 2006 Constitution and Canons with a new version. The Diocese contended that this new version was unconstitutional because the provisions in these new Canons conflicted with TEC's own Constitution.

under the Constitution and Canons of the Protestant Episcopal Church in the Diocese of South Carolina."

27. On October 15, 2010, the Diocese meeting in convention passed resolutions as follows:

– amending its Constitution to remove accession to the Canons of the TEC and to add the following provision: "In the event that any provision of the Constitution of the General Convention of the Protestant Episcopal Church in the United States of America is inconsistent with, or contradictory to, the Constitution and Canons of the Protestant Episcopal Diocese of South Carolina, the Constitution and Canons of this Diocese shall prevail." The resolution passed by a majority vote.

– amending its canons to conform to the amendment to its constitution. The resolution passed on a vote by orders with 90% of the clergy and 86% of the parishes and missions voting in favor.

– amending its canons to remove the so-called "Dennis Canon" on a vote by orders with 94% of the clergy and 91% of the parishes and missions voting in favor.

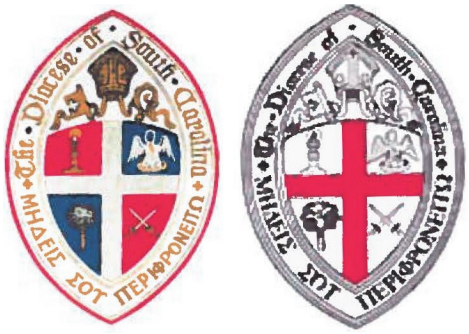
– amending its corporate purpose to "continue operations under the Constitution and Canons of the Protestant Episcopal Church in the Diocese of South Carolina." The resolution passed by a majority vote.

28. On October 21, 2010, the Standing Committee, sitting as the Diocese's Board of Directors, created

bylaws naming the Right Reverend Mark J. Lawrence President of the Diocese. On October 22, 2010, the Diocese filed Non Profit Corporation Articles of Amendment with the South Carolina Secretary of State containing the restated corporate purpose. The amendment was signed by "+ Mark J. Lawrence, President."

29. In late October 2010, the Diocese through its registered agent and Canon to the Ordinary[4], James B. Lewis, applied to the South Carolina Secretary of State for the registration of five service marks under the provisions of S.C. Code §§39-15-1105, *et. seq*.

30. In November 2010, the South Carolina Secretary of State registered the following service marks to the Diocese as owner: "The Diocese of South Carolina;" "The Episcopal Diocese of South Carolina;" "The Protestant Episcopal Church in the Diocese of South Carolina" and the Diocese seal in color and black and white:



[4] A canon to the ordinary is one whose assigned role is to work for the bishop.

31. In February 2011, the Diocese meeting in convention, on second reading, passed the constitutional changes of October 2010, by two-thirds of the votes by orders: 84% of the clergy and 80% of the parishes and missions.

32. Between late 2009 and November 2011, the Diocese issued and delivered quit claim deeds to every parish then in union with it including those now in union with TECSC. Most were recorded and none were sent back to the Diocese.

33. On November 1, 2011, the Standing Committee, also sitting as the Diocese's Board of Directors, unanimously passed a resolution that automatically called a convention of the Diocese to occur within 30 days after any attempted action being taken by TEC against Mark J. Lawrence.

34. On October 2, 2012, the Standing Committee, also sitting as the Board of Directors of the Diocese, unanimously passed the following resolution:

> "The Protestant Episcopal Church in the Diocese of South Carolina, through its Board of Directors and its Standing Committee, hereby withdraws its accession to the Constitution of the Episcopal Church and disaffiliates with the Episcopal Church by withdrawing its membership from the Episcopal Church. This decision shall be effective immediately upon the taking of any action of any kind by any representative of the Episcopal Church against The Bishop, the Standing Committee or any of its members or the Convention of this Diocese

> or any of its members including purporting to discipline, impair, restrict, direct, place on administrative leave, charge, derecognize or any other action asserting or claiming any supervisory, disciplinary or other alleged hierarchical authority over this Diocese, its leaders or members."

35. In 2011, claims were made to the Disciplinary Board for Bishops (DBB) that Mark Lawrence had abandoned TEC. The DBB refused to certify a charge of abandonment. Mark Lawrence was aware that the claims had been made and that the DBB had refused to certify them. In September 2012, the DBB again considered allegations that Lawrence had abandoned TEC. Included in these were the allegations made in 2011, which the DBB had found insufficient to justify a charge. This time, the DBB certified the charge of abandonment allowing it to go forward. A certification is a charge not a conviction. This time Lawrence was unaware that claims had been made, that they were being considered by the DBB and of the DBB's action. The action of the DBB was not disclosed to Lawrence until October 15, 2012. Lawrence was not served with the certification. Had he been, he would have had 60 days to respond.

36. The Diocese withdrew its association from TEC in October 2012.

37. On November 17, 2012, at a Special Convention of the Diocese called 30 days before November 17, the delegates overwhelmingly affirmed the Diocese's disaffiliation from TEC and made conforming changes

to its Constitution and Canons. The vote on the removal of accession to TEC's constitution and removal of all references to TEC passed by a majority vote on the first reading of the constitutional change and on a vote of orders of 96% of the clergy and 89% of the parishes and missions in favor as to the canonical changes.

38. In March 2013, a vote on the second reading of the November 2012 changes of the Diocese's Constitution passed unanimously on a vote by orders.

39. Mark Lawrence was not elected Bishop of the Diocese with the intent on either his part or on that of the Diocese to lead the Diocese out of TEC. From 2009 until October 2012, his intent was to remain "intact and in TEC."

40. Between his election as Bishop and until after the Diocese disassociated from TEC, Mark Lawrence was in good standing with TEC. He did those things that Bishops with jurisdiction do and had seat, voice and vote at TEC conventions and in meetings of the House of Bishops.

41. From November 2012 until the fall of 2013, the Defendants used, without the Diocese's permission, and with knowledge of that use, the names, marks and emblems of the Diocese.

42. These uses included the sending of email communications to the clergy of the Diocese purporting to be from the "Episcopal Diocese of South Carolina" and using the Diocese's seal on those emails; holding a

clergy meeting in the name of the Diocese; creating and using a website with a registered name of the Diocese; using the Diocese's seal description on the created website identical to the description found on the Diocese's website; creating a domain name using a registered name of the Diocese; calling a convention, and creating and using registration forms for that convention, using a registered name of the Diocese; using the names of the Plaintiff parishes on TECSC's website for a number of months without their permission; causing a search using a web search engine for a registered name of the Diocese to redirect the result to TECSC's website; and using a registered name of the Diocese on bank accounts used by TECSC.

43. The Defendants also took action as if TECSC was the Diocese at a convention on January 26, 2013 when votes were taken to reverse many of the changes the Diocese had made to its Constitution and Canons between 2010 and 2012.

44. As of July 8, 2014, the Diocese had approximately 25,000 parishioners worshiping in the 39 nonprofit parish corporations and 12 missions, which are in union with the Diocese.

B. Plaintiff Trustees

45. In 1880, the South Carolina legislature chartered the "Bishop and members of the Standing Committee" as the "Trustees of the Protestant Episcopal Church in South Carolina" ("Trustees).

46. In 1902, the 1880 act was amended to relieve the Bishop and Standing Committee as Trustees and provide for a "Board of Trustees" incorporated with the same name consisting of from five to nine Trustees elected by the annual Diocesan Convention and governed by the Trustees' own governance (by-laws) as determined by the Trustees majority vote. The Legislative acts and the bylaws are the only governance documents of the Trustees.

47. The Trustee's corporate purpose is to hold in trust property, receive assets under wills or gifts given by individuals or other organizations. Some assets are held for uses of the Diocese.

48. TEC has no voice in the Trustees governance nor does it have any right of approval of the Trustees' governance.

49. The Trustees Corporation is not now, nor has it ever been, a member of either the Diocese or TEC.

50. Nothing in the Trustee's legislative charter references TEC; all references are to the Diocese.

51. The Trustees Corporation is not subject to the 1994 Non-Profit Act; it is given its power, by statute, to decide its own governance by a majority vote of its Board of Trustees.

52. In 1982, the Trustees Corporation's bylaws stated that its duties would be carried out under the authority of the "Constitution and Canons of The Episcopal Church and of the Diocese of South Carolina." On March 17, 2010, these bylaws were

unanimously amended to remove the previous reference to the Constitution and Canons of The Episcopal Church.

C. Plaintiff Churches

53. None of the Plaintiff parish churches have ever been members of TEC or TECSC. None of the Plaintiff parish churches have ever participated in General Conventions of TEC and none have participated in Conventions of TECSC since TECSC was organized in January 2013.

54. The elected body of each parish church known as the "Vestry" sits as the parish church's Board of Directors. It is responsible for governance of the parish churches civil affairs.

55. Neither TEC nor TECSC have any veto or oversight with respect to the election of vestry members of a parish.

56. After joining the Diocese, the Plaintiff parish churches have annually participated for the most part, in conventions of the Diocese by electing and sending delegates to those conventions who typically have seat, voice and one vote for their parish church.

57. The Constitution and Canons of the Diocese do not restrict the ability of a member parish church voluntarily to withdraw its membership.

58. None of the Plaintiff parish churches filed with the Secretary of State an irrevocable election to

be governed by the South Carolina Non-Profit Act of 1994 (the "Act").

59. The following legislatively chartered Plaintiff parishes are not subject to the Act: **The Church of The Holy Comforter**, ("Holy Comforter"), **St. James' Church, James Island**, ("St. James"), **The Church of The Holy Cross-Stateburg**, ("Holy Cross"), **The Protestant Episcopal Church, of The Parish of Saint Philip, in Charleston, in the State of South Carolina**, ("St. Philip's"), **The Parish of St. Michael, in Charleston, in the State of South Carolina, and St. Michael's Church Declaration of Trust**, ("St. Michael's"), **The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah**, ("Prince George"), **The Vestry and Church Wardens of The Episcopal Church of The Parish of St. Helena and The Parish Church of St. Helena Trust**, ("St. Helena"), **The Vestry and Church Wardens of The Episcopal Church of The Parish of St. Matthew**, ("St. Matthew's, Fort Motte"), **Trinity Episcopal Church, Edisto Island**, ("Trinity Edisto"), **The Vestry and Church-Wardens of The Episcopal Church of The Parish of Christ Church**, ("Christ Church"), **The Vestry and Church-Wardens of The Episcopal Church of The Parish of St. John's, Charleston County**, ("St. John's"), **The Vestry and Churchwardens of the Parish of St. Andrew**, ("Old St. Andrew's"), and **The Vestry and Wardens of St. Paul's Church, Summerville**, ("St. Paul's Summerville").

60. The following Plaintiff parishes are subject to the Act: **All Saint's Protestant Episcopal Church, Inc.** ("All Saints"), **Christ St. Paul's Episcopal Church**, ("Christ St. Paul's"), **Christ the King, Waccamaw**, ("Christ the King"), **Church of The Cross, Inc. and Church of The Cross Declaration of Trust**, ("The Cross"), **Church of the Redeemer**, ("Redeemer"), **Holy Trinity Episcopal Church**, ("Holy Trinity"), **Saint Luke's Church, Hilton Head**, ("Saint Luke's"), **St. Matthias Episcopal Church, Inc.**, ("St. Matthias"), **St. Andrews Church – Mt. Pleasant and The St. Andrews Church Mt. Pleasant Land Trust**, ("St. Andrews Church"), **St. Bartholomews Episcopal Church**, ("St. Bartholomew"), **St. David's Church**, ("St. David's"), **St. John's Episcopal Church of Florence, S.C.**, ("St. John's Florence"), **Saint Matthew's Church**, ("St. Matthews"), **St. Paul's Episcopal Church of Bennettsville, Inc.**, ("St. Paul's, Bennettsville"), **St. Paul's Episcopal Church of Conway**, ("St. Paul's, Conway"), **The Church of St. Luke and St. Paul, Radcliffeboro**, ("The Cathedral"), **The Church of Our Saviour of The Diocese of South Carolina**, ("Our Saviour"), **The Church of The Epiphany**, ("Epiphany"), **The Church of The Good Shepherd, Charleston, S.C.**, ("Good Shepherd"), **The Church of The Resurrection, Surfside**, ("Resurrection"), **The Vestry and Church Wardens of St. Jude's Church of Walterboro**, ("St. Jude's"), **Trinity Church of Myrtle Beach**, ("Trinity MB"), and **Trinity Episcopal Church**, **Pinopolis**, ("Trinity, Pinopolis").

61. The following Plaintiff parish churches pre-existed the formation of the Diocese, TEC, TECSC and the United States and they first operated as churches on or about the stated dates: St. Philip's – 1680; Old St. Andrew's – 1706; Christ Church – 1706; St. Helena's – 1712; Prince George – 1721; St. John's, Charleston County – 1734; St. Michael's – 1761; St. David's – 1768; St. Matthews, Fort Motte – 1768; and Trinity Edisto Island – 1770.

