RECORD NO. 15-2284

In The

United States Court Of Appeals
For The Fourth Circuit

THE RIGHT REVEREND CHARLES G VONROSENBERG, individually and in his capacity as Provisional Bishop of the Protestant Episcopal Church in the Diocese of South Carolina,

Plaintiff – Appellant.

v.

THE RIGHT REVEREND MARK J. LAWRENCE; JOHN DOES, 1-10, being fictitious defendants whose names presently are unknown to Plaintiff and will be added by amendment when ascertained,

Defendants – Appellees.

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

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-2284 Caption: Charles vonRosenberg v. Mark J. Lawrence

Pursuant to FRAP 26.1 and Local Rule 26.1,

the Right Reverend Mark J. Lawrence
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/C. Alan Runyan Date: 11/10/15

Counsel for: Mark J. Lawrence

CERTIFICATE OF SERVICE

****

I certify that on 11/10/15 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/C. Alan Runyan
(signature)

11/10/15
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JURISDICTIONAL STATEMENT

Appellee does not believe this Court has jurisdiction because the appeal is neither a final order nor is it appealable as a collateral order under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the appeal should be dismissed because the issues raised are not ripe for review?

2. Whether the district court abused its discretion in finding "exceptional circumstances" existed under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), to stay this action until a final decision by the South Carolina Supreme Court in a parallel state action?

3. Whether the Anti-Injunction Act, 28 U.S.C. § 2283, supports the affirmance of the district's court's decision?

STATEMENT OF THE CASE

A. Introduction

> Bishop vonRosenberg's Lanham Act claims are *premised on one simple fact*: that he, and not Bishop Lawrence, is the Bishop of the religious body The Protestant Episcopal Church in the Diocese of South Carolina….

Pl. Resp. in Opp. to Mtn. to Dismiss, 2:13-cv-587-CWH, Doc. No. 24, 4 (D.S.C. Apr. 15, 2013) (emphasis added). This is how vonRosenberg described his Complaint in April 2013. Two years later, this Court described his remaining false

advertising claim quoting vonRosenberg: "Bishop vonRosenberg alleges that Bishop Lawrence violated [The Lanham Act] by unauthorized use of four service marks belonging to the Diocese of South Carolina and by advertising falsely that 'he was the Diocese's true Bishop and ecclesiastical authority of the Diocese."[1] *vonRosenberg v. Lawrence,* 781 F.3d 731, 733 (4th Cir. 2015) ("*vonRosenberg I*").

vonRosenberg's complaint remains as it was in April 2013. vonRosenberg's false advertising claim is based solely on the office he allegedly holds as Bishop of the Diocese. JA 10-30. "[T]he claims Bishop vonRosenberg asserts here,…are based on injustices he suffered by virtue of his office.…"[2] "[I]ndividual[ly] [he] would possess no rights or authority.…" *Dixon v. Edwards*, 290 F.3d 699, 711-12 (4th Cir. 2002).[3]

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[1] This Court stated that this is a dispute over who is "the proper leader of The Protestant Episcopal Church in the Diocese of South Carolina." *vonRosenberg I*, 781 F.3d at 732.

[2] Memo. in Support of Pl. Mtn. to Recons., 2:13-cv-587, Doc. No. 33-1, 8 (Sept. 16, 2013); *Id*. at 1 ("rights he possesses by virtue of his office," which "cannot be asserted by entities [or individuals] do not hold that office"); vonRosenberg is "asserting rights and interests held by virtue of [his] office." JA 1049; Memo. in Support of Pl. Mtn. to Recons., 2:13-cv-587, Doc. No. 33-1 at 10 (*quoting* district court's August 23, 2013 abstention order.)); *accord*, Opening Br. of Appellant, 14-1122, Doc 14, 2, 23, 33 (4th Cir. Apr. 7, 2014); JA 24 at ¶ 54 ("Bishop Lawrence's conduct…restricts Bishop vonRosenberg's ability to exercise the authority of his office").

[3] The "legally protected interest" here and in *Dixon* derives from the office: "by virtue of her office," *Dixon,* 290 F.3d at 712; "rights he [vonRosenberg] possesses

In *vonRosenberg I*, after abandoning his declaratory judgment and trademark infringement counts, vonRosenberg's Statement of the Case affirmed, as did his opening brief that: "Bishop vonRosenberg's main objective in this litigation is to enjoin Bishop Lawrence from falsely advertising that he is *Bishop of the Diocese*." Opening Br., 14-1122, Doc. No. 14, 1-2, 19, 31 (4th Cir. Apr. 7, 2014) (emphasis added).

Three months later, in the summer of 2014, the state court tried the parallel action, and then issued its Order in February 2015. JA 1078-1122. With jurisdiction of the only entities that can possibly claim a legal right to decide who holds the office of Bishop of The Protestant Episcopal Church in the Diocese of South Carolina ("the Diocese"), The Episcopal Church ("TEC") and The Episcopal Church in South Carolina ("TECSC")), the state court found that the Diocese withdrew from TEC in October 2012 and consequently, was no longer affiliated with TEC. The state court made that decision because "the United States Supreme Court…has granted the states the power to choose the method it will apply" between the "two [approved] methods for these types of disputes." Or., 2:13-cv-893-CWH, Doc. No. 167, 16 (D.S.C. June 10, 2013); JA1099-1100. South Carolina did not choose the one vonRosenberg alleges in his complaint, JA

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by virtue of his office". Memo in Support of Mtn. to Recons., 2:13-cv-587, Doc. No. 33-1, 1 (Sept. 16, 2013).

13-14 ¶13, and argued in *vonRosenberg I*, which "depends on…the First Amendment's deference to the polity of The Episcopal Church, as an [alleged] hierarchical religious organization on the question of who is ecclesiastically authorized to hold themself out as one of its bishops." Resp. in Opposition to Supplemental Mtn. to Dismiss, 13-cv-587, Doc. No. 53, 7, 14-15, 16, 19 (D.S.C. July 15, 2015). South Carolina chose a method that decides, "who are the corporation's rightful leaders…based on where corporate control rests." JA 1101 n. 5.

Five months after the state court's decision, vonRosenberg argued for the first time in the district court (as he does now) that his allegations are actually about Bishop Lawrence falsely holding himself out "as a Bishop of an *Episcopal Diocese*" and making false claims "regarding his ecclesiastical authority in the hierarchical religious organization of The Episcopal Church." By argument, not amendment, he contends this action is no longer about who is the "Bishop of the Diocese" but "who is ecclesiastically authorized to hold themself out as one of [TEC's] bishops." Resp. to Supplemental Mtn. to Dismiss, 13-cv-587, Doc. No. 53 at 7, 19 (emphasis added). This is a clear attempt to avoid the res judicata effect of the state court order by arguing, contrary to the facially plausible allegations in his complaint, that the case is about a different issue in an effort to

survive the preclusive effect of the decision of that "one simple fact" by the state court.[4]

B. Factual Background

1. vonRosenberg's Complaint

According to vonRosenberg's April 2013 complaint, he is the Provisional Bishop of The Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese"). He was installed as its Bishop because Bishop Lawrence, its former Bishop, was removed and the Diocese was unsuccessful in its attempted withdrawal-the entity stayed but the followers left. Lawrence, however, though no longer occupying the office of bishop, is still using the Diocese's marks (names and seal) and claiming to be its Bishop. Lawrence's actions are creating confusion about who is the true Bishop of the Diocese and about which group is providing

