THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2015-000622

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S.C. SUPREME COURT

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

of The Episcopal Church of the Parish of St. John's, Charleston County, The Vestries and Churchwardens of The Parish of St. Andrews,, ...

Respondents,

v.

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

PETITION FOR REHEARING

Pursuant to the provision of Rule 221(a), Respondents, with the exception of those parishes who prevailed with respect to their property rights (hereinafter "Petitioners"), through their undersigned counsel, respectfully petition this Court for a rehearing based on facts, points, and arguments overlooked or misapprehended as set forth herein.

This Court's decision relies upon a misapplication of the First Amendment and the Supreme Court's decision in *Jones v. Wolf*, 443 U.S. 596 (1979). The decision to strip Petitioners of their property rights depended upon a misreading and misapplication of *Jones*, and an erroneous conclusion that the First Amendment requires courts to enforce an alleged "trust" claimed by one side of an internecine dispute between religious institutions, even though such a trust would not be legally cognizable under generally applicable rules of state property and trust law. Simply put, the First Amendment does not require courts to establish specialized property and trust law that favor one religious institution over another. To the contrary, the Constitution affirmatively prohibits this Court from fashioning specialized rules that favor one religious institution over another. If two secular institutions had entered into the transactions at issue here, there is no question that an irrevocable trust would not have been created under South Carolina law. Applying the same neutral principles of South Carolina law, an irrevocable trust was not created between

the institutions in this case. The outcome of this property dispute cannot change simply because this case involves religious rather than secular institutions.

Additionally, the opinions variously overlook and misapprehend the law and facts involving the standard of review, the inadequacy of the record for findings made and legal conclusions reached, the consideration of issues that were not preserved for review by the Appellants, and the failure to apply and the misapplication of United States Supreme Court precedent. The disruptive effect of this decision on religious organization transactions with the business world will be significant. Mortgage lenders will now find that the real property which secured their loans to the parish churches, with whom they have contracts, is now owned by an entity with whom they have no contract. Lenders will be deprived of the security for their loans to the disassociated parishes' churches.

Similarly, the possibility of title insurance for religious organizations seems unlikely for any South Carolina religious organization's real property because of the unknown potential for trusts which might have been created by a means not possible with secular organizations. The ambiguity for the business world in its dealings with religious organizations will negatively affect the business risk calculus. This uncertainty will change business markets involving South Carolina religious organizations and their real property. Rehearing should thus be granted in this important dispute based on the arguments and points set forth herein.

I. The Opinions of the Majority of the Court are Erroneous on the Merits.

Four Justices either state their opinion on the standard of review or join in opinions that do, but there is no stated majority. Acting Justice Pleicones states the standard of review is for an action whose main purpose is equitable, a position in which Justice Hearn joins. Acting Justice Toal states the standard of review is for an action whose main purpose is legal, in which Justice

Kittredge joins. Chief Justice Beatty does not state his opinion on the appropriate standard of review, but it appears he believes this dispute should be decided based on neutral principles of law.

A determination that the main purpose of Plaintiffs' action is equitable rather than legal would mean this Court has created a new standard of review for identical claims involving the same essential facts. *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina* also involved cross-declaratory judgment claims over title to real property including the defendants' assertion of an express trust and issues of corporate control. 385 S.C. 428, 685 S.E.2d 163 (2009). There was also a claim for injunctive relief. Yet in *All Saints*, the standard of review was for a legal action, not an equitable one. Acting Justice Pleicones' view that *All Saints* should not control the standard of review is understandable, since his opinion depends upon an overruling of *All Saints*. However, Chief Justice Beatty, Justice Kittredge, and Acting Justice Toal do not agree and did not overrule *All Saints*.[1] As will be set forth more fully below, when the proper standard of review is applied, rehearing must be granted. Moreover, this Court has previously held the standard of review is legal when a defendant asserts paramount title to land, even if the primary action is equitable. *See Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 105, 712 S.E.2d 395, 397 (2011) ("When the defendant's answer raises an issue of paramount title to land, such as would, if established, defeat the plaintiff's action, the issue of title is legal.").

[1] Had *All Saints* been overruled, which it was not, Petitioners would have argued that such could not operate to retroactively deprive them of their property. Nevertheless, the effect of the majority of the opinions is to deprive them of their property retroactively. *See* infra. Further, because Acting Justice Pleicones' opinion is expressly dependent upon the overruling of *All Saints*, which did not occur and was rejected, his opinion is not efficacious to render any adverse result to the Petitioners, and thus, for this additional reason, rehearing is required.

The opinions of the Court depended on the conclusion that *Jones v. Wolf* mandated a minimal burdensomeness requirement for trusts created by religious organizations. 443 U.S. 595 (1979). However, as noted previously, that argument was not made until Appellant's Brief. Resp. Br. at 52. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 370 S.C. 71, 76, 497, S.E. 2d 731, 733 (1998). It is axiomatic that an issue cannot be raised for the first time on appeal." *Herron v. Century BMW*, 395 S.C. 461,465,719 S.E. 2d 640,642 (2011). "Constitutional arguments are no exception to the issue preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal." *Id.* (citations omitted). Under this Court's preservation rules, this issue cannot be considered.[2]

In ruling that under *Jones v. Wolf*, South Carolina trust law does not apply as it would to other South Carolina non-religious charitable organizations, this Court's decision has sanctioned an establishment of religion, an abridgment of the Petitioners' constitutional rights to freedom of worship, assembly and association, a denial of their rights to equal protection of the laws, a denial of their rights to the free exercise of their religion and a deprivation of their property without due process of law, all in violation of Article 1, Sections 2 and 3 of the South Carolina Constitution and the 1st , 5th and 14th Amendments to the United States Constitution.

Jones imposes no constitutional requirement modifying South Carolina's express trust law requirements for a religious organization since that would violate the First Amendment's Establishment Clause. The "Disassociated Diocese" and its associated parishes were constitutionally entitled, both before and after withdrawal from TEC, to those rights accorded all "voluntary associations for benevolent charitable purposes . . . the principles on which are those applicable alike to all of its class, ..." *Watson v. Jones*, 80 U.S. (13 Wall) 679, 714 (1871).

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[2] Additional preservation of error arguments are made *infra* at p. 22.

Just as the right to freedom of association is a right enjoyed by religious and secular organizations alike (not simply individuals)[3] expressed in this case by the Disassociated Diocese/Parishes' withdrawal from TEC, so too both sides of this religious dispute are entitled to similar neutrality by a court in the application of the First Amendment Free Exercise and Establishment Clauses. "'A proper respect for both the Free Exercise Clause and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion, and favoring neither one religion over others nor religious adherents collectively over non-adherents." *Board of Education of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). "The First Amendment

[3]Acting Justice Pleicones' suggestion that somehow the Constitution only protects individuals in their rights of association (and disassociation) with religious organizations as an expression of their free exercise of religion but does not protect non-profit religious organizations, whether incorporated or not, ignores the well understood concept that constitutional rights flow to entities because "when rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of the [people associated with a corporation]." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). A religious organization "exist[s] to foster the interests of persons subscribing to the same religious faith." While *Hobby Lobby* recently extended First Amendment free exercise protection to for-profit, secular corporations to protect "the religious liberty of the humans who own and control those companies," it has long been available to non-profit religious organizations. *Id.* at 2768. "Religious organizations exist to foster the interests of persons subscribing to the same religious faith." *Id.* at 2795 (Justices Ginsberg, joined by Justices Sotomayor, Breyer and Kagan, dissenting). Therefore, constitutional protection in "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." *Id.* at 2794 (citation omitted). Limiting the Diocese and the associated parishes rights of free exercise of religion and association because they are non-profit religious corporation would be just as unconstitutional as limiting the same rights of those individuals who associate with them. *Disabato v. South Carolina Ass'n. of School Administrators*, 404 S.C. 433, 445, 746 S.E. 2d 329, 335 (2013) (*relying* on *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)). The freedom of association (and the correlative right to disassociate) unquestionably includes associations, incorporated or unincorporated, not simply individuals. *See Roberts*, 468 U.S. at 612 ("The United States Jaycees . . . a non-profit membership corporation); *NAACP v. Button*, 371 U.S. 415, 418 (1963) ("The NAACP . . . a non-profit membership corporation . . . ."). South Carolina's non-profit act equally makes clear that a member may resign at any time, S.C. Code Ann. § 33-31-620, and that this right applies to members who are entities. S.C. Code Ann. § 33-31-140(23)(a), (27).

mandates government neutrality between religion and religion . . . This prohibition is absolute." *Epperson v. Arkansas*, 393 U.S. 97, 104, 106 (1968). The free exercise arguments advanced by TEC and entertained by Justice Hearn and Acting Justice Pleicones in favor of TEC's free exercise rights apply equally to those of the Disassociated Diocese and its associated parishes. This Court cannot act against the free exercise rights of the Disassociated Diocese/Parishes' non-profit corporations and those associated with them any more than it can act against those of TEC and those associated with it.