62. The following Plaintiff parish churches were legislatively chartered after petitioning the legislature pursuant to the provisions of Article 38 of the 1778 South Carolina Constitution: St. Helena; Prince George; St. John's, Charleston County; St. Michaels; St. Philips; Christ Church; Holy Cross, Statesburg; Old St. Andrews.

63. The Plaintiff parish churches had some or all of the following corporate governance documents: legislative charters, articles of incorporation, constitutions and bylaws.

64. Where applicable, the Plaintiff parish churches amended their corporate governance documents to remove references to TEC; such amendments complied with the notice quorum and voting requirements of the Act and the requirements of their corporate governing documents.

65. In 2012 and 2013, the Plaintiff parish churches passed resolutions declaring that they had no relationship with TEC or TECSC but that they remained in union with the Diocese.

66. Title to all the real property of the Plaintiff parishes, Trustees and Diocese is held in the name of those entities. No properties are held in the name of TEC or TECSC.

D. Defendants TEC and TECSC

67. TEC is a New York unincorporated association.

68. In 1789, the Diocese, along with 6 other state associations of Protestant Episcopal Churches, formed the association comprising TEC and voluntarily joined it as a founding member after its delegates subscribed to its Constitution. The Diocesan Convention ratified its delegates' actions in 1790. None of the Plaintiff parishes has ever been a member of the association comprising TEC.

69. TEC's first constitution provided in Article 5 that: "A Protestant Episcopal Church in any of the United States, not now represented, may, at any time hereafter, be admitted, on acceding to this constitution." Pursuant to this article as subsequently amended, the members of this legal entity, the association comprising TEC, are dioceses.

70. Since 1979, TEC has had the following paragraph, known as the "Dennis Canon," in its Canons. It has no similar provision in its Constitution:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the

> Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

71. TEC has no delegates at Diocesan Conventions and has no rights with respect to the conduct of business at a Diocesan Convention, nor has TEC ever had any right of approval over any amendments to the Articles of Incorporation, the Bylaws or to the Constitution and Canons of the Diocese.

72. The Constitution and Canons of TEC have no provisions which state that a member diocese cannot voluntarily withdraw its membership.

73. The Constitution and Canons of TEC do not provide for the discipline of member dioceses.

74. When TEC amends its Constitution, notice of the proposed amendment is sent to every Diocese in TEC followed by a vote on the amendment by diocese in which each diocese votes as a unit through its representatives at the next TEC convention. The amendment must receive affirmative votes from a majority of dioceses to pass.

75. TEC, through its Treasurer, has stated that TEC is composed of "autonomous" dioceses.

76. TEC does not have an ultimate judicatory.

77. TEC's provincial synod has no power to regulate or control the internal policy or affairs of any member diocese.

78. During the period when the Diocese was a member of TEC, funds were voluntarily sent to TEC from the Diocese and TEC, or entities with which it was associated, sent funds to the Diocese. Seventy percent of the funds TEC sent to the Diocese were for third party use; twenty-three percent went to Plaintiff parishes in the form of loans or grants and seven percent to the Diocese as a grant. The ratio of diocesan giving to TEC versus TEC gifts or grants to the Diocese was 117 to 1.

79. TEC is not organized in a fashion that its governance controls the Dioceses or the parish churches. Authority flows from the bottom, the parish churches, up. The "Ecclesiastical Authority" of a diocese is the diocesan bishop. There is no supremacy clause or other provision unambiguously giving any central body or officer of TEC governing authority superior to the diocesan bishop.

80. The Plaintiffs' names and marks were not derived from TEC. The word "episcopal" is used in many other churches unrelated to TEC. Before TEC was created, "Episcopal" and "Episcopal Church" were part of some of the Plaintiffs corporate names and some were called "denominations" by the South Carolina legislature. Before TEC was created, the words "Protestant Episcopal Church" were used to describe the Moravian

Church by the English Parliament in 1749 and were part of the names of pre-existing state church organizations who later formed the association comprising TEC.

81. A treatise, "The Episcopal Church And Its Work," part of the Episcopal Church teaching series, was found to be reliable by Dr. Allen Guelzo, an undisputed expert in 18th and 19th American, church and civil war history and a priest in TEC. It makes the following assertions with which Dr. Guelzo agrees:

- The Presiding Bishop of TEC lacks "canonical duties historically associated with the office of Archbishop" and does not "possess visitorial or juridical powers within the independent Dioceses of The Episcopal Church."

- "The first Dioceses existed separately from each other" before TEC was created in 1789 and after that union "each diocese retained a large amount of autonomy." The need for these dioceses to be publicly perceived as separate and in fact separate was critical to the safety of its members. If individuals were perceived to be part of the hierarchical Church of England during the American Revolution they were labeled "Tories." Tories had been tarred and feathered with some regularity during the Revolution and for the safety of its members autonomy was a paramount concern. Needless to say, the religious organizations which had earlier been part of or identified as associated with the Church of England were motivated to avoid any association whatsoever.

- "Diocesan participation in any national program . . . must be voluntarily given, it cannot be forced."

- The national church and general convention revenues are dependent on the "voluntary cooperation of Dioceses."

82. TECSC is a South Carolina unincorporated association. It was first organized on or about January 26, 2013.

83. TECSC's provisional bishop is Charles vonRosenberg who was elected to that position by TECSC delegates meeting in convention on January 26, 2013.

84. As of July 2014, TECSC had 10 parishes, 17 missions and 3 worshipping communities in union with it.

IV. Conclusions of Law

The Supreme Court of the United States has plainly stated that "civil courts [are] to decide church property disputes without resolving underlying controversies over religious doctrine." Therefore, "it follows that a state may adopt any one of various approaches to settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Maryland v. Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970); *accord Jones v. Wolf*, 443 U.S. 595, 602 (1979).

As early as 45 years ago, two such approaches were identified. Courts could: (1) enforce the property decisions of a congregational church made by a majority of its members or of those made by "the highest tribunal or judicatory that has ruled on the issue" in a hierarchical church, *Maryland Churches*, *supra* at 368-69; or (2) a court could use "neutral principles of law developed for use in all property disputes. . . ." *Presbyterian Church v. Blue Hull*, 393 U.S. 440, 449 (1969). This latter approach has come to be known as "neutral principles of law;" the former approach, "deference."

South Carolina has made its choice: " . . . When resolving church dispute cases, South Carolina courts are to apply the neutral principles of law approach. . . ." *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 442, 685 S.E.2d 163, 171 (2009). When a church dispute can be completely resolved on neutral principles of law, it must be. *Id.* at 445, 685 S.E.2d at 172. Since *All Saints*, the courts of this state have used neutral principles of law when resolving church property disputes. *Banks v. St. Matthew Baptist Church*, 406 S.C. 156, 750 S.E.2d 605 (2013); *Glover v. Manning*, 2014 WL 2926501 (Ct. App. 2014); *Glover v. Stephenson*, 2014 WL 2926811 (Ct. App. 2014); *Haselden v. New Hope Church*, 2014 WL 2581531 (Ct. Ap. 2014); *Progressive Church of Our Lord Jesus Christ, Inc. v. Black*, 2012 WL 10841363 (Ct. App. 2012). Just as in *All Saints*, the two primary legal issues here are "church property and corporate control." 385 S.C. at 434. These issues can be

completely resolved using neutral principles of South Carolina law.

The plaintiffs' evidence was primarily directed at establishing that they are the exclusive owners of their real, personal and intellectual property; that they took the necessary action, pursuant to South Carolina law and their governance documents, properly to disassociate themselves from any relationship with the defendants; and that the defendants infringed on their marks. The defendants' evidence was primarily directed at establishing that the plaintiffs lacked the authority to disassociate whether or not they complied with the procedural requirements of the Act or their governance documents. Alternatively, even if they successfully disassociated, the defendants contend that the plaintiffs' property is subject to an express or constructive trust in the defendants' favor.

A. Corporate Control and Rightful Leadership

Corporate control is decided, just as in *All Saints*, by the determination of whether each Plaintiff followed its appropriate civil governance and lawfully adopted changes to those documents "which effectively severed the Corporation's legal ties" to TEC. 385 S.C. at 449; 685 S.E.2d at 174.[5] Since all the parties are either South Carolina entities (non-profit corporations

[5] The issue of who are the corporation's rightful leaders is determined based on where corporate control rests. *Id.* at 451, 685 S.E 2d at 175.

or unincorporated associations) or do business in South Carolina, neutral principles of South Carolina law govern what was required to accomplish those changes. While many of the plaintiffs are subject to the South Carolina Non-Profit Act of 1994 (the "Act"), some were legislatively chartered before the first non-profit act. The Act does not apply to legislatively chartered corporations that have not elected to be subject to the Act. Fourteen of the thirty-eight plaintiffs are not subject to the Act since they were legislatively created before 1900 and did not file an irrevocable election to be bound by the Act.[6] Twenty-four of the plaintiffs were incorporated after 1900 and are subject to the Act.

1. Diocese

Initially, while TEC and TECSC assert that they have rights with respect to Diocese property, they do not derive from the so-called "Dennis Canon" because on its face this Canon does not apply to the property of a Diocese. *Diocese of Quincy v. Episcopal Church*, 388 Ill. Dec. at 647, 14 N.E.3d at 1258. Whatever rights the defendants might possess derive from their claim that

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[6] "[R]eligious corporations validly created by legislative authority before 1900 . . . " have their original powers and those of the Act if they choose to file "with the Secretary of State an irrevocable election to be governed by the provisions of this chapter." S.C. Code § 33-31-1701. Filing such an election "would constitute, in effect, the surrender of the [corporation's] legislative charter powers." *Id.* (S.C. RepTr. Transc. Comments). "However, nothing in this Act requires these entities to do this." S.C. Code § 33-31-305 (S.C. RepTr. Transc. Comments).

corporate control is vested in TECSC not the Diocese. Therefore, the sole issue with respect to the Diocese is corporate control. If the Diocese legally withdrew from TEC, then those currently in union with it and its leadership control it.

For over 200 years, the Diocese has governed itself through votes of its parish churches and clergy meeting in convention. Between meetings of its convention, it operated first through its Standing Committee starting in 1790 and then after 1795, its Bishop and Standing Committee, and then later in its history, it's Bishop, Standing Committee and its Diocesan Council. Its governance is found in its Constitutions and Canons which have existed and, from time to time, been amended for over 200 years. After its 1973 incorporation, its governance is also found in its Articles of Incorporation and Bylaws. The Diocese's usages and practices have been essentially unchanged since its creation.

In 2010, meeting in Convention, the Diocese began making a series of amendments to its Constitution and Canons that had a bearing on its association with TEC. It is uncontested that these were all passed with the necessary quorum and votes and that the voting procedures in its Constitution and Canons were followed. One of these changes was the amendment of the "purposes" clause in its corporate charter. This amendment was unanimously passed by its Standing Committee sitting as its Board of Directors. It was then passed at

the October 15, 2010 Convention by a majority vote.[7] The Diocese filed Articles of Amendment containing changes in its corporate purpose with the Secretary of State.

On October 2, 2012, the Standing Committee, also sitting as its Board of Directors, voted to disassociate from TEC if TEC took any action against the Diocese, Parishes or any of the Diocese or Parish leadership. Shortly thereafter, TEC announced it had charged Mark Lawrence with having abandoned The Episcopal Church. The Diocese disassociated through the prior vote of its Standing Committee sitting as its Board of Directors and the Diocese met in Convention thirty days later. There, its delegates voted overwhelmingly to affirm the Standing Committee's (Board of Director's) vote to disassociate from TEC. They also voted to remove all references to the Diocese's association with TEC from its Constitution and Canons. The defendants assert that these actions were beyond the power of the Diocese or *ultra vires*.[8]

There is no requirement that articles of incorporation include an express power of amendment. S.C. Code §§ 33-31-1001. The Diocese clearly had the authority

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[7] Majority rule is generally employed in the governance of religious societies." *Jones v. Wolf*, 493 U.S. at 607. (citation omitted).

[8] If third parties, the defendants may not bring a claim based on an *ultra vires* action. S.C. Code §33-31-304. If they claim membership, the claim must be brought derivatively and it was not. *Id*.; S.C. Code §33-31-630; *see* Ord. Den. Mot. to Join Additional Parties (May 20, 2014).

to amend its articles of incorporation, so the act of amending is not outside its power. S.C. Code §§ 33-31-1001 and 302. The appropriate question is whether the Diocese followed the requirements of the Act in making that amendment.

The defendants called a legal expert witness, Martin C. McWilliams, Jr. on the subject of nonprofit corporate governance under the Act. Mr. McWilliams opined that the Diocese did not meet the requirements of the Act when the Diocese amended its corporate purpose. The Court admitted this testimony recognizing that the issues of whether the Diocese's actions were sufficient under the Act to amend its corporate charter and its withdrawal from TEC are legal issues solely within the province of this Court. *Dawkins v. Fields*, 354 S.C. 58, 66-67, 580 S.E. 2d 433, 437 (2003). Additionally, this court, as the "trier of fact determines [the] probative value," if any of Mr. McWilliams' testimony. *Small v. Pioneer Mach., Inc.* 329 S.C. 448, 470, 494 S.E. 2d 835, 846 (Ct. App. 1997); *Vortex v. Ware, et. al.*, 378 S.C. 197, 207, 662 S.E. 2d 444, 450 (Ct. App. 2008). As the trier of fact, while the Court acknowledges Mr. McWilliams expertise, in this instance his opinion regarding the ultimate issue of corporate control was not of assistance.