[4] As pled, vonRosenberg has no Lanham Act claims to assert if he is not Bishop of the Diocese for they do not accrue to him individually because he has pled he does not own the marks. JA 17 ¶ 29. They accrue to him solely by virtue of the office he allegedly holds with the owner of the marks – the Diocese. Now, however, the issue of which group has the legal right to control the Diocese has been decided in the parallel state action and vonRosenberg does not occupy the office he alleges. A final state court finding will be preclusive in federal court. 28 U.S.C. § 1738; *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380 105 S. Ct. 1327 (1985) ("This statute [28 U.S.C. § 1738] directs a federal court to refer to the preclusion law of the state in which the judgment was rendered."); *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892 (1984); *accord, Briggs v. Newberry County School Dist.*, 838 F. Supp. 232, 234 (D.S.C. 1991), *aff'd*, 989 F.2d 491 (1993). The elements of preclusion under South Carolina law are present. *See* Def. Supplemental Mtn. to Dismiss, 13-cv-587, Doc. No. 52-1, 8-10 (D.S.C. June 30, 2015).

the Diocese's true religious services. Therefore, it is alleged that Lawrence is falsely advertising through the use of the Diocese's "famous and distinctive" marks that he is its Bishop and that the religious services being performed are religious services of the Diocese. These acts have injured the Diocese's true Bishop, vonRosenberg, and he seeks an injunction preventing Lawrence and others acting with him from claiming that he is Bishop of the Diocese and from making representations in conjunction with its marks. vonRosenberg also seeks damages and an accounting for the profits Lawrence has made from his false and misleading use of the Diocese's marks.[5]

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[5] vonRosenberg's complaint is that he, not Lawrence, is "the Diocese's veritable head, and, thus, the rightful user of the service marks." *vonRosenberg I*, 781 F.3d at 733. His Lanham Act claims are all premised on his alleged relationship with the "Protestant Episcopal Church in the Diocese of South Carolina," a state court Plaintiff. Therefore, Lawrence's continued use of the Diocese's marks and Lawrence's representations about his authority, are in violation of the Lanham Act:

- Lawrence is making false representations of fact through use of the Diocese marks, which include three names. JA 10 ¶ 1.
- By using the names falsely, Lawrence suggests that his actions are undertaken with the authority of the Diocese. JA 22 ¶ 52.
- These misrepresentations damage the goodwill of the Diocese and cause confusion to consumers of religious services and charitable donors because of Lawrence's assertion through the use of the marks that he is Bishop of the Diocese. JA 23 ¶ 53.
- Lawrence uses the marks, which are famous, with the intent to represent he is Bishop of the Diocese and consumers of Diocese religious services and donors are not sufficiently informed to know he is not Bishop of the Diocese. *Id.*
- These misrepresentations hurt the goodwill and reputation of the Diocese to vonRosenberg's harm in exercising "the authority of his office" as "Bishop of the Diocese." JA 11 ¶ 3, 24 ¶ 54.

2. The South Carolina Circuit Court's "Final Order"[6]

However, in the parallel state court action, after a three-week trial, the state court issued an order in February 2015 finding the facts to be the opposite of those alleged in vonRosenberg's complaint. JA 1077-1122. Some of these are summarized in the district court's order. JA 1157. Additional findings of the state court follow:

- TEC & TECSC are "aligned in interest. JA 1078.
- When resolving church dispute cases, South Carolina does not defer to church authorities; rather it uses neutral principles of law to resolve such disputes. JA 1099-1100.
- "Whatever rights [TEC and TECSC] might possess derive from their claim that corporate control is vested in TECSC not the Diocese. Therefore, the

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- Using the marks signifies "to consumers of religious services and charitable donors that the entity or person employing the marks is the Diocese or its representative." JA 17 ¶ 30.
- The Diocese's Bishop is vonRosenberg who was elected to that position after Lawrence was removed as a Bishop in TEC. JA 10, 21 ¶ 47.
- The Diocese did not successfully withdraw from TEC, rather Lawrence's "followers left the Diocese." JA 21 ¶ 45.
- vonRosenberg seeks an accounting for the profits derived from "false and misleading usage of the Diocese's marks as set forth in his complaint." JA 29 ¶ 5.

[6] The state court decision was made a part of the previous appellate record after oral argument but before the court's decision under FRAP 28(j) and Local Rule 29(E). 14-1122, Doc. No. 31 (4th Cir. Feb. 4, 2015). The Clerk directed vonRosenberg to file a response, 14-1122, Doc. No. 32 (4th Cir. Feb. 13, 2015), which was done. 14-1122, Doc. 33 (4th Cir. Feb. 23, 2015).

sole issue with respect to the Diocese is corporate control. If the Diocese legally withdrew from TEC, then those currently in union with it and its leadership control it." JA 1102.

- "The Diocese withdrew its association with TEC in October 2012." JA 1090.
- "[TEC and TECSC] admit that the Diocese is the owner and registrant of its marks …." JA 1115.[7]
- TEC & TECSC "used, without the Diocese's permission, and with knowledge of that use, the names, marks and emblems of the Diocese,"…, including taking action "as if TECSC was the Diocese." JA 1091.
- "The Diocese presented extensive testimony on the unauthorized use of the Diocese's marks, which was not contradicted by any witness for the Defendants [TEC and TECSC]." JA 1115.
- At a November 15, 2013 meeting, "called without authority in the name of the Diocese[,] Tom Tisdale, Jr. (counsel for TEC and the future TECSC)," stated, with Bishop vonRosenberg present, that "he was functioning as legal counsel for the President Bishop" and "he stated their intent to use the names and seals of the Diocese." JA 1116.

[7] The Diocese's marks are the same as those at issue in this action. *Compare* JA 17 ¶ 29 (Complaint) *with* JA 1088 ¶ 30 (State Court Final Order).

- "Bishop vonRosenberg testified that both he and the [TECSC] Steering Committee regularly used the name and seal of the Diocese in the fall of 2012 and that their use was intentional." JA 1115.

- "Under both statutes, the Plaintiffs have established their entitlement to permanent injunctive relief." JA 1119.

VonRosenberg also testified in the state action in a manner that is not entirely consistent with his April 2013 complaint.

3. Bishop vonRosenberg's Testimony.

Bishop vonRosenberg testified at the trial of the state court action (JA 1123-31) and by deposition (JA 1132-41) that:

- He was elected the Provisional Bishop of TECSC on January 26, 2013 at a Convention of TECSC and was thereafter installed as TECSC's Bishop by TEC's Presiding Bishop. JA 1125-27, 2151.

- He is employed by TECSC. JA 1130.

- Prior to his election as Bishop of TECSC in January 2013, he had been retired and unemployed. JA 1128.

- He has not previously been associated with the Diocese of South Carolina or the Trustees. JA 1128-29.

- He never attended an annual Convention of the Diocese. JA 1128.

- His use of the title "in his capacity as Provisional Bishop of the Protestant Episcopal Church in the Diocese of South Carolina" in his complaint in this action was based on the advice of counsel. ("The advice of counsel was to use that title."). JA 1137-40.
- He believes that he is covered by the state court's injunction. JA 1139.
- He never had permission from the Diocese to use its marks. Def. Supplemental Mtn. to Dismiss, 13-cv-587, Doc. No. 52-1 at 11.

