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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013
Appellate Case No. 2015-000622

The Protestant Episcopal Church
In the Diocese of South Carolina et, al. .....Respondents,

v.

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

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STATEMENT OF ISSUES ON APPEAL

I. Whether this action was capable of complete resolution using neutral principles of South Carolina law and whether it was so resolved.

II. Whether Respondents are collaterally estopped from asserting that TEC is hierarchical above the level of a Diocese.

III. Whether TEC's polity, in any event, is constitutionally discernable.

IV. Whether Appellants have any beneficial interest in Respondent parishes real, personal, and intellectual property.

STATEMENT OF THE CASE

Respondents add the following to supplement the procedural history set forth by the circuit court in its Order of February 3, 2015. (R. pp. 45-47).

A. Parties

Initially, the action had eighteen Plaintiffs and one Defendant, The Episcopal Church ("TEC").[1] Seventeen more Plaintiffs were added on January 22, 2013.[2] Two additional Plaintiffs were added on March 5, 2013, as well as another Defendant, The

[1] The Protestant Episcopal Church in the Diocese of South Carolina ("Diocese"); The Trustees of the Protestant Episcopal Church of South Carolina, A South Carolina Corporate Body ("Trustees"); Christ St. Paul's Episcopal Church; The Vestry and Church Wardens of the Episcopal Church of the Parish of Prince George Winyah; Church of the Cross, Inc. and Church of the Cross Declaration of Trust; Church of the Holy Comforter; Church of the Redeemer; The Church of Our Saviour, of the Diocese of South Carolina; The Church of the Good Shepherd, Charleston, SC; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; The Church of St. Luke and St. Paul, Radcliffeboro; The Protestant Episcopal Church, of the Parish of St. Philip, in Charleston, in the State of South Carolina; The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Helena and the Parish Church of St. Helena Trust; The Vestry and Wardens of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; The Protestant Episcopal Church, the Parish of St. Michael, in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust; St. Luke's Church, Hilton Head Island

[2] All Saints Protestant Episcopal Church; St. Bartholomews Episcopal Church; Christ the King, Waccamaw; Holy Trinity Episcopal Church; St. Matthews Church; St. Davids Church; St. Paul's Episcopal Church of Bennettsville, Inc.; St. James' Church, James Island, S.C.; St. Paul's Episcopal Church of Conway; The Church of the Epiphany (Episcopal); The Church of the Holy Cross; The Church of the Resurrection, Surfside; The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Matthew; Trinity Episcopal Church, Edisto Island; 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; St. Andrews Church – Mt. Pleasant and the St. Andrews Church – Mt. Pleasant Land Trust

Episcopal Church in South Carolina ("TECSC").[3] Finally, on August 19, 2013, the thirty-eighth Plaintiff South Carolina non-profit religious corporation was added by consent order.[4]

B. Temporary Injunction

Between the issuance of the temporary restraining order ("TRO") on January 23, 2013 and the scheduled January 31, 2013 hearing to extend or dissolve the terms of the TRO, TEC appeared through counsel on January 29, 2013, negotiated the terms of a temporary injunction and consented to its entry on January 30, 2013.[5] The consent temporary injunction was filed on January 31, 2013.[6]

C. Respondents' Causes of Action

The complaint alleged three statutory causes of action which sought: (1) a declaration that the Respondents were the sole owners of their real, personal and intellectual property in which the Appellants had no legal, equitable or beneficial interest, S.C. Code §§ 15-53-10 *et. sq.* (2) a declaration that the Appellants had infringed on the registered service marks of the Respondents, S.C. Code §§ 39-15-1105 *et. sq.* and (3) a declaration that the Appellants had improperly used the names and emblems of the Respondents in violation of S.C. Code § 16-17-310. The complaint also sought temporary and permanent injunctive relief to enjoin the infringement of the service marks, the

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[3] The Vestry and Church Wardens of St. Jude's Church of Walterboro; Trinity Episcopal Church, Pinopolis

[4] The Vestries and Church Wardens of the Parish of St. Andrew.

[5] It was negotiated and executed by counsel for TEC, Thomas S. Tisdale, Jr. who was also the newly elected Chancellor of TECSC. (R. pp. 2294-2295, 2297-2299)

[6] The findings consented to by TEC included the following: The Diocese is the owner of the state registered marks; the Diocese withdrew its association with TEC; the officers, directors and trustees of the Diocese and the Trustees are the same persons as those whose presently occupy the leadership positions in the Diocese and Trustees. Temp. Inj. (Consent) (R. pp. 7,10)

improper use of the names and emblems of Respondents and to prevent Appellants from holding themselves out as leaders of Respondents.

D. Appellants' Counterclaims and Respondents' Replies

The Appellants answered asserting affirmative defenses and counterclaims. Appellant TEC alleged forty-one counterclaims for declaratory and injunctive relief. None of TEC's counterclaims were against Respondents. Instead they were against "individual counterclaim Defendants" that were not listed as parties, were not served with the counterclaims and consequently were not before the court.[7] Count I sought declaratory and injunctive relief in TEC's favor against these individual non-parties over the control of the real and personal property of the Diocese and of the Trustees. The other claims against these individuals included federal Lanham Act and common law infringement claims (Counts II, III & IV), unfair trade practices (Count V), and unfair competition (VI). Counts VII-XLI made the same declaratory and injunctive relief allegations of control against 720 John, Jane, James and Andrew Does and John, Jane, Mary and Richard Roes who were alleged to be the current and former members of the respective vestries of each individual church non-profit religious corporation. TEC never moved to join these individuals as parties.

Appellant TECSC alleged nineteen legal and equitable affirmative defenses and seven counterclaims.

On April 18, 2013, while the case was still in federal court[8], the Respondents filed their replies to the counterclaims and demanded a jury trial.

E. Relevant Motions

[7] TEC's motion to add them as parties was denied on September 27, 2013, *infra.* at 4. (R. pp. 33-38)

[8] On April 3, 2013, Appellants removed the case to federal court. On June 10, 2013 the federal court granted Respondents' motion to remand. (R. pp. 13-32)

1. Appellants' motion to join individuals as counterclaim Defendants

On May 5, 2013, Appellant TEC moved to join twenty-three individuals as parties alleging they controlled the Diocese and that they were necessary parties under Rule 19, SCRCP. Appellant TECSC joined in the motion. This motion was denied on September 27, 2013. Or. Denying Defs. Mot. to Join Additional Counterclaim Defs. (Sept. 27, 2013). (R. pp. 33-38) TECSC moved to reconsider this order on October 20, 2013. The motion to reconsider was denied on December 31, 2013. (R. pp. 39-40) Appellants did not appeal these orders. However, on November 25, 2013, TECSC moved to join four individuals as parties. This motion was denied on May 20, 2014 finding that these four individuals were part of the twenty-three individuals the court had previously found were not necessary "because complete relief can be had between the existing parties," Or. Denying Defs. Motion to Join Additional Counterclaim Defs. at 14, and finding that Appellants had not appealed that order. Appellants' motion to reconsider was denied on June 6, 2014. Appellant TECSC appealed those orders on June 23, 2014. On June 25, 2014, Respondents, Diocese and Trustees, moved to dismiss the appeal and for an expedited hearing. One of the bases was that Appellants' failure to appeal the September 27, 2013 order since these four parties were included in that order denying they were "necessary;" therefore they were precluded from again asserting their joinder was "necessary."[9] The Court of Appeals dismissed the appeal on July 3, 2014.

