THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013

The Protestant Episcopal Church
in the Diocese of South Carolina et. al. . . . . 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.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in holding that the questions of (1) whether this dispute is ecclesiastical at its core, and (2) whether The Episcopal Church is a hierarchical church were irrelevant under South Carolina law, and, as a result, in excluding relevant evidence and failing to enforce that Church's internal governance.

II. Whether the trial court erred in its application of civil law by (1) concluding that state trademarks trump earlier-registered federal trademarks with which they conflict and cause confusion; (2) incorrectly interpreting the language of a statutory trust that describes the beneficiary as being affiliated with The Episcopal Church; and (3) concluding that South Carolina law permits a corporation to amend its corporate articles in direct contravention of those articles.

STATEMENT OF THE CASE

The plaintiffs in this case are 36 individual church parishes in southeast South Carolina, a corporation named "The Protestant Episcopal Church in the Diocese of South Carolina," and a trust corporation created by statute, "The Trustees of the Protestant Episcopal Church in South Carolina."

Eighteen of the plaintiffs filed this lawsuit in January 2013, several months after former Episcopalians in the Diocese of South Carolina and its parishes attempted, because of disputes over church doctrine and governance, to remove the Diocese and its parishes from The Episcopal Church. The other plaintiffs joined via amended complaints.

The initial defendant was The Episcopal Church, a voluntary association headquartered in New York, here referred to as the "National Church."

The Episcopal Church in South Carolina was added via the second amended complaint and comprises the South Carolina Episcopalians who were displaced when the former Episcopalians took the actions described above. They make up the *true* Diocese.

The plaintiffs sought relief on three causes of action. They sought a declaration that they were the owners of all diocesan and parish property, they sought injunctive relief on a claim that the defendants infringed diocese- and parish-owned State trademarks, and they sought several additional declarations that they were the only organizations who could use diocesan and parish corporate names, symbols, and other properties.

The defendants opposed these claims and brought their own similar requests for declaratory and injunctive relief under both State and Federal law.

The procedural history includes a temporary restraining order and two prior appeals.

An *ex parte* TRO prevented the loyal group of South Carolina Episcopalians from using the names of the Diocese or the Trustee Corporation. A subsequent preliminary injunction was entered by consent.

The first interlocutory appeal concerned an order denying a motion to compel discovery. The Episcopal Church in South Carolina filed this appeal in January of 2014 and it was dismissed 5 months later, in May. See C-TRACK Appellate Case No. 2014-000101.

The second appeal concerned the denial of The Episcopal Church in South Carolina's motion to add four of the plaintiffs' leaders as parties. This appeal was filed in June of 2014. It was dismissed early the next month. See C-TRACK Appellate Case No. 2014-001377.

After a 14-day trial, which began July 8th and included 58 witnesses and over 1,300 exhibits, the court found for the plaintiffs in an order dated February 3, 2015. The defendants' timely request for reconsideration was denied February 23rd. The defendants initiated this appeal March 24th.

STATEMENT OF FACTS

The plaintiffs, as well as the court below, rely on this Court's decision in *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 685 S.E.2d 163 (2009). That case included a debate about whether parish property was subject to a trust and which group of individuals—those loyal to the National Church or those who wished to leave—constituted the parish's governing board.

The present litigation is an effort to apply a particular view of the *All Saints* holding. But while *All Saints* involved one parish that wished to leave the National Church and the Diocese, in the present case multiple parishes have voted to leave and the Diocese purportedly wants to go with them. Moreover, the dispute in this case is, at its core, one over church governance and doctrine. These issues did not surface in *All Saints*.

By way of background, in 1784, after the American Revolution severed ties between colonial churches and the Church of England, a group of Episcopalians—a convention of "The Episcopal Church of America"—sent a letter to a South Carolina priest inviting him to gather parishes to join a National Church in this country. (DSC 56, pp.1-7). That letter was read at meetings of South Carolina churches, and the Diocese had its first convention in 1785. *Id.* It adopted the National Church's first Constitution in 1789. (D. 425, p.3). For over 200 years, the Diocese, as the regional element of the National Church's government, has recognized the National Church's authority and its rules.

The plaintiffs' claims focus on the use of corporate procedures to change the nature of the Diocese and its parishes. Although the Diocese has been in existence since the late 1700s, it was not incorporated until 1973. The plaintiffs say that by using procedures from

South Carolina's Non-Profit Corporation Act for amending articles of incorporation and bylaws, the Diocese in the last several years changed its "civil" corporate purpose. The plaintiffs acknowledge that when the Diocese was incorporated, it existed, as it had for centuries, to further the National Church's mission in South Carolina. (DSC 007) (the 1973 charter). They contend, however, and the trial court agreed, that the Diocese's corporate purpose is freely modifiable as would be the purpose of any corporation.

The National Church and its true Diocese say that this is all a ruse. They argue that the common understanding of an "Episcopal Diocese" is a Diocese that is part of The Episcopal Church, functioning as a bridge between Episcopal parishes and the National Church. It is part of the Church's structure, an ecclesiastical entity also cognizable under civil law. There is not a "civil" side of the Diocese that is separate from the ecclesiastical side. That concept is the creation of disgruntled worshipers who wish to take church property when they leave the denomination.

This dispute is foundational. The plaintiffs say (and the trial court agreed) that by virtue of its status as a South Carolina corporation, the Diocese shed its status as an integral, regional part of the National Church, and became a separate sovereign that can change its purpose and governance at will. The National Church and its true Diocese say this ignores history and long-standing practice.

Plaintiffs Plot to leave The Episcopal Church

Mark Lawrence was ordained as Bishop of the Diocese in 2008. He did not become "Bishop" immediately after his election. The National Church's rules require a several step process including gathering consent from the majority of the other dioceses. (D 203, p.10).

The ordination ceremony is also important. It included an oath or vow by Bishop Lawrence to conform to the National Church's doctrine, discipline, and worship. (Depo.88).

There were unusual circumstances around Bishop Lawrence's election. Two Episcopal Priests—Dow Sanderson and Thomas Rickenbacker—offered testimony tending to show that nominees were selected for their commitment to lead the Diocese "out" of the National Church. (Trial Tr.p.1312, lines 9 - p.1313, line 17) and (*Id.* at 2055, line 11 - p.2056, line 9). Bishop Lawrence and other witnesses of course denied this.

Moreover, Bishop Lawrence's election in 2006 did not garner the support of a majority of the National Church's other dioceses. (Trial Tr.p.1831, lines 8-22). Only after Bishop Lawrence made written assurances that he would make the required vows and that he did not intend to leave the National Church, was his second election approved, and he was ordained. (Trial Tr.pp.1335-36) (the letter's text).

This Court decided *All Saints* two years after Bishop Lawrence's ordination. Discovery revealed that Bishop Lawrence retained counsel who represents many of the plaintiffs here several months after the decision was published. See (Trial Tr.p.67, ll. 7-16).

Beginning in 2010, Bishop Lawrence and his followers took several actions to amend the Diocese's governing documents in an attempt to undo the Diocese's ties to the National Church. These culminated in an October 2012 resolution in which Bishop Lawrence announced that the Diocese was withdrawing its accession to the National Church's rules and was leaving the National Church. See (DSC 32).

Trial testimony also established that in 2010, Bishop Lawrence and his followers began providing parishes with quitclaim deeds designed to disclaim any interest of the

Diocese in each parish's property. Parishes were asked to delay recording these deeds until 2011. (Trial Tr.p.666, lines 2-9). One of the plaintiffs' witnesses explained that there was fear the National Church would discipline Bishop Lawrence if the quitclaim deeds were recorded and became public. (Trial Tr.pp.72, line 18 - p.73, line 5).

Bishop Lawrence and his followers also changed the Diocese's bank accounts. One witness explained that it was due to concern that the National Church would freeze the Diocese's accounts after it took disciplinary action against Bishop Lawrence. "Friendly bankers" were sought who would give assurances that "freezing" would not happen. (Trial Tr.p.1315, line 18 - p.1317, line 7).

Thus, Bishop Lawrence and his followers were laying the groundwork from 2009 forward, but Bishop Lawrence did not renounce his ordination oath and divulge that the Diocese was "leaving" the National Church until three years later. Throughout this staging period, Bishop Lawrence was serving in a position that he would not have gained without first promising to follow the National Church's direction and control. Bishop Lawrence was presiding over actions that he knew contravened the National Church's governance. He kept these actions secret from the National Church in order to maintain his status as Bishop.

The upshot of this plan was an attempt to transform the Diocese into something that undisputedly was different from what it was before. For over 200 years, membership in the Diocese required a parish to agree to all of the National Church's rules and its authority. E.g. (DSC 423B, pp.7-8). Under Bishop Lawrence these essentials were removed. The parishes altered their governing documents the same way. All the parishes removed their ties to the National Church, and all but one of the parishes declared loyalty to the Diocese.

The Parties' Arguments Regarding *All Saints*

To justify these results, the plaintiffs' constant refrain was that the *All Saints* decision directly controlled. They claimed that the reasons they were leaving the National Church did not matter,[1] that Bishop Lawrence's oath did not matter,[2] that whether the National Church was a hierarchical church did not matter,[3] and that it did not matter whether the National Church had disciplined other bishops who attempted to lead a diocese out of the church.[4] The plaintiffs said this case was only about how "neutral" law applied to these entities; that is, if they controlled the corporate boards and if they held all of the deeds, they win.