His federal complaint alleges facts about the office of bishop of the Diocese arising out of the underlying state law issue of corporate control that are now inconsistent with the state court ruling about the same office. He asks this Court to issue a permanent injunction which the district court found would directly contradict the state proceeding and its permanent injunction entered against TEC, TECSC, and against vonRosenberg as officer and employee, and as a member of TEC. JA 1158 n. 11.[8]

C. The Procedural History of the State and Federal Actions

This action began in March 2013, three months after The Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese") filed a lawsuit in state court against TEC and TECSC and two months after the state court entered

[8] In *vonRosenberg I*, he stated that he is "undeniably an officer and agent in TECSC." Reply Br. of Appellant, 14-1122, Doc. No. 21, 5 (4th Cir. May 27, 2014).

a temporary injunction, consented to by TEC, that allowed only Lawrence and those associated with the Diocese to use its marks. Joining the Diocese as Plaintiffs in the state action were thirty-eight other South Carolina religious organizations organized between 1680 and 2010 with an average age of 179 years. JA 565-667. Contrary to vonRosenberg's assertion that the state court Plaintiffs were created "mostly" in the twentieth century, Opening Br. of Appellant, Doc. No. 18, 5 (Feb. 22, 2016), twenty-nine of the thirty-nine Plaintiffs were organized between the end of the seventeenth and nineteenth centuries; only ten were organized in the twentieth century. JA 565-667. The Diocese has existed for more than 229 years, pre-existing both TEC and TECSC's creation, and was one of six other Dioceses that created TEC. JA 1081, 1090, 1095.[9] vonRosenburg sought through his federal action to avoid the application of existing state law[10] on how corporate control should be determined in disputes between religious organizations arising out of a schism. As the district court previously found, the facts associated with this action's filing suggested "procedural fencing" since vonRosenberg "filed

[9] The extensive history of the state court Plaintiffs is set out in the Second Amended Complaint, JA 565-667, and in the state court's findings of fact. JA 1081-99.

[10] *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 685 S.E.2d 163 (2009).

this action with full knowledge that service mark control and the Diocese's legal status as a whole were already at issue before the state court." JA 1062.[11]

1. vonRosenberg I[12]

The previous appeal was from the district court's dismissal on August 23, 2013 of this action in favor of a parallel state action. The district court found that since vonRosenberg's injunctive relief and attorney's fees claims were necessarily dependent on his declaratory judgment claim, all the claims were subject to review under the *Brillhart/Wilton* declaratory judgment abstention doctrine.[13] JA 1062-64; Or., 13-cv-587, Doc. No. 37, 6-7 (D.S.C. Jan. 15, 2014)

On appeal, finding that the Fourth Circuit "had never expressly held which abstention standard applies to a federal complaint, like the one at hand, which asserts claims for both declaratory and injunctive relief," *vonRosenberg I*, 781 F.3d at 734, this Court held that "*Colorado River*, not *Brillhart/Wilton*, must guide a

[11] The district court relied on *Great Am. Ins. Co. v. Gross*, 468 F.3d 199, 212 (4th Cir. 2009). (Procedural fencing exists when "a party has raced to federal court in an effort to get certain issues that are already pending before the state courts resolved first in a more favorable forum….")

[12] The procedural history of this action prior to *vonRosenberg I* is set forth in the appellate brief of Lawrence in *vonRosenberg I*. Br. of Appellees, 14-1122, Doc. No. 19, 11-19 (4th Cir. May 12, 2014).

[13] The initial motion to dismiss or in the alternative to abstain from exercising jurisdiction and/or to stay was based on Rules 12(b)(1) and 12(b)(2), Federal Rules of Civil Procedure, the Anti-Injunction Act (28 U.S.C. § 2283) and three abstention doctrines: federal declaratory judgment, *Younger* and *Colorado River*. The Court did not reach the other grounds for dismissal raised by Lawrence's Motion: the Anti-Injunction Act, *Younger* and *Colorado River* abstention.

court's decision to abstain from adjudicating mixed complaints alleging claims for both declaratory and non-declaratory relief…even when the claims for coercive relief are merely 'ancillary' to [a party's] request for declaratory relief." (citations omitted). *Id.* at 735. This Court vacated and remanded "for a determination whether such "exceptional" circumstances are present in this case…express[ing] no view on that issue." *Id.* at 736.

2. The Parallel State Court Action

As previously noted, the state court action has been tried and a judgment has been entered. As the district court found, the judgment grants permanent injunctive relief diametrically opposed to the injunction sought by vonRosenberg in this action. JA 1120-22. [14] TEC and TECSC appealed the order and the South Carolina Supreme Court transferred the case from the Court of Appeals. The case was argued on September 23, 2015. Supplemental Mtn. to Dismiss Ex. 3 – S.C. Supreme Court Or., 13-cv-587, Doc. No. 52-4 (D.S.C. June 30, 2015). A decision is pending.

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[14] It is important to note that if the federal court were to issue the requested declaration and permanent injunction, that order would directly contradict the state court's permanent injunction entered against TEC, TECSC, and Bishop vonRosenberg as an agent, employee, and member of ECSC.
JA 1158 n. 11.

3. The District Court's Colorado River Abstention Order

On remand, the district court stayed the present action until the final resolution of the parallel state court action. JA 1173. It did so mindful of the "virtually unflagging obligation" of the federal courts to "exercise the jurisdiction given them." *Id*. at 1160. In its detailed analysis of the six factors used to guide the decision, *Gross,* 468 F. 3d at 207-08, and the allegations of vonRosenberg's complaint, the district court found that two did not favor abstention (*in rem* jurisdiction and inconvenience of the federal forum) but four did, *id*. at 1167-73: the desirability of avoiding piecemeal litigation, the relevant order and progress of the state litigation, the applicable choice of law, and the adequacy of the state proceeding to protect the parties' rights.

On the issue of piecemeal litigation, it recognized that there must be more than different tribunals considering the same issue and possibly reaching different results. The district court's "retention of jurisdiction must create the possibility of inefficiencies and inconsistent results beyond those inherent in parallel litigation or the litigation must be particularly ill-suited for resolution in duplicate forums." *Id*. at 1166 (citation omitted). It found that the presence of intellectual property ownership and control issues in both suits with the attendant possibility of confusion with regard to its ownership and use weighed in favor of abstention. *Id*. 1166-67. It also found that vonRosenberg's Lanham Act allegations were not

separate and distinct from the underlying issue in both "the federal and state actions-the Diocese's ownership, control and identity" which the state court had already determined under state law. A different federal court ruling on that same issue "would inevitably affect the disposition of property before the state court and create substantial confusion." *Id.* at 1167. Furthermore, since the state court proceeding also included real and personal property issues of state Plaintiffs not present in this action, a federal court ruling would not dispose of those issues and could conflict with the permitted use of the Diocese's marks by the persons so empowered in state court. Finally, since the state court action included all the thirty nine parties interested in all the property issues including the principals who control the office of Bishop for both vonRosenberg and Lawrence, the state court could settle the entire controversy as vonRosenberg has alleged it. *Id.* at 1168.

On the relative progress issue, the district court found that factor weighed heavily in favor of abstention because the state court proceeding was nearly concluded while the federal court action had yet to have a scheduling order issued and no substantive rulings on the merits had occurred. *Id.* at 1168-70.

As to choice of law, though the presence of a federal question weighed in favor of the exercise of jurisdiction, South Carolina law provides the rule of decision on the underlying issues because the "United States Supreme Court granted state courts the authority to select the method by which to decide cases

involving church disputes." Not only are South Carolina's choice of method for religious dispute, its corporate law, and the marks registered in South Carolina strong state court interests, but the preliminary issues, "who constitutes the Diocese and who is entitled to its intellectual property" also must be addressed before the Lanham Act claims vonRosenberg alleges can be determined. *Id.* at 1171-72.

Finally, on the adequacy of the state action to protect the parties' rights, the district court found the same issues underlie vonRosenberg's federal complaint allegations that are present in the state action (Diocese's ownership, identity and control and the validity of the Diocese's withdrawal). The rights of the office of Bishop that vonRosenberg alleges he holds are already at stake in the state court action and those rights were represented by parties aligned in interest. Either way the South Carolina Supreme Court rules, the rights he alleges that flow from the office of Bishop of the Diocese will be adequately protected in the state action. *Id*. at 1172-73.

SUMMARY OF ARGUMENT

vonRosenberg's appeal is premature. The district court did not "surrender its jurisdiction" to the state court; rather it stayed its exercise until the South Carolina Supreme Court rules on issues that underlie vonRosenberg's complaint. vonRosenberg is not "effectively out of court" because the district court's order contemplates the exercise of its jurisdiction after the South Carolina Supreme Court rules which is likely imminent.