2. Appellant TECSC motion for a preliminary injunction

On September 30, 2013, TECSC moved to vacate the existing temporary injunction and for a preliminary injunction in favor of Appellants. This motion was

[9] Respondents, Diocese and Trustees, also moved to certify the appeal for this court's review. After the entry of the Court of Appeals order dismissing the appeal, this Court dismissed this motion as moot.

denied on January 14, 2014. One of the grounds was that the Respondent Diocese was "a sub-unit of TEC as conclusively determined by the hierarchical rules and polity of TEC." Def. Memo. in Support 10, 14 (Sept. 30, 2013). No evidence was offered to support this assertion. Respondents contested the assertion and presented evidentiary support. Pls. Memo. in Opposition to the Def. Mot. to Vacate (Oct. 10, 2013) (R. pp. 1981-2292) from Def. Mark J. Lawrence Response to Pl.'s Mot. For Prelim. Inj., 2:13-cv-587-CWH, Doc. No. 21 (Apr. 11, 2013)).

3. Order denying Respondents motion to exclude Appellants' experts

On June 9, 2014, the circuit court denied Respondents' May 29, 2014 motion to exclude Appellants' expert witnesses. The motion was based on the ground that the Appellants had not responded to expert witness interrogatories propounded in the spring and summer of 2013 until May 23, 2014 and then did not provide the requested expert opinions. In its order denying Respondents' motion, the circuit court ordered Appellants to submit written expert opinions 72 hours prior to the deposition dates scheduled in the order for Appellants' seven named expert witnesses. The circuit court also provided that no opinions can be offered at trial unless included in the 72 hour written disclosure. Appellants' failure to comply with this order resulted in evidentiary rulings during the trial.

F. Trial

The case was tried by the court with the consent of the parties, from July 8 through July 25, 2014. During the trial, Appellants did not call Dr. Robert Bruce Mullin as a witness on either the issue of corporate control nor did they proffer his testimony on

the issue of TEC's alleged hierarchy. Instead, they called Dr. Walter Edgar as a fact witness having failed to disclose any expert legal opinions.[10]

At the trial's conclusion, Respondents were directed to each submit within 30 days, in not more than three pages, the facts supporting their compliance with the law regarding the amendment of their corporate documents. Appellants had 30 days to counter the Respondents' assertions, also with a three-page limit. (R. p. 1030, line 12 – p. 1031, line 24) On the issue of the service marks, each side was given 30 days to provide proposed orders. (R. p. 1032 line 6 – p. 1033, line 2) On November 4, 2014, after the submission of the requested information, the court directed each side to submit proposed orders resolving all issues.

G. Parallel Federal Court Proceeding

On March 5, 2013, the Appellant TECSC, through its agent Bishop Charles vonRosenberg, filed an action in the Charleston Division of the Federal District Court against Bishop Lawrence and John Does. The complaint alleged that Bishop Lawrence, and others, were not authorized to use the Diocese's marks and sought an injunction against the use of the marks by Bishop Lawrence and others which would have contradicted the existing state court injunction to which TEC consented. Bishop Lawrence filed a motion to dismiss which was granted on August 23, 2013.

The federal district court's dismissal of this parallel action was appealed. On April 17, 2015, the Fourth Circuit Court of Appeals vacated the dismissal by amended

[10] Dr. Edgar was called initially as a fact witness (R. p. 790, lines 4-23) ("I am a factual witness, not an expert witness.") Counsel for Appellants then asked for his opinion on documents, (R. p. 791, lines 1-4) which raised objections by the Respondents, which then prompted Appellants to offer him as an expert witness (R. p. 792, line 9 – p. 794, line 5) However, the expert report Respondents produced had not provided his opinions. (R. p. 795, line 17 – p. 797, line 7) Dr. Edgar was permitted to testify as a fact witness.

order remanding the case to the District Court with directions that it apply a different abstention standard to the issues raised by Bishop Lawrence's motion to dismiss. The Fourth Circuit expressed no view on the merits or the appropriateness of a future dismissal under that standard. *VonRosenberg v. Lawrence*, 781 F.3d 731 (4th Cir. 2015), *as amended* (Apr. 17, 2015). This action is still pending.

STATEMENT OF FACTS

I. HISTORICAL BACKGROUND

The history of the Respondents is so intertwined with the history of South Carolina that it would have been impossible to make all of that history part of the record in this case.[11] Nevertheless, the Respondents offered documentary and testimonial evidence of their directly relevant histories. That evidence makes clear that their histories

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[11] To the extent this Court finds it relevant to its decision, that history may be judicially noticed. SCRE 201. There are extensive published histories in both books and periodicals of the Diocese and some of the Parish Plaintiffs. *See. e.g.*, Anderson, D. and Eastman, M., *St. Philip's Church of Charleston: An Early History of the Oldest Parish in South Carolina* (Charleston, S.C.: The History Press, 2014); Clarke, P., *Anglicanism in South Carolina 1660-1776* (Easley, SC, Southern Historical Press, 1976); Dalcho, F., *The Protestant Episcopal Church in South Carolina 1660-1820* (Charleston, S.C., E. Thayer, 1820); Goodbody, H., *A Goodly Heritage: A history of Episcopal Churchwomen in the Diocese of South Carolina* (Charleston, S.C., Nelson Printing, 1984); Gregg, A., *History of the Old Cheraws* (The State Company, 1925); Gregorie, A., Christ Church, 1706-1959 *A Plantation Parish of the South Carolina Establishment* (Charleston S.C.: The Dalcho Historical Society, 1961); Hampton, A., *Tombstones and Tablets St. Paul's Episcopal Church Summerville, South Carolina* (Summerville, S.C.: Phantom Press, 1998); History Committee of St. Helena's Episcopal Church, *The History of the Parish Church of St. Helena. Beaufort, S.C.*, (R.L. Bryan Co., 1990); Holmes, G., *A Historic Sketch The Parish Church of St. Michael in Charles Town, in The Province of South Carolina, Founded 1752* (Charleston, SC, Walker Evans & Cogswell Co. 1887); Jackson, Roderick H., *A Short Sketch of St. Paul's Episcopal Church* (Bennettsville, S.C., 1948); Kershaw, J., *St. Michael's Church 1751-1915* (1915); King, S., *Beesley's Illustrated Guide to St. Michael's Church* (Southern Printing & Publishing Co, 1938); Linder, S., *Anglican Churches in Colonial South Carolina: Their History and Architecture* (Charleston, S.C., Wyrick & Co. 2000); McCrady, E., *A Sketch of St. Philip's Church, Charleston, SC, From the Establishment of the Church of England under the Royal Charter of 1665 to July, 1897* (Charleston, S.C.); McIntosh,W., *The Spiritual Journey of St. Philip's Church, Charleston, SC 1906-1919*; Payne, B., *Amazing Grace, The Parish Church of St. Helena, Three Hundred Years of History. 1712-2012* (Lydia Inglett Ltd. Publishing, 2012); Porwall, P., *Against All Odds, History of Saint Andrew's Parish Church*, 1706-2013 (Bloomington, Ind., Westbow Press. 2014); Thomas A.S., *The Episcopal Church in South Carolina: A Historical Account of the Protestant Episcopal Church in South Carolina 1820-1957* (Columbia, S.C., R.L. Bryan Co., 1957); Williams, G., *St. Michael's Charleston, 1751-1951 With Supplements 1951-2001* (Charleston, University of South Carolina Press, 1951/2001); Zeigler, E., *Refugees and Remnants* (Spartanburg, S.C., Clio Press, Inc., 2002).