TEC's free exercise rights do not supersede the Establishment Clause. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitation imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). The creation of a "church-only" principle in South Carolina trust law that benefits TEC in this dispute between religious organizations unconstitutionally favors one religious institution over another Neutral principles, properly applied, avoids establishment clause problems.

Justice Kittredge correctly acknowledged that it "would be laughable" to suggest that any of the parishes created an express trust under these facts if the Court applied "the law of express trusts as we ordinarily would." Op. at 55. That should be the end of this dispute. *Jones* did not create a new constitutional requirement for treating religious charitable organizations differently from secular charitable organizations. That would clearly violate the Establishment Clause. This was made clear by Justice Rehnquist, who was in the *Jones* majority, that same term when he was asked to stay the action of California's Attorney General who was intervening in a religious organization's charitable trust because it was "not being administered in accordance with the trust instrument or with State law." *Syannon Foundation, Inc. v. California*, 100 S. Ct 496 (1979). In response to the church's claim that a religious charitable trust was constitutionally "somehow

entitled to different treatment that than accorded to other charitable trusts," Justice Rehnquist disagreed, referencing *Jones*' constitutionally permitted "neutral principles of State law." *Id.* at 497. Treating a religious organization differently than a similar secular organization would violate the Establishment Clause, as his citation to page 449 of *Presbyterian Church v. Hull* makes clear: "And 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) (emphasis added). According religious organizations acts different treatment than "similar acts of secular voluntary associations would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause." *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting).

The Supreme Court of Texas recently rejected identical arguments made by TEC in separate cases: one involving a parish that withdrew from TEC, *Masterson v. Diocese of Northwest Texas*, 422 S.W. 3d 594 (Tex. 2013), and the other involving a Diocese that withdrew from TEC. *Episcopal Diocese of Fort Worth v. Episcopal Church*, 422, S.W. 3d 646 (Tex. 2013).

> As we said in *Masterson*, *Jones* did not purport to establish a federal common law of neutral principles to be applied in this type of case. 422 S.W. 3d at 651. Rather, the elements listed in *Jones* are illustrative. If it were otherwise and courts were limited to applying some, but not all, of a state's neutral principles of law in resolving non-ecclesiastical questions, religious entities would not receive equal treatment with secular entities. We do not believe the Supreme Court intended to say or imply that should be the case.

Episcopal Diocese of Ft. Worth, 422 S.W. 3d at 652.

> Properly exercising jurisdiction requires courts to apply neutral principles of law to non-ecclesiastical issues involving religious entities in the same manner as they apply those principles to other entities and issues. Thus, courts are to apply neutral principles of law to issues such as land titles, trusts, and corporate formation,

> governance and dissolution, even when religious entities are involved.

Masterson, 422 S.W.3d at 606.

This is also recognized by most of the cases that have considered this issue, from the courts of Oregon, Indiana, Missouri, Texas, Louisiana and Ohio. *Jones* did not create a "legally cognizable form" for religious organizations different than the existing trust laws of the States because of a "minimal burden" requirement. *See Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A)*, 291 P.3d 711, 722 (Or. 2012) ("PCUSA relies on the Supreme Court's statement that '[t]he burden involved in taking such steps will be minimal.' . . . Whatever the exact contours of the phrase 'legally cognizable' because there is no federal law governing the creation of trusts, that phrase must include at least the trust laws of the 50 states. . . . Thus, under the neutral principles approach, the denominational church may ensure that property remains with the loyal faction in the event of a schism by reciting an express trust in favor, *provided* that the recitation is embodied in a legally cognizable form in **the state where the controversy arose**." (emphasis added)); *Presbytery of Ohio Valley v. OPC*, 973 N.E. 2d 1099, 1106 n. 7 (Ind. 2012); *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W. 3d 575, 589 (Mo. Ct. App. 2012) ("We will not read the quoted passage as itself establishing the substantive property and trust law to be applied to church-property disputes, particularly where the very same passage contemplates (in its reference to 'other neutral principles of state law') that the applicable law—like American property and trust law in general—would be state, rather than federal, law. Further, the statement that 'the civil courts will be bound to give effect to' the parties' expressed intentions was explicitly conditioned on those intentions being 'embodied in some legally cognizable form'—precisely the issue we address in this opinion."); *Carrollton Presbyterian Church v. Presbytery of S. Louisiana of Presbyterian Church (USA)*, 77 So. 3d 975 (La. App. Cir. 2011);

Ohio Dist. Council, Inc. of the Assemblies of God v. Speelman, 47 N.E.3d 954, 965 (Ohio Ct. App. 2016) ("[I]t left the matter of what constitutes a 'legally cognizable form' for determination under state law"); *Eastminster Presbytery v. Stark & Knoll*, Op. No. 25623, 2012 WL 723331 (Ohio Ct. App. 2012) ("[W]hile *Jones* firmly established the neutral principles doctrine and provided guidance with respect to the extent to which courts may look to church documents in resolving property disputes, it neither set a uniform standard for how such cases should be analyzed nor required deference to ecclesiastical documents. Instead, it left the matter of what constitutes a 'legal cognizable form' for trusts to determination under state law").

The use of minimalized South Carolina trust law favoring one faction in disputes between religious organizations—when a similar non-religious charitable organization would not be subject to the same trust law—is nothing less than the establishment of one religious group at the expense of the free exercise rights of another religious group. *Jones* made that clear. Neutral principles is "completely secular in operation;" therefore, it does not create a church-only form but one that "relies exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges." 443 U.S. at 606. Neutral principles would not be "completely secular in operation" if in the dispute in *Jones* or here required a different burden for TEC than that for similar secular organizations to create an express trust under South Carolina law.[4] Yet that is precisely what this Court required.

[4] It was undisputed within the Episcopal Church that the constitution is the most important document, amendable only after the action of two successive general conventions, whereas a canon can be amended at a single general convention. R 892, 894. TEC did not raise as an error on appeal the trial court's finding that the Dennis Canon was not placed in its Constitution, which "would require that the proposed amendment be sent to all the Dioceses first to get their conventions to vote on the proposed amendment. If approved by enough Dioceses, the Constitution would have been amended. Rather, TEC chose to pass it as a canon, which required one vote at one Convention." R77. If *Jones* (the "blueprint laid out by the United States Supreme Court," Op. at 42, Hearn, J.) is to be read that a national church as beneficiary can create an "express trust in

Acting Justice Pleicones and Justice Hearn misapprehended or overlooked facts by finding that Respondents sought the resolution of who was the "true diocese" when that is unsupported by the record, and then they misapprehended United States Supreme Court precedent by finding that the issue of who is the "true diocese" and whether the dispute was triggered by doctrinal issues required the application of a deference standard.

Despite the statements that Petitioners placed at issue which entity is the "true Diocese," this was not in their Complaint and only appears one time in the record as a statement by TEC's then-counsel, Thomas Tisdale, in a meeting held in anticipation of the dispute. R. 208. Even if the "true diocese" were an issue in this case, that would not turn an action otherwise resolvable under neutral principles into one requiring deference. *All Saints* is not distinguishable on this issue since who was the "true vestry" was expressly made an issue there, but deference was not required. Furthermore, the doctrinal dispute in *Jones* was both permitted to be resolved using neutral principles and was resolved using neutral principles when the issue of who was the "true congregation" had been raised. 443 U.S. at 598. The Georgia Supreme Court on remand found this issue irrelevant, despite a ruling by the Presbyterian Church's highest judicial body that the minority congregation was the "true congregation."[5]

To the extent that doctrinal issues were the underlying reasons for this dispute, (Op. at 29 ("doctrinal issues were the trigger"), 32 ("arose out of doctrinal issues")), this does not

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favor of a denominational church" simply by including it in a national document, then *Jones* must be followed on where that trust must be placed.

