IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO. 14-1122

The Right Reverend Charles G. VonRosenberg, individually and in his capacity as Provisional Bishop of the Protestant Episcopal Church in the Diocese of South Carolina,

Plaintiff-Appellant,

v.

The Right Reverend Mark J. Lawrence, John Does 1-10, being the fictitious defendants whose names are unknown to Plaintiff and will be added by amendment when ascertained,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DEFENDANT/APPELLEE'S PETITION
FOR REHEARING AND REHEARING EN BANC

Pursuant to Fed. R. App. P. 35 and 40 and Local Rules (4th Cir.) 35 and 40(a)-(c), Defendant /Appellee, The Right Reverend Mark J. Lawrence, petitions the Court for an order granting rehearing or rehearing en banc of the decision issued March 31, 2015. In counsel's judgment, rehearing or rehearing en banc is

warranted because (1) the decision overlooks a material factual or legal matter; (2) the opinion conflicts with other decisions, published and unpublished, of this Court and other courts of appeal and district courts, and (3) the proceeding involves one or more questions of exceptional importance. As set forth fully below, rehearing or rehearing en banc should be granted and the district court's dismissal of the case affirmed.

Factual Background

On January 4, 2013, The Protestant Episcopal Church in the Diocese of South Carolina ("the Diocese") and sixteen other South Carolina non-profit corporations, sued The Episcopal Church ("TEC") in state court seeking declarations and injunctive relief regarding the ownership and use of real, personal and intellectual property rights of property they possess.[1] The state court plaintiffs

[1] This complaint arises from a series of events in the fourth quarter of 2012. As set forth in Judge Houck's order (Joint Appendix ["JA"] 1959-60; Dist. Ct. Order, pp. 2-3), the Diocese disassociated and withdrew from TEC. In December 2012, TEC purported to remove Bishop Lawrence as the bishop of the Diocese. Thereafter, the Diocese and the Trustees of the Diocese (a separate legislatively created corporation) sought declaratory relief and injunctive in the state court suit over ownership and control of the Diocese and the property rights - real, personal, and intellectual - associated with it as did the other plaintiff non-profit corporations. By final order filed February 3, 2015, the state court, after a three-week trial involving 59 witnesses and over 1200 exhibits, found that the Diocese and other plaintiffs were the owners of the real, personal and intellectual property and that the defendants, TEC and an unincorporated association known as The Episcopal Church in South Carolina ("ECSC") of which Plaintiff Bishop VonRosenberg was the agent and head, had no legal, beneficial or equitable interest in the property. The state court enjoined defendants and their agents, including Bishop

amended the complaint on January 22, 2013, to add seventeen additional non-profit corporations.[2] They also sought and were granted a temporary restraining order prohibiting all except Bishop Lawrence and the officers, directors, trustees and employees of the Diocese and the Trustees of the Diocese from using the names and marks of the Diocese. Prior to the hearing on a preliminary injunction, TEC consented to imposition of the preliminary injunction upon the same terms as the TRO on January 31. As noted by Judge Houck (JA 1973; Dist. Ct. Order, p. 16), Bishop VonRosenberg received notice that he was precluded by the TRO and preliminary injunction issued by the state court.

The Episcopal Church in South Carolina ("ECSC"), an unincorporated association of individuals and church parishes who remained associated through the ECSC with TEC, was formed on January 26, 2013, following the issuance of the temporary restraining order. Plaintiff ,VonRosenberg, was elected bishop of the ECSC on that date. On February 28, 2013, with leave of court, the Diocese and the other Plaintiffs in the state court added the ECSC as a defendant. The ECSC claimed it was the real Diocese and thus was entitled to ownership and control over the same real, personal, and intellectual property first put at issue by the Diocese. Three additional plaintiff non-profit corporations that remained in association with

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VonRosenberg, from using the emblems and marks at issue. A copy of the state court's final judgment is attached as Exhibit 1. TEC and ECSC have appealed.

[2] Unless otherwise noted, the factual and procedural background in the parallel state court case is taken from that court's final order, attached as Exhibit 1.

the Diocese were also added as plaintiff parties. On the date this second amended complaint was served, March 5, Bishop VonRosenberg filed this case seeking the same relief that was already at issue in the state court action including a request for injunctive relief under the Lanham Act that directly contradicted the state court injunction.[3] (JA 8-28; Plaintiff's complaint.)