Mr. McWilliams is a long-standing member of an episcopal church still in union with TEC. He stated he was also a former legal advisor to the Upper Diocese of South Carolina, which is also in union with TEC. Mr. McWilliams testified essentially that the Bishop was made the Diocese's sole director upon its incorporation;

that there were never additional directors; or if there were, their powers were delegated to the Bishop. He then opined that even this person could not amend the charter to change its purpose, and he concluded that whatever the Convention or the Standing Committee did in the instant case were of no legal effect. As discussed infra, the court finds this opinion incorrect.

Mr. McWilliams' opinions lack factual support. The 1994 Act required at least 3 directors yet no evidence was offered that there had been any delegation of authority from the other directors to Mark Lawrence, leaving him as the sole director. S.C. Code §33-31-803. Most importantly, there was no testimony save that of Mr. McWilliams that the Standing Committee was not the Board of Directors.[9]

When the Diocese was incorporated in 1973, the existing non-profit corporation legislation could be described as vague. The South Carolina Nonprofit Corporations Act of 1994 (1994 Act) reduced much of the

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[9] Mr. McWilliams also opined that S.C. Code § 33-31-180 "converted" the provisions contained in TEC's Constitution and Canons into neutral principles of corporate law. Section 180 adds nothing new to issues involving religious non-profit corporations. The official comment recognizes this fact: " . . . Section 1.80 simply states the obvious. . . ." The provisions of any act are subservient to the requirements of the Constitutions of the United States and South Carolina. (" . . . religious doctrine controls to the extent required by the Constitution of the United States or the Constitution of South Carolina, or both." S.C. Code §33-31-180). Those "requirements" have been considered in the Court's conclusions of law. See also *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 442, 685 S.E.2d 163, 171 (2009).

uncertainty. One of the 1994 Act's hallmarks is a framework that provides for flexibility in the structure and operation of non-profit corporations. The 1994 Act elevates substance over form in determining a non-profit corporation's governance structure and operation. While a non-profit must have bylaws, the "bylaws" are the documents that regulate or manage the affairs of the non-profit corporation regardless of what they are named.[10] S.C. Code §33-31-206, Off. Com. ("The term bylaws has a broad meaning.") Similarly, the Board of Directors is comprised of those persons with overall management of the non-profit corporation's affairs irrespective of their titles. S.C. Code §33-31-801. Corporate authority may rest with any persons who actually exercise that authority. S.C. Code §33-31-801.

The Act also recognizes that many organizations including churches, meet in convention through delegates "at which time major corporate and policy decisions are made." S.C. Code §33-31-140(8), Off. Com. 4. However, because of the 1994 Act's provisions concerning delegates, they are not "members" of a non-profit corporation, by virtue of their position as a delegate. S.C. Code §33-31-140(23)(b)(A). Nonetheless, a non-profit corporation's governance may provide delegates with "some or all of the authority of members." S.C. Code §33-31-640. Delegates may therefore elect directors,

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[10] Roberts Rules of Order notes that it was "formerly common practice to divide the basic rules of an organization into two documents in order that one of them – the Constitution – might be made more difficult to amend than the other, to which the name bylaws was applied." RONR (10th ed., p. 13, l. 17-21.)

S.C. Code §33-31-726 (directors elected by "members or delegates"), and delegates' approval may be necessary to amend articles or bylaws. S.C. Code §33-31-1030, Off. Com. Delegates may even have corporate authority either in lieu of or in addition to, directors and members. S.C. Code §33-31-640. The Act leaves the authority of delegates to that set forth in the articles or bylaws. *Id.*, Off. Com.

The Diocese has operated virtually since its existence with a Constitution and Canons. These governing documents provide that delegates meeting in convention make major corporate decisions concerning the amendment of these documents. Both the Diocese's incorporation and the amendment of its Articles in 1987 were done through the authority of its delegates in convention. When the Diocese incorporated in 1973 and certainly by 1994, the Court specifically determines that the Constitution and Canons were the bylaws. In 2010, additional bylaws were adopted that were supplementary to the Constitution and Canons.

Since at least 2010, the entity that engaged in overall management of the corporation has been the Standing Committee. Under the 1994 Act, that is the function of the Board of Directors. The Diocese's bylaws (Constitution and Canons) provide that delegates elect the Standing Committee. The 1994 Act allows a corporation to "provide in its articles or bylaws for delegates having some or all of the authority of members." S.C. Code §33-31-640. Therefore, Delegates may be vested with the power to elect the Board of Directors of a Nonprofit Corporation.

In 2010, the Standing Committee, as the Board of Directors, unanimously voted to amend the Diocese's corporate purpose in its Articles to remove references to TEC's Constitution and Canons. The Diocese meeting in convention voted to amend them as well. These amended articles were then signed by "+Mark Lawrence, President," and filed with the Secretary of State. Mark Lawrence was acting at that time both as Bishop of the Diocese and as President of its convention. This signature was the same as that used by his predecessor Bishop when providing the notice which antedated the amendment of the Diocese's articles in 1987.

The Defendants offered evidence that the Diocese, during its association with TEC, followed certain rules or requirements associated with its membership in TEC as support for its contention that TEC's control over the Diocese and that control was such that the Diocese could not withdraw its association without TEC's consent.

It is plain that persons or entities organize themselves for common purposes under a variety of rules which govern their relationship. These organizational rules often contain both mandatory ("shall" "must") and permissive ("may" "should") provisions. Typically, adherence to these rules is maintained either by some form of sanction for noncompliance or by expulsion. In all of TEC's governing documents, no rule exists

prohibiting the withdrawal of one of its member dioceses.[11] No such rule could be constitutionally inferred.

Both TEC and TECSC are unincorporated associations. In South Carolina, in the absence of statutory changes, the common law governs issues involving unincorporated associations. *Graham v. Lloyd's of London*, 296 S.C. 249, 371 S.E.2d 801 (1988). Under the common law, a member of an unincorporated association may unilaterally withdraw from the association at any time. *Finch v. Oak* [1897] 1 Ch 409 (CA); Stewart, Nicholas, *The Law of Unincorporated Associations* p. 77 (Oxford University Press, 2011) ("The right is not

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[11] Although there was much evidence about the absence of an agreement not to leave, the most telling was the following exchange between plaintiffs' counsel and Bishop Daniel, a witness for Defendants. After handing the witness the TEC Constitution and Canons (2006 & 2009), he was asked:

> Q: Would you please turn to the page in those two where it says the diocese cannot withdraw from the Episcopal Church and read it to us?
>
> A: You're asking me to find the page, you're going to have to wait a little while.
>
> Q: I am.
>
> A: What is your question?
>
> Q: My question is, is there a page or a phrase or sentence in either of those two that says, quote, a diocese may not leave the Episcopal Church without the consent of the general convention?
>
> A: I don't believe so.
>
> Mr. Runyan: Thank you, sir.
>
> The Witness: But I may be wrong.
>
> Mr. Runyan: I'm sure it will be pointed out if you are. Thank you, Bishop.

dependent on acceptance by the association, even if the rules contain no provision for resignation").[12] Similarly, membership in a South Carolina non-profit corporation is voluntary, S.C. Code § 33-31-603 (1976) ("No person may be admitted as a member without his consent.") and "a member may resign at any time." *Id.*; S.C. Code § 33-31-620. More fundamentally, as noted in the commentary in Section 20 of the Revised Uniform Unincorporated Non-Profit Associations Act, "preventing a member from voluntarily withdrawing from an [association] would be unconstitutional and void on public policy grounds."

Freedom of association is a fundamental constitutional right: "it is beyond debate that freedom to engage in associations for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment. . . ." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, any state action which may have the affect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* Freedom

[12] "This association is a voluntary one." *Finch v. Oak* [1896] 1 Ch. 416. "The other members have no power to say that he shall not retire, and there is no law that a resignation which cannot be refused must be accepted before it can take effect. If therefore, a member of this association chooses, even from mere caprice, to retire from it, he can do so at any time without the consent of the other members . . . " *Id.* at 415.

of association is a constitutional right of both incorporated and unincorporated associations. *Id.*

With the freedom to associate goes its corollary, the freedom to disassociate. *Robert v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate."); *Disabato v. South Carolina Association of School Administrators*, 404 S.C. 433, 445, 746 S.E.2d 329, 335 (2013) ("Among the protections afforded by the freedom of association are the rights to not associate. . . ."); *accord Harris v. Quinn*, 134 S. Ct. 2618, 2629 (2014) (citations omitted) (A law is not justified "that forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought" or that "forces a person to "conform to [an entity's] ideology."

There is no basis to claim that the Diocese did not validly exercise its legal and constitutionally-protected right to disassociate from TEC in October 2012.

2. Trustees

The Trustees, an independent legislatively chartered corporation, are not now, nor have they ever been, members of TEC. The legislative charter does not reference TEC.[13] The Trustees relationship has always

[13] The Defendants contend that two entities are referred to in this legislation, the Diocese and TEC. It is clear that the legislative intent when reading the Act as a whole is to one entity and that entity is the Diocese.

been with the Diocese. They are given the power by statute to decide their own governance by a vote of their majority. In 1982, their by-laws stated that their duties would be carried out under the authority of the "Constitution and Canons of The Episcopal Church and of the Diocese of South Carolina." On March 17, 2010, these by-laws were amended to remove the previous reference to the Constitution and Canons of TEC. As noted above, the "Dennis Canon," on its face, does not apply to property of a Diocese much less to that of the Trustees. *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 442, 685 S.E.2d 163, 171 (2009). There is no legal basis for TEC or TECSC to have any claim of control over the Trustees or its assets.

3. Parish Churches

Parishes are not members of TEC. Any associational relationship they may have with TEC is solely through their association with the Diocese. The Defendants neither contested, nor offered contrary evidence

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The "Protestant Episcopal Church for the Diocese of South Carolina" is the Diocese. The language of the Act makes clear that this is a singular entity. This language is also used in the Diocese's Canons to mean the Diocese alone. E.g., D383B. While the 1880 Act refers to "said Church in said Diocese," the obsolescent legal drafting term "said" means the "aforesaid" or "above mentioned," and refers both, "church" and "diocese," to the previously mentioned name. *Black's Law Dictionary (9th Ed.) at 1453.* Additionally, the operative Act of 1902, makes clear that the "Diocese" is the proper name as church is stated as "church." Finally, the last section specifically recognizes that annual reporting is to the Diocese by name not to any other entity.

to the proof that the parish churches, where necessary, met the procedures required by the 1994 Act, their governance documents or both to sever any relationship they might have with the Defendants. Instead, they assert that these Plaintiffs lacked the authority "to remove their allegiance to The Episcopal Church" because they agreed to be bound by TEC governance either in their governing documents or by their conduct. If a parish could properly sever its relationship with the Diocese, as in *All Saints supra.*, it certainly could do so with an entity with which it had no corporate or associational relationship. The Plaintiff parishes are not under the authority or control of TEC or TECSC.

B. Real and Personal Property Rights

It is uncontested that all the real and personal property of the Plaintiffs is titled and held in their names. It is equally undisputed that there is nothing in the deeds of their real property referencing any trust in favor of TEC. However, the Defendants assert that TEC nevertheless is the beneficiary of express and constructive trusts.[14] The claims of an express trust arises out of the same provision that was at issue in *All Saints.* 385 S.C. at 437, 449, 685 S.E. 2d at 168, 174. The "Dennis Canon" is found both in the TEC canons and was also in the Diocese canons before its removal in 2010. The Defendants assert that any parish churches

[14] The Defendants conceded at trial that the only trust available other than an express trust was a constructive trust since there are no implied trusts in South Carolina except resulting and constructive trusts and a resulting trust is not present here.

governing documents, which voluntarily agreed to TEC's constitution and canons would constitute an express trust under South Carolina law. Failing the existence of an express trust, they contend that the plaintiff churches relationships with TEC gave rise to constructive trusts in TEC's favor.

1. *Express and Constructive Trusts*

The United States Supreme Court noted the "peculiar genius" of a "neutral principles analysis" in that it orders "private rights and obligations to reflect the intentions of the parties." *Jones v. Wolf*, 443 U.S. at 603. The parties, before the dispute arises, can structure their relationships so that any dispute over church property ownership will be resolved based on their intent as expressed in "legally cognizable" agreements. *Id.*[15] As between an express and a constructive trust,

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[15] TEC added the Dennis Canon to its canons in 1979 presumably because of a suggestion in *Jones v. Wolf* that neutral principles could allow parties to control the outcome of a dispute through pre-dispute agreements.