The National Church and its true Diocese, however, relied on a passage from *All Saints* in which this Court, citing the U.S. Supreme Court, explained that some church disputes will involve questions of doctrine or governance that are "masquerading" as fights over property. In those cases, the First Amendment requires courts to defer to decisions and other actions of the hierarchical church. See, e.g. (Trial Tr.p.256, l. 15 - p.257, l. 13).

To illustrate this conflict, the second witness at trial was a person who serves as the primary assistant to the Bishop. When questioned about why the Diocese decided to leave the National Church, the plaintiffs objected and the trial court sustained the objection. The National Church's counsel explained that he was not asking about this person's religious beliefs or for the court to decide who was right and who was wrong. Counsel was seeking

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[1]See, e.g. (Trial Tr.p.570, lines 8-18); (*Id.*p.786, lines 9-12; p.2492, lines 7-11).

[2]See, e.g. (Trial Tr.p.241, lines 11-24; p.1392, line 22 - p.1393, line 14; p.2505, lines 2-5).

[3]See, e.g. (10/11/13 Tr.p.82, lines 12-14); (Trial Tr.p.1417, ll. 13-15); (*Id.*p.2341, ll. 7-8).

[4] See, e.g. (Trial Tr.p.1995, ll. 6-16); (*Id.*p.2007, ll. 17-19); (*Id.*p.2173, l. 17 - p.2176, l. 9)

instead to explore the nature of the parties' disagreement. See (Trial Tr.p.253, line 1 - p.257, line 13). The trial court ruled that this line of inquiry was irrelevant. The court even refused to allow counsel to proffer the testimony. (Trial Tr.p.258, lines 1-4).

Summary of Trial Testimony and of the Parties' Other Arguments

Most of the other trial testimony followed a pattern. Most of the plaintiffs' witnesses testified for the individual parishes in a similar vein. The parishes had previously pledged to follow the National Church's authority and its rules, either directly or "indirectly" through pledging to follow the rules of the Diocese, which in turn required following the rules of the National Church. (DSC 423B, pp.5, 8). The parishes subsequently changed their governing documents to remove those pledges, apparently following appropriate corporate procedures for making such changes, citing *All Saints*. E.g. (Trial Tr.p.359, line 14 - p.360, line 25).

The defendants sought to establish that the parishes had historically understood themselves as parts of The Episcopal Church's structure, making express promises to obey National Church governance and conforming their operations to the church's authority and rules. Thus, some of the parishes had purchased insurance from the National Church's captive insurance company, taken advantage of the National Church's charitable tax exemption, and followed the National Church's rules with respect to selling or mortgaging property. E.g. (Trial Tr.p.387; p.861; p.1982). In sum, until this dispute erupted over the church's doctrine and governance, there was a common intention and understanding that being a part of The Episcopal Church's brand required agreeing that the National Church's rules—including its rules about property ownership—were authoritative and controlling.

Defendants also argued that plaintiffs' views of secular law failed on their own terms.

The defendants argued that the statute creating the Trustee Corporation imposed a trust whose beneficiary is the National Church's true Diocese.

The defendants argued that the Diocese's State-registered trademarks caused confusion with the National Church's Federally-registered trademarks. The defendants said the National Church's marks were part of a nationwide brand of which the plaintiffs acknowledge they are no longer a part.

The defendants also argued that the amendments to the Diocese's 1973 corporate charter had been unlawful because the corporate charter stated that the Diocese's purpose 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." See (DSC 007). Bishop Lawrence had changed this to read that the Diocese would operate under *its own* Constitution and Canons, not the National Church's Constitution and Canons. (DSC 009).

Finally, the defendants argued that the Diocese's "Standing Committee"—an ecclesiastical body established by the National Church's Constitution and Canons—never properly became the Diocese's "Board of Directors" under the Nonprofit Corporation Act. This meant any actions that Committee purported to take under the guise of being such a Board were void.

Summary of Evidentiary Rulings Against the Defendants

The trial court repeatedly stated its view that South Carolina was not a "hierarchical" state. (11/25/13 Tr.p.14, ll. 15-18); (12/30/13 Tr.p.19, ll. 12-14); (Trial Tr.p.829, ll. 6-8; p.1780, ll. 4-6); (*Id.*p.1796, ll. 2-6). The court appeared to view considering a church's hierarchical status as inconsistent with neutral principles. (*Id.*p.2011, ll. 12-19).

The trial court refused to consider the bishop's oath at ordination and the National Church's discipline of other bishops for trying to lead a diocese "out" of the church. (Trial Tr.p.1392, l. 22 - p.1393, l. 14; p.2507, ll. 14-18). The trial court also ruled that the reasons Bishop Lawrence and his followers decided to "leave" The Episcopal Church were largely irrelevant. (Trial Tr.p.257, l. 18 - p.258, l. 4). At one point, the court explained that the only use for this testimony would be impeachment. (Trial Tr.p.570, l. 19 - p.571, l. 14).

And, on the subject of trademark infringement, the court barred evidence about whether the plaintiffs' State trademark registrations caused confusion with the National Church's Federal trademarks. (Trial Tr.p.1559, line 22 - p.1565, line 24).

The Trial Court's Order

The trial court asked for several submissions at the close of the evidence, and the court ultimately signed a final order that was essentially the proposed order the plaintiffs prepared. The order is 46 pages long, has 84 numbered paragraphs labeled "findings of fact," and contains a "conclusions of law" section that spans 23 pages.

The order includes crucial findings: *first*, that the Standing Committee of the Diocese is vested with overall management of the Diocese, is the only body that can make decisions for the whole Diocese, and acts as the "Board of Directors." (Or.¶17.pp.8-9). *Second*, that Bishop Lawrence was not elected with the intent of leading the Diocese out of the National Church and that from October of 2009 to October of 2012, Bishop Lawrence intended to remain with the National Church. (Or.¶39.p.14). *Third*, that the National Church's governance does not control a diocese or individual parishes, rather, "authority" flows from the bottom up and a diocese retains a "large amount of autonomy." (Or.¶¶79, 81.p.22).

The court's conclusions of law state that "[w]hen a church dispute can be completely resolved on neutral principles of law, it must be." (Or.p.24). The court rejected the testimony of Professor Martin McWilliams—the defendants' expert on corporate governance and fiduciary duties—because Professor McWilliams is a long-standing member of a parish that is still in union with the National Church and because the court found that his opinions "lack factual support." (Or.p.28).

The court observed that "freedom of association" includes the freedom to "disassociate," and the court held that there was "no basis" to claim that the Diocese had not validly exercised what the court called the Diocese's "constitutionally-protected right to disassociate from [the National Church]." (Or.p.32).

The court held that the statute creating the Trustee Corporation referred only to one entity—the Diocese—and allowed the trustees to change their governance. (Or.p.33).

The court held that the National Church's "Dennis Canon," which recites a trust on all parish property in favor of the National Church and its dioceses, did not impose a trust on any of the parishes' properties because there was "nothing consensual" about the canon's adoption and because a "legally cognizable" trust would require a writing that was signed by each of the parishes, as the owners of the properties in question. (Or.pp.35-36). In doing so, the court made no mention of the evidence showing the parishes' *repeated* written promises to obey National Church rules.

The court decided the trademark claims by finding that the plaintiffs' marks were not later in time or similar to the National Church's trademarks. (Or.pp.42-43).

STANDARD OF REVIEW

This is an action in equity. A declaratory judgment is neither legal nor equitable, but is instead determined by the nature of the underlying issue. *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014). An action for an injunction is an action in equity, see *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001), and both this Court and the Court of Appeals have previously treated "church dispute" cases as equitable because the suits sought an injunction. See, e.g., *McCain v. Brightharp*, 399 S.C. 240, 246, 730 S.E.2d 916, 919 (Ct. App. 2012); *Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002); *Bowen v. Green*, 275 S.C. 431, 433, 272 S.E.2d 433, 434 (1980).

The standard of review in an equitable case is *de novo*, and this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011).

ARGUMENT

At its core this case is about identity and ecclesiastical governance.

At one time or another, all of the plaintiffs identified themselves as being associated with The Episcopal Church. They did this because there were advantages of being included in that brand, and this inclusion came as part of a bargain. In exchange for being part of The Episcopal Church's label, everyone was required to agree that the National Church's rules were authoritative and controlling. There is no legitimate dispute about this point. The plaintiffs' governing documents reflected this, and this is why the plaintiffs went to such great lengths to attempt to change those documents.

After these entities "left" the National Church, many removed the word "Episcopal" from their names and signs. At the same time, they asserted ownership and control over church assets. The leaders of this separation movement wanted to remove themselves from The Episcopal Church brand, but they wanted to retain the structures and assets that had been built up over generations under that brand. To accomplish this, these leaders attempted to keep control over parts of the National Church's hierarchy—the Diocese, the Trustee Corporation, and the individual parishes—as they plotted their way out

They followed that course because they knew these entities were connected to valuable property rights and trademarks. The Trustee Corporation's principal asset, for example, is a large tract of land on Seabrook Island that houses a camp. Before this dispute erupted, everyone intended for this and other church properties to be controlled by South Carolinians affiliated with the National Church. The plain language of the Church's rules requires this. Yet, when the dissidents left the National Church because they disagreed with its doctrine and governance, they wanted to change the terms of the deal and take the Diocese's and parishes' property interests with them.

The First Amendment does not permit the court system to bless this sort of action. "Neutral principles of law" can solve *some* property disputes, but the Constitution does not permit a court to upend a church's administration or trump its hierarchy, even if a church dispute involves interests in land.