are also the histories of South Carolina and in some cases of the United States. As previously stated to this Court:

> The Plaintiff non-profit corporations range in age from 331 to 3 years or an average of 179 years. They are located in almost every county of lower South Carolina. Their buildings, land, marks and heritage are at the core of the history of lower South Carolina extending well before the creation of the United States. Their graveyards contain many South Carolinians, some of whom had prominent historical roles including signers of the Declaration of Independence, the United States Constitution, Justices of the Supreme Courts of both the United States and South Carolina, a Vice President of the United States, Governors, Senators, United States Ambassadors, Revolutionary War soldiers and many others. Many of these non-profit corporations were created by the South Carolina legislature and they all have carried out their religious business over the history, acquiring, maintaining, repairing and restoring their property solely through the efforts and resources of their parishioner members.

Mot. to Certify for Review 4-5 (Feb. 6, 2014).[12]

Respondents' legacies aside, they also contribute on a large scale to the religious welfare of low country South Carolinians who worship there today.[13]

A. 1680 - 1786

On May 31, 1786, during the last day of the fourth convention of the Diocese, held in Charleston, South Carolina, the delegates present unanimously agreed to its first constitution. (R. pp. 1130-1135) (R. pp. 1211-1262)[14] Thirteen "Protestant Episcopal

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[12] This Court has previously referred to portions of Charleston where some of Respondents are located as the "cradle of the history of our State" because it called to mind "the times of the colonial governors, of the signers of the Declaration of Independence, revolutionary patriots, or statesmen and soldiers of the early days of the state of the republic." *Stevenson v. Bd. Of Adjustment of City of Charleston,* 230 S.C. 440, 443, 96 S.E.2d 456, 457 (1957); *see also,* Anderson & Eastman, *St. Philips Church of Charleston, supra* at 6, n. 11, App'x D, Necrology of St. Philip's Church.

[13] Approximately 25,000 low country residents are parishioners in the Respondent parishes. (R. p. 57 at ¶ 45) (R. pp. 169-171) As to those parishioners who desired to join TECSC worship, they are in ten parishes, seventeen missions and three worship communities.

[14] (R. pp. 1211-1262) is a copy of the original minutes written in late 18th and early 19th century script. The original was brought to court from the South Carolina Historical Society. (R. p. 1128) (Letter agreement between The Diocese of South Carolina and the South Carolina Historical Society). In 1820, these minutes were printed in Dalcho, F., *An Historical Account of the Protestant Episcopal Church in South Carolina, 1680-1820.* The cited pages appear at pages 473-75 in Dalcho.

Churches," formerly affiliated with the Church of England, subscribed to this constitution. Eight of the Respondents in this action are subscribers: St. Philips, St. Michaels, Trinity Edisto Island, Prince George, St. Helena, St. Andrews, St. Johns, John's Island and Christ Church. (R. pp. 1130-1135) These Respondents were not newly formed.[15] As early as 1680, these parishes began corporate worship as "episcopal" churches.

Initially created by Acts of the Colonial Assembly, these parish churches were part of the Church of England which was the established church in South Carolina, made so by the 1704 and 1706 Church Acts. Act. No 225, 2 S.C. Stat. 236 (1704); Act No. 256, S.C. Stat. 282 (1706). Although separated by an ocean, they were Church of England parishes in the Diocese of London and therefore under the ecclesiastical jurisdiction of the Bishop of London (R. p. 891, lines 1-3) Practically, however, their ecclesiastical and civil governance was through their vestries and wardens and a group of laymen, known as the "church commissioners." Act No. 256, S.C. Stat. at 288, 289. Religious power in Anglican colonial South Carolina effectively was "subservient to civil power." Underwood, James L., *The Constitution of South Carolina: Church and State, Morality and Free Expression* (Vol. 3) 19 (University of South Carolina Press, 1992). Rectors and vestry members were elected by parish members. *Id.* Nevertheless, the parish form of worship was episcopal according to the Church of England with its sacraments and liturgy found in the Book of Common Prayer. (R. p. 538, line 21- p. 539, line 19) An Anglican parish's congregants were viewed as "Episcopalians" as were parish clergy. (R.

[15] (R. p. 61 at ¶ 61) *see also* Chart of Respondents' creation dates from the oldest to the youngest. (R. pp. 2329-2330)

p. 1877, R. p. 541, line 21- p. 542, line 10)[16] The Church of England was viewed not only as an "Episcopal" church, *Combe v. Brazier*, 2 S.C. Eq. 431, 444 (1806), but also as a "Protestant Episcopal Church." *Vestry of St. Luke's Church v. Matthews*, 4 S.C. Eq. 578, 585 (1815).[17] Yet in its very nature, the Anglican Church in colonial South Carolina "was more congregational than episcopal." Edgar, W., *South Carolina, A History* 182 (University of South Carolina Press 1998); (R. p. 789) George C. Rogers, Jr., whom Dr. Edgar called a "renowned historian," (R. p. 788, lines 20-21) noted the effect of this *de facto* nature on the Church of England:

> The extensive power of the church membership in electing ministers and of the lay commissioners in controlling church policy caused protests by the church hierarchy in London that such ecclesiastical democracy was undermining their authority.

Underwood at 20.[18]

The Revolutionary War in general, and the Constitution of 1778 in particular, disestablished the Church of England in South Carolina. (R. pp. 1273-1283) In its place, the protestant religion became the established religion.[19] Article 38 of that Constitution permitted the incorporation of any protestant church upon a petition made to the

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[16] (R. p. 1877) a collection of photographs about the Parish Church of St. Helena, includes a photograph of a page in the original minutes of the Vestry from 1784 exhibited to the Court.. (R. pp. 540, line 13 – p. 542, line 15) It states "...wrote to Mr. John Kean requesting him, a Clergyman of the Episcopalian Church.

Beaufort 7th July 1784

You are hereby requested and empowered to produce a Clergyman of the Episcopalian Church for the town of Beaufort South Carolina on the following terms an annual salary of one hundred fifth pounds sterling."