> "At any time before the dispute erupts . . . they can modify the deeds or the corporate charter to include a rights of revision or trust in favor of the general church. Alternatively, the **constitution** of the general church can be made to recite an express trust in favor of the denominational church. . . . and the civil courts will be bound to give effect to the result indicated by the parties, **provided it is embodied in some legally cognizable form**.

Jones v. Wolf, 443 U.S. at 606. (emphasis added). This concept was explicitly recognized in *All Saints.* ("We find that the Diocese

the "legally cognizable" **consensual** agreement in South Carolina is an express trust.

In order to create an express trust in South Carolina, whether by transfer or declaration, there must be a writing "signed by the owner of the property that the owner holds identifiable property as a trustee" for another. S.C. Code § 62-7-401(a)(2) (2013). Obviously, this creates two hurdles: (1) the owner of the property must create the trust for the benefit of another (the beneficiary cannot create it for himself); and (2) it must be in writing and signed by the owner of the property. *All Saints* never reached the second issue with regard to TEC's asserted trust interest via its "Dennis Canon" because it held that "it is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another. . . ." 385 S.C. at 449. The Dennis Canon created no express trust of which TEC was the beneficiary.

First, TEC chose not to place its Dennis Canon in its Constitution. To do so would require that the proposed amendment be sent to all the Dioceses first to get their conventions to vote on the proposed amendment. If approved by enough Dioceses, the Constitution could have then been amended. Rather, TEC chose to pass it as a canon, which required a single vote at one Convention. Second, as to the Diocese and the Trustees, the Dennis Canon does not apply on its face to them. As to the parish churches, there was nothing

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and ECUSA organized their affairs with *All Saints Parish* in a manner. . . . 385 S.C. at 445).

consensual between TEC and the parish churches in the process used to adopt it, much less that it was subsequently "embodied in some legally cognizable form." A legally cognizable form in South Carolina would have required a writing signed by each parish church as the owner of the property making a declaration of trust in TEC's favor.[16]

Neither is there a constructive trust in TEC's favor. A constructive trust is not a true trust at all as it

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[16] Eight parish churches were incorporated by the legislature as a result of the 1778 Constitution. Finding 63. Article 38 of the 1778 Constitution of South Carolina in effect substituted the Protestant religion for that of the Church of England as the established church in South Carolina. This constitution also vested in those former Church of England parishes then in existence the property which they possessed, stating "the churches, chapels, parsonages, glebes, and all other property now belonging to any societies of the Church of England, . . . shall remain and be secured to them forever." Although Article 38 was effectively replaced in the Constitution of 1790 by Article 8 to remove the Protestant religion as the established church, this provision was added: "The rights, privileges, immunities and estates of both civil and religious societies, and of corporate bodies, shall remain as if the constitution of this state had not been altered or amended." This provision was carried through every constitution until that of 1868.

It is a well-known principle that neither legislative acts nor constitutional amendments can operate retroactively to "divest vested rights." *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Faulkenberry v. Norfolk Southern Ry. Co.*, 349 S.C. 318, 323, 563 S.E.2d 644, 646 (2002); *Robinson v. Askew*, 129 S.C. 188, 123 S.E.2d 822, 823 (1924). While this principle relates to governmental action and a parish church with vested property rights could divest itself of those rights, given their vested nature such disinvestment would have to be done with the owner's complete consent and the owner's unmistakable intent to accomplish that result.

lacks the fiduciary relationship present with a trust. Restatement of the Law of Trusts §2. It is a "remedial device imposed by law." S.C. Code §67-1-102 Off. Com. (2005); *accord* Karesh, Coleman. Trusts 1 at 66 (1977). It is not the product of an agreement. Its legal basis is the titleholder's equitable duty to convey property to another to prevent unjust enrichment if the titleholder retained it. Restatement of Restitution §160. The South Carolina Supreme Court has expressed these concepts as follows:

> A constructive trust arises entirely, by operation of law without reference to any actual or supposed intention of creating a trust and is resorted to by equity to vindicate right and justice, or to frustrate fraud.

Scott v. Scott, 216 S.C. 280, 288, 57 S.E. 2d 470,474. (1950); *accord Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 732 S.E. 2d 876 (2012). The evidence of its existence must be "clear, definite, and unequivocal." *Id.* at 6, 732 S.E. 2d at 879.

The undisputed evidence is that all the real and personal property at issue was purchased, constructed, maintained and possessed exclusively by the Plaintiffs.

There is no "clear, definite and unequivocal" evidence of the existence of a constructive trust in TEC or TECSC's favor. The circumstances in the instant case are most akin to those in *All Saints*, *Supra.*

C. Marks

Plaintiffs' action also seeks declaratory and injunctive relief with respect to their names, service marks, styles, seals and emblems under two statutes: S.C. Code §§ 39-15-1105 et. seq., (Service Mark Infringement) and S.C. Code §§ 16-17-310 & 320 (Improper Use of Names, Styles and Emblems).[17] The service mark infringement statutes, S.C. Code §§ 39-15-1105 *et. seq.*, create a statutory framework for the protection of registered marks in South Carolina. The issuance of a certificate of registration by the Secretary of State is "competent and sufficient proof" of the mark's registration and of "compliance by the applicant with the requirements of the [Act]." *S.C. Code* § 39-15-1125 (1994). Once a mark is registered, a person[18] is liable to the registrant for its use or reproduction without consent of the registrant either in connection with merchandising activities[19] or when

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[17] These names, marks and their usage are the subject of three prior orders of this Court. One temporarily restrained their use to the Diocese and its officers, directors and employees. It was entered on January 23, 2013. The second continued that relief in the form of a temporary injunction consented to by TEC until a final ruling by this court. *Temp. Inj. (Consent), January 31, 2013.* The third denied, *inter alia*, TECSC's Motion to Vacate or Modify the January 31, 2013 injunction. *Or. Den. Mtn. to Vacate/Modify Temp. Inj. and Den. TECSC Mtn. for Temp. Inj., January 14, 2014.*

[18] A person "includes a juristic person, as well as a natural person. The term "juristic person" includes a firm, partnership, corporation, union, association, or other organization capable of suing and being sued in a court of law." *S.C. Code Ann.* § 39-15-1105(4).

[19] Such activities are the "sale, distribution, offering for sale, or advertising of goods and services." § 39-15-1160 (1994).

using it is "likely to cause confusion or mistake or to deceive as to the source of origin . . . " S.C. Code § 39-15-1160. If the mark is "famous," the registrant is entitled to injunctive relief and if willful intent is proven, to other remedies set forth in the Act. S.C. Code § 39-15-1165. When the infringement is done with knowledge or in bad faith, the Court may award reasonable attorneys' fees to the prevailing party. S.C. Code § 39-15-1170.

Sections 16-17-310 and 320 provide for injunctive relief as well. However, these sections are not based on registration of a mark. They secure the "names, styles and emblems" to the *incorporated* charitable entity that was first organized and used the names.[20] Since neither TEC nor TECSC are incorporated and all the

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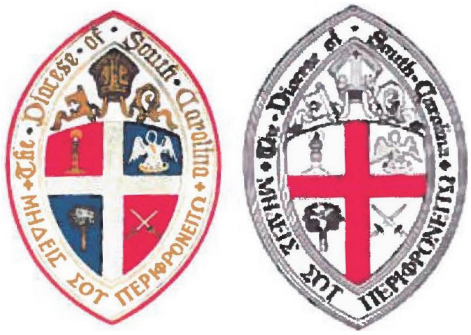
[20] S.C. Code Section 16-17-310 provides:

> No person, society or organization shall assume, use, adopt, become incorporated under or continue to use the name and style or emblems of any incorporated benevolent, fraternal, social, humane or charitable organization previously existing in this State or a name and style or emblem so nearly resembling the name and style of such incorporated organization as to be a colorable imitation thereof. When two or more of such societies, associations or corporations claim the right to the same name or to a name substantially similar as above provided, the organization which was first organized and used the name and first became incorporated under the laws of the United States or of any state of the Union, whether incorporated in this State or not, shall be entitled in this State to the prior and exclusive use of such name, and the rights of such societies, associations or corporations and of their individual members shall be fixed and determined accordingly.

plaintiffs are incorporated, the only issue is whether TEC and TECSC have used or threatened to use the names and emblems of the plaintiffs. There is no requirement that people be "deceived or misled" by the misuse to secure injunctive relief. S.C. Code *§ 16-17-320*.

The Diocese marks are: "The Diocese of South Carolina," "The Episcopal Diocese of South Carolina," "The Protestant Episcopal Church in the Diocese of South Carolina" and the Diocese seal, in color and black and white:



These marks were registered with the South Carolina Secretary of State on November 15, 2010. Several of the Plaintiff parishes, in addition to the injunctive relief they seek with the other plaintiffs under sections 16-17-310 and 320, also seek declaratory and injunctive relief with respect to their registered marks.[21] The

[21] **St. Michaels**: "The Protestant Episcopal Church, The Parish of St. Michael, In Charleston, in the State of South Carolina," "St. Michael's Episcopal Church," "St. Michael's Church," and its Seal all registered on October 14, 2011; **St. Philips**: "St.

facts surrounding the use of the plaintiffs' marks are not disputed.

The Defendants admit that the Diocese is the owner and registrant of its marks and TEC also admits that these marks are "famous" within the meaning of Section 39-15-1165. *Answer and Counterclaim of The Episcopal Church to Second Amended Complaint for Declaratory and Injunctive Relief ¶ 341*; *The Episcopal Church in South Carolina's Response to Request for Admissions by Certain Parishes, October 3, 2013, No. 13.* There is no dispute that the Diocese has used the marks at various times throughout its history.

The dispute surrounding the use of the Diocese marks began after the Diocese withdrew from TEC in October 2012. At least from November 2012 until the fall of 2013, the Defendants intentionally used, without permission, and with knowledge of that use, the names, marks and emblems of the Plaintiffs. Bishop vonRosenberg testified that both he and the Steering Committee regularly used the name and seal of the Diocese in the fall of 2012 and that their use was intentional. He also testified that TECSC used the names of the Plaintiff parishes on its website after TECSC was organized in January 2013.

Philip's Church" registered on November 27, 2011; and **The Parish Church of St. Helena**: "The Parish Church of St. Helena," "The Parish Church of St. Helena (Episcopal)," "St. Helena's Episcopal Church," "St. Helena's Church" and its Seal all registered on July 22, 2011.

The Diocese presented extensive testimony on the unauthorized use of the Diocese's marks, which was not contradicted by any witness for the defendants. James B. Lewis testified as follows:

- On November 7, 2012 he received emails sent to all clergy of the Diocese purportedly from the "Episcopal Diocese of South Carolina" which had not come from the Diocese. These emails attached an invitation to a November 15, 2012 Clergy Day supposedly on behalf of the Diocese and used the Diocese's seal with the TEC shield on the invitation. The Diocese immediately issued a press release and emailed it to all clergy stating that the use of the name and seal of the Diocese was without authority. Nevertheless, another email was again sent from TECSC using the Diocese name and seal.

- He attended a November 15 clergy meeting called without authority in the name of the Diocese. Tom Tisdale, Jr. (counsel for TEC and the future TECSC) spoke most of the time and appeared to be in charge. Bishop vonRosenberg was also present. Mr. Tisdale stated "explicitly that he was functioning as legal counsel for the Presiding Bishop" and that "he had been contacted by the presiding bishop several months . . . prior and asked to begin organizing for the possible need of replacing the Diocese." He stated their intent to use the names and seal of the Diocese.

- TECSC created and used a website using a registered name of the Diocese. Mr. Lewis checked the website domain registration and found the name

"episcopaldioceseofsc.com." He checked the origin of the email address with "episcopaldioceseofsc.com" as the sender and found it registered to "Domain Discreet Privacy Service."

• In December 2012, he received a registration form using a registered name of the Diocese for a special convention to be held on January 26, 2013. The presiding bishop of TEC had called the special convention. The form also used the Diocese seal together with the TEC shield. It further stated that registration checks should be made payable to the "Diocese of South Carolina."

• After TECSC launched a website in a registered name of the Diocese, Mr. Lewis visited the site where he observed use of the Diocese seal and it's registered name. He also found a page on that website where there was a description of the Diocese seal. It was identical to the written description of the Diocese seal which he had prepared and which was on the Diocese website. "It had been lifted in whole from our Diocesan website."

• Mr. Lewis attended the January 26, 2013 convention of TECSC. "My impression upon attendance is that the intention was to be a convention of the Diocese of South Carolina." However, had the convention been of the Diocese of South Carolina, it would have lacked the necessary quorum.

• Among other things at this convention, Mr. Lewis observed Mr. Tisdale's appointment as the Chancellor of TECSC, passage of resolutions intended to alter

existing provisions of the Constitution and Canons of the Diocese and which used a registered name of the Diocese.

- Mr. Lewis made a comparison between the Diocese of South Carolina's Constitution and Canons and those, which were part of the resolutions and found "it was clear that the changes that were being proposed were in direct correspondence with what were our governing documents as the Diocese of South Carolina."