The result does not change if this Court puts the First Amendment completely to the side. The civil law does not permit people to create confusion that interferes with federally-protected brands and trademarks, to alter trusts created by statutes, or to retroactively validate

unlawful corporate actions. People can leave The Episcopal Church at will, but they cannot take the church's identity and property when they go.

I. The trial court erred in holding that the "neutral principles" approach precludes any consideration of ecclesiastical questions or evidence.

There is no dispute that South Carolina courts resolve church disputes by following the "neutral principles of law" approach approved in *Jones v. Wolf*, 443 U.S. 595 (1979). *Pearson v. Church of God*, 325 S.C. 45, 51-52, 478 S.E.2d 849, 852-53 (1996). *All Saints* did not alter the rule, but "explicitly reaffirm[ed]" it. 385 S.C. at 442, 685 S.E.2d at 171.

Like many other rules, "neutral principles" has boundaries. The First Amendment's protection of religious freedom requires that the neutral principles approach can function only when the underlying dispute is free of religious implications. A dispute may appear to be facially "neutral," but if resolving that dispute will touch on issues of church governance or doctrine, courts must yield to the resolutions reached by appropriate church bodies.

This trial court, however, went too far in the name of neutrality. For the most part, it barred the consideration of evidence about church governance and the underlying nature of this dispute. Ironically, by seeking to sanitize this case of ecclesiastical questions and evidence, the trial court waded into a religious controversy. This was an error of law.

A. The neutral principles approach requires deference to ecclesiastical determinations and rules.

The neutral principles of law approach was the culmination of a decade's worth of cases working through the court system. The Supreme Court first suggested it in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial*

Presbyterian Church when the court stated, in dicta, that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." 393 U.S. 440, 449 (1969). Ten years (and a few cases) later, the Supreme Court formally approved the neutral principles approach as a constitutionally acceptable method for adjudicating church property disputes. *Jones*, 443 U.S. at 604. Under this approach:

> 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 its members.

Id. at 603-04.

This approach is not intended to make things difficult for churches. *Jones* explains that churches can "modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church," or "the constitution of the general church can be made to recite an express trust in favor of the denominational church," to "ensure . . . that the faction loyal to the hierarchical church will retain the church property." *Id.* at 606. *Jones* promises that the burden imposed on churches to take these steps "will be minimal." *Id.*

Since the rule's inception, the Supreme Court has consistently maintained that the First Amendment prevents neutral principles from being a vehicle for a civil court to intrude upon questions of religious doctrine and governance. Even at the rule's genesis, the Supreme Court cautioned that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious

doctrine and practice." *Hull*, 393 U.S. at 449. The court explained "[i]f civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Id.* The First Amendment therefore "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." *Id.* In sum, general rules of neutral law "may not be relied upon" if applying them will cause a civil court to resolve a doctrinal issue. *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

This means that the First Amendment requires a civil court—even one employing "neutral principles"—to defer to a hierarchical church's resolution of issues of religious doctrine or governance. *Jones*, 443 U.S. at 602. *Any* approach to church disputes has to respect this boundary, and when the *Jones* dissent argued that neutral principles would inhibit the free exercise of religion, the *Jones* majority responded, "Nothing could be further from the truth." *Id.* at 606.

An example may help to illustrate the rule and its constitutional limitations. In *Serbian Eastern Orthodox Diocese for United States of America and Canada v. Milivojevich*, the Supreme Court reviewed the Illinois Supreme Court's application of neutral principles. 426 U.S. 696, 721 (1976). Although the state court had ostensibly been "neutral," it erred by effectively "substituting" its interpretation of church constitutions for decisions made by the appropriate church bodies. *Id.* at 721. The Court wrote that the First and Fourteenth Amendments forbid such substitution. *Id.* Like a major portion of the present case,

Milivojevich involved the reorganization of a church's diocese, which, the Court explained, "involves a matter of internal church governance, an issue at the core of ecclesiastical affairs[.]" *Id.*

These limiting principles have been stated several ways. They find expression in the Supreme Court's instruction that "religious freedom encompasses the 'power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1956)). The same principles underlie the Court's statement that church decisions will control even in cases where the connection to property rights is not direct, but instead "follows as an incident" from the resolution of another issue. *Kedroff*, 344 U.S. at 120-21.

This Court was recognizing these same principles in *Banks v. St. Matthew Baptist Church* when it wrote that a court may decide a church dispute only "so long as a court can hear [the] case without deciding issues of religious law[.]" See 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013). The Court made similar pronouncements in both *All Saints* and *Pearson*. See *All Saints*, 385 S.C. at 445, 685 S.E.2d at 172 (if a question of religious law or doctrine is masquerading as a dispute over property or corporate control, the court must defer); *Pearson*, 325 S.C. at 53, 478 S.E.2d at 853 (court should not decide whether a church acted consistently with its laws, doctrines, or system of discipline in revoking a pastor's ministry). If the core of a dispute is based on church doctrine or governance, courts must recognize the limits imposed by the First Amendment and account for them.

B. If questions of doctrine or governance are involved, courts must accept the church's decisions and enforce those decisions when applying civil law.

Courts cannot simply look at a dispute and automatically declare that it is neutral on its face. That runs the risk that civil courts will unwittingly inject themselves into religious controversies and infringe a church's constitutional right to govern itself.

To avoid this result, courts must attempt to "peel back" the surface of a case and determine, in the first instance, whether deciding the case will implicate considerations of church governance or doctrine. This is not a rule of "compulsory" or "automatic" deference. The court uses neutral principles when those principles are appropriate, but the court must defer when deference is required. Doing so ensures that courts steer clear of becoming entangled in religious disputes. This analysis into a case's origin is not searching and exacting, but as *Jones* recognizes, it is the critical step to preventing the court from improperly deciding an issue that is out of bounds. See 443 U.S. at 604 (discussing precedent that entailed "no inquiry into religious doctrine").

This Court has offered examples of the questions that a court cannot decide. For instance, civil courts cannot determine whether a church followed proper procedures or what procedures a church *should* follow when passing a resolution or taking certain action. *Pearson*, 325 S.C. at 53, 478 S.E.2d at 853; *Knotts v. Williams*, 319 S.C. 473, 478, 462 S.E.2d 288, 290-91 (1995); *Bowen v. Green*, 275 S.C. at 435, 272 S.E.2d at 435; *Morris St. Baptist Church v. Dart*, 67 S.C. 338, ___, 45 S.E. 753, 754 (1903). The question of whether a minister's views and conduct conform to church doctrine and practice is likewise beyond the jurisdiction of the courts. *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120-21

(1843). A court also cannot endeavor to adjudicate which faction is the "true" faction of a church. *Turbeville v. Morris*, 203 S.C. 287, ___, 26 S.E.2d 821, 828 (1943).

Candor requires acknowledging an apparent inconsistency between *All Saints* and *Pearson*. *Pearson* described many of these examples as being "consistent" with neutral principles, but *All Saints* described some of the same cases as following the "deference" approach. Compare *All Saints*, 385 S.C. at 443-44, 685 S.E.2d at 171, with *Pearson*, 325 S.C. at 51, 478 S.E.2d at 852. Respectfully, these cases accurately state and apply the neutral principles approach within its appropriate constitutional confines, as *Pearson* accurately found. This is consistent with the Supreme Court's treatment of similar disputes. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (judicial review of a church's decision about the identity of its pastor unconstitutionally "intrudes upon more than a mere employment decision"); *Milivojevich*, 426 U.S. at 709 (reorganization of a diocese involves not a property dispute, but a religious dispute); *Md. & Va. Eldership*, 396 U.S. at 367 (per curiam) (dismissing a church property dispute for want of a substantial federal question because it involved "no inquiry into religious doctrine").

When a civil lawsuit implicates church doctrine or governance, the court's duty is to accept the decision of the appropriate church body and determine what effect, if any, that decision has on the civil case. Precedent explains "[t]he civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions, out of which the right arises, as it finds them." *Harmon*, 17 S.C. Eq. (Speers Eq.) at 121. The court is to "plug" the church's decision into the civil law, and the court is to *apply* the church's action; it does not *determine*

the church's action. This was the precise approach applied in *Pearson*. There, the court would not review whether a church followed its rules in revoking a priest's ministry. Accepting that the priest was defrocked, the court used contract law to decide the priest's entitlement to his pension. *Pearson*, 325 S.C. at 53-54, 478 S.E.2d at 853.

C. *All Saints* did not change any of these constitutional requirements or alter this long-standing analysis.

The plaintiffs and the trial court appeared to operate under the assumption that *All Saints* changed the landscape and strictly mandated that ecclesiastical evidence is categorically inadmissible. This view precluded consideration of the church's internal governance structure and decisions, oaths that the church requires of its clergy, and the true nature for why these dissidents are leaving The Episcopal Church.

All Saints did not change anything. The case "expressly reaffirm[ed]" that South Carolina follows the neutral principles approach and explained that it was seeking to provide the context necessary for a clear understanding of this rule as well as a clear understanding of how the rule applied to the facts of that case. *All Saints*, 385 S.C. at 442, 685 S.E.2d at 171. *All Saints* specifically recognized that neutral principles give way to questions of religious law or doctrine that are "masquerading as a dispute over church property or corporate control," and proceeded on the presumption that the issues before the Court did not require the court to "wade into the waters of religious law, doctrine, or polity." *Id.* at 445, 685 S.E.2d at 172. *All Saints* is accordingly limited to those circumstances and is largely inapposite to the present case. This case involves the threshold question that *All Saints* did not consider.