[17] One witness testified that there were "approximately fifty [churches] in one county" that use the word "Episcopal" in their name but who are not affiliated with TEC. (R. p. 631, line 9-17)

The use of the term "Protestant Episcopal Church" was not confined to Anglican churches. A 1749 Act of Parliament encouraging people of the United Brethren Church to settle in "His Majesties Colonies in America," called the United Brethren Church "an ancient Protestant Episcopal Church." (R. pp. 1347-1350)

[18] The Bishop of London sent commissaries to the colonies to exercise his ecclesiastical jurisdiction but as noted by the first commissary to South Carolina, Gideon Johnston, there was a distinct aversion to the episcopacy with his own office being "a mere Empty title." Rogers, Jr., George C., *Church and State in Eighteenth Century South Carolina* 12 (Charleston, S.C.: Dalcho Historical Society, 1959).

[19] "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be the established religion of this state." (Constitution of 1778, Art. XXXVIII). (R. p. 1281)

legislature, (R. pp. 1281-1282) which the former Anglican Plaintiff parishes did. (R. pp. 1925-1927) (R. pp. 1862-1865) (R. pp. 1891-1896) (R. pp. 1936-1940) (R. pp. 1953-1955) (R. pp. 1886-1889) (R. pp. 1922-1923) (R. pp. 1969-1976) They were then incorporated by the legislature.[20] (R. pp. 1928-1934) (R. pp. 1866-1871) (R. pp. 1891-1896) (R. pp. 1936-1940) (R. pp. 1950-1952) (R. pp. 1884-1885) (R. pp. 1969-1976) (R. pp. 1961-1967) (R. pp. 1879-1882) The Constitution of 1778 protected their existing corporate status ("shall still continue incorporate") and property ("hold the religious property now in their possession" which "shall remain and be secured to them forever").[21] It also added distinctly congregational aspects to church governance.[22] Although Article 38 was effectively replaced by Article 8 of the Constitution of 1790 which removed any religion as the "established" one, 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." (R. p. 1292) This provision was in every constitution until that of 1868.

B. 1787 – 2005

The Diocese's Constitution, created a year after its 1785 organization and three years before TEC's Constitution was passed in 1789, expressed in written form ideas that

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[20] These legislative incorporations added to the corporate powers already possessed as a result of the original acts that created them. *Wagner v. Vestry and Wardens of the Episcopal Church in the Parish of Christ Church*, 30 S.C. Eq. 155, 160 (1857).

[21] With respect to existing Anglican congregations they "shall still continue incorporate, and hold the religious property now in their possession." Article 38 ended with the following: "**But, the churches, chapels, parsonages, glebes and all other property now belonging to Societies of the Church of England, or any other religious societies, shall remain and be secured to them forever.**" (emphasis added). (R. p. 1281)

[22] The 1778 Constitution added provisions that distinctly mirror a congregational governance structure including the election of church clergy by a majority vote of the congregation and a prohibition against requiring any person to financially support "a religious worship, that he does not freely join in or has not voluntarily engaged to support." (R. p. 1282) "A form of congregational democracy was decreed covering the selection of ministries in accord with the tradition that had earlier frustrated the English Bishops...." Underwood at 67.

were prevalent after the Revolutionary War. At its core was the concept of subsidiarity, any authority not delegated was retained. (R. p. 1371)[23] This organization of churches within the state was "independent," having its own "full and exclusive powers" with no power "delegated" to any "General Ecclesiastical Government" except that which the local clergy and vestries could not exercise. (R. pp. 1130-1135) (R. p. 48 at ¶ 4, Art. 6)[24] The former Anglican churches were not creating "any kind of monarchical form of government." (R. p. 887, line 25 – p. 888, line 9) Authority "remain[ed] within these representatives in South Carolina." (R. p. 889, lines 11-19) Bishop William White of Pennsylvania, who first expressed the idea of a national association of state churches that later became TEC, outlined a plan "for organizing these Church of England congregations." White was "very sympathetic to the notion that the individual state organizations and dioceses should have the full and open control of their property and of their own government." (R. p. 889, line 20 – p. 890, line 4)[25]

Consistent with the recent end of the Revolutionary War, and with the organizing principal of subsidiarity, top down control was not a component of the Diocese or of TEC.[26] The "idea of an episcopacy" was "dicey." (R. p. 886, lines 12-14) Former

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[23] (R. pp. 1361-1381) (Bishops' "Statement on Polity of the Episcopal Church") and (R. pp. 1383-1398) ("Interpretation of the Constitution and Canons by the Ecclesiastical Authority of the Diocese") were admitted without objection. (R. p. 981, lines 10-17) (R. p. 986, lines 3-12)

[24] Article 6th – That no power be delegated to a General Ecclesiastical Government except such as cannot be exercised by the clergy and vestries in their respective congregations.

Article 6 is identical to that proposed by Bishop White, the architect of TEC (R. p. 1364) as a "fundamental principle" in the formation of TEC.

[25] TEC's official commentary on its Constitution and Canons described TEC at its formation as "a federation of equal and independent churches in the several states." (R. p. 1365) "The consensus was that the Episcopal Church was a federation of its diocese and functioned in that light." (R. p. 915, lines 20-21)

[26] The United States Supreme Court recognized these facts of Colonial Anglicanism. Southern Anglicans "chaffed at control exercised by the Crown" with vestries "chos[ing] ministers of their own" and "colonial assembl[ies] enact[ing] laws placing that right in the vestries." Therefore, "familiar with life under the established Church of England, the founding fathers sought to foreclose the possibility of a national church." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 703 (2012).

Anglican parishes were seen as a "religious fifth column of the British Empire." Therefore, TEC's organizational language would stay "far away from the vocabulary of a full hierarchical structure or a full control structure." White "suggests the term 'overseer' be used rather than 'bishop' for fear of implying that some kind of top-down control is being imposed from England." (R. p. 886, line 12- p. 887, line 8)[27] The Diocese's Constitution initially rejected having Bishops. (R. pp. 1131, 1134 at Art. 4)[28]

It was in this historical setting that the Protestant Episcopal Church in South Carolina together with six other state "Protestant Episcopal churches" came together and created TEC: "the state organizations were responsible for creating The Episcopal Church." (R. p. 885, line 25 – p. 886, line 4) Representatives of the Diocese were sent to TEC's organizing conventions, subscribed to TEC's first Constitution thereby agreeing ("acceding") to it which the Diocese ratified in 1790. (R. pp. 1229-1230)[29] However, TEC's organizational structure was not such that it controlled the Diocese. (R. p. 878, lines 7-10) It was a "voluntary association," "of equal and independent churches in the several states." (R. p. 1364) (R. p. 1394 at n. 25)[30] There was "no clear sense in which relationships between dioceses and the national church represent what you could legitimately call control." (R. p. 878, lines 20-22) In fact, when TEC was organized, its founders struggled to avoid language of supremacy so that words like

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[27] The written governance of TEC today does not require a Diocesan Bishop.. (R. p. 891, line 19 – p. 892, line 5) In the absence of a Bishop, the Diocese's Standing Committee is the "ecclesiastical authority."

[28] Bishop W.B.W. Howe goes so far as to say that, "In the minds of some of our own people, immediately after the war, a Bishop was little better than a monstrum horrendum." Rogers, *Church and State in Eighteenth Century South Carolina* at 47.