- He discovered after the January convention of TECSC, that when searching for a registered name of the Diocese of South Carolina by using a web search engine, the search would be redirected to TECSC's website.

- In addition to Mr. Lewis' testimony, TECSC admitted that at its two conventions in 2013, it attempted to revise the Constitution and Canons of the Diocese; used a website known as "www.episcopalchurchofsc.org" until the summer of 2013, redirected web visitors seeking the Diocese of South Carolina's website to TECSC's website, used the names of the Plaintiff parishes on TECSC's website for a number of months without their permission and operated a bank account in the registered name of the Diocese.

Finally, there was testimony from witnesses on both sides that the use of the names and the marks of the Plaintiffs not only was likely to cause confusion and to deceive persons as to their source or origin but that there was confusion and deception about their source or origin. The Defendants do not dispute that

they used the marks after the Diocese's withdrawal from TEC. They, however, assert as a defense that the marks were derived from the marks of TEC. The record does not support this defense.[22]

Plaintiffs' names and marks were claimed to be derived from these marks of TEC: "The Episcopal Church" and "The Protestant Episcopal Church in the United States of America." To be derived from these names, the Plaintiffs' marks of necessity must have been later in time and so uniquely similar to TEC's marks, in the way used by Plaintiffs, else the object of their derivation, if any, may have been another source. Neither is the case here.

The word "episcopal" refers to an organization with bishops or overseers. Not only does the use of this word predate TEC, but it also is used today in many other church organizations unrelated to any party in this lawsuit. "Episcopal" and "Episcopal Church" were also part of the corporate names of some of the Plaintiffs before TEC was created. "Episcopalian Church" also was in use before TEC's existence.[23] Some of these

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[22] TECSC's "FOURTEENTH DEFENSE (Invalidity)" asserts that the Plaintiffs' names and marks "were derived wholly from and through Defendants and the rights and interests . . . are invalid and do not constitute a basis for the relief sought." *Answer, Affirmative Defenses and Counterclaims of The Episcopal Church in South Carolina to Second Amended Complaint for Declaratory Injunctive Relief ¶ 518.*

[23] A portion of the Parish Church of St. Helena vestry minutes from July 7, 1784, requests a clergyman from the "Episcopalian Church for the Town of Beaufort, South Carolina on the following terms. An Annual Salary of One Hundred Fifty Pounds Sterling."

"Episcopal" churches were also called "denominations" by the legislature before TEC existed as well. Equally, the words "Protestant Episcopal Church" are not unique to, nor were they first used by, TEC.

As early as 1749, the English Parliament referred to the Moravian Church as an "ancient Protestant Episcopal Church." In the United States, prior to the formation of TEC, these words were part of the names of independent church organizations in Maryland, South Carolina, and Pennsylvania and in other states. If anything, the record supports the conclusion that TEC derived its name from those of the preexisting "Protestant Episcopal Churches" which formed it including that of the Diocese and its preexisting "Protestant Episcopal" parishes.

This Court finds, there is no adequate legal remedy for the protection of the Plaintiffs' names and marks making permanent injunctive relief necessary if the facts justify relief.

It is clear from the record that the Plaintiffs are the owners of their names and marks and that they are incorporated charitable organizations while the Defendants are not. It is also clear that in the absence of the January 2013 restraining order and temporary injunction there would have been a continuance of the intentional infringement of these marks that occurred prior to their entry. Under both statutes, the Plaintiffs have established their entitlement to permanent injunctive relief. There has been the "actual or threatened violation" of Plaintiffs' rights to the "exclusive"

use of their "names, styles and emblems," S.C. Code *§§ 16-17-310 & 320 (1976)*, and there has been use that is both likely to cause confusion and deceive as to source or origin and has done so. Additionally, the Diocese's marks are "famous" as defined by S.C. Code § 39-15-1165.

It is also clear, as to the Diocese, that the Defendants "willfully intended to trade on the registrant's reputation" and that they chose, intentionally, to use the names and seal of the Diocese as strategic support for TECSC's purposes. This strategy was not simply one of TECSC's but was one that TEC benefited from and promoted. "Legal counsel for the presiding bishop" announced it. TEC allowed the TEC shield to be used jointly with the Diocese's seal and TEC's presiding bishop called a special convention using both the name and the seal of the Diocese. Even after the entry of the January 2013 orders, TECSC continued to use the name of the Diocese on its checking account, acted to make modifications to the Diocese's Constitution and Canons also using the Diocese's name, and forwarded web searches for the Diocese to TECSC's website.

IT IS THEREFORE ORDERED,

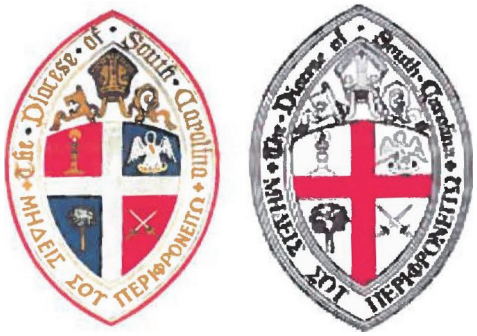
1. The Plaintiffs are the owners of their real, personal and intellectual property.

2. The Defendants have no legal, beneficial or equitable interest in the Plaintiffs' real, personal and intellectual property.

3. The Defendant TEC, also known as The Protestant Episcopal Church in the United States of America and Defendant The Episcopal Church in South Carolina and their officers, agents, servants, employees, members, attorneys and any person in concert with or under their direction or control are permanently enjoined from using, assuming, or adopting in any way, directly or indirectly the names, styles, emblems or marks of the Plaintiffs as hereinafter set out, or any names, styles, emblems or marks that may be reasonably perceived to be those names, styles emblems or marks:

Diocese:

- "The Protestant Episcopal Church in the Diocese of South Carolina"
- "The Episcopal Diocese of South Carolina"
- "The Diocese of South Carolina"
- The seals of the Diocese:



St. Michael's Church:

- "The Protestant Episcopal Church, The Parish of St. Michael, In Charleston, In the State of South Carolina"
- "St. Michael's Episcopal Church"
- "St. Michael's Church"

St. Philip's Church:

- "St. Philip's Church"

The Parish Church of St. Helena:

- "The Parish Church of St. Helena"
- "The Parish Church of St. Helena (Episcopal)"
- "St. Helena's Episcopal Church"
- "St. Helena's Church"
- The Seal of St. Helena's as depicted on page 4 of exhibit PCSH-23 and registered with the South Carolina Secretary of State on July 22, 2011. The Seal is described as follows: "The seal is composed of shield, crest, collar, divided in 4 segments. "Parish Church of St. Helena: over the top 2 segments, "1772 Beaufort South Carolina" under the bottom segments. First quarter is a pelican on a red field, second quarter depicts azure field with the steeple of St. Helena's Episcopal Church; third quarter shows an azure field, a palmetto tree and crescent (South Carolina); fourth quarter depicts blood

> red gules with a portcullis, gate of a castle, taken from crest of the Duke of Beaufort."

4. The Dorchester County Clerk is directed, upon the filing of this order, to refund the sum of $50,000.00 to the Protestant Episcopal Church in the Diocese of South Carolina.

5. The Defendants counterclaims are dismissed with prejudice.

IT IS SO ORDERED!

/s/ Diane S. Goodstein
The Honorable
Diane S. Goodstein
Circuit Court Judge
First Judicial Circuit
State of South Carolina

February 3, 2015
Orangeburg, South Carolina

The Supreme Court of South Carolina

The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Christ the King, Waccamaw; Church of The Cross, Inc. And Church of the Cross Declaration of Trust; Church of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Matthews Church; St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. David's Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway; The Church of St. Luke and St. Paul, Radcliffeboro; The Church of Our Saviour of the Diocese of South Carolina; The Church of the Epiphany (Episcopal); The Church of the Good Shepherd, Charleston, SC; The Church of The Holy Cross; The Church of The Resurrection, Surfside; The Protestant Episcopal Church of The Parish of Saint Philip, in Charleston, in the State of South Carolina; The Protestant Episcopal Church, The Parish of Saint Michael, in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust; The Vestry and Church Wardens of St. Jude's Church of Walterboro; The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah; The Vestry and Church Wardens of The Church of The Parish of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens of

The Parish of St. Matthew; The Vestry and Wardens of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens of the Episcopal Church of The Parish of Christ Church; Vestry and Church Wardens of The Episcopal Church of the Parish of St. John's, Charleston County, The Vestries and Churchwardens of The Parish of St. Andrews, Respondents.

v.

The Episcopal Church (a/k/a The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina, Appellants.

Appellate Case No. 2015-000622

ORDER

Respondents, with the exception of those parishes who prevailed with respect to their property rights, have filed petitions for rehearing. We would deny the petitions.

/s/ D. W. Beatty C.J.

/s/ Costa M. Pleicones A.J

We would grant the petitions for rehearing.

/s/ John W. Kittredge J.

/s/ Jean H. Toal A.J.

In light of the above, the petitions for rehearing have failed to receive a majority vote. Therefore, the petitions for rehearing have been denied, and the opinions previously filed in this case reflect the final decision of this Court. The Clerk of this Court shall send the remittitur.

/s/ D. W. Beatty C.J.

/s/ John W. Kittredge J.

/s/ Jean H. Toal A.J.

/s/ Costa M. Pleicones A.J

Hearn, J., not participating

Columbia, South Carolina
November 17, 2017

cc:
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Thomas S. Tisdale, Jr., Esquire
Jason S. Smith, Esquire
Allan R. Holmes, Sr., Esquire
David Booth Beers, Esquire
Mary E. Kostel, Esquire
Andrew Spencer Platte, Esquire
Henrietta U. Golding, Esquire
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Ivon Keith McCarty, Esquire
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Francis Marion Mack, Esquire
Peter Brandt Shelbourne, Esquire
Susan Pardue MacDonald, Esquire
James Kent Lehman, Esquire
Allan Poe Sloan, III, Esquire
Joseph C. Wilson, IV, Esquire
David B. Marvel, Esquire
David L. DeVane, Esquire
David Spence Cox, Esquire
Henry E. Grimball, Esquire
Thomas Christian Davis, Esquire
G. Mark Phillips, Esquire
W. Foster Gaillard, Esquire
William A. Scott, Esquire
John B. Williams, Esquire
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George J. Kefalos, Esquire
Oana Dobrescu Johnson, Esquire
C. Alan Runyan, Esquire
Robert Walker Humphrey, II, Esquire
Bess Jones DuRant, Esquire
Timothy O'Neill Lewis, Esquire
Amanda A. Bailey, Esquire
C. Mitchell Brown, Esquire
Henry Pickett Wall, Esquire
William C. Marra, Esquire
Charles J. Cooper, Esquire

Matthew Terry Richardson, Esquire
Wallace K. Lightsey, Esquire
D. Reece Williams, III, Esquire
John Carroll Moylan, III, Esquire
Christopher Ernest Mills, Esquire
Cheryl L. Graham
The Honorable Diane Schafer Goodstein

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-000622

(Filed Sep. 1, 2017)

The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Christ the King, Waccamaw; Church of The Cross, Inc. and Church of the Cross Declaration of Trust; Church of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Matthews Church; St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. David's Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway; The Church of St. Luke and St. Paul, Radcliffeboro; The Church of Our Saviour of the Diocese of South Carolina; The Church of the Epiphany (Episcopal); The Church of the Good Shepherd, Charleston, SC; The Church of The Holy Cross; The Church of The Resurrection, Surfside; The Protestant Episcopal Church of The Parish of Saint

Philip, in Charleston, in the State of South Carolina; The Protestant Episcopal Church, The Parish of Saint Michael, in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust; The Vestry and Church Wardens of St. Jude's Church of Walterboro; The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah; The Vestry and Church Wardens of The Church of The Parish of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens of The Parish of St. Matthew; The Vestry and Wardens of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens of the Episcopal Church of The Parish of Christ Church; Vestry and Church Wardens of The Episcopal Church of the Parish of St. John's, Charleston County, The Vestries and Churchwardens of The Parish of St. Andrews,, ... Respondents,

v.

The Episcopal Church (a/k/a The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina,.....Appellants.

MOTION TO RECUSE THE HONORABLE JUSTICE KAYE G. HEARN FROM PARTICIPATION IN THE REHEARING PETITION; MOTION FOR VACATUR OF OPINION OF JUSTICE HEARN AND FAILING THAT, MOTION BY NON-PREVAILING PARISHES AND THE DIOCESE TO VACATE ALL OPINIONS IN THIS MATTER; AND MOTION FOR

CONSIDERATION OF THIS MOTION BY THE FULL COURT AND FOR OTHER RELIEF

The Respondents in this appeal are, simultaneously with the filing of this motion, also filing their Petition for Rehearing in this matter. Hence, the Respondents in this appeal will herein be referenced as "Movants." Unless otherwise specified, all Respondents are "Movants." This motion is filed pursuant to the South Carolina Rules of Appellate Procedure and the Judicial Canons, as well as the Constitutions of the United States and of South Carolina. The Court should grant this motion as set forth below. As an initial matter, as set forth below at page 18, the full Court should consider this Motion.