TEC and ECSC filed their state court answers and counterclaims on March 28, 2013, and April 3, 2013. (*See* JA 569-666; 475-558.) The counterclaims of TEC include the same Lanham Act claims asserted by Bishop VonRosenberg in this case.[4] (JA 619-21.)

On August 23, 2013, the district court entered its order abstaining from deciding Plaintiff's claims and dismissing those claims without prejudice, reserving to Plaintiff the right to seek restoration of the matter if it appeared that

[3] Subsequently, the district court rejected the effort by Plaintiff to obtain an injunction against Bishop Lawrence in direct contravention of the previous temporary injunction issued by the state court. (JA 1979; Dist. Ct. Op. p. 22.) The state court has now entered a final order granting permanent injunctive relief against TEC, ECSC, and Plaintiff. *See, supra*, note 1 and Exhibit 1.

[4] ECSC, with TEC's consent, attempted to remove the state court matter to federal court on April 3, 2013. The district court remanded the case for lack of subject matter jurisdiction on June 10, 2013. *Protestant Episcopal Church in the Diocese of S.C., et al. v. The Episcopal Church, et al.*, 2:13-cv-00893-CWH (DSC) (Dkt. Entry #1, Notice of Removal; Dkt Entry # 167, Remand Order).

the claims would not be fully resolved in the state court matter within any applicable limitations period.[5] (JA 1979; Dist. Ct. Op. p. 22 & n. 11.)

Grounds for Rehearing

I. The Court's Decision is Inconsistent With the Court's Prior Decisions.

A. The Decision Conflicts with the *Riley* opinion.

Although unpublished, the Court's decision in *Riley v. Dozier Internet Law, PC*, 371 Fed. App'x 399 (4th Cir. 2010), extensively discussed and relied upon by Judge Houck, conflicts with the Court's adoption of a *per se* rule requiring a district court to apply *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) in all cases involving mixed claims for declaratory and nondeclaratory relief .

In *Riley*, the plaintiff argued that the *Brillhart/Wilton* standard[6] was inapplicable because his federal complaint contained claims for an injunction and money damages. *Riley*, 371 Fed. App'x at 404, n. 2. Rejecting the *per se* approach (adopted by the Court here), the Court in *Riley* stated:

> [T]he perfunctory inclusion of non-declaratory requests for relief does not suffice to remove a plaintiff from the ambit of the *Brillhart/Wilton*

[5] The Court's opinion correctly states that Bishop Lawrence moved the district court to dismiss for lack of standing or alternatively abstain from deciding the action pending resolution of the state court matter, but incorrectly states that the district court stayed this case. (Op., p. 5.) The district court dismissed, rather than stayed, this case. (JA 1979; Dist. Ct. Order, p. 22.)

[6] *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

> rule. A declaratory judgment plaintiff may not convert a district court's discretionary jurisdiction under *Brillhart/Wilton* into nearly mandatory jurisdiction under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 817 … (1976) simply by tossing in dependent or boilerplate nondeclaratory requests.

Id. The Court's decision incorrectly characterizes this statement in *Riley* as simply a form of an exception to its adopted *per se* rule. (Op. p. 10-11, n.3.) This statement of the *Riley* Court is not an exception to this Court's *per se* rule, but is instead a reference to "dependent or boilerplate nondeclaratory requests," which relate to alternative tests for abstention in mixed-claim cases adopted by the Seventh, Eighth, and Ninth Circuits and certain district courts. These alternative tests involve an analysis of whether the nondeclaratory claims are "independent" of the claims for declaratory relief, *see, e.g., R.R. Street & Co., Inc. v. Vulcan Materials Co.*, 569 F.3d 711, 715 (7th Cir. 2009) and *United Nat. Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1112-13 (9th Cir. 2001) , or whether the "essence of the suit," when viewing the suit as a whole, can best be characterized as declaratory or coercive. *See, e.g., Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 793 (8th Cir. 2008); *Perelman v. Perelman*, 688 F.Supp.2d 367, 378 (E.D. Pa. 2010).