D. The trial court erred in excluding ecclesiastical evidence.

The trial court did not permit evidence as to whether this dispute was "a question of religious law or doctrine masquerading as a dispute over church property or corporate control." *All Saints*, 385 S.C. at 445, 685 S.E.2d at 172. Rather, the court consistently excluded, and at times prevented even the proffer of, evidence of Episcopal Church structure, administration, and discipline—evidence which would enable the court to make the threshold constitutional inquiry. This began with the court's pretrial rulings and held true to the end of trial. The court operated on the mistaken assumption that South Carolina is not a "hierarchical state." (12/30/13 Tr.p.19, ll. 13-14); (11/25/13 Tr.p.10, l. 14). In one of the pre-trial hearings, the court explained "South Carolina's not a hierarchical enforcement state. We're just not." (11/25/13 Tr.p.14, ll. 16-18). The same thing happened at trial. See (Trial Tr.p.829, ll. 7-9) ("*All Saints* stands for the proposition that we are a state, not one of hierarchical enforcement by the state, but one involving neutrality[.]"); (*Id.*p.1780, ll. 4-6) ("[O]ur Courts have said we will not enforce the hierarchical decisions of churches but we are a neutrality state [.]").

The court therefore refused to admit evidence that bears on whether this case involves ecclesiastical considerations. For example, the court barred evidence of the differences that drove Bishop Lawrence and his followers to try to withdraw from the National Church, see (Trial Tr.p.253, l. 6 - p.258, l. 4) and (*id.*p.265, l. 22 - p.267, l. 12); the doctrinal disputes that caused parishes to withdraw from the National Church, see (*id.*p.402, line 8 - 403, line 10) and (*id.*p.570, line 8 - p.571, line 14); and the promises that a bishop must make to the

National Church during his ordination. See (*Id.*p.1392, line 22 - p.1393, line 14); (*Id.*p.2506, line 5 - p.2507, line 18). The court also excluded evidence showing how other dioceses understood that they are bound by the Canons of the National Church, see (*id.*p.1984, line 21 - p.1988, line 19); that a diocese cannot change its boundaries or cede territory without the National Church's consent, see (*id.*p.1991, line 11 - p.1993, line 14); that the highest ecclesiastical body in The Episcopal Church has decided that a diocese may not withdraw from the church, see (*id.*p.1995, line 5 - p.2003, line 20); and charges and convictions against other bishops who attempted to lead dioceses out of the National Church. See (*Id.*p.2004, line 14 - p.2014, line 7). The court took the position that the National Church's general policy and position on this question was not relevant. (*Id.*p.2164, line 23 - p.2179, line 12).

This erroneous interpretation of the neutral principles approach also permeated the court's final order. The court failed to consider whether The Episcopal Church's governance structure permits a diocese to withdraw. As the court explained during trial, "[i]f The Episcopal Church says under The Episcopal Church's theory that no one can ever leave the church, and that differs from what South Carolina civil law says, South Carolina civil law is what I'm going to follow." (Trial Tr.p.2169, line 22 - p.2170, line 1). The order's analysis on diocesan control consequently was quite brief. See (Or.p.32). The court drew a comparison to an individual's right to disassociate from an organization; but, of course, individual rights are not at issue here. A person's freedom to leave a church is quite different from the question whether a diocese or a parish, which are regional and local parts of a larger church, can be removed from the denomination by dissidents. Bishop Lawrence and his followers are effectively declaring that there is no Episcopal Church in the lower part of

South Carolina and that the National Church has no diocese there. That is a direct challenge to the National Church's structure.

Each of these questions—the reasons for leaving, the actions of other dioceses, the discipline of other bishops, and the common understandings about this church's structure—bears directly on the question whether this dispute, at its heart, is one that implicates church governance and doctrine. The trial court's refusal to admit this evidence prevented the court from ensuring that this dispute did not implicate religious questions that were beyond its jurisdiction. This was error.

E. Applying the proper rule compels the conclusion that The Episcopal Church in South Carolina is the true Diocese and that the Dennis Canon creates a trust over the parish property.

Despite the trial court's error, there is sufficient evidence in the record for this Court to determine that the underlying nature of this dispute is inherently ecclesiastical. Giving these questions the required deference leads to just one conclusion: The Episcopal Church in South Carolina is the true entity in control of the Diocese, and the Dennis Canon is a legally cognizable acknowledgment of a trust over the parish properties in question.

The first step in the appropriate analysis is to determine whether there are underlying questions of religious governance or doctrine that implicate the First Amendment. This inquiry need not be detailed or exacting, but rather it employs a common sense examination of the underlying facts and theories.

If the answer to that question is "yes," the next step is to ascertain which entity or body is entitled deference with respect to those questions.

If the appropriate church body has spoken on the issue, the court must enforce and abide by that determination. If the appropriate church body has not spoken, the appropriate remedy is to restore the *status quo ante* to enable that body to speak. This is required by the cases both pre- and post-dating *All Saints*. See, e.g., *McCain v. Brightharp*, 399 S.C. at 249-50, 730 S.E.2d at 921 (after *All Saints*); *Bowen v. Green*, 275 S.C. at 434, 272 S.E.2d at 434-35 (before *All Saints*).

i. This dispute involves intrinsic questions of church governance and doctrine.

This case is not simply about corporate control and the ownership of property. While perhaps facially neutral, the roots of this dispute are deep in fundamental disagreements over church governance, church discipline, and the theological direction of The Episcopal Church.

The record demonstrates that the parish plaintiffs attempted to leave the National Church because of disagreements over ecclesiastical issues. Several parish witnesses acknowledged that this dispute is rooted in disagreements over doctrine. See (*Id.*p.403, lines 11-12) (agreeing "[t]hat it was a doctrinal issue" that motivated St. Andrew's, Mount Pleasant); see also (*Id.*p.427, lines 3-7) (agreeing Church of the Epiphany withdrew, in part, because of "theological concerns"). The witness for Holy Comforter described that the National Church was "moving away from the idea that Jesus Christ is the only path to salvation" and that it "seemed to be moving away from the Christ teaching that marriage is between a man and a woman." (*Id.*p.571, line 21 - p.572, line 20).

Other parish witnesses explained that they were leaving the National Church because of the way the National Church was treating Bishop Lawrence. See, e.g., (Trial Tr.p.348,

lines 8-12) (Christ St. Paul's); (*Id.*p.377, line 23 - p.378, line 7) (Christ the King). Still other parishes said the National Church was impairing Bishop Lawrence's ministry and that only God had the authority to declare that Bishop Lawrence was not the Diocese's bishop. See, e.g., (*Id.*p.829, line 23 - p.830, line 5); (*Id.*p.1214, lines 22-24).

The evidence with respect to the Diocese's reasons for leaving is the same, and much of it comes from Bishop Lawrence himself. The Diocese purported to enact a resolution that it would automatically withdraw from the National Church if the National Church took any action against Bishop Lawrence, if the National Church took action against the Standing Committee, or if the National Church claimed "hierarchical authority" over the Diocese, its leaders, or its members. See, e.g. (*Id.*p.1409, l. 13 - p.1410, l. 7). Bishop Lawrence said that "certain dioceses, South Carolina among them, [were] uncomfortable with the trajectory of the general convention of the Episcopal Church." (Lawrence Depo.p.46, ll. 9-12).

This too was rooted in doctrinal differences. Bishop Lawrence claimed that he did not intend to lead the Diocese out of the National Church until 2012, which is when he said "the general convention of The Episcopal Church changed the doctrine, discipline and worship of The Episcopal Church." See (*Id.*p.79, lines 2-9). He did not invite the Presiding Bishop of the Episcopal Church to participate in his ordination because he believed "[s]he had gone contrary to the historic teachings of the church and the Holy Scripture," (*id.*p.82, lines 3-4), he decried the Presiding Bishop's decision to hire an attorney in South Carolina as "an act of hostility," (*id.*p.148, lines 18-25), and he explained that "the decisions of the General Convention had changed the doctrine, discipline, and worship of The Episcopal Church and [] I could no longer seek to engage to conform to that." (*Id.*p.168, lines 9-13).

The ecclesiastical nature of the present dispute, then, is clear, and that fact alone brings First Amendment protections to bear. But in addition, this case cannot be resolved without deciding which faction—the plaintiff Diocese or the defendant The Episcopal Church of South Carolina—may lawfully function as the "true" diocese. Nor can it be resolved without deciding who may function as the Bishop of the Diocese. The trial court attempted to avoid those questions, but its decision effectively resolved them. Those questions, too, are unmistakably ecclesiastical, for their resolution involves determining the role that a diocese plays in the governance structure of The Episcopal Church, the powers that Bishop Lawrence possessed both before the alleged disassociation and now that he is no longer a bishop in The Episcopal Church, and the significance of a bishop's oaths and vows. The question of who controls the Diocese also involves who the National Church recognizes as the true Diocese of South Carolina and who the National Church recognizes as the Bishop of the Diocese. Further, these ecclesiastical questions affect the Diocese as well as the Trustee Corporation. See, e.g., (Lawrence Depo.p.126, lines 18-20) (Bishop Lawrence admitting that he became "president" of the diocesan corporation by virtue of his position as bishop). And, this case also presents questions of the authority of the Standing Committee. This committee does not exist in a vacuum. It is empowered to act by the National Church's rules, not the Diocese's rules. See (D 203, pp.12, 58); (DSC 423B, p.9); (Lawrence Depo.p.136, lines 7-13).