[5] On remand, the Georgia Supreme Court ruled the issue of who was the "true church" was not relevant to a determination of the property issues. *Jones v. Wolf*, 260 S.E. 2d 84, 85 (Ga. 1979) ("...this court is not concerned with the procedure by which factions within the local church and the national church decide which persons are "true believers" or "adherents to the true faith". Rather, church documents will be considered only insofar as they determine or assist in the determination of the persons who are "entitled to possess and enjoy the property located at 2193 Vineville Avenue in Macon, Ga.").

constitutionally require deference. *Presbyterian Church v. Hull* stated the obvious: church property disputes "involve underlying controversies over religious doctrine." 393 U.S. 440, 449 (1969). *All Saints* stated the obvious as well. 385 S.C. 428, 442, 685 S.E.2d 163, 170 (2009) ("Church disputes are very often prompted by disagreements over religious doctrine and beliefs."). The other United States Supreme Court neutral principles decisions all involved underlying controversies over religious doctrine or church government. *See Hull*, 393 U.S. at 449 (women's ordination, Bible reading and prayers in public schools, etc.); *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970) (church government); *Jones v. Wolf*, 443 U.S. 595, 605 (1979) (adherence to the Bible as the infallible word of God and to the Westminster Confession of Faith); Resp. Br. 25-26. Yet each decision found that a deference standard was not constitutionally required.[6] *Serbian* and *All Saints* are not inconsistent with this.[7]

Acting Justice Pleicones and Justice Hearn's finding that deference is required to TEC because it is hierarchical overlooks and misapprehends both the record and United States Supreme Court precedent. It does so either by failing to consider, or by improperly determining, which

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[6] Acting Justice Pleicones' (joined by Justice Hearn) concept that a false dichotomy is created when a court separates ecclesiastical from secular issues within the same organization completely misapprehends the very idea of applying neutral principles to disputes involving religious organizations. It is the fact of their separability that makes the use of neutral principles possible. Without it there would always be compulsory deference over any issue. Not only does the very existence of the *Jones* decision recognize this dichotomy, so do quite old and more recent decisions. *See, e.g., Episcopal Diocese of Ft. Worth v. Episcopal Church*, 422 S.W.3d 646, 650 (Tex. 2013) (Courts defer on ecclesiastical issues, "while they decide non-ecclesiastical issues such as property ownership and whether trusts exist based on neutral principles of secular law that apply to other entities."); *Bridges v. Wilson*, 58 Tenn. 458, 470 (1872) (Ecclesiastical issues belong to ecclesiastical courts. "However, the personal and property rights of churches and their members are civil, and of them the Courts of this state have exclusive jurisdiction.").

[7] In *Serbian*, the Bishop had complete control of the real property, so determining that religious issue determined property ownership. Resp. Brief at 29-31.

body within TEC must be deferred to because the deference standard cannot be used to resolve a dispute involving religious organizations where there is a substantial controversy as to the identity of the governing body that is the locus of control within the religious organization.

TEC admitted that the Parish churches were not members of TEC. R.630.[8] Much of the evidence concerned whether TEC had the right to control the Diocese. This is reflected in the trial court's findings.[9] As the Record on Appeal reflects, there was a substantial dispute over whether the locus of control was with the Diocese or with TEC's General Convention. Resp. Br. at 13-15, 20-21.

The cases relied upon by Acting Justice Pleicones and Justice Hearn, Op. at 17, 28, were cases in which TEC was not a party and the issue of control between the Diocese and a parish was uncontested, with one exception.[10] Resp. Br. at 40 and n. 66. These cases were not about a dispute between a Diocese and TEC and did not present the constitutional issue presented here and in *Quincy* (Resp. Br. at 35-38): the absence of an unambiguous locus of control as between the General Convention and the Diocese.[11] Acting Justice Pleicones and Justice Hearn misapplied

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[8] These Requests for Admission were also added to the Record on Appeal at the request of the Clerk in April 2016.

[9] The trial court found that the Diocese preexisted TEC and was one of its founders. The Diocese had previously disaffiliated from TEC. TEC has no supervisory authority over a Diocese: it has no delegates at Diocesan Convention, does not reserve a right to approve amendments to its articles of incorporation, its Bylaws or its Constitution and Canons. TEC's governing documents do not state a Diocese cannot withdraw. TEC cannot discipline a Diocese. TEC's provincial synod expressly cannot interfere in the internal affairs of a Diocese. A Diocese cannot be compelled to contribute funds to TEC and there is no supremacy clause giving any body within TEC authority superior to the Diocese's Bishop. TEC has no ultimate judicatory power and TEC has repeatedly noted in its historical records the autonomy of a Diocese. R. 48, 49, 62-65.

[10] The issue of hierarchy was contested in one case between a Diocese and a parish. *In re Church of St. James The Less*, 888 A.2d 795, 806 (Pa. 2005). TEC was not a party.

[11] For the court to defer within a hierarchy, proof of four elements is required. The party holding the property must be "a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."

constitutional precedent because there was a substantial factual controversy over which church governing body exercises the requisite control. The Diocese contended that the locus of control was with the Diocese, not TEC's legislative body, the general convention. R. 822. TEC contended otherwise. A deference standard could not be applied without deciding the locus of control which the substantial factual dispute constitutionally prohibited. The result of the majority of the opinions is that the Court is granting deference to TEC's legislative body, in spite of this controversy over the locus of control between the Diocese and TEC. This deference violates the United States Supreme Court precedent of *Maryland and Virginia Eldership*, 396 U.S. at 369-370 & n. 4 (stating that deference is not constitutionally permissible where there is a substantial controversy over the identity of the body or bodies that exercise general authority within a church); and *Jones v. Wolf*, 443 U.S. at 605 (stating that the rule of compulsory deference advocated by the dissent could not be used to defer, when a "searching and therefore impermissible inquiry" was necessary to determine which unit of government had authority). In fact, as recognized by Acting Justice Toal, the substantial nature of this factual dispute is established by the differing factual views between the trial court and members of the majority, which is itself sufficient for the court to be prohibited

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Then, "whenever the question of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Watson v. Jones*, 80 US (Wall) 679, 722-23, 727 (1871). This Court recognized this standard in its opinion making neutral principles the standard rather than deference. *Pearson*, 325 SC 45, 49, 478 SE 2d 849, 851. Appellants did not establish that the Diocese was subordinate to TEC, did not establish that there were any ecclesiastical tribunals nor that there was a supreme judicatory with "ultimate power or control, more or less complete". The overwhelming record is that Dioceses are the fundamental unit and are not subordinate to any other body in TEC. R. 878, 879, 895-97, 2033, 2031-38, 2050-52, 2066-67.

constitutionally from choosing the appropriate governing body to which it would defer under a deference standard.[12] Op. at 77 n. 61.

Justice Pleicones states the resolution of the property issues should be driven by the relationship between a national church and a local congregation upon disassociation, which he contends is an ecclesiastical matter. Op. at 27 n.6. He attributes that view to the United States Supreme Court. In doing so, he misapprehends a matter of law by mistakenly attributing the following as a quotation from the United Stated Supreme Court decision in *Serbian*, rather than from the majority opinion in *Masterson v. Diocese of Northwest Texas*, 422 S.W. 3d 594, 607 (Tex. 2014), and by leaving out *Masterson*'s qualification of that sentence which immediately follows and which is set out in bold below.

Here is the full relevant quote from *Masterson* (not *Serbian*):

> What happens to the relationship between a local congregation that is part of a hierarchical religious organization when members of the local congregation vote to disassociate is an ecclesiastical matter over which the civil courts generally do not have jurisdiction. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 697 (1976). **But what happens to the property is not, unless the congregations' affairs have been ordered so that ecclesiastical decisions effectively determine the property issue.**

Id. Masterson went on to rule, reversing the court of appeals, that even if the determination of the true representative of the Episcopal Church was an ecclesiastical decision, the question of "who owns the property" is not inextricably linked to that decision under neutral principles of law. *Id.* at 608.

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[12] Ironically, a case relied upon by Acting Justice Pleicones and Justice Hearn found the locus of control in the Episcopal Church is the Diocese, not TEC's general convention. In *Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002), the affidavit submitted by TEC's expert on its "hierarchical structure" stated "The Diocese is the jurisdictional unit of the Episcopal Church," R. 2288, and the Diocesan Bishop is "at the apex of that hierarchy." R. 2287.

For all of the above reasons, the Court erred on the merits in many particulars, and rehearing is warranted. Moreover, they are supported by various rulings which reverse the trial court when this Court has made plain that it will not reverse the trial court based on arguments and points not properly preserved or made.

II. The retroactive application of a different standard for *this* case violates Respondents' rights to the free exercise of their religious beliefs, and the Court's action constitutes a deprivation and a taking of the private property of respondents without due process of law in violation of the 5th and 14th Amendments to the United States Constitution.