Movants and their counsel do not lightly make this motion. The twenty six South Carolina attorneys who have signed it do so because of their respect for the judicial system, not in derogation of it. Scholars write of the difficult decisions confronting lawyers and judges that attend a recusal motion. None of the undersigned members of the bar are free from their own biases and if they were to move to the bench, those biases would follow them. Justice Cardozo aptly noted that "[t]he great tides and currents which engulf the rest of men do not turn aside and pass judges by. "*The Nature of the Judicial Process*, 168 (1924). While Movants strongly assert that they do not seek to impugn Justice[] Hearn[']s personal judicial integrity, nevertheless scholars studying the subject of recusal report

that judges frequently view motions to recuse as personal attacks and become very defensive. *See* Michael W. Martin, *Current Issues in Judicial Disqualifications Symposium*, 30 Rev. Litig.639, (2010-2011) (noting scholars finding "error in the commonly held view that disqualification motions and attorney allegations of partiality or bias are an affront to the individual judge's personal judicial integrity . . . ").

This "disqualification paradox" creates the reluctance Movants and their counsel have in filing this recusal motion. In taking their oath of judicial office, judges commit themselves to being, and appearing to be, impartial; yet, the disqualification rules give them the task of finding themselves impartial, or not appearing to be impartial. This inherent tension suggests that most judges would find themselves impartial despite facts that might cause parties to reasonably question the judge's impartiality. *Id.* (citing to Charles Geyh, *Why Judicial Disqualification Matters. Again*, 30 REV. LITIG. 671, 695 (2011)). "Jurists-particularly at the Supreme Court level-have occasionally shown a disturbing defensiveness . . . " regarding recusal motions. Id. (citing Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification-and a Stronger Conception of the Appearance Standard Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 Rev. LITIG. 733, 739 (2011). The law has changed rather dramatically in recent decades generally regarding disqualification of a judge, perhaps to address the above

paradox. *See Id.*, noting "seismic shifts in the judicial recusal landscape since 2001."

Though perhaps difficult for Justice Hearn, and maybe other Justices of the Court to accept, this motion is not made to impugn Justice Hearn's integrity or that of this Court, it is made to strengthen it. As Justice Holmes stated, "[o]ne may criticize what one reveres." "The Path of the Law," 10 *Harv. L. Rev.* 457, 473 (1897). Without public confidence in the court, the rule of law itself, is imperiled. *Liljeberg v Health Services Acquisition Corp.*, 486 U.S. 847, 861, 108 S. Ct. 2194, 2203 (1988) (It is appropriate for a court to consider "the risk of undermining the public's confidence in the judicial process. We must continually keep in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" citation omitted.)

> Counsel for a party who believes a judge's impartiality is reasonably subject to question has not only a professional duty to his client to raise the matter, but an independent responsibility as an officer of the court. Judges are not omniscient and, despite all safeguards, may overlook a conflict of interest.

In Re Bernard, 31 F.3d 842, 847 (9th Cir. 1994) (Kozinski, J.)

Movants and their counsel respectfully make this motion based on the facts, the law and the opinion of experts in this field.

As explained below, Justice Hearn had a duty to disclose various facts concerning her relationships with the Appellants and with a Respondent. Further, based on the facts and her relationships, she had a mandatory duty to recuse. Justice Hearn did not disclose the relationships nor did she ultimately recuse herself

"In general, 'every person has a right to presume that every other person will perform his duty and obey the law.'" *Webb v Special Elec. Co.*, 63 Cal. 4th 167, 186, 370 P.3d 1022, 1034 (2016). Movants had the right to presume that Justice Hearn, in the end, would not participate in the decision in this matter. However, she did participate, and she penned an opinion favoring the Appellants.

I. <u>The Facts Relating to This Motion</u>.

This case has been challenging emotionally, spiritually, and financially to thousands of people in South Carolina. One of those people is Justice Hearn. Like all of her current and former fellow parishioners, this dispute was and is important to Justice Hearn. However, only a limited number of those people were actively engaged in the debate of the underlying issues. An even smaller handful of people left their parish homes and started new parishes because of the issues involved in this case. One of those people is Justice Hearn. This case was important to Justice Hearn, and she and her husband were actively involved in the debate of the issues and were leaders in developing a new parish after

leaving their prior one. Over several years, Justice Hearn developed opinions, advocated for these opinions, and took action based on the outcomes of decisions central to this case. These actions are to be expected by any interested parishioner. However, they should have led Justice Hearn to publicly disclose them, and she should not have rendered judgment in this case. Movants rely on the facts set forth below, and on the affidavits attached hereto in support thereof.

St. Paul's Conway

Justice Hearn and her husband, George, were members of St. Paul's Conway, for many years, at least since 1998. *See* Ex. 1, Julian "Tripp" Jeffords Affidavit. *See also* Ex. 2, Depo. of George Hearn p. 15 (tracing his membership to the early 1980s). The Hearns actively participated in the life of the church. *See* Ex. 1, Affidavit of Jeffords. *See also* Ex. 2, Depo. of G. Hearn generally. St Paul's Conway is a party plaintiff to this action.

Leading up to the disaffiliation of St. Paul's Conway from The Episcopal Church ("TEC"), a group of St. Paul's parishioners vocally aligned themselves with the views of The Episcopal Church and against those of the Diocese and the majority of St. Paul's. *See* Ex. 1, Affidavit of Jeffords. The opposition group included the Hearns and their friends, Rebecca and Richard Lovelace. *Id.* This opposition group spoke publicly in opposition to Bishop Lawrence and the direction of the Diocese and Justice Hearn also spoke publicly to

various actions taken by St. Paul's rector, with whom the group disagreed. *Id.*

After disaffiliation of the Diocese and St. Paul's from TEC was announced in January, 2013, the Hearns no longer attended St. Paul's Conway. *See* Ex. 1, Affidavit of Jeffords. Rebecca Lovelace was called as a witness at trial by The Episcopal Church in South Carolina ("TECSC"). *See* Trial transcript p. 1490, R. 757. George Hearn was deposed as a witness in this case.

The Episcopal Forum

The Episcopal Forum ("Forum") is a group of people in South Carolina who advocate for stronger ties with TEC, take positions on the governance structure of TEC, and uphold the Constitution and Canons of The Episcopal Church. *See* Ex. 3, Forum Newsletter. The Forum's website states: "The 'Forum' is a 501(c)3 nonprofit corporation affiliated with *The Episcopal Church in SC* which is the southern SC diocese of *The Episcopal Church* worldwide."

The Forum has been opposed to Bishop Lawrence and his leadership regularly since 2007. *See* Ex. 4, Forum letter dated September 14, 2007. The Forum has existed since at least 2007, when it opposed the election of Mark Lawrence as bishop. *Id.* The Forum took public positions on the structure of TEC, the authority of bishops, and the disassociation of dioceses from TEC as early as 2007. *See* Ex. 5, newsletter dated September 17, 2007. Today, the Forum continues to have the

mission to support TEC and TECSC, both parties to the case. *See* Ex. 6, mission statement on website June 25, 2017. The Forum has reserved seating at TECSC conventions. *See* Ex. 7, Affidavit of Karen Kusko.

Justice Hearn has been a member of the Forum for at least ten years and allowed her name to be included on published membership lists. *See, e.g.*, membership lists dated March 15, 2007, March 16, 2010, April 7, 2014, and April 21, 2017, attached as Exs. 8, 9, 10, and 11. The Forum ceased publishing its membership list this summer. In 2010, the Forum, of which Justice Hearn was a member at the time, corresponded with TEC and its subdivisions regarding the Forum's positions on the issues and actions decided in this case. *See* Ex. 12, 8/24/10 EFSC Letter to HOB and Executive Council; Ex. 13, 10/25/10 Executive Council Letter to EFSC; and Ex. 14, 11/9/10 EFSC Letter to The Province IV House of Bishops. In 2012, the President of the Forum posted an article on the Forum's website criticizing the *All Saints* opinion in much the same way as Justice Hearn's opinion. *See* Ex. 15, All Saints Opinion, 1/9/12. By publishing her membership, Justice Hearn has publicly connected herself to the activities of the Forum.

Public Recognition of Bias

Justice Hearn's bias relating to the issues in this case has been commented on in several friendly and non-friendly public forums. Charleston's *Post and Courier* published an entire article on the subject of Justice

Hearn's lack of impartiality related to this case. *See* Ex. 16, Article September 27, 2015. Two popular blogs exist which are devoted to discussing the disaffiliation at issue in this case and both are openly written in a manner supportive of *TEC. Scepiscopalians.com* noted on April 9, 2014, attached as Ex. 17, that Justice Hearn and her husband were "prominent Episcopalians" and that they "left their longtime parish homes," and specifically noted Justice Hearn's place on the Court. As recently as August 2, 2017, scepiscopalians.com noted the specific impact of the Supreme Court opinion on Justice Hearn's former parish, attached as Ex. 18.

Episcopalschismsc.blogspot.com goes further in identifying Justice Hearn's interest in the case and bias. On December 26, 2015, Hearn was referred to as a "loyal Episcopalian" and that "The Episcopal Church could not have had a better champion," attached as Ex. 19. This website repeatedly references Justice Hearn and her husband's involvement in their parishes and issues. *See* Exs. 20, 21, and 22, posts dated April 16, 2015, August 28, 2015, and September 18, 2015. The website author sees Justice Hearn as "obviously resolved to defend the Church's claims" and TEC's "intrepid advocate, doing, in my opinion, a better job of it than the lawyer." *See* posts dated October 2, 2015 and September 28, 2015, attached as Exs. 23 and 24.

Justice Hearn also shared her personal views on the issues involved in the case. In late 2012, one of TECSC's lawyers of record in this very case, and one of Justice Hearn's former law clerks, shared the Justice's views with a third party. Walker Humphrey emailed a

TEC-aligned priest that Justice Hearn had forwarded Humphrey emails about people "being labeled as outcasts," as well as her parish's plans for worship after leaving St. Paul's Conway. *See* Ex. 25 D 010770-010771. The email further states: "She also told me about the plan to use the chapel for continuing services, and I believe they asked Holy Cross-Faith Memorial for help. I think it's a good arrangement, and I hope Trip Jeffords, the rector at St. Paul's, is accommodating. I've seen some postings on St. Pauls' Facebook page which shows it's been gone for far longer than I thought." *Id.* Movants understand that if Justice Hearn's opinion controlled, St. Anne's, Justice Hearn's current church, could receive from TEC either title or the right to use the church property formerly owned by St. Paul's, Justice Hearn's former church

St. Anne's and The Episcopal Church in South Carolina

After St. Paul's Conway disassociated from TEC, Justice Hearn and her husband were part of a group that started St. Anne's. *See* Ex. 2, Depo. of G. Hearn at pp. 18-20. George Hearn was a member of the three-person steering committee for the new group called St. Anne's and later became a member of the mission committee overseeing St. Anne's in 2014. *See* Ex. 2, Depo. of G. Hearn at pp. 18-19, 25.

George Hearn was elected to attend two conventions of TECSC in January and March of 2013. Mr. Hearn purported to attend the first convention as a

delegate from St. Paul's, even though he no longer attended St. Paul's and was on the mission committee for St. Anne's. At the convention, Mr. Hearn signed a declaration of conformity to The Episcopal Church and voted to purportedly amend all of the diocesan governing documents that are at issue in this case. *See* Ex. 2, Depo. of G. Hearn at pp. 25-26, 28, 43-45, 47-59.

Justice Hearn continues to be an active member and lay leader at St. Anne's today. The current website for St. Anne's includes pictures of Justice Hearn singing in the choir. *See* www.stanneconway.org, last visited on August 21, 2017. Justice Hearn was listed on the same webpage as a service participant the week the Supreme Court issued its opinion in this case.

Evidence of Bias in the Current Opinion

There is evidence of Justice Hearn's personal views and bias in her decision in this case. Justice Hearn found that it was "clear from the record that doctrinal issues concerning. . . . the role of women were the trigger" for the disassociation. *See* Opinion p. 37. A complete and thorough review of not just the Record on Appeal, but the entire trial transcript uncovers no mention of the role of women. George Hearn stated that the role of women in the church was an issue to him in leaving St. Paul's Conway, but this deposition testimony was not introduced at trial. *See* Ex. 2, Depo. of G. Hearn pp. 27-28.

In another section of her opinion, Justice Hearn strongly criticizes Bishop Lawrence by arguing that

Lawrence joined an effort to lead his prior diocese, San Joaquin, out of TEC. *See* fn. 23. The record on appeal and trial transcript are devoid of such information. The published, opinions on the San Joaquin case never mention Lawrence at all. In his deposition, which was not part of the record, Lawrence testified that he left San Joaquin before taking any position on their disassociation. *See* Ex. 26, Depo. of Mark Lawrence pp. 177-79, 183-84.