[29] Dalcho at 476-78. Although the Diocese had agreed with TEC's Constitution when it formed and then joined TEC, it did not place a recital memorializing that accession in its Constitution until 1841, at which point it did so voluntarily (R. p. 1384-1387) TEC's Constitution has never required the accession of its founding members to its Constitution. (R. p. 1019, lines 15-20)

[30] TEC has no legal relationship with parishes. Parishes are not members of TEC. (R. p. 630, lines 14-18)

"supreme" or "supremacy" are not found in its organizational documents. (R. p. 879, lines 2-8) (R. p. 1368) Even though a member of TEC, the Diocese's early history demonstrates Diocesan independence.

The 1806 Diocesan Constitution stated that "no article, canon, rule or other regulation, of any general or state conventions, shall be obligatory on any Episcopal church within this state, when the same shall be found to infringe on any of its chartered rights." (R. p. 1386); (R. p. 48 at ¶ 8) In 1807, the Diocesan Convention refused to adopt general canons passed after 1789, in part, because they were "obnoxious to several of the churches in this state." (R. p. 1386) In 1861, the Diocese withdrew from TEC, immediately declaring "null and void" provisions in its governance documents inconsistent with that disassociation. Bishop Davis declared the Diocese was "a free and independent Diocese." *Id.* at 9. In 1866, it rejoined TEC. (R. p. 49 at ¶ 11) (R. p. 1392) The Diocese "came back as the same Diocese...with the same authority," and was "welcomed back" by TEC. (R. p. 897, line 24 – p. 898, line 3) Diocesan independence in taking that action was again expressed by the preamble to the 1866 Journal of the Diocese's Convention. (R. pp. 1352) The preamble was a resolution passed by the "General Council of Protestant Episcopal Church in the (late) Confederate States." *Id.* The preamble stated it was up to "any Diocese to decide for herself whether she shall any longer continue in union with this Council." *Id.* Diocesan independence would be exercised again in 2010 and 2012.

The historical fact of Diocesan independence is so fundamental that it is freely expressed in a standard reference and summary of the history of TEC, *The Episcopal Church and Its Work.* This book is part of TEC's teaching series and was found to be

reliable by Dr. Allen Guelzo, Respondents' church history expert. (R. p. 892, line 16 – p. 897, line 4). (R. p. 64 at ¶ 81) Appellants did not challenge his expertise in "late 18th and 19th Century American history, intellectual history, church history and Civil War history.". (R. p. 871a, lines 17-25) There is nothing in this book that suggests TEC controls a Diocese.[31]

In 1973, the Diocesan Convention voted to incorporate. (R. pp. 1264-1267) A declaration and petition were filed, (R. pp. 1296-1303) and it was incorporated. (R. p. 1089) (R. p. 125, line 18 – p. 126, line 10) The petition listed twenty-one people as "all the Managers, Trustees and Directors. (R. pp. 1296-1303) In 1977, the Diocese with the advice of its then Chancellor, Thomas S. Tisdale, Jr., filed an application with the IRS for 501(c)(3) status stating the Diocese did not control nor was it controlled "by any other organization." (R. p. 1310) When the Diocese amended its name in 1987, in the newspaper notice of intent, its then Bishop signed as President. (R. p. 1357) (R. p. 945, line 2 – p. 946, line 1) That same year, the Treasurer of TEC described the Dioceses in TEC as "autonomous." (R. p. 1019, line 21 – p. 1020, line 4)

II. THE PRESENT DISPUTE (2006-Present)

After The Right Reverend Edward L. Salmon, Jr., retired, the Diocese's Standing Committee created a search committee to look for bishop candidates. (R. p. 662, line 5 – p. 663, line 3) Prospective candidates were interviewed and three were nominated, among

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[31] TEC's presiding bishop does not "possess visitorial or juridicial powers within the independent Dioceses of the Episcopal Church." (R. p. 895, lines 11-13) At the time of the American Revolution, "the first dioceses existed separately from each other before they agreed to the union in 1789 into a national church" in which they "retained a large amount of autonomy" and "today...still possess an independence far greater than that characteristic in most other churches with Episcopal polity." (R. p. 895, lines 25 – p. 896, line 6) "Diocesan participation in any national program...must be voluntarily given...it cannot be forced." (R. p. 896, lines 9-11) While a Diocesan Bishop's power is restricted in his own Diocese "his independence in respect to the rest of the church is almost complete." (R. p. 896, lines 14-16) The General Convention cannot "put men and money to work...without the voluntary cooperation of the diocese." (R. p. 896, line 25 – p. 897, line 2)

them Mark J. Lawrence. (R. p. 664, line 22 – p. 665, line 8) Neither Bishop Lawrence nor the Standing Committee ever desired to remove the Diocese from TEC. (R. p. 664, line 22 – p. 665, line 8) Appellants' witness agreed when he testified that Bishop Lawrence coined the phrase "intact and in TEC" because "that's what he wished to do." (R. p. 672, lines 10-21)

One year later, in the fall of 2009, this Court issued an opinion with direct relevance to the events taking place in the Diocese.

A. The Precedence of *All Saints Parish, Waccamaw v. Protestant Episcopal Church,* 385 S.C. 428, 685 S.E.2d 163 (2009), *cert. dismissed sub nom, Green v. Campbell,* 730 S. Ct. 2088 (2010) ("*All Saints*")

All Saints' origin was in theological differences. *Modified Bench Or.* 2-3, *All Saints Parish, Waccamaw, et. al v. The Protestant Episcopal Church, et. al,* 2000-CP-22-0720 (Cooper, Presiding Judge, Apr. 20, 2007); *All Saints Parish v. Protestant Episcopal Church,* 358 S.C. 209, 216, 595 S.E.2d 253, 257-58 (Ct. App. 2004) (recognizing that the Notice was filed in September 2000, "after an ecclesiastical dispute arose between the Parish, the Diocese, and the National Church").[32] The facts giving rise to the lawsuit arose in September 2000, when The Right Reverend Edward L. Salmon, Jr., then the Bishop of the Diocese, filed with the Georgetown County Register of Deeds' office a notice ("Notice") that the wardens and vestry of All Saints Parish, Waccamaw ("All Saints") were subject to the "Dennis Canon" contained within the Constitution and

[32] At the time, the Diocese and TEC described the ecclesiastical dispute with reference to the consecration of All Saints' then Rector, Rev. Charles H. Murphy, III, as a bishop in the Episcopal Church in the Province of Rwanda, and his subsequent involvement with the Anglican Mission in America. *Final Brief of App./Respt. the Protestant Episcopal Church in the Diocese of South Carolina,* at *14, *All Saints Parish, Waccamaw, et. al v. The Protestant Episcopal Church, et. al.,* 2008 WL 2971594 (Ct.App. 2008) (Op. No. 29724); *Final Respondents' Brief of App./Respts.,* at *5-6, *All Saints Parish, Waccamaw, et. al v. The Protestant Episcopal Church, et. al,* 2008 WL 2971598 (Ct.App. 2008) (Op. No. 29724). On appeal, the Diocese and TEC argued that the appeal involved "a straightforward application of South Carolina law to a schism within the congregation of a hierarchical church." *Final Respts. Brief of App./Respts.* at *8, 2008 WL 2971598.