It is undisputed that Petitioners are the owners in fee simple absolute of their real and personal property. As found by the trial court and not contested on appeal, "the undisputed evidence is that all the real and personal property at issue was purchased, constructed, maintained and possessed exclusively by the Plaintiffs." R. 79. Moreover, seventeen parishes predate not only the creation of TEC, but that of the Diocese as well. R. 2329. Fourteen predate the creation of the United States of America. *Id.* It is also undisputed that eight legislatively chartered parishes were vested with rights to their real property by the South Carolina legislature with the legislative statement that their properties "shall remain and be secured to them forever." R. 78. Despite the reliance by two justices on Section 33-32-180 of the Non-Profit Act (Acting Justice Pleicones and Justice Hearn), thirteen legislatively-created Petitioners were not subject to the Non-Profit Act because there is no irrevocable election to be bound by that Act filed with the South Carolina Secretary of State. R. 59-60. None of these facts have been contested on appeal. Moreover, none of the majority contend that there has been a transfer of property by any means recognized under neutral principles of South Carolina trust, property, contract or other law as would be required for any similar South Carolina secular charitable non-profit corporation. In short, as stated by Acting Associate Justice Toal, "three hundred years of settled trust and property law" are disregarded driven by "a desired result in *this* case," who "with a stroke of a pen vitiates South Carolina's

charitable corporation law and invalidates all of the plaintiffs' duly adopted corporate documents." Op. at 63, 92-93.

The standard applied in resolving religious disputes in this state has been neutral principles of law since *Pearson v. Church of God*, 325 S.C. 45, 478 S.E. 2d 849 (1996). The result of the majority of the opinions of the Court is completely inconsistent with the neutral principles application in *All Saints*, which involved the same basic issues of corporate control, real property, the Dennis Canon and substantially the same parties. *Jones* recognized in a footnote, qualifying its neutral principles analysis, that the retroactive application of a different standard for the resolution of church disputes could infringe upon the free exercise rights of the party to which the different standard is applied. *Jones*, 443 U.S. at 606, n. 4.

It is not disputed that the Respondent religious non-profit corporations structured their "relationships, involving church property" consistent with *Jones*, *Maryland & Virginia Eldership*, *Presbyterian Church* and *All Saints*, "so as not to require the civil courts to resolve ecclesiastical questions." Acting Justice Pleicones did not find that the trial court misread *All Saints*; rather he found that "her rulings were governed, in large part, by her understanding of *All Saints*." Op. at 20. Therefore, he would overrule *All Saints*. Justice Hearn "concur[red] fully in Acting Justice Pleicones'" opinion. Op. at. 35.

The record demonstrates that the Petitioners followed to the letter the requirements of *All Saints* to structure their relationships under South Carolina civil law involving corporate control and real property. Yet to no avail, according to the majority. The majority's retroactive application of a severely distorted neutral principles of law analysis violates Respondents' free exercise of religion under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the South Carolina Constitution.

III. The "Accession" Ruling Is Erroneous.

The ruling regarding the effectuation of an irrevocable trust under neutral principles of law via the accession of parishes to the Dennis Canon is, respectfully, incorrect, for several reasons. Rehearing is required as a result.

A. The Dennis Canon Does not Create a Trust.

A trust under South Carolina statutory law must be created by the settlor. S.C. Code Ann. §§ 62-7-401(a) and 402(a). TEC is the beneficiary, not the settlor. TEC cannot create the trust for itself by adopting the Dennis Canon. Chief Justice Beatty correctly recognized that the Dennis Canon was legally insufficient to create a trust in favor of TEC. Hence, it was invalid and legally meaningless at the time of its creation. Chief Justice Beatty's opinion, however, applies a minimal burdensomeness standard in result, despite claiming to apply neutral principles. When neutral principles are applied to these facts, the "accession" documents do not result in the creation of an irrevocable trust under South Carolina law.

The Dennis Canon does not get converted into a trust by an "accession" to "the Canons" of TEC by parishes. In fact what has occurred with a few parishes is an "accession" (such as that is) to "Constitution and Canons," one of which is the legally meaningless Dennis Canon. The key inquiry to any trust is the intent of the settlor, not the beneficiary, to both create a trust and to set forth its terms. S.C. Code Ann. § 62-7-402(a)(2); *State v. Parris*, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005). Even having "accession" documents to "Canons," one of which is the legally invalid purported trust created by the Dennis Canon, is a far cry from proof of intent that any parish sought to actually create a legally enforceable trust in favor of TEC over all of its property. As noted by the Missouri Court of Appeals, in considering a similar property-trust clause in the Presbyterian Church's Book of Order,

> [O]ur laws are based on the reasonable assumption that a party would not intend to convey its property (in this case worth millions of dollars) in trust without signing the writing purporting to create the trust, identifying property to be conveyed, and expressing a definite intention to create a trust.

Colonial Presbyterian Church v. Heartland Presbytery, 375 S.W. 3d 190, 197-97 (Mo. Ct. App. 2012); *see also* Resp. Brief 45-48.

Further, the fact that the Dennis Canon can be changed by TEC, the purported beneficiary, renders it invalid as a trust under neutral principles of law. It is the settlor who would alter a trust, not the beneficiary. S.C. Code Ann. § 62-7-602.

B. The "Accession" Documents Are Non-Specific and Limited.

When some parishes acceded to "the Constitution and Canons," they could only have acceded to the canons as they existed, collectively, at the time of such accession. The word "canons" is used—the plural word. Therefore, it follows that when any of the canons were ever changed by alternation, amendment, deletion or addition after the accession occurred, it would take a new accession to the collective new "canons." After every accession occurred, there indeed occurred changes, deletions, or additions to "the canons." Thus, there is no "accession" to the changed canons. One might argue that until a particular canon is changed, the accession necessarily remains to the unchanged canons. But that would not be the case. There is no basis to say the accession remains to one canon but not to another. The accession was to "canons" plural, and no differentiation is made as to this or that cannon. There is not a single document acceding specifically to the Dennis Canon by any parish. Thus, if TEC changes "the canons" after an accession, then there is no longer any applicable accession.

C. There is no Signed Writing by the Settlor.

South Carolina law is clear that the settlor must sign the documents creating the trust. S.C. Code Ann. § 62-7-401(a)(2); *Whetstone v. Whetstone*, 309 S.C. 227, 231–32, 420 S.E.2d 877, 879 (Ct. App. 1992) (citing *Beckham v. Short*, 298 S.C. 348, 349, 380 S.E.2d 826, 827 (1989)); *Williams v. Wilson*, 341 S.C. 136, 533 S.E. 2d 593 (Ct. App. 2001), *aff. in part, rev. in part*, 349 S.C. 336, 563 S.E. 2d 320 (2002). As is set forth below, the alleged documents to create an "accession" are in many cases unsigned. No trust can thus be created thereby.

D. The Trust Cannot be Irrevocable.

Chief Justice Beatty concluded that the trust created by the combination of the accession documents and the Dennis Canon was also irrevocable. As noted by Justice Kittredge, irrevocability is also a question of intent. Op. at 57. The presumption of irrevocability is not unrebuttable. On this record, it cannot be in any event. The Dennis Canon is subject to change by the beneficiary, TEC, at any time. The Dennis Canon is part of TEC's Canons (R. 1563) which can be "amended or repealed" by TEC's General Convention. R. 1703. The Dennis Canon is not excepted from this power to amend. A trust subject to change (especially by the beneficiary!) cannot be an irrevocable trust. *See* S.C. Code Ann. § 62-7-103 (13) ("revocable," as applied to trusts, is defined as a trust that is revocable by the settlor without the consent of the trustee or a person holding an adverse interest); *Macauley v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (an irrevocable trust is deemed a completed gift and, therefore, a higher degree of capacity is required—the settlor must understand the nature of the trust and its probable consequences).

Moreover, all the parish churches retained an interest in the property, as the express terms of the Dennis Canon make clear. The presumption is that the trust is revocable, not irrevocable:

> Presumptions regarding revocability. Where the settlor has failed expressly to provide whether a trust is subject to revocation or amendment, if the settlor has retained no interest in the trust (other than by resulting trust, § 8), it is rebuttably presumed that the settlor has no power to revoke or amend the trust. **If, however, the settlor has failed expressly to provide whether the trust is revocable or amendable but has retained an interest in the trust (other than by resulting trust), the presumption is that the trust is revocable and amendable by the settlor.**

Restatement (Third) of Trusts, Section 63, comment c (2003) (emphasis added). Chief Justice Beatty should at minimum on this issue thus vacate his opinion.

E. At Minimum, the Fact Question of the Parishes' Intent to Create a Trust in Favor of TEC via Accession Documents Should be Remanded for Fact Findings by the Trial Judge.