In the meantime, in this Court, vonRosenberg's appeal is based on his attempt to replead his complaint by argument in order to avoid the *potential* effect of a decision by the South Carolina Supreme Court affirming the state trial court's order that the Diocese "legally withdrew from TEC" vesting corporate control in "those currently in union with it and its leadership," with Lawrence as its Bishop. JA 1101-02.

The district court stayed, as opposed to dismissed, this action under the *Colorado River* standard because "the federal case has a chance of continuing even after resolution of the state case." JA 1163. It is the uncertainty of that outcome that drives vonRosenberg's contradictory and unreasonable inferences about what his complaint alleges. He seeks to preserve his pleading in the event the state court order is reversed yet he argues unwarranted inferences that are inconsistent with the well-pled allegations of his complaint in order to avoid the potential res judicata effect of an affirmed state court order. The issues in this appeal depend on "future uncertainties" and are not "presented in a clear cut and concrete form" and the appeal should be dismissed. *Scoggins v. Lee's Crossing Homeowner's Assn.*, 718 F.3d 262, 270 (4th Cir. 2013) (citations omitted); *Doe v. Virginia Dept. of State Police*, 913 F.3d 745, 757 (4th Cir. 2013) (quoting *Reserve Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 584, 67 S. Ct. 1409 (1947)).

Similarly, vonRosenberg asks this court to consider his motion for a preliminary injunction, which has not yet been considered by the district court, concerns highly contested facts, and would directly enjoin the results of an ongoing state proceeding in violation of the Anti-Injunction Act, 28 U.S.C. § 2283. The motion should not be considered.

Finally, the district court properly found there were exceptional circumstances warranting a stay.

ARGUMENT

STANDARD OF REVIEW

I. Ripeness

The issue of whether the issues raised in this appeal are ripe for review was not raised in the district court and is a jurisdictional issue for this court's *de novo* consideration.

II. Abstention

A district court's decision to abstain is reviewed for abuse of discretion. *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000).

III. Preliminary Injunction

There should be no consideration of the motion for preliminary injunction. It has not been considered by the district court and the facts are disputed. *Infra* at 22.

DISCUSSION OF THE ISSUES

I. The issues raised in this appeal are not ripe for review and the appeal should be dismissed.

A. vonRosenberg's false advertising claim is not ripe for review.

vonRosenberg's complaint alleges what his counsel argued to the district court and to this Court prior to the state court decision. *Supra* at 1-3. However, that complaint plainly does not allege what is briefed now.

The district court considered vonRosenberg's allegations as true when it applied the *Colorado River* standard: vonRosenberg is the true Bishop of the Diocese and Lawrence misrepresents that he is its Bishop. Facts have been found by the state trial court based on controlling state court law that are contrary to those pled by vonRosenberg in his complaint but von Rosenburg has not sought leave to amend his complaint. That is understandable because that order is now before the South Carolina Supreme Court and the outcome of that appeal might be consistent with vonRosenberg's federal complaint. Yet he chose to appeal now rather than wait until those state law issues are finally decided. He recognizes they will be binding here because his new arguments assume that he is not bishop of the Diocese as he has pled. Therefore, this Court is presented with arguments over the reasonableness of inferences from what has been alleged rather than a pleading that actually alleges what counsel now unreasonably seeks to infer.

This appeal is not yet ripe for review for the same practical reason the district court stayed the action. It rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 118 S. Ct. 1257, 1254 (1998).

If vonRosenberg has a false advertising claim that survives in spite of such a final ruling, he would not be forced to engage in the semantic dance he engages in before this Court. His pleading could then be amended to make it consistent with the state court findings. The district court could then consider the false advertising claim under an amended pleading and this Court would then be faced with an issue that is fit for judicial decision.

> A case is fit for adjudication "when the action in controversy is final and not dependent on future uncertainties." (citations omitted) Stated alternatively, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.

Scoggins, 718 F.3d at 270 (quoting *Texas*, 523 U.S. 296). A claim is ripe when "presented in a "clean-cut and concrete form." *Doe*, 713 F.3d at 757 (quoting *Reserve Army*, 331 U.S. 549). The "federal ripeness doctrine … counsels against adjudication of questions that might be altered or dissolved by further action in the state court." *Creston Mortgage Corp. v. Peoples Mortgage Co.*, 818 F. Supp. 816, 820 n. 5 (E.D. Pa. 1993).

Although a stay order under *Colorado River* can be "as much a refusal to exercise federal jurisdiction as a dismissal," this is not an appeal from an order that puts vonRosenberg "effectively out of court" nor is it from an order that "would be entirely unreviewable if not appealed now." *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 10-11, 28, 103 S. Ct. 927, 934-35 (1983), *superseded by statute on other grounds.* "The sole purpose and effect of the stay" by the district court was not "to surrender jurisdiction of a federal suit to a state court." *Id.* at 10 n. 11. Rather, the district court stayed this action because a state court ruling on common issues is likely imminent. Depending on its outcome, vonRosenberg may pursue his complaint with the facts as he has alleged them, or unless he amends his complaint, he might be appealing the district court's order dismissing his complaint.[15] In either event, review in this court is preserved.[16] The district court's order is not a final order "merely because it may have the practical effect of allowing a state court to be the first to rule on a common issue." *Id.*

[15] That the district court recognized that an order from the South Carolina Supreme Court affirming the state trial court order would mean that "this action is resolved as well," JA 1173 n. 26, would not foreclose an appeal from the necessary order of the district court dismissing the action in that circumstance.

[16] Given the status of the state court proceeding, the hardship to the parties attendant to withholding court consideration at this stage is minimal. While any delay can be argued to create a hardship, the hardship prong of the ripeness test would be meaningless if injury to the general interest is prompt relief, an interest surely shared by all Plaintiffs, constituted the kind of hardship that trumped every other consideration and required immediate resolution of a case.

This appeal should be dismissed because it is not from a final order of the district court.

B. The motion for a preliminary injunction is inappropriately before this Court.

vonRosenberg seeks *de novo* review of the merits of his Motion for a Preliminary Injunction even though the district court has not considered its merits. As in his previous appeal, (Opening Br. Appellant, 14-1122, Doc. 14 at 30; Reply Br. of Appellant, 14-1122, Doc. 21 at 11). vonRosenberg relies on *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 128 (4th Cir. 1999) (*de novo* review "since district court based its decision solely on a premise and interpretation of the applicable rule of law and the facts we established"). *Eisenberg* does not apply here. There the district court **had** considered the merits of the injunction and the facts were undisputed. Neither of these situations is present here. The facts surrounding the injunction that vonRosenberg's complaint seeks are certainly not established,[17] and they have not been considered by the district court.

[17] There has been no answer filed by Lawrence and the District Court did not consider the merits of the preliminary injunction motion nor the averments in support of it upon which vonRosenberg relies. There are also 400 pages contained in 10 counter affidavits submitted by Lawrence in response to the Motion for a Preliminary Injunction. JA 476-978. The District Court did not consider these either.