Further, Justice Hearn states in fn. 14 "although there can be no question that the individual parishes have been affiliated with the National Church for decades, the trial court found in its order that '[n]one of the Plaintiff parish churches have ever been members of [the National Church].'" The record is clear that the trial court was right. The clerk of the Supreme Court specifically asked for Requests to Admit to be supplemented in the record. On October 8, 2013, TEC admitted "[p]arish churches are not members of The Episcopal Church." *See* Ex. 27, Requests for Admission dated October 8, 2013. This same admission appeared in the Record on Appeal already at R. pp. 81 & 630. This finding in Justice Hearn's opinion exists despite the clear admission from the party itself.

Justice Hearn states that the Diocese did not disassociate because its amendment of its corporate documents was trumped because "the National Church has promulgated its own set of rules concerning corporate governance, including changes to the bylaws." Op. at 14. However, TEC has no governance provisions in its constitution (R.1532) and canons (R.1703) which

speak at all to the ability of a Diocese to amend its governance documents or that require the Diocese to secure approval for such amendments from anybody. There is no reference at all to a Diocese's Constitution and Canons or to its articles of incorporation or bylaws. In fact, it, was undisputed that interference ("regulation or control") with a Diocese's internal policy or affairs was forbidden to TEC's provincial synods. R.783-84. There was no provision here like that in *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696 (1976), where a Diocese submitted its governance documents, either originally or when amended, to any other body for approval. 426 U.S. at 715, n. 9.

Justice Hearn As A Party

Under the laws of South Carolina, Justice Hearn is considered a party to this action and should not hear this case. The positions taken by the Defendants in the litigation are clear. TECSC stated in responses to Interrogatories "that members of [TECSC] are persons." *See* Exs. 28 and 29, Response to St. Philip's Interrogatories Nos. 5 and 6, and Response to Request for Admission No. 3. St. Anne's in Conway was an unincorporated association until at least April 1, 2013. Justice Hearn was a member of St. Anne's at least by the beginning of 2013. *See* Ex. 2, Depo. of G. Hearn p. 18.

Members of unincorporated associations are responsible for judgments against the association. *See*

S.C. Code Ann. §15-35-170. Thus, under the position taken by TECSC, Justice Hearn could be personally liable for any judgment entered against TECSC, at least until April 1, 2013, at a minimum, when St. Anne's incorporated. When this lawsuit was filed, either Justice Hearn was a member of TECSC under its interpretation of membership, or Justice Hearn was a member of the unincorporated association St. Anne's, which was itself a member of another unincorporated association, The Episcopal Church in South Carolina.

TEC takes the position that individual parishes are not members of TEC. *See* Ex. 27, Response to Church of Our Savior, et al. Request for Admission No. 2. Individuals are members of TEC.[1] TEC cannot bring diversity actions in federal court because its citizenship is that of its individual members. *Brown v. Protestant Episcopal Church in the United States of America*, 8 F.2d 149 (1925). Justice Hearn is a member of TEC, and she is a member of the unincorporated association, TECSC.

In addition, Justice Hearn was previously a member of Plaintiff St. Paul's Conway until late 2012 or early 2013. *See* Exs. 2 and 1, Depo. of G. Hearn p. 18 & Jeffords Affidavit. Thus, when St. Paul's Conway joined the lawsuit on January 22, 2013 as a plaintiff, Justice

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[1] In its November 2013 answer to the Diocese's First Interrogatories, question 5, "who do you contend are members of the unincorporated association known as The Episcopal Church and on what documents do you base your response?", TEC's answer is "See Church Canon I.17(1)(a)." That canon provides that baptized individuals are members. R. 1576.

Hearn was either still a member of a Plaintiff parish, or had only just withdrawn her membership within weeks over the issues involved in the lawsuit.

TEC and TECSC, the two Defendants, are unincorporated associations. Members of an unincorporated association are parties to the action involving the unincorporated association. *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E. 651 (1936); *accord, Crocker v. Barr*, 305 S.C. 406, 409, 409 S.E.2d 368, 370 (1991). Once the association is before the court, the rights of its members will be determined in the state court action. *Graham v. Lloyd's of London*, 296 S.C. 249, 371 S.E.2d 801 (1988). Neither TEC nor TECSC are legal entities "separate from the persons who compose [them]." *Graham*, 296 S.C. at 255, 371 S.E.2d at 804; *Medlin v Ebenezer Methodist Church*, 132 S.C. 498, 129 S.E. 830 (1925). Judgment in a state court action is entered against members of an unincorporated association *individually. Crocker*, 305 S.C. at 409, 409 S.E.2d at 370; *Elliott*, 181 S.C. 84, 186 S.E. 651.

Expert Opinions[2]

Lawrence J. Fox and Nathan Crystal have been attorneys, teachers, authors, and experts in legal ethics and professional responsibility for most of their professional lives. This has included leadership positions in the professional ethics bodies of the American Bar Association and the South Carolina Bar. They have

[2] *See* Affidavits of Lawrence J. Fox and Nathan Crystal, attached as Exs. 30 and 31.

reviewed the material submitted to this Court and have concluded:

Justice Hearn is disqualified from participation in this case because Justice Hearn's impartiality might reasonably be questioned, because Justice Hearn is biased in favor of the defendants and because Justice Hearn has personal knowledge of disputed evidentiary facts.

Justice Hearn and her husband have an economic interest and more than a "de minimus" interest in this case that is substantially affected by the proceeding.

Justice Hearn failed to attempt to comply with the remittal provision of the Judicial Ethics Canon.

Justice Hearn's participation, applying an objective bias standard, violates the due process rights of the Plaintiffs under the United States Constitution.

Justice Hearn's disqualification is not waived because she did not follow the procedure for waiver of disqualification, her participation was a structural error in the proceedings which is not subject to waiver and in any event, the waiver provisions do not apply where there is personal bias or prejudice.

II. The Basis of Justice Hearn's Duties To Disclose and Recuse and to Refrain from Participation in any Rehearing Petition.

The due process clauses of the United States and South Carolina Constitutions, as well as the Judicial

Canons and law of South Carolina, required that Justice Hearn make disclosures and disqualify herself from participation in this matter. Because she did neither, and instead participated by writing an opinion favoring the Appellants, her opinion should be stricken and vacated. These same precepts preclude Justice Hearn from participating in the Rehearing Petition in this matter.

A. Constitutional and Structural Bars to Justice Hearn's Participation.

As stated by the United States Supreme Court, "[u]nder our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 566 U.S. 868 (2009) (citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)). In *Caperton*, the Supreme Court held that the Fourteenth Amendment was violated when one of the majority justices of the West Virginia Supreme Court refused to recuse himself due to receiving large campaign contributions from, and through the efforts of, the corporation's principal. The Supreme Court held that actual bias and prejudice need not be shown in order to establish a constitutional deprivation of due process. Objective standards may require recusal whether or not actual bias on the part of a judge exists or can be proved. The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process, the *Caperton* Court held.

The *Caperton* Court held that the true constitutional test was not actual prejudice or actual bias, but the question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the [***1214] guarantee of due process is to be adequately implemented." *Id.*, citing *Withrow*, 421 U.S., at 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712. It is respectfully submitted that the "Facts" section above show this objective constitutional test precludes Justice Hearn from rendering a decision in this matter.

In addition to this objective constitutional test, the United States Supreme Court has held that "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016), (citing *In re Murchison*, 349 U.S. 133, 136-37 (1955).) "This objective risk of bias is reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'" *Id* at 1906. This scenario is also present here and represents an additional structural and insurmountable due process problem. *See supra*, "Facts," relating to Justice Hearn actually being a party to this very action and affidavits of Fox and Crystal, that Justice Hearn has a personal interest in the outcome.

Similarly, under the *Caperton* test, the conflicts of Justice Hearn's spouse must be imputed to the Justice herself for federal due process purposes. As explained

above, George Hearn was a critical player in the underlying events of this case, and he was even a witness in this case for he provided deposition testimony in support of one of the parties. Indeed, it appears that the federal recusal statute and the recusal requirements of almost every state – including South Carolina, *see infra* – require recusal whenever a judge's spouse has more than a de minimis interest in a case or is likely to be a material witness in the case. *See Adair v. State, Dep't of Educ.*, 474 Mich. 1027, 1033-34 (2006). Due process requires no less.

As a result of the *Caperton* test of an "unacceptable risk of actual bias" being met, in addition to Justice Hearn effectively ruling in favor of her interests in her own case as prohibited by *In re Murchison*, Justice Hearn was and is under a mandatory duty to disqualify herself from participation in this matter. As a result, her opinion in this case should be vacated.

In *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the issue presented was whether the justice's denial of a recusal motion and his subsequent participation in the proceedings violated the due process clause of the 14th Amendment. The facts of the *Williams* case span almost 30 years. It began when Williams, and a friend, Draper, were arrested and charged with murder. At the time of the arrest, Ronald Castille was the district attorney. The prosecutor in the District Attorney's office wanted to seek the death penalty against Williams. To do so, he had to get the approval of the DA, Castille. Castille signed the prosecutor's memorandum, stating "approved to proceed on the

death penalty." Williams was subsequently convicted and sentenced to death. For the next 26 years, the conviction and sentence were upheld on appeal, state post-conviction review, and federal habeas review.

In 2012, Williams' attorneys discovered that the prosecutor procured false testimony from Draper, suppressed evidence regarding Williams' relationship with the victim, and failed to disclose a benefit that Draper received for the testimony against Williams. He then filed a petition for Post-Conviction Relief pursuant to Pennsylvania statute. The court of common pleas ordered the District Attorney's office to produce "previously undisclosed files of the prosecutor and police." In those files was the sentencing memorandum with Castille's approval for the prosecutor to seek the death penalty. The court of common pleas, in light of the evidence of false testimony, suppression of evidence, and the prosecution's failure to disclose a benefit provided to a witness against Williams, stayed the execution and ordered a new sentencing hearing. The Commonwealth then submitted an emergency application to the Pennsylvania Supreme Court to vacate the stay of the execution. At the time the emergency petition was filed with the Supreme Court, Castille was serving as Chief Justice. Williams filed a response to the Commonwealth's petition as well as a Motion for Recusal. Chief Justice Castille denied the motion for recusal and the State Supreme Court vacated the court of common pleas' order. Chief Justice Castille joined the majority opinion, which reinstated the death sentence, and also authored a concurrence.

Williams petitioned for certiorari to the United States Supreme Court, which was granted. Before the United States Supreme Court, Williams argued that Castille's decision as the District Attorney to seek the death penalty barred him from acting as Chief Justice and deciding the petition to overturn his sentence because he was, in essence, acting as both the accuser and the judge in the case. The Supreme Court agreed, holding that under the Due Process Clause, there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case (*Id.* at 1905). The Court held: "Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias." (*Id.* at 1908.).

The question then became, "whether Williams is entitled to relief." (*Id.* at 1909.) The Court observed: "In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's *vote was not decisive.*" (*Id.* (emphasis added).) The Court went on to hold that "[A]n unconstitutional failure to recuse constitutes structural error *even if the judge in question did not cast a deciding vote*." *Id.* (emphasis added). The Court remarked that "[t]he deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision

making process." *Id.* Thus, it "does not matter whether the disqualified judge's vote was necessary to the disposition of the case." *Id.* The result was a vacating of the opinion, and a rehearing awarded.

Here, Justice Hearn did cast the deciding vote as to most of the parishes. Because of this, the Movants request the following relief: 1) that her opinion be vacated; and 2) that she not be permitted to participate with regard to the Petition for Rehearing.

B. Judicial Canons Bar Justice Hearn's Participation in the Matter and Require that Justice Hearn's Opinion be Vacated.

Judicial Canon 3E(1)(a) specifically provides that the judge "*shall* disqualify himself or herself" when "(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." The word "shall" is mandatory, and as is set forth above in the "Facts" section of this Motion, Justice Hearn meets this standard.

Similarly, the South Carolina canons, like federal due process law, impute the conflicts of Justice Hearn's husband to Justice Hearn herself Canon 3E(1)(d) provides that a judge "shall" disqualify herself where "the judge's spouse," *inter alia*, "is a party to the proceeding, or an officer, director or trustee of a party," "is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding,"

or "is to the judge's knowledge likely to be a material witness in the proceeding." Here, George Hearn *was in fact a material witness* in the case. And he undoubtedly has more than a de minimis interest in the case, given his role in the underlying dispute, his leadership position within St. Anne's, and the fact that St. Anne's could receive the right to possession or use of the property formerly owned by St. Paul's. Thus under Canon 3E(1)(d), Justice Hearn must be recused.

Judicial Canon 3F, Remittal of Disqualification, provides that if a judge is disqualified under the terms of 3E, he "*may* disclose on the record the basis of [his] disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification *other than personal bias or prejudice concerning a party*, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding." As can be seen by the emphasized language from the Canon, the only bases of disqualification that *cannot* be waived under this Judicial Canon paragraph are "personal bias" and "prejudice concerning a party." Put simply, disqualification of Justice Hearn under the Canons is mandatory, and cannot be waived. Both Nathan Crystal and Lawrence Fox have concluded that Justice Hearn is personally biased.