The primary inquiry with respect to the creation of a trust is the intent of the settlor. Whether any of the Parishes actually intended to create a trust regarding all of their property via the accession documents, assuming arguendo that such is possible legally to do, is a fact question. *See, e.g.*, *Friedman v. Gomez*, 159 A.3d 703, 710 (Conn. App. 2017) ("The presumption of the existence of such a trust, however, is one of fact rather than law and may be rebutted by proof of contrary intent"); *Drewes v. Schonteich*, 31 F.3d 674, 677 (8th Cir. 1994) (finding that determination of settlor's intent to create trust constituted question of fact); *Carl H. Christensen Family Tr. v. Christensen*, 993 P.2d 1197, 1205 (Idaho 1999) (holding that issue of settlor's intent, as a question of fact, could not be resolved on summary judgment); *see generally* S.C. Code Ann. § 62-7-103(17) ("Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding); *Williams v. Government Employees Ins. Co. (GEICO)*, 409 S.C. 586, 762 S.E.2d 705 (2014) (if the court decides the language of a written agreement is ambiguous, evidence may be admitted to show the intent of the parties, and the

determination of the parties' intent becomes a question of fact for the fact-finder). As a result, this Court should at absolute minimum remand to the trial court so that she can take evidence and consider this issue properly.

IV. The Trial Court is Being Improperly Reversed Based on Arguments and Points that were not Preserved, are Procedurally Barred, or which are Unsupported by the Record on Appeal, and thus Rehearing is Required.

A. The Trial Judge is Being Reversed on Issues on Which She Did Not Rule.

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Lucas v. Rawl Family Ltd. Partnership*, 359 S.C. 505, 598 S.E.2d 712 (2004). The following points, relied upon to reverse the trial court, were not ruled on by the trial court.

- TEC wins because of the Minimum Burden Issue: no ruling by the trial court.
- TEC wins because the Trust in its Favor is Irrevocable: no ruling by the trial court.
- TEC wins because it is Hierarchical: ruling by the trial court limited to TEC is not organized in a fashion that its governance controls the Dioceses or parishes. Authority flows from the bottom (parishes) up.
- TEC wins because Accession is Sufficient to Create a Trust: ruling of the trial court was limited to no express or constructive trust (plaintiffs purchased, constructed, maintained, and possessed property and there was no clear, definite or unequivocal evidence of constructive trust and the Dennis Canon did not create an express trust.
- TEC wins due to the Deference Required for TEC: ruling by the trial court was that corporate control and property issues were not ecclesiastical issues, so deference was not addressed.
- TEC wins because Lawrence Acted in Derogation of Fiduciary Duties: no ruling by the trial court.

B. TEC's Rule 41(C) Motion for Nonsuit was Insufficient.

While TEC made this motion, it was not made on any specific basis. As a result, the motion preserved nothing for appellate review. A general, non-specific argument does not necessarily encompass the multitude of specific grounds which may support such a broad argument; rather a party must actually raise the specific grounds below in order to preserve the issue for review. *See*

Collins Entm't Corp. v. Coats & Coats Rental Amusement, 368 S.C. 410, 418, 629 S.E.2d 635, 639 (2006) ("Initially, although American argued there was insufficient evidence of excess capacity [of machines] below, it made no argument with respect to the specific types of machines at issue. Accordingly, as this specific argument was not raised below, it is not preserved."). The entirety of the Rule 41 motion is set forth below.

> **Tisdale**: I think we should perhaps just put a motion for dismissal on the record, directed verdict, nonsuit, whatever, Rule 41, at the end of everything, shouldn't take but just a minute for the record. (Trial Transcript p. 2306.)
> **Holmes**: I have been asked to make the Rule 41(b) motion for dismissal of the plaintiffs' case *on the grounds the facts and law plaintiff has presented show no right to relief* and a directed verdict in favor of our clients, and if Your Honor wants to hear argument on it, I will die.
> **Tisdale**: TECSC joins in that motion in all respects.
> **Court**: In toto. With great admiration and respect I would respectfully deny the motions. (Trial Transcript p. 2312.)

C. The Trial Court Should Not be Reversed Based on an Issue Not Included in the Statement of Issues on Appeal.

No point will be considered which is not set forth in the statement of issues on appeal. Rule 208(b)(1)(B), SCACR; *State v. Crocker*, 366 S.C. 394 (Ct. App. 2005). The Statement of Issues on Appeal, as set forth in their entirety from Appellant's brief are:

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.

Missing from these two issues is an argument that accession by parishes can form the basis for the creation of a trust as to certain of the parishes, when combined with the Dennis Canon. This issue,

relied upon by Chief Justice Beatty in his opinion, and relied upon by Acting Justice Pleicones and Justice Hearn, simply does not appear in the Statement of Issues on Appeal. Rehearing is thus required, and the opinions should be vacated.

D. In Order to Support Reversal of the Trial Court, an Issue Must have Been Argued in the Appellant's Initial Appeal Brief.

All issues must be argued in the initial briefs in order to permit appellate review. Rule 208(b)(1)(D), SCACR; *see also First State Sav. and Loan v. Phelps*, 299 S.C. 441, 385 S.E.2d 821 (1989). An issue which is not argued in the appeal brief is deemed abandoned and precludes consideration on appeal. Rule 208(b)(1)(D), SCACR; *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003). An issue is also deemed abandoned if the argument in the brief is not supported by authority or is only conclusory. *In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001). The following issues were not argued in the Appellant's Initial Brief:

- Minimum Burden and Legally Cognizable: The Brief only addresses minimal burden (which was first raised on appeal) and implies the Dennis Canon is legally cognizable. The Brief does not contain an argument regarding accession to the Dennis Canon through the accession documents.

- Lawrence Derogation of Fiduciary Duties: The Brief merely states the court rejected the testimony of McWilliams, the defendants' expert on corporate governance and fiduciary duties.

E. The Trial Judge is Being Improperly Reversed Based on Matters Not Appearing in the Record.

The appellate court will not consider any fact which does not appear in the record on appeal ("ROA"). Rule 210(h), SCACR; *see also Sheppard v. State*, 357 S.C. 646, 594 S.E.2d 462 (2004) (Court refused to consider State's failure to produce witness's prior statements because petitioner failed to include statements in the record). As for various parishes, there are many disparities and differences with respect to asserted accession documents, as set forth below.

1. All Saints, Florence

The ROA contains Articles of Association for All Saints, Florence that purport to have been adopted at the Annual Congregational Meeting on January 27, 1960. However they are not signed and the Dennis Canon was not adopted until 1979. R. 2958. Hence, there is no basis for finding that unsigned documents predating the Dennis Canon amount to an accession to the Canon.

2. Church of the Holy Comforter, Sumter

The ROA contains testimony regarding the amendment of the Constitution of the Church of the Holy Comforter, Sumter, but it is insufficient to evidence any specific accession to the Dennis Canon. The testimony confirms amendments to delete references to the Episcopal Church and any canons not accepted by the Diocese of South Carolina to "free us from any requirement to be part" and "to exempt us from . . . accede to the doctrine, discipline, and worship of the Episcopal Church." R. 402-403. There is no signed accession in the ROA, and this testimony does not confirm a signed express accession to the Dennis Canon or other actions sufficient to create a trust.

3. Christ Church, Mount Pleasant

The ROA contains the signed July 14, 1980 Bylaws for Christ Church, Mount Pleasant, which do not reference any accession to the Dennis Canon, although the Church acknowledges and accedes to the doctrine, discipline, and worship, the Constitutions and Canons of the Protestant Episcopal Church in the United States of America. R. 1968-1979. Nonetheless, Christ Church's property rights should be preserved as described in Section V.

4. The Asserted Accession Documents Relating to the Remaining Parishes are not in the Record on Appeal.

Aside from the three parishes listed above, the ROA contains no accession documents for any of the parishes. It appears the Court is basing its understanding of which parish had acceded to the Dennis Canon based on argument of counsel in TEC's Motion to Reconsider filed with the Trial Court. The motion of course is not evidence, but argument. Statements regarding the contents of a document made by counsel are not evidence and cannot be considered. *See Hobbs v. Beard*, 43 S.C. 370 (1895); *American Motors Insurance Co. v. Murphy*, 253 S.C. 346 (1969).

Further raising the accession documents in the Motion to Reconsider was too late. As an example, when asked in interrogatories by St. Philip's Church to identify all the documents that constitute the written agreement between them and TEC creating any alleged trust, for which TEC is the beneficiary, TEC identified several documents, none of which included the parish's bylaws or other governing documents. TEC's interrogatory answer pointed to four documents: (1) 1886 Diocesan Journal showing funds received and distributed for disaster relief, (2) parochial reports filed by St. Philip's for 1979, 1985-1993, and 1995-2000; (3) historical and current versions of the Church's [TEC] Constitution and canons and Book of Common Prayer; and (4) the Diocese's Constitution and canons. *See* TEC's Response to The Protestant Episcopal Church, of the Parish of Saint Philip, in Charleston, in the State of South Carolina Second Interrogatories, Interrogatory #8 (Nov. 8, 2013)[13]. These interrogatory answers were not supplemented to add any additional documents. It was not until after the conclusion of trial that TEC advanced the argument that additional parish documents were included in the written agreement allegedly creating a trust with TEC as a beneficiary.