Canons of the Diocese and TEC which required All Saints to hold its property in trust for the Diocese and for TEC.[33] *All Saints,* 385 S.C. at 434. After discovering the Notice, in October 2000, All Saints filed a Complaint seeking a declaration that All Saints was the lawful and rightful owner of its property and that TEC and the Diocese did not hold an interest in the property. *Id.*

While this action was pending, on January 8, 2004, corporate action was taken by the members of All Saints to amend its articles of incorporation removing any reference to the Diocese and TEC. The amended articles were subsequently filed with the Secretary of State. *All Saints*, 385 S.C. at 439-41. *All Saints*' members then voted to sever any relationship with the Diocese and TEC. *Id.* As a result of this corporate action, the minority vestry commenced a separate lawsuit against All Saints and its' governing board, seeking declaratory and injunctive relief that they were the true officers of the corporation because the actions were not recognized by the Diocese or TEC and were inconsistent with its historical operation as a parish within the Diocese and TEC. *Id.*

Following the appeal of a grant of summary judgment and subsequent remand in *All Saints,* 358 S.C. at 216, 595 S.E.2d at 257-58, a trial was held with The Honorable Thomas W. Cooper, Jr. presiding. Judge Cooper held the property at issue was subject to a valid 1745 Trust Deed and that the vestry remaining loyal to the Diocese and National Church were the "true" officers of the non-profit corporation All Saints Parish, Waccamaw, Inc. *All Saints,* 385 S.C. at 434, 685 S.E.2d at 166.[34]

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[33] *Final Brief of Apps. All Saints Parish, Waccamaw* at *1, *All Saints Parish, Waccamaw, et. al v. The Protestant Episcopal Church, et. al*, 2008 WL 2971595 (Ct.App. 2008) (Op. No. 29724).

[34] The trial in *All Saints* involved both property issues (ownership and trust on property) and corporate control. *Modified Bench Or., All Saints Parish, Waccamaw, et. al v. The Protestant Episcopal Church, et. al,* 2000-CP-22-0720 (Cooper, Presiding Judge, Apr. 27, 2007). The trial court did not rule on issues related to the viability of the Dennis Canon, but instead decided that the All Saints property was subject to

All Saints appealed, arguing that the property and corporate matters could be exclusively resolved by the application of neutral principles of trust, non-profit corporate, and contract law. *Final Brief of Apps. All Saints Parish, Waccamaw* at *1, 2008 WL 2971595. In response, TEC and the Diocese argued that the Dennis Canon required the real property to be held in trust for the benefit of the TEC and the Diocese, and further that the corporate matters could be resolved by deference to the higher authorities of the hierarchical church.[35] In a unanimous opinion, this Court reversed, noting that both neutral principles and deference are constitutional methods for resolving church disputes, *All Saints*, but South Carolina is a neutral principles of law state, as opposed to a deference state. *Id.* at 443-45.[36]

This Court found that the reasons for the underlying ecclesiastical dispute were not relevant. *See All Saints,* 385 S.C. at 439, 685 S.E.2d at 169 ("In August 2003,

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a trust created in 1745 for the benefit of the heirs and inhabitants of the Waccamaw Neck. *Id.* at 6. Further, the trial court determined the corporate issues by following the hierarchical principals under the deference approach and ruled that the group remaining loyal to the Diocese and TEC were the officers and members of the corporate entity. *Id.* at 6-13. On reconsideration, the trial court construed the South Carolina's Non-Profit Business Corporations Act (S.C. Code § 33-31-180) to yield to religious doctrine, specifically finding:

> To transform a group of Episcopal communicants into communicants of another church... would be contrary to the religious doctrine of the Episcopal Church and the Diocese. One need not cite constitutions or canons to show that hierarchical churches generally disapprove of their component churches being wrested away and reassigned to other ecclesiastical bodies. To allow a corporate amendment to redefine a group of Episcopal communicants would result in an invasion of First Amendment protections.

Or. on Reconsideration 21-22, *All Saints Parish, Waccamaw, et. al v. The Protestant Episcopal Church, et. al*, 2000-CP-22-0720 (Cooper, Presiding Judge, Apr. 27, 2007). The trial court considered and held that the question of who the communicants and vestry of All Saints was conclusively decided by the hierarchical church authorities, and thus, not subject to review in compliance with the South Carolina Non-Profit Act. *Id.* at 19-20.

[35] *Final Brief of App./Respt. the Protestant Episcopal Church in the Diocese of South Carolina* at *14, *All Saints Parish, Waccamaw, et. al v. The Protestant Episcopal Church, et. al.*, 2008 WL 2971594 (Ct.App. 2008) (Op. No. 29724)[35]; *Final Respts. Brief of App./Respts.*, at *5-6, *All Saints Parish, Waccamaw, et. al v. The Protestant Episcopal Church, et. al.*, 2008 WL 2971598 (Ct.App. 2008) (Op. No. 29724). TEC joined in this Brief. *See App./ Respt. the Episcopal Church's Brief in Opposition to Brief of Respt./App. All Saints Parish, Waccamaw, et al,* at *2 *All Saints Parish, Waccamaw, et al v. The Protestant Episcopal Church, et. al.* 2008 WL 2971596 (Ct.App. 2008) (Op. No. 29724).

[36] It is this holding that the circuit judge referenced in her statements which Appellants repeatedly quoted. *See* Apps. Brief at 9.

prompted by events that are not relevant here, the congregation appointed a committee to recommend whether it should leave the Diocese and the ECUSA."). On the issue of property, this Court held that neither the 1745 trust nor the Dennis Canon were valid under neutral trust principles, but that the title to the property was vested in the church non-profit entity – All Saints Parish Waccamaw, Inc. On corporate control, this Court held that the corporate actions taken by All Saints to amend its' corporate purpose were done in accordance with its governing documents and the South Carolina Nonprofit Act. *Id.* at 449-51, 685 S.E.2d 174-75. Therefore, the true officers were the majority vestry and the corporation had severed any relationship it had with the Diocese or TEC.[37] One year later, the Diocese removed the Dennis Canon from its canons based on *All Saints.*

B. Fall 2009 - Present

Between 2009 and 2012, the Diocesan Convention passed a number of resolutions dealing with its relationship with TEC. (R. pp. 52-56 at ¶ 26, 27, 28, 29, 38, 39) In October 2010, the Diocese amended its corporate purpose removing references to TEC, removed the Dennis Canon and removed its accession to the canons of TEC. (R. p. 1045) (R. pp. 1153-1154) (R. pp. 1163-1175) (R. p. 193, line 19 – p. 197, line 20) The Standing Committee sitting as its Board of Directors had previously unanimously approved these resolutions. (R. p. 191, line 23 – p. 192, line 1) After the corporate purpose was amended and accession to TEC's Canons was removed, Bishop Mark Lawrence continued to be in