II. The district court properly stayed this action until final adjudication of the parallel state action.

A. vonRosenberg is bound by the well-pleaded allegations of his complaint and their reasonable inferences.

Contrary to vonRosenberg's assertion, in considering vonRosenberg's complaint under *Colorado River*, the district court took the well-pleaded facts of vonRosenberg's complaint as true, drawing all reasonable factual inferences in his favor. The problem vonRosenberg complains of is not that the district court did not take his allegations as true, but that the district court did not read into those allegations the "…unwarranted inferences, unreasonable conclusions, or arguments," it was not required to accept. *Massey v. J.J. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014); *Phillips v. Pitt County Memorial Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (quoting *Waki v. Charleston Amer. Med. Ctr. Inc.*, 562 F.3d 599, 616 n. 26 (4th Cir. 2009)). Nor did it have to consider the arguments made as if his complaint had been amended. *Southern Walk at Broadland's Homeowners' Assn, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184-85 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaints through briefing or oral advocacy."); *accord*, *E.I. Dupont de Nemours & Co. v. Kolom Industries, Inc.*, 637 F.3d 435, 449 (4th Cir. 2011) ("statements by counsel that raise new facts constitute matters beyond the pleadings"); *Car Carriers, Inc. v. Ford Motor Co.*,

745 F.2d 1101, 1107 (7th Cir. 1984) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.")

The complaint which must be considered by the district court is one that asserts a claim "plausible [not possible] on its face" which "shows" that the Plaintiff has stated a claim entitling him to relief.[18] As pled, and as argued a year ago, vonRosenberg's complaint **is** plausible on its face. This is the complaint the district court considered. However, the arguments vonRosenberg makes today state "facts" that are not plausible on the face of *this* complaint. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554, 557 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009)).

The complaint's false advertising allegations all relate to three central factual allegations: (1) Lawrence is not the Bishop of the Diocese; (2) Lawrence is misrepresenting that he is Bishop of the Diocese; and (3) vonRosenberg is Bishop

[18] The "possibility" that the Plaintiff could prove a set of facts in support of his claim for relief is no longer an appropriate standard for judging the sufficiency of a complaint. *McCleary-Evans v. Maryland Dept. of Transp.*, 780 F.3d 582, 587 (4th Cir. 2015); a*ccord, Amcol Systems, Inc. v. Lemberg Law, LLC*, 3:15-cv-3422-CMC, 2016 WL 613896 (D.S.C. Feb. 2, 2016) (false advertising allegations failed to allege a plausible claim for relief where the allegations of damage to goodwill and business relationships was based on *debtors* believing the Defendant engaged in improper collection practices not that Defendant suffered an injury in its relationship with its *creditor* customers as argued.) Here vonRosenberg alleges an injury to his interest as Bishop of the Diocese yet he argues the same injury if he is not Bishop of the Diocese.

of the Diocese. The complaint seeks an injunction to prevent Lawrence's representation that he is affiliated with the Diocese and it seeks an accounting for profits "obtained in connection with his false and misleading usage of the Diocese's marks." JA 29.[19]

vonRosenberg would have the district court disregard the facts accepted as true in his well-pled complaint in favor of a different factual theory. No longer should the court accept as true the assertions that vonRosenberg is Bishop of the Diocese and that Lawrence is not but yet is misrepresenting that he is, by using the names (marks). Now, the court should accept as true that Lawrence is the Bishop of the Diocese authorized to use its marks; vonRosenberg is not and Lawrence is misrepresenting something else entirely.

[19] vonRosenberg's allegations also do not track those required under 15 U.S.C. § 1125(a) for false advertising. *Design Resources, Inc. v. Leather Industries of America*, 789 F.3d 495, 501 (4th Cir. 2015); *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272 (4th Cir. 2002). In fact, the specific "false by implication" quote now relied upon by vonRosenberg ("likely to mislead and to confuse consumers given the merchandising cited," *Id.*), when viewed in the context of what has been pled is implausible on the face of the complaint if the state court order is affirmed. The confusion that has been pled is all related to the use of the "actual and identical" marks of the Diocese (which "are famous and distinct and are closely associated with the Diocese"), by Lawrence with the "intent to misrepresent to consumers of religious services and donors that he is Bishop of the Diocese." This misrepresentation is confusing because he "is no longer authorized to represent the Diocese and is thus unable to provide the services he purports to provide – the religious services of the Diocese." vonRosenberg's injury is caused by the confusion over "who is the true Bishop of the Diocese." JA 22-23 ¶ 53; 25 ¶¶ 57, 59.

On the one hand, vonRosenberg pleads that the Diocese did not leave TEC because it cannot and vonRosenberg is its Bishop replacing Lawrence but Lawrence is still using the marks of the Diocese and representing that he is its Bishop when only vonRosenberg is authorized to do that. On the other hand, vonRosenberg argues that the complaint's reasonable inferences are that, while Lawrence is properly authorized to use the marks, the Diocese lawfully left TEC and Lawrence is truthfully representing that he is Bishop of the Diocese (vonRosenberg is not), his complaint still states a "plausible on its face" claim for false advertising because the marks use the word "Episcopal," and Lawrence is a "Bishop" of a "Diocese." Doc. No. 18 at 3.

B. The law of this case is that this action and the state action are parallel

Continuing the pattern reflected in his attempted rewrite of the "one single issue," vonRosenberg tries to reargue the issue of parallel suits based on "changed circumstances" since the district court's first abstention order (August 23, 2013). However, those circumstances were established in September 2013 and they were argued in *vonRosenberg I.*

In his opening and reply *vonRosenberg I* briefs, vonRosenberg first recognized that before the issue of abstention could be reached, the court had to find that the state action was parallel ("The abstention analysis begins, and in this

instance should end, with the threshold requirement of parallelism").[20] He then argued the state court's failure to allow joinder of Lawrence so that TEC could assert its Lanham Act claims against made the state case not parallel to this federal action. Opening Br., 14-1122, Doc. No. 14 at 14-15, 16-17. The state court's refusal to allow the TEC Lanham Act claims was not new; it occurred in September 2013 and was argued to the district court before the previous appeal. Reply Br., 14-1122, Doc. No. 21 at 5-6.[21]

On remand, the district court was directed to determine if "exceptional" circumstances existed for abstention. The district court found that vonRosenberg's old arguments were foreclosed by the mandate rule. JA 1164 n. 19. This Court had to consider the issue of parallel suits before it instructed the district court to

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[20] Opening Br., 14-1122, Doc. No. 14 at 22; *Id.* at 18, 28 ("If *arguendo*, this Court nevertheless affirms the district court's finding that the case is a parallel, it should reverse the District's decision to evaluate abstention under the more permissive standard…");

[21] …[O]n September 27, 2013, the state court denied the motion filed in the district court back on May 5, 2013 by The Episcopal Church and TECSC to join the individuals, including Bishop Lawrence, that they believe to be responsible for wrongfully controlling and causing the plaintiff corporations to file the state action and engaging in various unlawful and tortious acts, including trademark infringement. JA 2126-2131. The state court held that those individuals, including Bishop Lawrence, were not necessary parties because all relief between the parties could be obtained without their joinder, and furthermore that a South Carolina statute gave them immunity in connection with all of the corporate acts at issue in the pleadings. *Id.* Bishop vonRosenberg informed the district court of this state court decision in its reply in support of its motion for reconsideration filed on October 15, 2014. JA 2122.

Opening Br., 14-1122, Doc. No. 14 at 14-15.

determine whether "exceptional circumstances" existed. JA 1164; 1075-76; *cf. Putnam Res. v. Pateman*, 958 F.2d 448, 458 (1st Cir. 1992) ("if determination of an issue effectively disposes of an appeal, the appellate court should resolve the case on that basis without reaching other presented issues."); *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989) ("Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be present"). Therefore, the "mandate rule," a "specific application of the law of the case doctrine… forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993). [22]

Furthermore, the two refused Lanham Act claims TEC wanted to assert against Lawrence (and others) in state court are not claims vonRosenberg pled here. TEC's claims were for the alleged infringement and dilution of marks that TEC owns. JA 1156. vonRosenberg's false advertising claim against Lawrence is about the marks of the Diocese. The alleged infringement and dilution of TEC's marks is not part of this action because vonRosenberg (1) did not plead the TEC marks; (2) is not the owner of those marks, (3) did not plead Lawrence used TEC's

[22] There are not "exceptional circumstances" here to allow reconsideration under the exceptions to the mandate rule. In particular, there is no "significant new evidence not obtainable in the exercise of due diligence." *Bell*, 5 F.3d at 67.

marks and; (4) in any event, has now abandoned any infringement claim.[23] The "strength of The Episcopal Church's brand" argument, Doc. No 18 at 3, is a concept associated with trademark infringement or dilution claims; it is not an element of this false advertising claim because it is not TEC's brand whose goodwill has allegedly been lessened by Lawrence's false advertising, it is the Diocese's. JA 11 ¶ 1, 24 ¶ 54, 27 ¶ 72, 28 ¶ 76. *Pizzaria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984) (in a trademark infringement claim on the issue of likelihood of confusion, "the first and paramount factor…is the distinctiveness or strength of the two marks.").