[13] This interrogatory and response are not in the ROA.

In the Motion to Reconsider, Appellants' counsel asserted that an express trust was created "as a result of having executed one or more writings before January 1, 2006" that "expressly accepted the National Church's governance" after TEC adopted the Dennis Canon in 1979 or expressly accepted the Diocese's governance after 1996 or both ("Counsel's Argument"). R. 98-106. The records cited in support of Counsel's Argument were not included in the ROA. The appellate court will not consider any fact which does not appear in the record on appeal. Rule 210(h), SCACR. Reversal is not available for an argument based on facts not appearing in the record. *See Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993). As a result, Rehearing should be granted.

F. The Actual Proof at Trial Regarding Accession Does not Support the Opinions of the Court and Rehearing Must be Granted.

Even assuming the ROA contained the documents of the various churches relating to possible accession, those documents do not support "accession" to the Dennis Canon. As an initial matter, there is no evidence of an express accession to the Dennis Canon specifically by any of the parishes. As stated by Chief Justice Beatty, unless the parishes "expressly accede to the Dennis Canon", they "cannot be divested of their property." Op. at 52. Further, as is pointed out below, various groups of churches have differing documents. At a minimum, these issues require Rehearing and a remand to the trial court for fact finding with regard to intent to accede to the Dennis Canon.

1. **Christ The King, Waccamaw; Prince George Winyah, Georgetown; St. Andrews Church-Mt. Pleasant Land Trust; St. John's, Florence; Saint Matthews Church, Darlington; St. Paul's, Conway and St. Matthias, Summerton, Old Saint Andrews.**[14]

For these parishes, there is not even a "reference" to any documentation of accession to TEC's Canons, much less documents showing accession, in the ROA. These parishes retained their property rights.

2. **Holy Comforter, Sumter**[15]**; St. Bartholomew's, Hartsville; St. James' Church, James Island; Saint Luke's, Hilton Head; All Saints, Florence; Church Of The Holy Cross, Stateburg; St. David's Church, Cheraw; St. Jude's, Walterboro; Trinity Church of Myrtle Beach; Church of the Redeemer, Orangeburg; St. Paul's, Summerville; Trinity Episcopal Church, Edisto Island; Church Of The Cross, Bluffton; Church Of The Epiphany, Eutawville; St. Helena, Beaufort; St. Michael's, Charleston; Trinity Episcopal Church, Pinopolis; Christ St. Paul's, Yonges Island; and St. Paul's, Bennettsville.**

For these churches, there are no signed documents in the record acceding to any canons, even if one were to look at documents cited in Counsel's Argument which were not included in the ROA.[16] As to Church Of The Cross, Bluffton, the 2003 Bylaws are not signed, but attached to that exhibit is the last two pages for the 2001 Bylaws that are signed but do not contain accession to

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[14] The members of the Court and the public disagree about whether there are 7 or 8 parishes. The disagreement stems from the name "Parish of St. Andrews, Mount Pleasant" in footnote 49. The Vestries and Churchwardens of the Parish of St. Andrews (commonly known as Old St. Andrews) is a different party than St Andrews Church-Mt. Pleasant Land Trust. Old St. Andrews is located in West Ashley, and is the 8th parish in the original opinion to retain property rights. To the extent necessary, Justice Toal should reissue her opinion clarifying that Old St. Andrews was the 8th parish to retain property rights under the original Opinion.

[15] In addition to being unsigned, the document cited for Holy Comforter (D-HC-6) also predates the adoption of the Dennis Canon.

[16] By referencing these documents not in the ROA, Petitioners do not consent to their being considered to prove accession. Petitioners prevailed at trial. It was incumbent upon TEC to include matters into the ROA in this regard. Further, it would be improper, after briefing and argument, for the Court to make more documents part of the ROA without granting rehearing and the opportunity for the Petitioners to argue fully the meaning and relevance of the documents.

the TEC canons. Additionally, St. Paul's, Bennettsville Bylaws referencing the canons of TEC are not signed, but Articles referencing canons of the Protestant Episcopal Church in the *Diocese of SC* are signed. The documents cited for Trinity, Pinopolis were not even prepared by the parish, much less signed. Instead, the documents Appellants depend on for Trinity, Pinopolis were prepared by the Diocese of South Carolina. Because there are no signed accession documents as to these parishes, rehearing should be granted. The law of South Carolina requires a signed writing in order to create a legally enforceable trust. S.C. Code Ann. § 62-7-401(a)(2).

3. **Church Of The Cross, Bluffton (*doctrine and practices*); Church Of The Epiphany, Eutawville (*doctrine and practices*); St. Michael's, Charleston (*authority*); St. Philip's, Charleston (*Articles of Religion*); Church Of The Good Shepherd, Charleston (*Canons of the Protestant Episcopal Church in the Diocese of SC*); St. Paul's, Bennettsville's (*Bylaws referencing the Canons of The Episcopal Church are not signed, and its signed Articles reference only the Canons of the Protestant Episcopal Church in the Diocese of SC*).**

For the above six parishes, even were one to review documents from the trial record not in the ROA, there is no language of accession to TEC's canons. Rather, the language employed relates to doctrine and practices, Articles of Religion, or otherwise, as noted above for each church in italics. Failure to even mention TEC's canons cannot result in accession. As such, rehearing is required as to these parishes.

4. **Many Parishes have no Documents showing "accession."**

Were one to review underlying documents not in the ROA, it would also be revealed that the Parishes did not use words of "accession" in many instances. *See* All Saints, Florence (*bound*); St. John's, Johns Island (*subject to*); Church of Our Savior (*conform* and *recognized authority in accordance with*); Church of the Redeemer, Orangeburg (*conform*); Church Of The Resurrection, Surfside (*organized for the purpose of operating an Episcopal church pursuant to*); Church of St. Luke and St. Paul, Radcliffeboro (*organized for the purpose of operating an Episcopal church*

pursuant to); St. Paul's, Summerville (*organized pursuant to*); Trinity Episcopal Church, Edisto Island (*organized for the purpose of operating an Episcopal church pursuant to*); Church Of The Cross, Bluffton *(for the public worship of Almighty God in accordance with the doctrine and practices of*); Church Of The Epiphany, Eutawville (*object and purpose of the corporation is for the support and maintenance of a Church in the general area of Eutawville, SC in the Protestant Episcopal Diocese of SC for the public worship of Almighty God in accordance with the doctrine and practices of*); St. Helena, Beaufort (*pledges to adhere to the doctrine, discipline, and worship of" and any article or section of these By-Laws which may be in conflict with the canons of the Diocese of South Carolina and the Protestant Episcopal Church of the United States of America, shall be considered null and void*); St. Paul's, Bennettsville (*purpose is to operate a parish organized under and subject to the Canons of the Protestant Episcopal Church in the Diocese of SC*); St. Michael's, Charleston (*acknowledges the authority of*); St. Philip's, Charleston (*purposes of said corporation include the preaching and teaching of the Gospel of our Lord and Savior, Jesus Christ, in accord with the Articles of Religion of*); Trinity Episcopal Church, Pinopolis (*to be seated as parish in union with this Diocese of SC Convention*); Christ St. Paul's, Yonges Island (Q: is it true that before they [the bylaws] were amended, with the documents that you looked at today, they stated that this *parish is organized for the purpose of operating an Episcopal Church pursuant to the constitution and canons of* the Episcopal Church in the Diocese of South Carolina and of the Episcopal Church in the United States now in force or as hereafter may be adopted. A. Yes, ma'am); Church Of The Good Shepherd, Charleston (*operating a Parish or Mission, organized pursuant and subject to the Canons of the Protestant Episcopal Church in the Diocese of SC*); and St. Matthias, Summerton (*operating a Mission (church) organized pursuant and subject to the Canons of the Protestant Episcopal Church in the Diocese of SC*). Moreover, St.

Matthias is granted its property rights by virtue of the current opinions of the Justices. The language cited by the Appellants for Good Shepherd, Trinity-Pinopolis, and St. Paul's-Bennettsville is very similar to the language this Court already found protected St. Matthias' property rights. As such, Rehearing should be granted to consider these parishes.

5. Additionally, Appellant's Counsel's Arguments in the Motion to Reconsider are at times inconsistent with the cited documents.