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[37] In October 2010, the Diocese recognizing the authority of *All Saints* removed the Dennis Canon from its canons on a vote by orders with 94% clergy and 91% parishes in favor. (R. pp. 1269-1271) (R. pp. 1163-1175)

Newly elected, Bishop Lawrence opposed the effort underway in late 2009 to seek Supreme Court review. (R. p. 1516, lines 5-10) When asked why he responded:

> There was profound unrest within the Diocese about the lawsuit to begin with. It wasn't a lawsuit that I had initiated. It was a lawsuit that had been initiated during the time of my predecessor. It resulted in much angst and disunity within the Diocese. And it was time to be done with it and move on with our life and mission as a Diocese.

good standing, (R. p. 782) (R. pp. 983-992) (R. pp. 1400-1406) and TEC did not discipline the Diocese because it could not. (R. p. 1019, lines 7-12)

During this same time period, the Diocese issued and delivered quit claim deeds to every parish, most of which were recorded. (R. p. 152, line 11 – p. 158, line 25) The memorandum that accompanied their filing explained the reasons. (R. pp. 1112-1118)[38] In October 2012, the Diocese withdrew from TEC. (R. pp. 159-161) (R. pp. 1124-1126) (R. p. 1051-1057) (R. pp. 1479-1516) Beginning in November 2012 and continuing for a year, Appellants used the Diocese names and its seals in a deliberate effort to make others believe that TECSC was the true Diocese. (R. pp. 200-217) (R. pp. 1193-1209)

TEC does not control Dioceses. They are equal members of an unincorporated association. TEC consents to their admission, it does not create them. TEC has no power over the affairs of a Diocese. It cannot compel participation in projects or giving. It cannot discipline a member Diocese. TEC has no involvement in Diocesan governance or the right to approve changes to that governance. (R. pp. 238-239) 27-53. (R. pp. 120-146) TEC has no ultimate judicatory. (R. p. 1020, line 15- p. 1021, line 2) TEC's provincial synod has no power to control the internal policy or offices of any Diocese. (R. p. 784, lines 15-22) TEC's Constitution and Canons refer to the Diocesan Bishop and the Standing Committee as the Ecclesiastical Authority. There is no provision giving supremacy to any body higher than the Diocese. (R. p. 879, lines 2-8) TEC's Dennis Canon was not applied to Diocesan property because the Diocese is the highest authority. The ultimate expression of Diocesan independence is that there is nothing in any of

[38] The Diocese had no ownership interest to quit claim; rather, the deeds "lay to rest any lingering issues that may exist for some parishes when they seek to obtain title insurance or secure bank financing for parish projects." *Id.*

TEC's governance that prohibits a Diocese from withdrawing its association with TEC. (R. p. 786, line 14- p. 787, line 18) (R. p. 900, line 21 - p. 901, line 6)

TEC has no legal relationship with the Trustees or the parishes. Neither the Trustees nor the Parishes are members of TEC. (R. pp. 1383-1398) (R. p. 630, lines 14-18)

STANDARD OF REVIEW

Appellants characterize this action as one in equity citing three "church cases" for the proposition that church dispute cases seeking an injunction are equitable. This is an incorrect statement of the law, of their holdings, and consequently of the standard of review.[39]

In an action at law tried to the court, appellate review of the "circuit court's findings of fact [is] equivalent to a jury's findings in a law action....not disturb[ing] the findings unless the court views the circuit court's findings to be without reasonable evidentiary support" with "review generally extend[ing] merely to corrections of errors of law." *Abbeville County School Dist. v. State*, 410 S.C. 619, 629, 767 S.E.2d 157, 162 (2014) (citations omitted).

Because of its chameleon nature (neither legal nor equitable), the standard of review for a declaratory judgment action is determined by the nature of the underlying issues. *Sloan v. Greenville Hosp. Sys.*, 388 S.C. 152, 156-57, 694 S.E.2d 532, 534-35

[39] Two of these cases held that the main purpose the declaratory judgment actions had been brought was for injunctive relief and therefore they were equitable in nature. *McCain v. Brightharp*, 399 S.C. 240, 246, 730 S.E.2d 916, 918 (Ct.App. 2012) ("Respondents' main purpose in bringing this action was to enjoin Brightharp from continuing to act as pastor and to reinstate Respondents to their former positions in the church."); *William v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002) ("Respondents' main purpose in bringing this action was to enjoin Trustees present and future interference in church matters."). The third case did not seek a declaratory judgment. It sought to "restrain" conduct – an exclusively equitable purpose.

(2010); *Bell v. Progressive Direct Ins. Co.,* 407 S.C. 565, 575, 757 S.E.2d 399, 404 (2014). The main issues underlying all parties' declaratory judgment claims relate to issues of corporate control and ownership interests in property, real and personal (including intellectual). Any injunctive relief necessarily depends on the resolution of these issues.

The determination of title to real property is an action at law. *Wigfall v. Fobbs,* 295 S.C. 59, 367 S.E.2d 156 (1988). However, the present property claims depend heavily on the issue of contract (association) law involving the rights of the Respondents to withdraw from TEC. Contract actions are generally legal and where issues of fact are raised they are for the jury to decide. *Moore v. Crowley & Assoc. Inc.,* 254 S.C. 170, 174 S.E.2d 340 (1970). Similarly, the determination of an express trust is a contract issue; its existence being a question of fact. *Small v. Springs Indus. Inc.,* 297 S.C. 481, 357 S.E.2d 452 (1987). Whether a constructive trust exists is an equitable determination. *Doe v. Roe,* 323 S.C. 445, 475 S.E.2d 793 (Ct. App. 1996). Therefore, the issues of corporate control and ownership of property are legal issues subject to the any evidence scope review while the issue of a constructive trust is equitable, reviewed *de novo.*

The claims involving the right to relief under the state statutes involving Respondents' marks are actions at law. *Harvey v. South Carolina Dept. of Correction,* 338 S.C. 500, 527 S.E.2d 765 (Ct.App. 2000). Appellate review of the circuit court's statutory interpretation of these statutes and those involving the Trustees is a question of law for the court, therefore, *de novo.* However, the application of facts to the statutes is a question of fact subject to the any evidence standard. *Brushy v. South Carolina Dept. of Health & Environmental Control,* 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN RULING THAT TEC'S ORGANIZATIONAL STRUCTURE IS IRRELEVANT

The gravamen of Appellants' arguments is that if the underlying dispute concerns religious doctrine or governance, a court cannot use neutral principles of law to resolve the civil issue with which it is presented. This is a fundamentally erroneous premise. It is also inextricably intertwined in Appellants' arguments that deference is required to TEC's alleged "hierarchy."

Appellants argue that neutral principles are available only "when the underlying dispute is free of religious implications;" Apps. Brief at 14, or when "resolving the dispute will [not] touch on issues of church governance or doctrine," *Id.,* or when applying them "will cause a civil court to resolve a doctrinal issue." *Id.* at 16. Then Appellants attempt to explain how the court must "peel back" and look into the "origins of the dispute. *Id* at 18, 19, 23, 24, 27.