Further, the Court's opinion fails to grapple with Judge Houck's findings and conclusions that Bishop VonRosenberg's nondeclaratory requests for relief wholly hinge on resolution of the declaratory requests pertaining to ownership and

control of the Diocese and are, therefore, perfunctory and dependent and, therefore, raised simply to avoid the *Brillhart / Wilton* standard.[7] Judge Houck noted that Bishop VonRosenberg's claim under the Lanham Act seeks the same relief as TEC's counterclaim in the state action and that he had twice been notified of the binding effect upon him of the state court's restraining orders. The district court concluded that "these facts alone suggest procedural fencing," given Plaintiff's full knowledge. (JA 1976-77; Dist Ct. Op. pp. 19-20.)

The Court's opinion does not address these findings about Plaintiff's manipulation of the pleadings to obtain jurisdiction in the federal court. Rather, it

[7] *See* JA 1964, Dist. Ct. Op., p. 7 and n. 7 (stating that while Plaintiff claimed election to a particular office, "elements of his office related to diocesan identity are outstanding in the state court" and that Plaintiff's pleadings "do not contend that his installation [by TEC] automatically conferred rights and interests recognized by the South Carolina Secretary of State or that Bishop Lawrence's removal [by TEC] altered his own corporate executive status"); JA 1970, p. 13 (noting that Plaintiff's claims "are not discrete from those issues involving greater Diocese ownership, control, and identity that are currently before the state court"); JA 1972, p. 15 (rejecting Plaintiff's claims that the federal and state cases are not "parallel" and expressly noting that the pleadings allege Bishop von Rosenberg "is an agent of ECSC [a co-defendant in the state action]" and that Plaintiff is improperly using the service marks and names of the Diocese, and that though he is not a named party, "the rights he possesses with regard to control of the Diocese's property and his office are already at stake in the state action"); JA 1973, 1975, pp. 16, 18 (noting that Bishop VonRosenberg is "not a stranger to the state action" and twice was informed of the binding effect of the state court's TRO and preliminary injunction against him as an agent of defendants, and that his requested injunctive relief under the Lanham Act would "be in direct contravention of a temporary injunction already issued by the state court").

states that there is "[n]othing in the record" to suggest Plaintiff was attempting to avoid dismissal under the *Brillhart/Wilton* standard. (Op. p. 11.)

Rehearing should be granted to address the conflict with *Riley* or alternatively, it should be granted to address the findings of Judge Houck that this case represents procedural fencing on the part of Plaintiff to gain a perceived more favorable forum and avoid the dismissal of his core declaratory claims on the basis of the *Brillhart/Wilton* standard.

B. The Decision is Factually Inconsistent With the Court's Prior Decisions in *Kapiloff* and *Nautilus*.

In support of its decision to adopt a *per se* rule requiring application of *Colorado River* in all mixed-claim cases, the Court relies upon *New England Ins. Co. v. Barnett*, 561 F.3d 392 (5th Cir. 2009). *Barnett* adopted the *per se* approach for mixed claims even though the federal court complaint there raised only claims for declaratory relief. The non-declaratory claim that triggered the application of the *per se* rule in *Barnett* was contained in the counter-claims filed by the defendant.

Such an approach is factually inconsistent with this Court's decisions in *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1989) and *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371 (4th Cir. 1994). In both cases, the complaints filed by the insurance companies sought only declaratory relief regarding coverage obligations under the insurance contracts. *Kapiloff*, 155 F.3d at

492, *Nautilus*,15 F.3d 373. In both cases, the claimants asserted counter-claims, just as in *Barnett*, for non-declaratory relief. *Id.* Nonetheless, the *Kapiloff* and *Nautilus* Courts applied the *Brillhart/Wilton* standard to the district court's decisions regarding abstention, not the more rigorous *Colorado River* standard.[8] In fact the *Barnett* Court, in analyzing various tests applied in different circuits to mixed-claim abstention, characterized the holding in *Kapiloff* as requiring "a per se application of *Brillhart* any time a request for declaratory action is made, regardless of other facts and circumstances." *Barnett*, 561 F.3d at 395. Hence, rehearing *en banc* is appropriate here to clarify the proper test to be applied in mixed-claim abstention contexts.