In addition, there are inconsistencies between Appellant's counsel's stated conclusions regarding accession in the Motion to Reconsider filed with the trial court and the underlying documents of the parishes. *See* documents cited in Counsel's Argument for Christ Church Mt. Pleasant (D-CC-6 refers to "General Convention" not "National Church"); Holy Comforter, Sumter (D-HC-6 was adopted in 1967 and ratified in 1968 and is not dated 1985); Church Of The Holy Cross, Stateburg (HCS-11 is dated 2011, not 1980 and 1981); Holy Trinity, Charleston (refers to documents dated 1985, 1988, 1993 and 2001, but they are dated 1974/1975, 1988, 1993 and 2001)[17]; Church of Our Savior (D-OS-51 refers to "General Convention" not "National Church"); Church of the Redeemer, Orangeburg (R-24 51 refers to "General Convention," not "National Church"); Trinity Episcopal Church, Pinopolis (DTP-31 and D401A were not prepared by the parish); Christ St. Paul's, Yonges Island (refers to 1980 bylaws which were not admitted at trial). As a result, Rehearing must be granted.

V. Rehearing Must Be Granted to Eight Churches Based on Vested Rights.

Eight[18] parish churches were incorporated by the legislature as a result of the 1778 Constitution. R. 61-Finding 62 of Trial Order. Article 38 of the 1778 Constitution of South

[17] The only signed document for Holy Trinity is the set of Bylaws dated 1974, before the adoption of the Dennis Canon. This requires Rehearing as to accession by Holy Trinity.

[18] St. Helena, Prince George Winyah, St. John's Charleston County, St. Michael's, St. Philip's, Christ Church Mount Pleasant, Church of the Holy Cross-Stateburg, and Old St. Andrews.

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

It is a well-known principle that neither legislative acts nor constitutional amendments can operate retroactively to "divest vested rights." *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Faulkenberry v. Norfolk Southern Ry. Co.*, 349 S.C. 318, 323, 563 S.E.2d 644, 646 (2002); *Robinson v. Askew*, 129 S.C. 188, 123 S.E.2d 822, 823 (1924). When a "creditor . . . has obtained vested rights thereby which no court can divest, except in the exercise of legislative functions, which no court in this state is authorized to do." *Magovern v. Richard*, 27 S.C. 272, 3 S.E. 340, 342 (1887).

"The validity and effect of rights are usually tested by the state of things existing at the time they become operative. Conflicting claims in the nature of rights of property, general or special, take priority, as among themselves, according to the time when they commenced to act upon the subject property." *Pender v. Lancaster*, 14 S.C. 25, 26-27 (1880). These vested rights cannot be defeated by subsequent occurrences, even when the holder of vested rights does not take actions to enforce their vested rights. *In re: Worley's Estate*, 49 S.C. 41, 26 S.E. 949 (1897) (court

protecting widow's homestead exemption vested rights even though she never objected to an attempted sale of the property and never asserted her claim to vested rights until after the sale).

Nor would some notion of accession to the Dennis Canon waive this principle. While this principle relates to governmental action in many cases, the courts have explained how to consider the issue. "[T]he general rule is that no statute . . . is to be construed as designed to interfere with...especially vested rights, unless the intention that it shall so apply is expressly declared, . . . unless there is something in the very nature of the case or in the language of the new provision which shows that they were intended to have a retrospective operation." *Bouknight v. Epting*, 11 S.C. 71, 73 (1878). The question of such intent is one for the fact finder, and once vested, only divested according to law. *Parkins v. Dunham*, 34 S.C.L. 224 (1848); *see also City of Myrtle Beach v. Juel P. Corp.*, 344 S.C. 43, 543 S.E.2d 538 (2001) (finding that intent to abandon vested rights under a sign ordinance were not supported by the record).

The eight parish churches with vested property rights could only divest themselves of those rights with the parish's complete consent, a signed writing, and the parish's unmistakable intent to accomplish that result. The trial court considered this issue TEC has not raised on appeal. R 78, n. 16. The Record on Appeal is devoid of these issues. None of the parish documents acknowledge the Dennis Canon specifically nor show any understanding by the parish of the intent to create a trust. The ROA only includes a reference in a St. Helena document that it adheres to the doctrine, discipline and worship of TEC, with no accession and no reference to canons at all. St. Michael's bylaws referenced by Appellants simply state that the parish acknowledges the authority of TEC, with no mention of canons and no accession. St. Philip's only agreed to act in accord with the Articles of Religion, which is a purely religious historical document. Prince George and Old St. Andrews were already found not to be subject to the Dennis Canon. The other 3 parishes merely

have a document that mentions TEC's canons,[19] but that is surely not enough to rise to the heightened level required to invalidate vested rights granted by the South Carolina Constitution.

This Court should reconsider its findings to determine that these eight[20] parishes have vested rights in their property and those vested rights were never abandoned, waived, or released based on any viewing of the evidence in the record. As such, these eight should be entitled to retain all rights in their property.[21]

VI. The Ruling as to Camp St. Christopher is Erroneous.

Chief Justice Beatty's statement in footnote 29 concerning Camp St. Christopher, that "the disassociated Diocese can make no claim to being the successor to the Protestant Episcopal Church in the Diocese of South Carolina," is not consistent with South Carolina neutral principles of law. All the opinions, Justice Hearn perhaps excepted,[22] recognize that the Plaintiff Diocese withdrew its association with TEC ("the Disassociated Diocese").[23] The Dennis Canon does not apply to the

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[19] However, those documents are insufficient to show accession in a signed writing as outlined herein.

[20] No rehearing is requested as to Prince George and Old St. Andrews to the extent they retain their property rights under the Court's current Opinion.

[21] Prince George has already been determined to retain all rights in its property by the original opinion in this case, and as argued above, Petitioners believe Old St. Andrews has also retained its property.

[22] Justice Hearn states that the Diocese did not disassociate because its amendment of its corporate documents is subject to TEC's "rules concerning" corporate governance, including changes to the bylaws" and therefore those "rules trump" the Diocese's amendments. Op. at 48. However, TEC has no governance provisions in its constitution and canons which speak to the amendment of Diocese governance documents or require the Diocese to secure approval for such amendments. The only argument made by TEC on appeal was that TEC's constitution and canons provide the method for amending TEC's governance documents, not the Diocese's governing documents. R. 1532 (constitution) 1703 (canons). It is undisputed that the Diocese had no requirement, as did the Diocese in *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 715 n.9 (1976), to submit its governance documents, either originally or when amended, to any other body for approval.

[23] Acting Justice Pleicones, Op. at 16, Chief Justice Beatty, Op. at 53 n. 29, Acting Justice Toal, Op. at 88-89, and Justice Kittredge, Op. at 54 n.31, by joining Acting Justice Toal on every issue but one.

Diocese's property, which TEC admits. App. Br. 33. TEC's contentions with respect to the Diocese were based on its claim of control and the asserted inability of a Diocese to withdraw. *Id.* at 32. However, this Court has found that the Diocese withdrew and there is no neutral principles basis for it not being the same South Carolina non-profit religious corporation it was before its withdrawal with the same validly adopted corporate name, owning the same property and any other result would be a deprivation of property without due process of law for no other basis was raised to or considered by the trial court nor presented to this Court. As a result, the ruling as to Camp St. Christopher is in error, and rehearing should be granted.

VII. Rehearing Must be Granted Based on Statute of Limitations Defenses.

The Court erred when it held that the Respondent St. Luke's Church, Hilton Head, and Trinity Church of Myrtle Beach and their properties were subject to a trust imposed by the Dennis Canon, for the Appellants did not timely assert their claims.

The Respondent St. Luke's Church, Hilton Head amended its Bylaws and its Charter on December 1, 2009 when its members held a Special Meeting and overwhelming voted to remove all references to the Protestant Episcopal Church of the United States, the Diocese of South Carolina, and any Canons associated therewith. Resp.'s Exs. SL-10 and -11. The Articles of Amendment were sent to the South Carolina Secretary of State by letter dated January 1, 2010. Resp.'s Ex. SL-12.

The Respondent Trinity Church of Myrtle Beach amended its Bylaws and its Articles of Incorporation on November 22, 2009, when its members held a Special Meeting and overwhelmingly voted to remove all references to the Protestant Episcopal Church and the Diocese of South Carolina and any of their canons. Resp.'s Exs. TMB-4, 14, 16, 17, & 18. The Articles of Amendment were recorded by the Secretary of State on November 30, 2009.

No claims were asserted against this St. Luke's and Trinity Church of Myrtle Beach until March 27, 2013 when the Appellants filed their respective Answer and Counterclaims; clearly more than 3 years had passed since these Respondents amended their governing documents. These parishes, in their Replies to the Appellants' counterclaims, asserted the Statute of Limitations as an affirmative defense. The trial court did not rule upon this defense in that it was not necessary based on its findings that the parishes had properly disassociated and amended their governing documents. Now that this Court, in its divided decision, has reversed the trial court's findings in this regard, it is now appropriate that the applicable statute of limitations be considered. According to Section 15-3-530 (1) and (2) of the Code of Laws of the State of South Carolina, three years is the applicable statute of limitations, and therefore, the claims of the Appellants were untimely as to St. Luke's and Trinity Church of Myrtle Beach.