1. *The state court has adjudicated the issue of whether the Diocese marks were derived from TEC's marks.*

As alleged by vonRosengerg, the false "episcopal bishop" representation in his complaint is not separate from the Diocese's marks. Implicit in his allegations about the use of the marks is the concept that Lawrence is still an "Episcopal Bishop" because the Diocese is still associated with TEC. JA 10-11. There is no

[23] Whatever claim could be made for infringement of TEC's marks against Lawrence, vonRosenberg could not make it.

> To establish trademark infringement under the Lanham Act, a plaintiff must prove: (1) that it owns a valid mark; (2) that the defendant used the mark "in commerce" and without plaintiff's authorization; (3) that the defendant used the mark (or an imitation of it) "in connection with the sale, offering for sale, distribution, or advertising" of goods or services; and (4) that the defendant's use of the mark is likely to confuse consumers.

Rosetta Stone Ltd. v. Google Inc., 676 F.3d 144, 152 (4th Cir. 2012) (quoting 15 U.S.C. § 1114(1)(a)).

dispute that Lawrence is not a Bishop in TEC nor is there any allegation that Lawrence represents he is still individually associated with TEC. The state court has found that he is not holding himself out as a Bishop in TEC by using the marks of the Diocese and representing that he is its Bishop. However, it also held that the presence of the word "episcopal" in the marks of the Diocese did not make them derived from TEC's marks. In fact, contrary to the assertion by vonRosenberg that the state court "expressly declined the opportunity to adjudicate" the "dispositive question in this case" (JA 16-17), the state court at TECSC's insistence, adjudicated the issue of whether the word "episcopal" in the name of the Diocese caused confusion as to the Diocese's (and its leaders') relationship with TEC.

TECSC, in which vonRosenberg is "undeniably an officer and agent,"[24] asserted the defense that the "Plaintiffs' names and marks were derived solely from and through Defendants and the rights and interests … are invalid and do not constitute a basis for the relief sought" because they used words that are also in TEC's marks. JA 1118 n. 22. TEC joined in the defense and put its marks in evidence. TEC and TECSC offered expert testimony on the issue of whether the use of some of the words in the Diocese name which were also in TEC's marks, created confusion or deception as to their source or origin. The Diocese countered with expert testimony on this issue. The state court decided that the Diocese and

[24] As vonRosenberg told this court, he "undeniably is an officer and agent of TECSC." Reply Br., 14-1122, Doc. No. 21 at 5.

its leadership, by using its names and marks (containing the words "Episcopal", "Episcopal Church" and "Protestant Episcopal Church") did not cause "confusion and deception as to their source or origin" because TEC and TECSC did not prove the marks were "derived from the marks of TEC." JA 1118-19. The state court expressly found that the use of the words "Episcopal," "Episcopal Church" and "Protestant Episcopal Church" were not derived from TEC's names.

> If anything, the record supports the conclusion that TEC derived its name from those of the preexisting "Protestant Episcopal Churches" which formed it including the Diocese and its preexisting "Protestant Episcopal" parishes.

Id. at 43.

Purcell v. Summers, 145 F.2d 979 (4th Cir. 1944), relied on by vonRosenberg supports this ruling. The state court's temporary injunction, consented to by TEC, notes that *Purcell* held that it was the use of the "same name" that created confusion necessitating an injunction not the presence of the common word "episcopal" in both names. JA272-73. Here, TEC and TECSC, prior to the entry of an injunction, had been using the same name of the Diocese. After the consent injunction, TECSC adopted a new name that used the word "episcopal" but did not use the full name of the Diocese. Now vonRosenberg attempts to turn that ruling on its head by arguing that since Bishop Lawrence represents he is the Bishop of the same entity that benefited from that consent temporary injunction, now permanent, and that entity uses the word "episcopal" as one part of its name, that would constitute false

advertising or a false description of origin. *Purcell* makes clear it does not. *Purcell* agreed with the state court decision at issue in there[25] that the use of the word "Episcopal," like "Methodist" and "Protestant" which "appear in many names of religious associations," does not of itself create confusion whereas the use of the "same name" would. *Purcell*, 145 F.2d at 988.

2. *Certain case law relied upon by vonRosenberg does not support his arguments.*

Neither *Dixon Edwards v. Summers, Purcell* nor the United States Supreme Court cases cited by vonRosenberg provide support for vonRosenberg's position. Doc. No. 18 at 17, 18, 28. *Dixon* is cited for the proposition that The Episcopal Church decides the authority and scope of vonRosenberg's office in "The Episcopal Church's Diocese [TECSC]." *Id*. at 17-18. It is not a novel concept that a religious organization has the right to decide who will lead it and their qualifications. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. __, 132 S. Ct. 694, 704-707 (2012). (The freedom of a religious organization to select its ministers prevents the government from interfering in a religious institution's selection of its ministers.) However, that right begs the question here. The question here is *which* religious organization has that right. Under South Carolina's method of resolving disputes over corporate control between religious organizations, the state court, (subject to the appeal,) has

[25]*Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821, 833 (1943).

resolved that issue. The Diocese can no more use the power of a court to tell TECSC it cannot have vonRosenberg as its Bishop, than TEC and TECSC could use that power to tell the Diocese it cannot have Lawrence as its Bishop.

Dixon, 290 F.3d 699, a diversity action, concerned the authority of the Bishop of the Diocese of Washington over a parish, its Rector and Vestry all of whom were in the Diocese of Washington, which is located in Maryland. The Diocese of Washington was a member of TEC. The case did not concern a dispute arising out of a schism and the consequent issues such as who is the "true" Vestry, as in *All Saints*[26], or who is the "true Bishop," as in the present state court action and here. The *Dixon* parish had not attempted to leave the Diocese of Washington and there was one diocese in union with TEC with its one bishop. [27]

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[26] *All Saints*, 385 S.C. 428, 685 S.E.2d 163.

[27] Although the Fourth Circuit broadly asserted *in dicta* that TEC was hierarchical throughout its structure, it did so when the only issue before it was whether a hierarchy existed between the Diocese of Washington and its parish, not between a diocese that withdrew and the national church. None of the cases relied upon by *Dixon* involved a dispute between a diocese and TEC. The district court properly viewed the hierarchy issue noting the additional factor of a Maryland statute, which impacted the question of whether TEC has hierarchical. *Dixon v. Edwards*, 172 F. Supp. 2d 702, 716 (D. Md. 2001). The Maryland Vestry Act, 1976 Md. Laws Ch. 96 § 3125, statutorily does not allow actions by a parish that are contrary to the Constitution and Canons of TEC and a diocese in union with it. *Id.* at 716 n. 17. There is no similar statute in South Carolina. They all involved disputes between a diocese and a parish over a parishes attempted withdrawal. In fact, it has not been until recently that there has been a final decision involving a diocese and TEC on the issue of whether a diocese can leave TEC. The first final decision involving a dispute between a diocese and TEC held that TEC could not constitutionally establish that it is a hierarchy above the level of a diocese and that a diocese can