II. The Court's Decision Adopting a Per Se Rule In Cases Involving Mixed Declaratory and Non-Declaratory Claims is Inconsistent With Statutory Law Prescribing the Discretionary Authority of Courts to Hear Claims for Declaratory Relief and Supreme Court Precedent Construing that Law.

The Court's adoption of a *per se* rule applying *Colorado River* exclusively in mixed-claim cases violates the express text of 28 U.S.C. § 2201 whereby Congress, pursuant to the power vested in it by Article I, Section 8 to create inferior courts, has prescribed that such courts "***may*** declare the rights and other

[8] The mixed-claim issue, though factually present in each case under the approach now adopted by the Court from the Fifth Circuit, was either not raised to the Court or not addressed by the Court in *Kapiloff* and *Nautilus*. Because the issue was not specifically addressed in those cases, the Court's decision does not technically conflict with those decisions.

legal relations of any interested party seeking such a declaration," not that they ***shall*** declare such rights, simply because a party joins a claim for non-declaratory relief such as damages or an injunction in the suit (as the Court's decision now requires).[9] 28 U.S.C. § 2201 (emphasis added).

The Court's decision is also inconsistent with the Supreme Court's restatement in *Wilton* of the discretionary power afforded to the district courts by the statute and the Court's earlier pronouncement in *Brillhart*. Although it did not address a mixed-claim situation, the *Wilton* Court strongly reiterated the discretionary authority granted to district courts with regard to claims for declaratory relief, even in the face of arguments for application of the more stringent *Colorado River* standard and its rationale of the obligation of federal courts to hear cases falling within their subject matter jurisdiction.

Thus, the fact that a case contains a federal law claim conveying subject matter jurisdiction upon the district court does not negate the discretion afforded the district courts over claims for declaratory relief. *Id.* at 282. The *Wilton* Court particularly noted the Declaratory Judgment Act's "textual commitment to discretion, and the breadth of leeway we have always understood it to suggest …." *Id.* at 286-87. Quoting a treatise on declaratory actions, the *Wilton* Court noted:

[9] As held in *Barnett*, upon which the Court relies, this thwarting of the Declaratory Judgment Act's statutory text may be accomplished by either plaintiffs or defendants as part of the complaint or as a counter claim.

> We agree, for all practical purposes, with Professor Borchard, who observed half a century ago that '[t]here is … nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court' to hear a declaratory judgment action. … By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to consideration of practicality and wise judicial administration.

Wilton, 515 U.S. at 288 (quoting E. Borchard, *Declaratory Judgments* 313 (2d ed. 1941)).

Thus, the *per se* rule adopted by the Court (and by the Second, Fifth, and Tenth Circuit Courts of Appeal) negates the express statutory command and its explication in *Wilton* by *requiring* a district court to entertain and rule upon a request for declaratory relief in every instance simply because a party coupled some request for non-declaratory relief with the request for declaratory relief.[10] The Court should reject this approach for one that gives real meaning to the Congressional mandate regarding claims for declaratory relief.

[10] The Court's opinion (Op., pp. 10-11 & fn. 3) does recognize a possible exception to the *per se* rule where the request for non-declaratory relief "is frivolous or is made solely to avoid application of the *Brillhart* standard," quoting *Black Sea Inv., Ltd. V. United Heritage Corp.*, 204 F.3d 647, 652 (5th Cir. 2000) and citing to this Court's unpublished decision in *Riley*. As discussed above, the Court's decision does not grapple with the district court's findings in this regard. (JA 1976-77; Dist. Ct. Op. p. 19-20.)