Conclusion

The majority has fashioned a neutral principles standard for religious organizations under South Carolina property, trust and corporate law that admittedly would not be applied to secular organizations. It then applied it to religious organizations today in a fashion it did not do 8 years ago involving the same issues between the Plaintiff Diocese, The Episcopal Church and a parish church. It does so when no appellant asked the trial court, either during trial or post trial, to apply such a standard. As a result, the majority would transfer the real and personal property of South Carolina religious organizations, many of which preexisted The Episcopal Church and the United States, to a New York religious organization. This establishment of one religion over another impacts the choices these South Carolina religious organizations (and those associated with them) made in the free exercise of their religion. They chose to disassociate, exercising their right of association under the United States and South Carolina Constitutions which this Court has

recognized. Yet, according to the majority, that constitutionally protected decision requires a massive transfer of centuries old real and personal property when it would not be required for a secular South Carolina organization.

These are serious issues for all religious organizations in South Carolina. This Court should grant rehearing.

Signature Page(s) Attached

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorney for *The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of the Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body*

_____

C. Mitchell Brown
On behalf of and with permission for the following Petitioners:

C. Alan Runyan Andrew S. Platte Speights & Runyan *Attorneys for the Diocese and Parishes as Reflected of Record* C. Pierce Campbell Turner Padget Graham & Laney, PA *Attorney for All Saints Protestant Episcopal Church Inc., St. Bartholomews Episcopal Church and The Church of the Holy Cross* David S. Cox Barnwell Whaley Patterson & Helms, LLC *Attorney for The Protestant Episcopal Church in the Dioeces of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body* Thornwell F. Sowell III Bess J. DuRant Sowell Gray Robinson Stepp & Laffitte, LLC *Attorneys for The Church of the Holy Comforter* Robert R. Horger Horger Barnwell & Reid LLP *Attorney for The Church of the Redeemer*	Henrietta U. Golding McNair Law Firm *Attorney for The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body, St. Luke's Church, Hilton Head* I. Keith McCarty McCarty Law Firm, PC *Attorney for Christ St. Paul's Episcopal Church* David B. Marvel Marvel Et Al, LLC *Attorney for The Church of St. Luke and St. Paul, Radcliffeboro* Francis M. Mack *Attorney for The Protestant Episcopal Church, of the Parish of Saint Philip, in Charleston, South Carolina* P. Brandt Shelbourne Shelbourne Law Firm *Attorney for The Vestry and Wardens of St. Paul's Church, Summerville*

William A. Scott Pederson & Scott, PC *Attorney for The Holy Trinity Episcopal Church* William A. Bryan Bryan & Haar *Attorney for The Church of the Resurrection, Surfside* W. Foster Gaillard Womble Carlyle Sandridge & Rice, LLP G. Mark Phillips Nelson Mullins Riley & Scarborough LLP *Attorneys for The Protestant Episcopal Church of the Parish of Saint Philip, in Charleston, South Carolina* Allan P. Sloan III Joseph C. Wilson IV Pierce Herns Sloan & Wilson LLC *Attorneys for Vestry and Church-Wardens of the Episcopal Church of the Parish of Christ Church* John B. Williams Williams & Hulst, LLC *Attorney for Trinity Episcopal Church of Pinopolis*	Susan P. MacDonald James K. Lehman Nelson Mullins Riley & Scarborough LLP *Attorneys for Trinity Church of Myrtle Beach* Henry E. Grimball Womble Carlyle Sandridge & Rice LLP *Attorney for The Protestant Episcopal Church, The Parish of Saint Michael in Charleston, in the State of South Carolina and St. Michael's Church* Harry R. Easterling, Jr. Easterling Law Firm, PC *Attorney for St. David's Church and St. Paul's Episcopal Church of Bennettsville, Inc.* Mark V. Evans *Attorney for St. James Church, James Island, South Carolina* Charles H. Williams Williams & Williams Thomas C. Davis Harvey & Battey, PA *Attorneys for The Protestant Episcopal Church in the Diocese of South Carolina and the Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body*

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2015-000622

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

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

v.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by U.S. mail to the following address(es):

Pleadings: **Petition for Rehearing**

Counsel Served:

John S. Nichols
Blake A. Hewitt
Bluestein Nichols Thompson & Delgado
Post Office Box 7965
Columbia, SC 29201

Thomas S. Tisdale, Jr.
Jason S. Smith
Hellman Yates & Tisdale
105 Broad Street, 3rd Floor
Charleston, SC 29401

R. Walker Humphrey II
Willoughby & Hoefer, PA
Post Office Box 10
Charleston, SC 29402

David Booth Beers
Goodwin Procter LLP
901 New York Avenue NW
Washington, DC 20001

C. Pierce Campbell
Turner Padget Graham & Laney, PA
Post Office Box 5478
Florence, SC 29502

Allan R. Holmes Sr.
Timothy O. Lewis
Gibbs & Holmes
171 Church Street, Suite 110
Charleston, SC 29401

Charles H. Williams
Williams & Williams
Post Office Box 1084
Orangeburg, SC 29116-1084

David S. Cox
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street
Charleston, SC 29402

Thomas C. Davis
Harvey & Battey, PA
Post Office Box 1107
Beaufort, SC 29901-1107

Harry R. Easterling Jr.
Easterling Law Firm, PC
Post Office Drawer 611
Bennettsville, SC 29512-0611

G. Mark Phillips
Nelson Mullins Riley & Scarborough LLP
Post Office Box 1806
Charleston, SC 29401-2239

W. Foster Gaillard
Womble Carlyle Sandridge & Rice LLP
Post Office Box 999
Charleston, SC 29402

I. Keith McCarty
McCarty Law Firm, PC
Post Office Box 30055
Charleston, SC 29417

William A. Scott
Pederson & Scott, PC
775 St. Andrews Blvd.
Charleston, SC 29407

Mark V. Evans
147 Wappoo Creek Drive, Suite 202
Charleston, SC 29412

Robert R. Horger
Horger Barnwell & Reid LLP
Post Office Drawer 329
Orangeburg, SC 29116

Francis M. Mack
656 Fort Motte Road
Saint Matthews, SC 29135

William A. Bryan
Bryan & Haar
Post Office Box 14860
Surfside Beach, SC 29587

Susan P. MacDonald
Jim K. Lehman
Nelson Mullins Riley & Scarborough LLP
Post Office Box 3939
Myrtle Beach, SC 29577-6412

P. Brandt Shelbourne
Shelbourne Law Firm
131 E. Richardson Avenue
Summerville, SC 29483

Henry E. Grimball
Womble Carlyle Sandridge & Rice LLP
Post Office Box 999
Charleston, SC 29402

John B. Williams
Williams & Hulst, LLC
Post Office Box 1288
Moncks Corner, SC 29461

C. Alan Runyan
Andrew S. Platte
Speights & Runyan
2015 Boundary Street, Suite 239
Beaufort, SC 29902

George J. Kefalos
George J. Kefalos, PA
46A State Street
Charleston, SC 29401

Thornwell F. Sowell III
Bess J. DuRant
Sowell Gray Robinson Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, SC 29211

Henrietta U. Golding
McNair Law Firm
Post Office Box 336
Myrtle Beach, SC 29578

David B. Marvel
Marvel Et Al, LLC
Post Office Box 22734
Charleston, SC 29413

David L. DeVane
David L. Devane, Attorney At Law LLC
110 N. Main Street
Summerville, SC 29483

John F. Wall III
NCGS, Inc.
288 Meeting Street, Suite 400
Charleston, SC 29401

Allan P. Sloan III
Joseph C. Wilson IV
Pierce Herns Sloan & Wilson LLC
Post Office Box 22437
Charleston, SC 29413

Oana D. Johnson
215 East Bay Street, Suite 406
Charleston, SC 29401

Stephen A. Spitz
Stevens & Lee
151 Meeting Street, Suite 350
Charleston, SC 29401

Saunders M. Bridges Jr.
Aiken Bridges Elliott Tyler & Saleeby, P.A.
Post Office Drawer 1931
Florence, SC 29503

Lawrence B. Orr
Orr Elmore & Ervin LLC
Post Office Box 2527
Florence, SC 29503

Robert S. Shelton
Bellamy Rutenberg Copeland Epps Gravely & Bowers, P.A.
Post Office Box 357
Myrtle Beach, SC 29578-0357

Harry A. Oxner
Oxner & Stacy, PA
Post Office Box 481
Georgetown, SC 29442-0481

Steven S. McKenzie
Coffey & McKenzie, PA
2 N. Brook Street
Manning, SC 29102

Lisa Whitehurst
Administrative Assistant

September 1, 2017