In *Purcell*, 145 F.2d 979, the rights enforced in federal court were based on the state court's determination of the validity of a corporate merger. This determination was then binding in federal court on the issue of which faction acquired the right to use the name.[28] That is because the federal court's equitable power to enjoin such use was based on the state court's determination of the

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voluntarily withdraw from TEC. *Diocese of Quincy v. Episcopal Church*, 2014 IL App (4th) 130901, 14 N.E.3d 1245 (Ill. App. 4th Dist. 2014), *petition for leave to appeal denied*, 21 N.E.3d 713 (2014). Though not yet a final decision, a Texas state court applying the same principles as the South Carolina trial court has also ruled that a diocese and all of its parishes successfully withdrew from TEC. Ex. 5 to Def. Reply to Supplemental Mtn. to Dismiss, 13-cv-587, Doc. No. 54-5 (D.S.C. July 27, 2015) (Final J., *The Episcopal Church, et al. v. Franklin Salazar, et al.*, No. 141-252083-11 (Dist. Ct. 141st Jud. Dist. TX July 24, 2015)). Under South Carolina substantive law the resolution of church disputes does not depend on church polity (congregational or hierarchical). *All Saints*, 385 S.C. at 443, 685 S.E.2d at 172. Therefore, the state court ruled that the issue of TEC's polity was irrelevant. TEC and TECSC have appealed this ruling and now put the issue of TEC's alleged hierarchy in front of the South Carolina Supreme Court. The Plaintiff state court parties have responded to that contention. *See* Reply to Supplemental Mtn. to Dismiss Exhibit 6 – Initial Br. of Respts., 13-cv-587, Doc. No. 54-6.

[28] *Purcell* was decided the same year that the Rules of Decision Act became effective, 1944. Though not referenced in the opinion, *Purcell* applied the same concept which the Rules of Decision Act required after its enactment:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652.

This Act requires application of not only substantive state statutory law, "but also the unwritten law of the state as pronounced by its courts." *King v. Order of United Comm'l Travelers of America*, 333 U.S. 153, 157 (1948); a*ccord, C.I.R. v. Bosch's of Estate*, 387 U.S. 456, 464 (1967). Though typically referenced in diversity cases, the same rule applies to non-diversity cases even where the federal court claim is based on a federal statute. *Id*. at 465; *cf*., *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 38-39 (1988).

substantive rights of the parties: whether under state law a corporate merger caused the "rights and property" of two entities to vest in the merged entity. The decision of the South Carolina Supreme Court on the validity of the corporate merger was a "determination of substantive" rights and a federal court was bound to apply the rules of substantive law as they would be applied in a state court sitting in the same state. *Purcell*, 145 F.2d at 990-91.[29] In this dispute, the state court has determined under South Carolina substantive law involving non-profit corporations that the Diocese withdrew from TEC and as a result, one of its rightful leaders is Mark Lawrence, its Bishop. *Purcell* makes this decision enforceable through the federal court's equitable power against vonRosenberg, an "undeniable officer and agent of TECSC", not against Lawrence.

III. The district court did not abuse its discretion because exceptional circumstances exist that justify a stay until the state court decides an underlying issue of South Carolina law necessary to vonRosenberg's alleged false advertising claim.

vonRosenberg argues broadly and imprecisely that the district court abused its discretion by staying the case under *Colorado River*. Doc. No. 18 at 24-26. He makes four arguments: First, the district court feared disjointed or irreconcilable "results from piecemeal litigation that could not be avoided" because the state court "declined to adjudicate any Lanham Act claims whatsoever" causing

[29] Ironically, at that time, South Carolina substantive law required deference to the Methodist Church on the issue of the validity of the corporate merger. Today, that is no longer state substantive law. *All Saints*, 385 S.C. 428, 685 S.E.2d 163.

vonRosenberg to come to the district court to adjudicate "his personal claims." *Id.* at 24-25. Second, the progress achieved by the state court is only because the district court "errantly abstained." *Id.* Third, South Carolina law does not provide the rule of decision on the underlying issues apparently because a decision on corporate control adverse to vonRosenberg will not affect his false advertising claim. *Id.* at 26. Fourth, vonRosenberg's Lanham Act rights are not adequately protected "by a state court that has declined to adjudicate" his Lanham Act claims. *Id.* All of these alleged errors are, at best, superficial. They simply do not substantially address the district court's rulings.

First, the district court was not afraid of "disjointed or irreconcilable results." It recognized that the decision had to be driven by more than that threat. JA 1166. None of its actual findings on this issue are addressed by vonRosenberg. Instead, he falls back on the incorrect argument that the state court refused to adjudicate his Lanham Act claims. His were not presented for review. TEC's were and they are different and have not been, nor could they have been, asserted here by vonRosenberg.

Second, he cites no authority for the proposition that incorrect judicial rulings which delay a federal case form a basis to disregard the progress of a parallel state case.

Third, as his complaint is pled, South Carolina, not federal law, is the choice of law on the issue of corporate control which is a necessary determination to the issue of whether vonRosenberg has the right to use the Diocese's marks. Moreover, his principal, TECSC, put at issue in the state court the very issue he says is reasonably inferred from his complaint – by using the name of the Diocese with its word "episcopal." Lawrence is misrepresenting he is still affiliated with TEC. vonRosenberg is bound by that determination as any claim he has derives from his office of Bishop. It is not individual to him apart from that office.

Fourth, the state court's asserted failure to protect his rights under the Lanham Act do not square with his complaint or the unwarranted inferences from that complaint. As to the complaint as pled, the state court, as the district court held, has determined the issue of corporate control (subject to appeal). As to the other Lanham Act rights now asserted, TECSC, his principal, presented the issue of whether the use of the word "Episcopal" in the Diocese's name creates confusion about its relationship with TEC. The state court held it did not. Again, that finding binds vonRosenberg because his rights flow from the office of Bishop of TECSC, they are not individual to him.

The district court properly found the existence of exceptional circumstances to stay this action.

IV. The district court order should be affirmed on the alternative ground that the Anti-Injunction Act[30] applies.

The district court order staying the proceeding until the state court proceeding is finally resolved should be affirmed because the Anti-Injunction Act would prohibit the relief sought by vonRosenberg if the state court judgment is affirmed.[31]

vonRosenberg asserts that the state court's permanent injunction would not conflict with "the relief sought in the federal Lanham Act claim." He argues it only enjoins TEC and TECSC from using the marks of the Diocese. "That is all it does." Doc. No. 18 at 23 n. 5. It does not permit Lawrence to use those marks and make representations that "mislead and confuse the public." *Id.* However, the issue under the Anti-Injunction Act is whether the requested federal court injunction *he* seeks would prohibit the utilization of results of the state proceeding. As the district court found, it clearly would.

The district court recognized that the requested federal court injunction would put "a full halt to Bishop Lawrence's faction's use of the marks… allowing

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[30] A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
28 U.S.C. § 2283.

[31] The district court did not consider the Anti-Injunction Act though it was advanced in that court. It may be considered here as an alternative sustaining ground. *Skipper v. French*, 130 F.3d 603, 610 (4th Cir. 1997).