Further, even if the facts were different and Justice Hearn believed her impartiality could not reasonably be questioned, the Canon commentary under Canon 3E goes on to state that the judge "*should* disclose on the record the information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Here, Justice Hearn made no disclosures, although it is beyond argument that she knew or should have known of various considerations which should have been publicly disclosed by her. Thus, there can be no waiver of other disqualification grounds within the Canons, *viz*, Canons 3E1c, and 3E1d(i), (iii), all of which are supported by the "Facts" section of this motion, *supra*.

Lastly, "[w]hen a judge fails to disclose information to the parties that the judge knew or should have known, this failure to disclose could provide the basis for a motion to disqualify." *See* Leslie W. Abramson, *Appearance of Impropriety Deciding When a Judge's Impartiality Might Reasonably be Questioned*," 14 Geo. J. Legal Ethics 55, 69 (2000). Hence, according to the Canons, Justice Hearn must be disqualified and her opinion vacated.

C. South Carolina Supreme Court Precedent Also Supports Disqualification.

This Court in *In re Underwood*, 417 S.C. 433, 790 S.E.2d 761 (2016) noted the mandatory nature of both

the disclosure and disqualification duties of Judges under the Canons. There, the Judge in mitigation offered that she felt the issues concerning her duties were waived when no one raised any complaints to her about her handling of the matter. This Court noted:

> Respondent asserts she thought that she was complying with the remittal requirements by announcing her conflict before court and proceeding when no objections were voiced. She now recognizes that remittal requires that the disclosure be made on the record to each defendant, that each defendant be given time to consider the matter with counsel, and that the defendant's decision on the matter be placed on the record. Respondent also incorrectly believed that when defendants requested she take their plea and/or knew her connection with the Sheriff's Department that the conflict was waived and she could take the plea. Respondent now recognizes that in these situations she was required to comply with the requirements of Section 3F of Canon 3.

Id.[3] Hence, this Court correctly strictly applied the Canons there and should likewise do so here.

Further, in *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) this Court addressed a motion to disqualify a judge. There, the alleged "prejudice"

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[3] The Canons were adopted in 1991. Older authority opining that personal bias can be waived is thus inapposite. *See, e.g , Butler v. Sea Pines Plantation*, 282 S.C. 113, 317 S.E.2d 464 (Ct. App. 1984) (bias and prejudiced deemed waived).

of the judge was due to certain social relationships he had with the attorneys and attorneys' families. This Court found that "[n]one of the disqualification situations outlined in Canon 3E were present here." Given that only the social relationships were at issue, "under the Rules the circuit judge was not required to disclose any of these relationships with counsel, nor recuse himself." By negative implication, since in this case the facts and relationships are very different, the opposite conclusion is required.

Lastly, this Court has not hesitated to reverse and remand for a new trial where there is an allegation of bias made to this Court and this Court finds that the Record does not support the factual findings of a judge. *See Ellis v. Proctor & Gamble*, 315 S.C. 283, 433 S.E.2d 856 (1993) (findings of master not supported by record, judge alleged to be biased, trial reversed). As shown above in the "Facts" section of this motion, Justice Hearn recited as "fact" some events that nowhere appear in the Record on Appeal or in the trial transcript. Hence, Justice Hearn must be disqualified and her opinion vacated.

III. Timeliness Concerns Cannot Bar this Recusal Motion.

Timeliness concerns cannot bar consideration of this recusal motion. The plain text of the Canons makes clear that disqualification *cannot be waived* for reasons of personal bias and prejudice concerning a party. In light of the active participation of Justice

Hearn and her husband in the facts giving rise to this case – including Justice Hearn's participation in an Episcopal Church institution that has pushed for sanctions against Bishop Lawrence, and her husband's leadership of St. Anne's – Justice Hearn has both actual and apparent bias, and this conflict cannot be waived.

This Court's decision in *Davis*, 409 S.C. at 289, does not require a different result. To be sure, *Davis*, citing *Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C. 1975), notes in *dicta* that the "timeliness of the motion [to disqualify] is questionable." *Davis*, 409 S.C. at 289. Of course, federal courts, ***unlike*** South Carolina state courts, have statutes that guide them on issues of timeliness. In fact in *Duplan*, the district court noted this, stating: "This court is of the opinion that Canon 3C is intended to be utilized by every judge at the outset of every case as a checklist to assist him in determining whether he should at that point disqualify himself from any participation in the proceedings." Once the judge becomes active in the proceeding, he "has the benefit of statutory guidance as to when and under what conditions he should disqualify himself" The district court went on to state that "once a federal judge has commenced his deliberations in a particular action, any challenge to his continued consideration of that matter, based on grounds for which Congress has provided a remedy, must employ those remedies and not the Code of Judicial Conduct". *Duplan* 400 [F.] Supp. at 505 (emphasis added.) 28 U.S.C. §§ 144 and 455 govern recusal in federal court after the

judge takes the case. One of these statutes, Section 144, has an explicit timeliness requirement, and the other, Section 455, is the one for which many courts imply a timeliness requirement.

Hence, the *Davis* Court should not have been guided by federal cases that have a statutory overlay leading them to certain decisions regarding timeliness. Regardless, the reason that the timeliness was deemed questionable by the *Davis* Court is that the party there moved for recusal on the basis of impartiality nearly two years after the judge disclosed the bulk of the relationship involved. Here, Justice Hearn never made any disclosures. Further, the Plaintiffs had a good faith basis to believe she would ultimately adhere to her obligations and not rule in the case. In any event, the structural constitutional problems in this matter cannot be waived or dismissed via timeliness on due process of law grounds. The vacatur must occur in this particular case, regardless, because of the compelling constitutional grounds[4].

Even if the Court were to conclude that this motion is untimely with respect to whether it should *vacate* Justice Hearn's prior opinion in this case, timeliness concerns undoubtedly cannot bar Movants' request for Justice Hearn's *prospective recusal*. In other words, timeliness concerns cannot justify Justice Hearn's continued participation in this case

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[4] *See In re Chavez*, 130 S.W.3d 107 (Tex. Ct. App. 2003) (motions to disqualify based on bias and prejudice not subject to timeliness due to Texas constitutional concerns.

notwithstanding her bias and conflict of interest. The United States Court of Appeals for the Third Circuit, for example, has recognized this point in two separate cases involving the federal recusal statute, holding that when a motion for recusal is "presented to the [judge] prior to a proceeding over which the judge would preside," the motion cannot be denied for lack of timeliness, lest a judge who has an actual or apparent bias be allowed to continue to preside over the case. *United States v Furst*, [886 F.2d 558], 581 (3d Cir. 1989). The *Furst* Court explained that "authorities dealing with situations in which recusals were sought to upset what had already been done" are inapposite when a party seeks prospective recusal. *Id.*

Similarly, in *In re Kensington Int'l*, 368 F.3d 289 (3d Cir. 2004), the Court required the district court to recuse itself prospectively even though a party had moved for recusal 22 months after learning about the grounds for recusal. *Id.* at 316-17. The *Kensington* Court emphasized that the federal recusal statute requires a weighing of the "competing institutional interest in avoiding the appearance of impropriety, on the one hand, and avoiding the abuse of [recusal] procedure, on the other." *Id.* Here, just as in *Kensington*, because "the seriousness of the grounds for recusal that exist on this record far outweighs any significance" of the timeliness of the recusal motion, this Court cannot "have the issue of timeliness trump what [it] ha[s] concluded are the principles of [the federal recusal statute]." *Id.* at 317. Put simply, the judicial system cannot tolerate a judge with an actual or apparent bias to

continue to sit on proceedings after a recusal motion is brought. *See Also Bradley v. Milliken*, 426 F. Supp. 929, 931 (E.D. Mich. 1977) (holding that plaintiffs' motion "is untimely" but nonetheless addressing the merits because "[w]ere plaintiffs' assertions grounds for recusal, we could not sit on this case regardless of any implied waiver or the untimeliness of the motion").

IV. <u>This Motion Should Be Decided by the Full Court, Not by Justice Hearn Alone</u>.

While it is not unusual for a motion for disqualification to be heard by the judge to whom the motion is directed, this should not be the case here. As noted by the Supreme Court in *Williams*, *supra*, citing *In re Murchison*, 349 U.S. 133, 136-37 (1955), the Courts must adhere to the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'" *Id* at 1906. Here, as noted above, Justice Hearn participated and wrote an opinion directly affecting her favorably as a party and her interests within the meaning of the Canon. As a matter of due process, she cannot continue in such a role by deciding whether she will disqualify herself and nullify her opinion (just as she cannot participate in any future rehearing in this matter). It would thus be a denial of Movant's due process if Justice Hearn is permitted to decide her own disqualification motion alone.

V. Conclusion and Arguments As to Relief Requested.

Based on the foregoing, and on the affidavits attached hereto, Movants request that the full Court grant this Motion, and vacate the opinion of Justice Hearn. Movants further request that Justice Hearn not be permitted to participate in the Petition for Rehearing in this case. Should Rehearing without Justice Hearn be deadlocked at 2-2, the Movants further move that the Chief Justice appoint a fifth participant jurist to break the tie. The due process violation would continue if her disqualification from participation in Rehearing simply affirmed the decision in which she participated that caused a violation of due process in the first instance. Failing the above requested relief, Movants who improperly lost their property rights[5] move to vacate all opinions in this matter, and order rehearing and a new oral argument with a newly constituted Court.[6]

Signature Page(s) Attached

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[5] The Movant Diocese (with the exception of Camp Christopher) and 8 parishes prevailed as to their property.

[6] Due to the retirement of former Chief Justices Pleicones and Toal, it is not anticipated that either would ordinarily participate in the rehearing. There are many past examples where rehearing was considered by different justices that those who first heard the case. *See, e.g.*, *Hopkins v. S.C. Dep't of Soc. Servs.*, 313 S.C. 322, 327, 437 S.E.2d 542, 545 (1993); *SCANA Corp v S.C. Dep't of Revenue*, 384 S.C. 388, 389, 683 S.E.2d 468, 468 (2009).

/s/ Charles J. Cooper
Charles J. Cooper
-Pro Hac Vice Motion Pending

/s/ William C. Marra
William C. Marra
-Pro Hac Vice Motion Pending
for *The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body*

/s/ C. Alan Runyan
C. Alan Runyan

/s/ Andrew S. Platte
Andrew S. Platte
for *the Diocese and Parishes as Reflected of Record*

/s/ Allan P. Sloan III
Allan P. Sloan III
Joseph C. Wilson IV
for *Vestry and Church-Wardens of the Episcopal Church of the Parish of Christ Church*

/s/ C. Mitchell Brown
C. Mitchell Brown

/s/ David Cox
David S. Cox
for *The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body*

/s/ Henrietta U. Golding
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/s/ T. F. Sowell III
Thornwell F. Sowell III

/s/ B Durant
Bess J. Durant
for *The Church of the Holy Comforters*

/s/ C. Pierce Campbell
C. Pierce Campbell
for *All Saints Protestant Episcopal Church Inc., St. Bartholomews Episcopal Church and The Church of the Holy Cross*

/s/ Robert R. Horger
Robert R. Horger
for *The Church of the Redeemer*

/s/ I. Keith McCarty
I. Keith McCarty
for *Christ St. Paul's Episcopal Church*

/s/ William A. Scott by
C. Pierce Campbell
w/permission
William A. Scott
for *The Holy Trinity Episcopal Church*

/s/ David B. Marvel
David B. Marvel
for *The Church of St. Luke and St. Paul, Radcliffeboro*

/s/ John F. Wall, III
John F. Wall III
for *The Church of the Good Shepherd, Charleston, South Carolina*

/s/ Francis M. Mack
Francis M. Mack
for *The Protestant Episcopal Church, of the Parish of Saint Philip, in Charleston, South Carolina*

/s/ William A. Bryan
William A. Bryan
for *The Church of the Resurrection, Surfside*

/s/ P. Brandt Shelbourne
P. Brandt Shelbourne
for *The Vestry and Wardens of St. Paul's Church, Summerville*

/s/ G. Mark Phillips
G. Mark Phillips

/s/ Susan P. MacDonald
Susan P. MacDonald
James K. Lehman
for *The Trinity Church of Myrtle Beach*

/s/ W. Foster Gaillard
W. Foster Gaillard
for The Protestant Episcopal Church of the Parish of Saint Philip, in Charleston, South Carolina

/s/ Henry E. Grimball
Henry E. Grimball
for *The Protestant Episcopal Church, The Parish of Saint Michael in Charleston, in the State of South Carolina and St. Michael's Church*

/s/ Mark V. Evans
Mark V. Evans
for *St. James Church, James Island, South Carolina*

/s/ Harry R. Easterling Jr.
Harry R. Easterling Jr.
for *St. David's Church an St. Paul's Episcopal Church of Bennettsville, Inc.*

/s/ Charles H. Williams
Charles H. Williams

/s/ Thomas C. Davis
Thomas Davis
for *The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body*

/s/ John B. Williams, by G. Mark Phillips, with permission and direction
John B. Williams
for *Trinity Episcopal Church of Pinopolis*