Determining the impact of the Dennis Canon's recitation of an express trust on parish property necessarily requires examining what it means for a parish to be a part of a hierarchical church. This includes whether a parish's accession to the National Church's

canons is an agreement to hold property in trust for the National Church and its dioceses, the extent to which parishes are bound by National Church rules, and the impact any civil court ruling may have on the ecclesiastical structure and governance everyone agreed to follow.

The upshot is that nobody could plausibly deny that this case is about a deep divide over the governance and doctrine of The Episcopal Church, and its resolution has deep implications for the denomination's structural integrity. There *are* facially civil issues that are implicated here, but those issues are merely outgrowths of these inherently ecclesiastical issues. As Bishop Lawrence recognized during his deposition, "[t]he reality is you can't separate the two, many times." (Lawrence Depo.p.135, lines 3-4). He knew that the civil and the ecclesiastical are often blended together, and the trial court erred in attempting to blind itself to this reality. The promise of religious freedom requires respecting a church's internal system of governance, and upsetting a church's structural integrity via a court ruling would be a direct violation of the First Amendment.

ii. The Episcopal Church is a hierarchical church and courts must defer to determinations made by the National Church bodies.

Because this case necessarily implicates questions of religious governance and doctrine, the next question to answer is which body has the authority to resolve them. That begins with a determination of whether The Episcopal Church is hierarchical or congregational. The trial court tacitly recognized the importance of this question because despite its consistent belief that the question whether The Episcopal Church is hierarchical was irrelevant, the court nevertheless made findings of fact that the church is congregational

when the court found that "authority" flows from the bottom up and that a diocese retains a "large amount of autonomy." (Or.¶¶79, 81.p.22).

This Court has explained that a hierarchical church is "one organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *Seldon v. Singletary*, 284 S.C. 148, 149-50, 326 S.E.2d 147, 148-49 (1985) (quoting 66 Am. Jur. 2d *Religious Societies* § 3). In this structure, a local church is a member of a larger religious organization, is under that organization's government, and "the voluntary act of joining the general denominational organization subjects the local church to its rules and regulations." *Id.* at 149-50, 326 S.E.2d at 148-49. This is different from a congregational church structure, where a local church is "governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government." *Id.* at 149-50, 326 S.E.2d at 148-49. In a congregational church, "the local church is not subject to the control of any higher ecclesiastical judicature and is self-governing in its religious functions." *Id.* at 149-50, 326 S.E.2d at 148-49.

As multiple other courts have held, The Episcopal Church is organized hierarchically, with the National Church's General Convention at the top, its dioceses in the middle, and the individual parishes in the lowest tier. *Protestant Episcopal Church in the Diocese of Va. v. Truro Church*, 694 S.E.2d 555, 558-59 (Va. 2010); *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 48 (Ga. Ct. App. 2010) (*Christ Church I*); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 921 (N.Y. 2008); *Dixon v. Edwards*, 290 F.3d 699, 715 (4th Cir. 2002); *Parish of the*

Advent v. Protestant Episcopal Diocese of Mass., 688 N.E.2d 923, 931 (Mass. 1997); see also *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga.*, 718 S.E.2d 237, 240 (Ga. 2011) (*Christ Church II*) (parties agreed The Episcopal Church is a hierarchical church "with a three-tiered, representative form of government."). The Episcopal Church's General Convention even passed a resolution in 1979 declaring that the church is hierarchical. *Christ Church II*, 718 S.E.2d at 251.

The burden therefore fell on the plaintiffs to prove that they operated under a different structure. *Williams v. Wilson*, 349 S.C. at 342, 563 S.E.2d at 323 ("In a church dispute, the party asserting a deviation from governance according to the affiliated church convention must demonstrate by a preponderance of the evidence that the church adopted an alternative government."); *Bowen*, 275 S.C. at 435, 272 S.E.2d at 435 (citing a court decision and a *Corpus Juris Secundum* article for the proposition that Baptist churches are generally congregational, which placed the burden on the "party departing from the usual Baptist convention to demonstrate by a preponderance of the evidence that its church had adopted an alternative means of church government"). Here, the plaintiffs did not meet the burden of proving that the Episcopal Church has congregational structure. In fact, the plaintiffs took the position that this inquiry was barred and that evidence of structure was inadmissible.

The evidence shows that The Episcopal Church has a hierarchical structure and that ultimate authority rests with the National Church's General Convention. As the trial testimony described, "[t]he General Convention is the highest authority in the Episcopal Church." (Trial Tr.p.2154, lines 15-16). Other sources of authority within the Episcopal Church include the church's Constitution and Canons, the Book of Common Prayer, and the

Holy Bible. (*Id.*p.2155, lines 4-9). The Book of Common Prayer "lays out the various liturgies, the various services in regular use in The Episcopal Church, and there also are rubrics and other notes which have responsibility in governance as well." (*Id.*p.2156, lines 16-19). All churches and dioceses in The Episcopal Church are required to follow the Book of Common Prayer. (D 203, p.9). The canons also govern the discipline of bishops and priests who fail to follow the National Church's rules. (*Id.*p.5) (listing canons for discipline).

The National Church's canons bind all parishes and dioceses. Membership requires agreeing to this. At least as early as 1822, the Diocese's rules required that any parishes seeking to become a part of the Diocese must pledge conformity with and accede to the Constitution and Canons of the National Church. (Trial Tr.p.1839, l. 22 - p.1840, l. 14). This was part of the Diocese's canons through 2008. (*Id.*p.1845, l. 8 - p.1846, l. 12).

In 1841, all of the delegates to the diocesan convention unanimously voted in favor of acceding to the National Church's Constitution and Canons. (Trial Tr.p.1816, ll. 5-15) (reciting the text of the article). The individual plaintiff parishes acceded to these rules too, either directly or through their accession to the Diocese. E.g. (D-AS-6) and (CC25, p.1).

Until this dispute arose, the plaintiffs acted in accordance with their agreement to abide by the National Church's rules and to acknowledge the authority of those rules. They paid premiums into the National Church's pension fund, as required by National Church canons. (Trial Tr.p.251, ll. 19-25). The Diocese sought the General Convention's permission to divide into two separate geographical units, as required by the National Church's Constitution. (Trial Tr.p.1833, line 13 - p.1835, line 4). The Diocese adopted changes in business practices required by the General Convention. (*Id.*p.1851, l. 8 - p.1852,

l. 7). It was not until the National Church allegedly departed from the plaintiffs' theological views and took action against Bishop Lawrence that the plaintiffs decided to alter the rules and undo the bargain.

The Court can find further evidence of hierarchy in the oaths required of church clergy. Deacons, priests, and bishops must take a "vow" or "oath" of conformity and loyalty to the National Church's doctrine, discipline, and worship. (*Id.*p.244:9-246:8) (discussing the oath of deacons and priests); (Lawrence Depo.p. 87, l. 11 - p.88, l. 13) and (p.95, line 14 - p.97, l. 17) (discussing the oath of a bishop). A bishop cannot become a bishop without the consent of a majority of the church's dioceses, pursuant to the rules of the General Convention. (D203, p.10, sec. 2); (Trial Tr.p.1379, ll. 11-13) ("[T]he bishop is, after all, a creature of the national church. You can't be a bishop if the national church doesn't make you a bishop."). Similarly, the National Church's canons require that there be a diocesan Standing Committee to act as the bishop's council of advice. Only when there is no bishop does this committee become the ecclesiastical authority for the diocese. (*Id.*p.1855, ll. 4-12). As a creature of the National Church, the duties of the Standing Committee are defined in the Canons as well. (*Id.*p.1855, ll. 12-19); (Lawrence Depo.p.101, ll. 6-14). This committee's duties are *not* set forth in the rules of the Diocese. (*Id.*p.136, ll. 7-13).

A fair examination of this evidence leads to the conclusion that the Episcopal Church is hierarchical under *Seldon*. See 284 S.C. at 149-50, 326 S.E.2d at 148-49. Respectfully, it is hard to understand why the trial court made the finding that authority flows from the bottom up after the court repeatedly announced that the church's structure was *irrelevant*. When the plaintiff parishes joined the Diocese, the plaintiffs were required to acknowledge

and agree that ultimate authority rested not with the local congregation, but somewhere else. The Diocese's rules recognized the seat of that authority as the General Convention of the National Church and the bodies that Convention allowed to decide in specific instances.

iii. These principles lead to the conclusion that The Episcopal Church in South Carolina controls the Diocese because the National Church recognizes it as the true Diocese.

The Episcopal Church in South Carolina is the only diocese that is recognized by the National Church in the southern part of South Carolina. (Trial Tr.p.2151, line 19 - p.2152, line 7). This ecclesiastical determination cannot be questioned or reversed by a civil court, and no witness at trial challenged this.

Furthermore, the determination by the General Convention, the highest ecclesiastical body in the National Church, is that a diocese cannot unilaterally withdraw. Indeed, those bishops who tried to lead their dioceses out of communion with the National Church were removed from their ordained ministry pursuant to the disciplinary rules enacted by the General Convention, years before Bishop Lawrence made the same attempt here. The trial court's holding that this evidence is not relevant is both incorrect as a matter of relevance and it ignores the decision made by the National Church's highest authority. The court's holding also ignores the evidence that the National Church attempted to discipline Bishop Lawrence but was unable to do so because Bishop Lawrence withdrew from the National Church before that process ran its course.