Other circuit courts of appeal and district courts have adopted approaches that give meaning to this Congressional mandate. For example, in *R.R. Street & Co., Inc. v. Vulcan Materials Co.*, 569 F.3d 711 (7th Cir. 2009), the court, following the Ninth Circuit, adopted an "independent claim" test. This approach gives some effect to the statutory command of deference under the Declaratory Judgment Act while also recognizing the concerns regarding nondeclaratory relief expressed on *Colorado River*. Under this test:

> Where state and federal proceedings are parallel and the federal suit contains claims for both declaratory and non-declaratory relief, the district court should determine whether the claims seeking non-declaratory relief are independent[6] of the declaratory claim. If they are not, the court can exercise its discretion under *Wilton/Brillhart* and abstain from hearing the entire action.[7] But if they are, the *Wilton/Brillhart* doctrine does not apply and, subject to the presence of exceptional circumstances under the *Colorado River* doctrine, the court must hear the independent non-declaratory claims. The district court then should retain the declaratory claim under *Wilton/Brillhart* (along with any dependent non-declaratory claims) in order to avoid piecemeal litigation.

Id. at 716-17. According to the *R.R. Street* court:

> A claim for non-declaratory relief is "independent" of the declaratory claim if: 1) it has its own federal subject-matter-jurisdictional basis, and 2) its viability is not wholly dependent upon the success of the declaratory claim. If a claim satisfies this test, then the district court's "virtually unflagging obligation" to exercise jurisdiction over a non-declaratory claim is triggered.

Id. at 716 n.6. Under this approach, the *Brillhart/Wilton* standard would apply in this case. As Judge Houck determined (JA 1977-78; Dist. Ct. Op. p. 20-21), the

viability of the claim for non-declaratory injunctive relief under the Lanham Act is entirely dependent on the antecedent declaration that Bishop VonRosenberg has ownership and control of the intellectual property at issue.

Another example of such a test that gives meaning to the Congressional mandate is found in *Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 793 (8th Cir. 2008), wherein the court set forth an "essence of the suit" approach:

> [T]he fact that Royal Indemnity Company seeks monetary damages in addition to declaratory relief does not require a federal court automatically to apply the exceptional circumstances test articulated in *Colorado River*. The Declaratory Judgment Act allows a court to grant any "further necessary or proper relief based on" its declaratory judgment decree…. A court has discretion to grant further necessary or proper relief in declaratory judgment actions; consequently, a court may still abstain in a case in which a party seeks damages as well as a declaratory judgment so long as the further necessary or proper relief would be based on the court's decree so that the essence of the suit remains a declaratory judgment action….While Royal Indemnity Company seeks monetary damages in addition to a declaratory judgment, those damages can all be characterized as "further necessary or proper relief" that Royal Indemnity Company seeks based on the requested declaratory judgment. The damages Royal Indemnity Company seeks are not independent of the requested declaratory judgment, but are closely linked with it.

Id. at 793-94 (internal citations omitted). Were this approach to be applied, the result in this case is much the same as under the "independent claim" approach of the Seventh and Ninth Circuits. In this case, the nondeclaratory relief at issue – an injunction under the Lanham Act—is simply "further necessary or proper relief" flowing from the antecedent declaration of Lanham Act liability, which in turn is

dependent on an antecedent declaration of who has ownership and control of the intellectual property at issue. (JA 1977-78; Dist. Ct. Op. p. 20-21.)

The tests utilized by the Seventh, Eighth, and Ninth Circuits also preserve, to a greater degree, the discretion given to the district courts to entertain or abstain from claims for declaratory relief based on "considerations of federalism, efficiency, and comity," *Penn-Am. Ins. Co. v. Coffey*, 368 F.3d 409, 412 (4th Cir. 2004), using the four-factor approach set forth in *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371 (4th Cir. 1994). This contrasts with the Court's *per se* approach under which discretion is virtually non-existent.

The Court should adopt, by published opinion, the "independent claim" test set forth in its prior *Riley* decision and also applied in the Seventh and Ninth Circuits, or the "essence of the suit" test employed by the Eight Circuit. Alternatively, the Court should grant rehearing to address the exception to the *per se* rule and the district court's findings that Plaintiff filed this suit as part of an effort at procedural fencing (JA 1976-77; Dist. Ct. Op., pp. 19-20) to obtain a perceived more favorable forum in light of the state court grant of preliminary injunctive relief.

Conclusion

For the reasons set forth above, Petitioner / Appellee requests that the Court grant rehearing or rehearing en banc and affirm the judgment of the district court.

Dated: April 14, 2015 Respectfully Submitted,

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