Bishop vonRosenberg to communicate as the "sole Bishop of the Diocese." *Id.* Lawrence could be held in contempt for using the Diocese's marks or representing that he is a Bishop of the Diocese as well as those acting in concert and participating with him or, in the Court's words, "Bishop Lawrence's faction." A federal injunction would prohibit Bishop Lawrence and others from "utilization of the results of the completed state proceeding," which allows Lawrence and others the right to use the marks of the Diocese containing the word "episcopal." That would be a "stay" within the meaning of 28 U.S.C. § 2283. Def. Supplemental Mtn. to Dismiss, 13-cv-587, Doc. No. 52-1 at 12. Such an order would not only affect the result given Lawrence by the state court, but it would affect the other low country parishes who are parties to the state court lawsuit but not this action, most of whom use the word "episcopal" in their names.[32]

[32] None of the three cases vonRosenberg cites, *Id.*, supports his arguments. One in particular, *Aluminum Company of America v. Utilities Commission North Carolina*, 713 F.2d 1024 (4th Cir. 1983) supports Lawrence's position. *ALCOA* is not a Lanham Act case. The Fourth Circuit upheld the district court's abstention from taking jurisdiction of the case, which sought to enjoin enforcement of the state court order after the federal Plaintiffs had lost in the state court of appeals. A specific federal statute provided some instances where a federal court could issue injunctions against the enforcement of state rate setting orders involving utilities but these instances were found not to apply. The court specifically rejected the argument that whenever a party brings a preemption claim in a federal action, the mere presence of that claim requires a court not to abstain. Rather the complaint on its face must make clear that "the federal government has preempted the field." That is certainly not the case with Lanham Act claims.

The Anti-Injunction Act's express denial of federal court power to enjoin pending state proceedings

> [i]s more than a mere statement of 'a principal of comity'; it represents 'a binding rule on the power of the federal courts' a rule which may not be ignored, even though the state 'proceedings' sought to be stayed 'interfere with a potential federal right…, even when the interference is unmistakably clear' and 'regardless of whether the federal court itself has jurisdiction over the controversy.' It is not to be whittled away by judicial improvisation nor are its exceptions to be 'enlarged by loose statutory construction.

Hartsville Theatres, Inc. v. Fox, 324 F. Supp. 258, 261 (D.S.C. 1971) (Three-Judge District Court: Haynesworth, Simons and Russell, J.J.) (claim dismissed for injunctive and declaratory relief alleging a violation of Plaintiffs First Amendment rights) (footnotes omitted); *accord, In re American Honda Motor Co., Inc. v. Bernard's Inc.*, 315 F.3d 417 (4th Cir. 2003).

A. There Is A Pending State Court Proceeding

What constitutes a state proceeding "is to be given a comprehensive meaning." *Hartsville Theatres, Inc.*, 324 F. Supp. at 262 (quoting *Hill v. Martin*, 296 U.S. 393, 403, 56 S. Ct. 278 (1936)) (It "includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.").[33] "State court proceedings" include state court injunctions as long

[33] The broadest possible definition has been given to his phrase by the United States Supreme Court:

as they are in effect. *County of Imperial v. Munoz*, 449 U.S. 54, 59, 101 S. Ct. 289 (1980) (citing *Atlantic Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 286-87, 90 S. Ct. 1739 (1970)); *accord*, *Garcia v. Bauza-Salas*, 862 F.2d 905, 908 (1st Cir. 1988).

The state injunction is in effect; there is a pending state court proceeding.

B. The Injunction Sought Would "Stay" The State Proceeding

vonRosenberg has previously argued that "none of [his] requested relief would have the effect of halting the state court proceeding." Pl. Resp. to Mtn. to Dismiss, 13-cv-587, Doc. No. 24 at 15-16. However, "the prohibition of § 2283 cannot be evaded by *prohibiting utilization of the results of a completed state proceeding." Atl. Coast Line*, 398 U.S. at 287 (emphasis added). If the effect of the federal court injunction renders the state court proceeding ineffective, it constitutes a "stay" within the meaning of 28 U.S.C. § 2283. *Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 881 (7th Cir. 1989) (The federal injunction would "nullify the results of the prior state proceeding."); *U.S. Steel Corp. Plan for*

> That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective.

Hill, 296 U.S. at 403, 56 S. Ct. at 282.

Employee Ins. Benefits v. Musisko, 885 F.2d 1170, 1175 (3d Cir. 1989) (The applicability of ERISA to the state claims as described, while not terminating the case, would effectively prevent the trial judge from doing what the Superior Court instructed him to do, thus "obstructing and interfering with the state court's process."); *Garcia*, 862 F.2d at 908 (federal court injunction "in direct conflict with earlier injunction" would "nullify the effect of the state court judgment" and "block the utilization of the results of a completed state court proceeding.")

There is no more effective "stay" that could be obtained than to have a federal court injunction countermand not only the state court injunction but also the very basis upon which it was entered.[34]

C. vonRosenberg Is No "Stranger" To The State Court Action

The Act applies unless the federal court parties are "strangers to the state court proceeding," *Cty. of Imperial, Cal*, 449 U.S. at 59-60, that is, one who is neither a party nor in privity with a party to the state court action. *Musisko*, 885 F.2d at 1179.

Plaintiff vonRosenberg is no "stranger" to the state court proceedings. As stated in the previous motion, he was personally served with the First Amended

[34] The Act would be applicable even though the relief sought were a declaratory judgment since "the two-step procedure of serving a declaratory judgment followed by an injunction to support it… would be doing indirectly what could not be done directly." *Hartsville Theatres, Inc.*, 324 F. Supp. at 263; *accord Denny's, Inc. v. Cake*, 364 F.3d 521, 528 n. 8 (4th Cir. 2004). The Court added, "the cases are legion that the Declaratory Judgment cannot be used to give relief indirectly that cannot be given directly." *Hartsville Theatres, Inc.*, 324 F. Supp. at 263 n.12 (quoting *Rolls-Royce Ltd. Derby, Eng. v. U.S.*, 364 F.2d 415, 419 (Ct. Cl. 1964)).

Complaint, the Second Amended Complaint, and the TRO. Now, He has been served with the Permanent Injunction. Supplemental Mtn. to Dismiss Ex. 7 Aff. Of Service of vonRosenberg, 13-cv-587, Doc. No. 52-8. He alleges to have an express and unique relationship with the Diocese as its Chief Operating Officer and the "sole representative of the Diocese" recognized by TEC.[35] The Diocese is a party in the state court action. His principal, TECSC is also a party. The state court found vonRosenberg to be TECSC's agent. He stated to this court "undeniably he is an officer and agent of TECSC." Reply Br. Appellant, 14-1122, Doc. No. 21 at 5. TEC is also a party in the state court action and vonRosenberg is a member of TEC. Moreover, as a member of one or both of these unincorporated associations, under South Carolina substitution law he is also a party to any proceeding in which they are parties.[36]

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[35] JA 15 ¶ 25, 12 ¶¶ 47 & 48. The Diocese, a party in the state court action, expressly alleges the opposite.

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

As a result, the Anti-Injunction Act applies and the district court would be required to dismiss this action if the Supreme Court affirms the state court's issuance of an injunction,[37] as it does not come within one of the Act's exceptions. Therefore, the Anti-Injunction Act is an alternative ground for affirming the district court.

CONCLUSION

This appeal is based on unwarranted inferences and conclusions from an April 2013 complaint whose allegations have not yet been conformed to 2015 state court findings binding in federal court on the issue underlying vonRosenberg's false advertising allegations, corporate control of the Diocese, a South Carolina non-profit corporation. This state law issue is now before the South Carolina Supreme Court. It likely will be determined by its ruling. Yet vonRosenberg seeks review by this court when the outcome of that appeal is not yet known. He does so under the premise that his false advertising claim will survive an adverse ruling in the state court. However, the claim that he argues will survive is not one he has pled and may be unnecessary depending on how the South Carolina Supreme Court rules. The district court order did not effectively dismiss his claim and he will still have the review he prematurely seeks now.

[37] "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atl. Coast Line*, 398 U.S. at 297.

This appeal should be dismissed as it is premature or the district court order finding the existence of "exceptional circumstances" should be affirmed. Either result preserves vonRosenberg's ability to pursue any appellate rights he may have for false advertising.

Dated: March 28, 2016

Respectfully Submitted,

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Dated: March 28, 2016

By: /s/ C. Alan Runyan
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 28, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the following registered CM/ECF users.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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