This conclusion is sensible because it was only by virtue of his position as a bishop that Bishop Lawrence assumed control of the diocese corporation. Even Bishop Lawrence

conceded that his ecclesiastical role as bishop cannot be separated from his corporate role. When Bishop Lawrence withdrew as a bishop in The Episcopal Church, he ceded control of the corporation to his successor, Bishop Charles vonRosenberg, who leads The Episcopal Church in South Carolina. The analysis with respect to the Trustee Corporation follows a similar path because that corporation's legislative charter provides that it is to be governed by a Board of Trustees which is elected by the Diocese. See (DSC 14) (the amended legislative charter). Because The Episcopal Church in South Carolina is the *true* Diocese, the plaintiffs have no claim to control of the Trustee Corporation. The plaintiffs abandoned any claim when they withdrew from the National Church and transmuted the corporation that *was* the Diocese into something different.

iv. These principles also mean that the Dennis Canon imposes a trust over the parish property.

The General Convention of the National Church—whose voting members comprise the church's bishops as well as elected clergy and lay representatives from every diocese—enacted the Dennis Canon in 1979. The Dennis 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 a part of, and subject to, this Church and its Constitution and Canons.

(D193, p.19, sec.4). Although the General Convention did not require it, the Diocese enacted its own Dennis Canon in 1987 that similarly provides all parishes hold their property in trust for both the Diocese and the National Church. (DSC 423B, p.41) (Canon XXX, sec.5).

Furthermore, each parish, as a condition of becoming a member of the diocese, voluntarily acceded to and agreed to be bound by the canons of the National Church and the Diocese. This is the nature of a hierarchical church. While local churches exercise freedom in many areas, they are nevertheless bound to adhere to the rules of the national governing body. Those rules include the Dennis Canon, to which no local parish objected for thirty years. Indeed, some courts have held that the Dennis Canon codified what had been implicit since the National Church's founding. See, e.g., *Christ Church II*, 718 S.E.2d at 254.

The trial court, relying heavily on *All Saints*, held that the Dennis Canon was insufficient to create a trust because the "settlors" of the trust—the parishes—did not expressly agree to hold their properties in trust for the beneficiaries, the National Church and its "Diocese thereof." The trial court went so far as to hold that "there was nothing consensual between The Episcopal Church and the parish churches in the process used to adopt" the Dennis Canon. (Or.pp.35-36).

This represents a direct violation of the internal integrity that the Constitution guarantees the National Church. The trial court's holding tells the National Church that the promises of allegiance that it required of its subordinate parts as well as of its ordained persons have no effect, and that local churches and their leaders are free to disregard the Canons of the National Church at will. This is plainly erroneous. It contravenes long-standing precedent recognizing that churches have the exclusive right to dictate matters of church governance. *Kedroff*, 344 U.S. at 116. Failing to give effect to the Dennis Canon upsets the National Church's structure and governance, and effectively converts the National Church into a congregational church. The plaintiffs are taking the hierarchy they want—they

recognize Bishop Lawrence's authority. They want to use local majority rule to make their church into something different.

Yes, individual parishes have a certain degree of autonomy under the National Church's governance structure, but when those parishes have concerns about governance, they are properly addressed within the church. The courthouse is not the proper forum for airing such disputes. See *Diocese of Cent. N.Y. v. Rector, Church Wardens, Vestrymen of Church of Good Shepherd*, No. 2008-0980, 2009 WL 69353, at *3 (N.Y. Sup. Ct. Jan. 8, 2009) ("[I]f Good Shepherd has an objection to the validity of the Dennis Canon, the remedy is not with the courts, but rather with the General Convention of The Episcopal Church.").

Giving effect to the Dennis Canon is entirely consistent with Supreme Court precedent. *Jones v. Wolf* promised that complying with neutral principles would impose only a "minimal" burden on churches. Forcing churches to comply with the strictures of every state's trust law would run afoul of that teaching. If a nation-wide church must obey procedures that can vary from state to state, the burden on parent churches, the burden on local churches, and the burden on "the free exercise of religion by their members would not be minimal but immense." *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 719 S.E.2d 446, 453 (Ga. 2011). Disregarding the church's decisions and chosen governance structure gives the church second class status.

This argument was not presented in *All Saints*, and with the exception of *All Saints*, appellate courts in every state to address whether the Dennis Canon imposes a trust on parish property have held that it does. See *In re Episcopal Church Cases*, 198 P.3d 66, 84 (Cal. 2009); *Episcopal Church in Diocese of Conn. v. Gauss*, 28 A.3d 302, 325 (Conn. 2011);

Christ Church II, 718 S.E.2d at 255 (Georgia); *Episcopal Diocese of Mass. v. Devine*, 797 N.E.2d 916, 923 (Mass. App. Ct. 2003); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d at 925 (New York); *Daniel v. Wray*, 580 S.E.2d 711, 719 (N.C. Ct. App. 2003); *In re Church of St. James the Less*, 888 A.2d 795, 808-09 (Pa. 2005); *The Falls Church v The Protestant Episcopal Church in the U.S. of Am.*, 740 S.E.2d 530, 540-42 (Va. 2013); cf *Masterson v. Diocese of N.W. Tex.*, 422 S.W.3d 594, 612 (Tex. 2014) (remanding case to trial court for consideration of Dennis Canon).

A trust has even been found to exist with respect to disputes arising before the enactment of the Dennis Canon. See *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986); *Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982); *Diocese of Newark v. Burns*, 417 A.2d 31, 34 (N.J. 1980); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980). The body of precedent here is not as one-sided. A contrary case is *Bjorkman v. The Protestant Episcopal Church in the United States of Am. of the Diocese of Lexington*, 759 S.W.2d 583, 586-87 (Ky. 1988).

The same is true when the property transfers in question took place before the Dennis Canon's enactment but the dispute did not. E.g., *Episcopal Church Cases*, 198 P.3d at 71-72; *Harnish*, 899 N.E.2d at 925; see also *St. James the Less*, 888 A.2d at 808-10 (doing so based on specific facts relating to the church); *Daniel*, 580 S.E.2d at 718 (not applying neutral principles, but still finding that local church had acceded to Dennis Canon's express trust after fifty years adherence to all of the Church's canons without raising an objection). One court even held that the *existence* of the Dennis Canon was dispositive as to whether an express trust exists in favor of the National Church. *Harnish*, 899 N.E.2d at 925.

Decisions from Georgia and Virginia are particularly instructive. Both cases involved property transfers that pre-dated the Dennis Canon, and both involved churches established before the National Church came into existence. See *The Falls Church*, 740 S.E.2d at 534; and *Christ Church II*, 718 S.E.2d at 247. And, both were decided after *All Saints*.

The Supreme Court of Virginia said that the National Church's adoption of canons was "hardly 'unilateral.'" *The Falls Church*, 740 S.E.2d at 541. After describing the National Church's structure and the process of enacting canons, the court wrote "it is clear that each canon, including the Dennis Canon, is enacted through a process that resembles a representative form of government." 740 S.E.2d at 541. And even if the Dennis Canon had been adopted unilaterally, which it was *not*, the court said it "would be powerless to address any issues of inequity wrought thereby, as to do so would involve judicial interference with religion and clearly violate the First Amendment." *Id.* It did not matter that the parish church and the building existed before the Dennis Canon. The Canon itself was clear.

The Supreme Court of Georgia followed a similar approach. It observed that the resolution which set forth the Dennis Canon contained the following additional language:

> *Whereas*, the Episcopal Church is a[] hierarchical church, in which local parish churches are a part of, and are subject to, the Constitution and Canons of the Episcopal Church and of the Diocese in which they are geographically present; and
>
> *Whereas*, the Episcopal Church recognizes that local parishes have broad autonomy in the use of their property, so long as they act within the confines of the Constitution and Canons of the Episcopal Church and of the Diocese in which they are geographically present . . . .

Christ Church II, 718 S.E.2d at 251. The Georgia court observed that this resolution passed both houses of the bi-cameral General Convention. *Id.* at 251-52.

The court viewed the Dennis Canon "as making explicit that which had always been implicit in the discipline of the Episcopal Church (and the Church of England before it)." *Id.* at 254. Like the Supreme Court of Virginia, the Georgia Supreme Court rejected the contention that the Dennis Canon was imposed unilaterally when it was "enacted through the process of representative government to which Christ Church had adhered and in which Christ Church was represented." *Id.* at 254 n.17.

The plaintiff parishes' voluntary accession to the National Church's rules, including the Dennis Canon, supplies the requisite intent to hold their property in trust for the National Church. Requiring anything more violates the command of *Jones v. Wolf* that the burden on churches is to be "minimal." Indeed, the trial court's view would impose an unconstitutionally immense burden on the National Church. See *Christ Church II*, 718 S.E.2d at 244-45 (recognizing this). The trial court accordingly erred in finding that the plaintiff parishes do not hold their property in trust for the National Church.

Even if the First Amendment did not require enforcement of the Dennis Canon here, South Carolina's Trust Code and common law of constructive trusts do, and the trial court's failure to reach that conclusion—while giving the issue only 5 lines in its 46-page decision see (Or.pp.35-36)—was erroneous. For example, as the defendants set out in an 89-page proposed order and repeated in their motion for reconsideration, 29 of the 36 parishes made express promises in their governing documents to comply with the National Church's rules *after* those rules had been amended to include the Dennis Canon in 1979. See (Def's Mot. for Recons., pp.166-172). Those writings fulfilled the writing and signature requirement of South Carolina's Trust Code. S.C. Code §§ 62-7-401(a)(2) and -407 (Supp. ____); *Harter*

v. Johnson, 122 S.C. 96, ___, 115 S.E. 217, 230 (1922) (express trust requires no special writing, only the settlor's intent to create trust); 2 George G. Bogert et al., *The Law of Trusts and Trustees* § 86 (3d ed. Rev. 2008) (requirement that written declaration be "signed" by owner of property is satisfied by the "placing in the document of words, letters, or other symbols intended to stand for the name of the party in question.") (internal quotes omitted). Moreover, because these promises were made before January 1, 2006, they were presumptively irrevocable. See S.C. Code § 62-7-602(a) (____) and *Chiles v. Chiles*, 270 S.C. 379, 384, 242 S.E.2d 426, 429 (1978). No evidence was offered that might rebut that presumption. The trial court failed to appropriately apply "neutral" civil law.

II. Even setting the proper application of neutral principles completely to the side, the trial court's approach with respect to civil law was also error.

Even if the trial court's incorrect view of the First Amendment and the "neutral principles" approach is placed to the side, there are still three reasons why the court's application of the law was incorrect.

First, although the court found that there is confusion between plaintiffs' State-registered trademarks and the National Church's Federally-protected trademarks, it nevertheless erroneously concluded that the State marks are valid, even though the Federal marks have superior status. Federal registrations and State registrations are not equals. A federal registration is *prima facie* evidence of protected ownership and validity. 15 U.S.C. § 1115(a). A state registration is not. S.C. Code Ann. § 39-15-1125(b) (____).

Second, the statute that created the Trustee Corporation imposes a trust, and the beneficiary of that trust is the diocese of the National Church in South Carolina. This is what

the relevant statute says, and it is bolstered by the fact that until Bishop Lawrence and its followers tried to change the Trustee Corporation's nature, that corporation's charitable purpose—and the trust imposed on all property it acquired—was tied to the National Church.

Finally, the court approved corporate actions which purport to be legal but which are actually *ultra vires*. Bishop Lawrence's actions are invalid because they contravene his oath of loyalty to the National Church as well as the express terms of the Diocese's original corporate charter, and the Standing Committee's actions are invalid because nothing shows that this committee had authority to function as a "board of directors."

A. The court erred when it concluded that plaintiffs' State-registered trademarks are valid, notwithstanding its finding that those marks cause confusion with the National Church's Federally-registered marks.

The trial court's order only mentions The Episcopal Church's trademarks in a passing reference, and the order does not acknowledge that these marks are federally-registered. These trademarks include "The Episcopal Church" and "The Protestant Episcopal Church in the United States of America." (Trial Tr.p.2306, line 2 - p.2307, line 10). These Federal registrations provide broad protection to the brand used by The Episcopal Church, its dioceses, and its parishes. For example, the Federal registration for the brand "Coca-Cola" protects the owner of that trademark against the unauthorized use names like Coca-Cola North or Coca-Cola West.

The plaintiffs' trademark infringement claims sought relief for State trademark registrations under State law. The first of the plaintiffs' State registrations was filed in 2010. More were filed later. These registrations include "The Diocese of South Carolina, "The

Episcopal Diocese of South Carolina," and "The Protestant Episcopal Church in the Diocese of South Carolina." See (Or.pp.38-39) (listing these in the final order). The State registrations also include "The Protestant Episcopal Church, The Parish of St. Michael, In Charleston, In the State of South Carolina," "St. Michael's Episcopal Church," "The Parish Church of St. Helena (Episcopal)," and "St. Helena's Episcopal Church." *Id.* (same). The plaintiffs do not own any Federal trademarks or have any Federal registrations.

Federal law establishes that The Episcopal Church's registrations are *prima facie* evidence that The Episcopal Church has the exclusive right to use these trademarks. See 15 U.S.C. § 1115(a). Federal law also establishes that it is unlawful to use the dominant word in these marks—the word "episcopal"—with other words in a way that causes confusion between the user and The Episcopal Church. See, *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1343 (Fed. Cir. 2004); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1266-67 (Fed. Cir. 2002) (discussing the importance of confusion). This means a label that included the words "episcopal," "church," and a divisional or geographic identifier like "diocese" or "South Carolina" would likely be invalid because it is infringing. It also means that a use would probably be acceptable if a modifier accompanied the word "episcopal" and clearly distinguished the services being provided, like the name "The Reformed Episcopal Church."

The trial court's order emphasized that "[t]he word 'episcopal' refers to an organization with bishops or overseers." (Or.p.42). It also observed that the use of the word "episcopal" pre-dates the existence of The National Church and was a part of some of the plaintiffs' names before the National Church came into being. *Id.*

Respectfully, this case is not about the first person to use the word "episcopal" or what that word means in Latin. The United States Patent & Trademark Office approved The Episcopal Church's trademarks under Section 2(f) of the Lanham Act, which applies to marks that are not inherently distinctive, but have "become distinctive of the applicant's goods in commerce." See 15 U.S.C. § 1052(f). Today there are approximately 7,500 parishes and 110 dioceses (including two in South Carolina) that are a part of The Episcopal Church. They use the dominant word "episcopal," without a modifier, to denote their affiliation with The Episcopal Church and with each other. These parishes and dioceses include about 2,000,000 members. There is consistency in the quality and nature of the religious services being provided under this nationwide brand, and this consistency derives from the control exercised by The Episcopal Church through the Constitution and Canons of its General Convention and its Book of Common Prayer. These points are not fairly debatable. The Episcopal Church owns the brand that these marks describe.

As the trial court recognized, see (Or.p.43), the record contains several examples of confusion between the brand identity that the plaintiffs are claiming and the brand that The Episcopal Church owns. Many of the plaintiff parishes have removed the word "episcopal" from their signs. When asked about the reasons for this change, the witness for one of these parishes explained "we thought it created confusion because the Episcopal Church is commonly understood as the National Church." (Trial Tr.p.506, lines 11-12). Other parishes said they wanted to "clarify" how they were perceived in the community or "which side of the fence [they] were on." (*Id.*p.622, lines 12-14); (*Id.*p.1185, lines 3-5).

The confusion was not limited to the plaintiff parishes. It extended to the Diocese as well. An employee of the plaintiff Diocese testified to several instances of actual confusion resulting from Bishop Lawrence's and his followers' continuing use of the Diocese's name after its purported disaffiliation. This witness explained:

> We received phone calls intended for the other diocese. We have actually had churches get confused and they weren't with us anymore, send us a check and it was intended for the other diocese. It has caused confusion.

(D 23.p.23, lines 6-10).

The common law provides additional support for the defendants' position. A leading treatise on trademarks observes that "[a] parent religious group is entitled to protection against a schismatic group or a dissident minority's confusing use of the same name." 1 *McCarthy on Trademarks and Unfair Competition* § 9:7.50, at 9-31 (2014). The reasoning behind this common law principle is explained in a case that is similar to the present controversy. *Purcell v. Summers* dealt with former members of the Methodist Church who built "a rival church organization" and claimed the right to the church's property and name. See 145 F.2d 979, 981 (4th Cir. 1944). In rejecting the argument that the words "Methodist" and "Episcopal" are generic, the court attached importance to the fact that the group of dissidents was not proposing to use those words in a new name that was so different from the old name there would be no confusion. The court observed that the schismatic group was "using the precise name of the old church; and the question is, not whether they have the right to use 'Methodist' or 'Episcopal' in a new name so constructed as to avoid confusion, but whether they have the right to use the old name in a way that amounts, as we think it does, to implied misrepresentation[.]" *Id.* at 988.

The trial court's order ignored these concepts. To establish a claim for trademark infringement, the plaintiffs had to establish that their State registrations were valid, and those marks cannot be valid if, as here, they cause confusion with the Federal trademarks that are owned by The Episcopal Church. State law recognizes this—it prohibits misdescriptive trademark registrations and mandates their cancellation. See S.C. Code Ann. §§ 39-15-1110(A)(5) and -1145 (____). The reality is that ever since the plaintiffs' purported disaffiliation in 2012, their use of "Episcopal" names has been misdescriptive. By their own admission, they are no longer parishes or a diocese of The Episcopal Church, as their names deceptively suggest. Their registrations should be cancelled. This Court should so find.

B. The court erred in holding that the statute creating the Trustee Corporation does not reference the National Church and its true Diocese.

The General Assembly created the Trustee Corporation in 1880. (DSC 13) (the 1880 Act). It amended the corporation's charter in 1902. (DSC 14) (the 1902 Act). This Court has explained that the language of a legislative charter is controlling. *Pearson v. Mut. Ins. Co.*, 61 S.C. 321, ___, 39 S.E. 512, 515 (1901). If the legislation creating the Trustee Corporation contemplated that the corporation would be affiliated with the National Church, that legislative intent must control.

The statute *does* envision such an association. Section 1 of the 1880 Act provides:

> *Be it enacted* . . . That the Bishop and members of the Standing Committee for the time being of the Protestant Episcopal Church for the Diocese of South Carolina, and their successors in office or a majority of them, are hereby appointed trustees **for the purpose of holding in trust** any property heretofore given or acquired, or hereafter to be given or acquired, **for objects connected with said Church, in said Diocese**[.]

(DSC 13) (italics in original, bold added). The 1902 Act altered the identity of the trustees from the Bishop and the members of the Standing Committee to a Board of Trustees. This board was to be elected by the Diocese's "annual Council in and for the said church in the said Diocese." (DSC 14, Sec. 2).

The 1880 statute references a charitable corporation and a charitable trust. Concluding otherwise would give no effect to the statute's words about holding property *in* trust, and this Court has previously articulated that a court is generally "bound" to give effect to a statute's language because that language is often the best expression of legislative intent. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012).

The plain language of this enactment also speaks of the Diocese as being part of a larger church. This is understandable, because at the time of this enactment, the Diocese *was* a constituent component of The Episcopal Church. Both statutes speak of "said Church, in said Diocese."

The 1880 act references the trustees reporting annually "to the Convention of the Diocese of the said Church." See (DSC 13, Sec. 3). The 1902 act says that the board for this corporation will be "elected at the annual Council in and for the said church in the said Diocese." (DSC 14, Sec. 2). If the legislature had been referring to "the Diocese" as a stand-alone entity and not the larger church of which the Diocese was a member, it would not have referenced "said church." It would have simply said that the Trustee Corporation held its property in trust for "objects in connection with the Diocese."

This conclusion is bolstered by this Court's jurisprudence on trusts in general and on statutory trusts specifically. In *South Carolina Department of Mental Health v. McMaster*,

this Court addressed the question whether several deeds and legislative acts created a charitable trust over the property that was formerly used as the state mental asylum. 372 S.C. 175, 642 S.E.2d 552 (2007). In the course of that decision, this Court recognized the rule that properties conveyed to a charity are impressed with a charitable trust. *Id.* at 182, 642 S.E.2d at 555-56. The law does not presume that the gifts made to a charity are gifts to the corporate entity apart from its charitable work. *In re Los Angeles County Pioneer Soc.*, 257 P.2d 1, 8-9 (1953) (cited in *McMaster*, 372 S.C. at 182, 642 S.E.2d at 555-56). When someone gives property to a charity, the law implies that the gift has been made "for the objects and purposes for which the corporation was organized." *Id.* at 182, 642 S.E.2d at 556 (citing *In re Harrington's Estate*, 36 N.W.2d 577, 582 (Neb. 1949)).

Until Bishop Lawrence and his followers tried to change the Diocese's nature, that organization's charitable purpose—and the trust imposed on all of the property that it acquired and passed to the Trustee Corporation—was tied to the National Church. Bishop Lawrence and his followers tried to change that purpose in October of 2010, see (DSC 007) and (DSC 009), but the gift of the Seabrook Island property, for example, happened in July of 1951, see (DSC 30), which was more than 50 years before Bishop Lawrence and his followers attempted to sever the Diocese and the Trustee Corporation from the larger church.

Thus, even if the plaintiffs' changes were effective, and they were *not*, they could not affect the trust that was imposed on previous gifts to these entities. The terms of those trusts are dictated by the Diocese's purpose and the Trustee Corporation's purpose at the time the gifts in question were made. See, e.g., *Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Acad. in Andover*, 148 N.E. 900, 913 (Mass. 1925). Any gifts

made prior to 2010 are held in trust for the larger ministry of the National Church and its Diocese in South Carolina.

C. The court erred in approving corporate actions which purport to be legal but which are actually *ultra vires*.

The Diocese was incorporated in 1973. (DSC 7). This was over two centuries after the Diocese came into existence. For the next 37 years, the Diocese continued to operate according to its ecclesiastical governance. It was substantively unaffected by its new corporate shell.

Beginning in 2010, however, Bishop Lawrence and the Standing Committee began using the Diocese's corporate shell as a mechanism to undermine the Diocese's long-standing ecclesiastical governance, which was tied to the National Church. The trial court blessed this on the ground that it was accomplished through statutory procedures, but what the court should have done is examine whether Bishop Lawrence and the Standing Committee had the authority to take the these actions. They did not. Several things limited the authority of the people who took these actions in the Diocese's name.

The Diocese's 1973 charter required the corporation to follow The Episcopal Church's rules. The charter provided that "[t]he purpose of the said proposed Corporation is to continue the operation of an Episcopal Diocese under the Constitution and Canons of The Protestant Episcopal Church in the United States of America." (DSC-7). The charter gives a list of "all Managers, Trustees, Directors or other officers" as consisting of the bishop, a secretary, and a treasurer. *Id.* As Professor Martin McWilliams explained, the charter's language ties the Diocese's shell corporation to the National Church and ties the

leadership of this corporation to the office of bishop—which is an ecclesiastical office, defined by the National Church. (D 203, pp.10-11) (creating the office of bishop); (Trial Tr.p.1350 - p.1428).

This means that when Bishop Lawrence tried to alter the corporation's charter to remove the references to the National Church, he was acting outside the source of his authority. Bishop Lawrence only had authority because he had been ordained as Bishop, and his authority as a bishop was limited by his ordination oaths and promises. He could not assume any greater authority than the authority he had been given. Acts taken beyond the charter are *ultra vires*. *Baumann v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008).

A faithful review of the evidence illustrates the plaintiffs knew that what they were doing was inappropriate. Bishop Lawrence and his followers' first step was to amend the 1973 charter to remove its reference to The Episcopal Church's rules. The Standing Committee voted in this amendment while purporting to act as the "Board of Directors," and Bishop Lawrence executed this amendment, purporting to act as "President" of the corporation. (DSC 009). But it was not until *after* this amendment that the Diocese purported to adopt a series of bylaws that named Bishop Lawrence as the President and the members of the Standing Committee as the Board of Directors. (DSC 6C, p.1). The new bylaws also gave the Standing Committee sole authority to determine the identity and authority of the Bishop of the Diocese, contrary to the National Church's rules. (*Id.*, p.2).

The Standing Committee then took various acts on behalf of the corporation culminating in a resolution to disaffiliate from The Episcopal Church in late 2012. By its

own terms, that disaffiliation was automatically effectuated when The Episcopal Church restricted Bishop Lawrence's authority as one of its bishops on the basis, in part, that he had improperly amended the 1973 charter. (DSC 32).

Then, *after* the purported disaffiliation from The Episcopal Church, Bishop Lawrence presided over a so-called "Convention of the Diocese," which voted to remove the accession clause from the Diocese's own Constitution and Canons. (DSC-5, p.4, 12). This convention also adopted a "Standing Resolution" to make the Standing Committee the board of directors of the corporation. (Trial Tr.p.90, l. 20 - p.92, l. 8); (Lawrence Deposition,p.131). This was two years after the Standing Committee purported to make itself the Board of Directors.

The plaintiffs' theory was that Bishop Lawrence's authority as President and the Standing Committee's authority as the Board of Directors were implied by the historical operation of the Diocese. (Trial Tr.pp.90-91). That argument cannot prevail because it is inconsistent with the South Carolina Nonprofit Corporation Act. Section 33-31-180 of that Act provides that if a religious corporation is governed by rules that are inconsistent with the Act's default provisions, the religious corporation's rules will control to the extent required by the State or Federal Constitution. This means that if The Episcopal Church's rules concerning governance and changing bylaws are inconsistent with the Nonprofit Corporation Act's provisions on the same subjects, The Episcopal Church's rules will control. This statute ensures the Act's constitutionality.

The amendments that Bishop Lawrence and his followers attempted in 2010 were taken under a default corporate voting procedure provided by the Act. The problem is that this default is inconsistent with Article XII and Title V, Canon 1, of the Constitution and

Canons of The Episcopal Church. (D 203, pp.16-17, 173-74). These provisions discuss the procedures for amending the National Church's Constitution and Canons. Allowing subordinate parts of the church to employ local majority rule to circumvent these procedures invades the church's government. The result is that the Nonprofit Corporation Act mandates the same result prescribed by the First Amendment. The court was required to respect the National Church's rules and its decisions when it came to structure and governance.

This Court should accordingly hold that the trial court erred in discounting Professor McWilliams' testimony. His conclusions *do* have factual support, and moreover, his conclusions are correct. Respectfully, it is difficult to follow the analysis that the court employed. At one point, the court states that if the defendants were suing for *ultra vires* actions, they were required to bring a derivative lawsuit and could not sue the plaintiffs' directly. (Or.p.27 n. 8).

The defendants claim more than membership in the plaintiff Diocese, the Trustee Corporation, and the parishes. See *Deborde v. St. Michaels and All Angels Church* , 272 S.C. 490, 501, 252 S.E.2d 876, 881 (1979) (dismissing an *ultra vires* claim against a church on the grounds that the plaintiffs were not members of the church). The defendants claim ownership of these entities and that these entities are tied to the defendants' ecclesiastical governance. On this point, as with others, the order simply does not take the appropriate view of this case's nature.

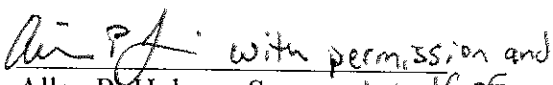
CONCLUSION

In the normal case, the trial court's application of an incorrect legal standard would require a reversal and a remand. But this case sounds in equity. This Court need not remand.

A faithful examination of the record indicates that this is a dispute about identity and ecclesiastical governance. The plaintiffs do not like the National Church's doctrine, its authority, or its discipline of "their" Bishop. All of these implicate the church's freedom to establish and protect its identity. This is a case where certain questions required deference.

As for the ultimate result, the proper conclusion is that The Episcopal Church in South Carolina is entitled to control the Diocesan corporation and the Trustee Corporation, as well as all diocesan assets; and, as the Supreme Court of Georgia held, the Dennis Cannon is enforceable and all parish property at issue is held in trust for The Episcopal Church and The Episcopal Church in South Carolina. That canon makes explicit that which had always been implicit, and the parties understood this very well. That is why the Bishop Lawrence and his followers plotted this scheme. The Court should reverse.

Respectfully submitted,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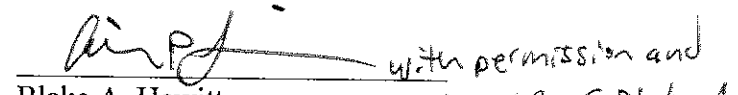
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