Appellants argue their "underlying doctrinal-governance dispute" premise is supported by a United States Supreme Court decision referenced in *All Saints.* It is argued that this principle requires deference when there are church disputes "masquerading as fights over property." Apps. Brief at 7.[40] Not only do Appellants misconstrue this principle, they also misunderstand the application of neutral principles to church disputes.

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[40] The passage in question from *All Saints* provides:

> ...[W]here a civil court is presented an issue which is a question of religious law or doctrine masquerading as a dispute over church property or corporate control, it must defer to the decisions of the proper church judicatories in so far as it concerns religious or doctrinal issues. *See Serbian Eastern Orthodox Diocese* 426 U.S. at 709, 96 A. Ct. 2372 (finding that the controversy before the Court "essentially involve[d] not a church property dispute, but a religious dispute the resolution of which...is for ecclesiastical and not civil tribunals.").

All Saints, 385 S.C. at 445, 685 S.E.2d at 172.

A. *Neutral Principles of Law Are Appropriately Used as The Exclusive Means of Resolving Church Disputes Even When The Issues Giving Rise to The Dispute Involve Religious Doctrine or Governance*

Rarely are there any disputes between competing churches born of schisms[41] the underlying nature of which does not involve either religious doctrine or governance or both. Indeed it is the intent of neutral principles to provide a means for resolving church disputes *in spite of* the presence of underlying doctrinal or ecclesiastical issues. Neutral principles, a constitutionally permissible method for resolving church disputes, would be unavailable if Appellants' argument were correct. However, it is not. One need look no further than to *All Saints* and the first United States Supreme Court decision discussing neutral principles in church dispute cases. *Presbyterian Church in the U.S. v. Hull,* 393 U.S. 440 (1969).[42] As previously noted, *supra* at 16, the dispute underlying *All Saints* was "ecclesiastical." Nevertheless, this Court noted that the reasons underlying the decision to withdraw were not relevant. *All Saints*, 385 S.C. at 439, 685 S.E.2d at 169 ("prompted by events not relevant here");[43] a*ccord, Colonial Presbyterian Church v. Heartland Presbytery*, 375 S.W.3d 180, 196 (Mo. 2012) ("The underlying doctrinal or

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[41] Schism is "a split or division between strongly opposed sections or parties caused by differences in opinion or belief." Lindburg, C. & Stevenson, A., Eds., *New Oxford American Dictionary*, 3rd Ed. (New York: Oxford University Press, 2010); *accord*, Black's Law Dictionary, 9th Ed., 2009 p. 1463. ("2. A separation of beliefs and doctrines by persons of the same organized religion, religious denomination, or sect.")

[42] *Hull* recognized the obvious. Church property disputes "involve underlying controversies over religious doctrine." *Presbyterian Church in the U.S. v. Hull,* 393 U.S. 440, *449 (1969).*

[43] Similarly, the federal district court in its remand order in this case, found that the presence of underlying ecclesiastical issues "does not necessitate inquiry into, nor resolution under, the First Amendment" citing *All Saints*, 385 S.C. 428, 685 S.E.2d 163, 171 (S.C. 2009). Or., 2:13-cv-893-CWH at 15 (D.S.C. June 10, 2013) (Remanding case to state court). (R. p. 27)

religious dispute – the reason Colonial left the national church – is unknown to this Court because the parties have (appropriately) not addressed it.")[44]

Furthermore, when the "surface" of each of the church property cases decided by the United States Supreme Court in the last 45 years is "peeled back," these cases had their "origin" in doctrinal or governance disputes. *Presbyterian Church in the U.S. v. Hull*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), involved a dispute between "the general church" and "two local churches" over "control of the properties." It arose because the local churches believed that "certain actions and pronouncements of the general church were violations of the organization's constitution and departures from doctrine" *Id.* at 442.[45] *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg,* 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970), was a church property dispute "between a regional church" and "two secessionist congregations." Each congregation voted to withdraw from the regional church because the regional church attempted to require the congregation to accept a pastor selected by the regional church. *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg,* 249 Md. 650, 653-56; 241 A.2d 691, 693-95 (Ct. App. 1968). Finally, the opinion in *Jones v. Wolf,* 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) begins, "This case involves a dispute over the ownership of church property following a

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[44] Like Appellants here, the national church in *Colonial* seemed to complain that "the court below relied (as we do) exclusively on secular principles of trust law. Rather, we have simply resolved a property dispute ... a matter that could scarcely be more secular."

[45] The local churches withdrawal resolution unquestionably dealt with doctrinal disputes:

> ordaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church.

Presbyterian Church in U.S. v. E. Heights Presbyterian Church, 224 Ga, 61, 62-63, 159 S.E.2d 690, 692 (1968), *rev'd sub nom, Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L. Ed. 2d 658 (1969).

schism....". The schism was occasioned by the passage of a resolution (164 to 94) "to separate from PCUS." *Id.* The underlying reasons for the withdrawal were stated in the resolution and they were unquestionably doctrinal.[46]

Nevertheless, in spite of the "ecclesiastical" "doctrinal" and "governance" issues in which these three disputes were "rooted," the United States Supreme Court approved the application of neutral principles of law to resolve each dispute resulting in the withdrawing congregations keeping their property even though the ultimate decision, using Appellants' language, "implicated considerations of church governance or doctrine."[47] This was so *in spite of* the fact that the religious organization in *Hull*, 393 U.S. at 440, and *Jones*, 443 U.S. at 597 was admittedly hierarchical and in *Maryland and Virginia Churches*, one of mixed polity.[48]

B. As In All Saints, The Issues Presented to The Circuit Court Were Capable of Complete Resolution Using Neutral Principles of Law

The real question is not whether there are doctrinal, ecclesiastical or governance issues underlying the dispute, it is whether a civil court is **required** to decide those issues in order to resolve the case before it. *All Saints*, 385 S.C. at 445, 685 S.E.2d at 172.

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[46] The Vineville Presbyterian Church

> [d]esires to be at peace and to proclaim the good news of Jesus Christ, adhering closely to the Bible as the infallible word of God, and to the doctrines originally stated in the Westminster Confessions of Faith....

Brief of Petrs. for Writ of Certiorari to the Supreme Court of Georgia at *5, *Jones v. Wolf*, 1978 WL 206962.

[47] On remand, the Georgia Supreme Court in both *Hull* and *Jones*, applied neutral principles of law and ruled in favor of the congregations who withdrew from their hierarchical church. *Presbyterian Church in U.S. v. Eastern Heights Presbyterian Church*, 225 Ga. 259, 107 S.E.2d 658 (1969), *cert. denied*, 90 S.Ct. 680 (1970); *Jones v. Wolf*, 244 Ga. 388, 260 S.E.2d 84 (1979) *cert. denied* (1980) (Finding no evidence of a "right to control the actions of the titleholder that is, as to the right to possess, enjoy and control the use of these church premises," the court applied the presumption of majority rule on the right to control).

[48] The Maryland Court of Appeals found that it was presbyterial in governance but congregational in the use and control of property. *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 249 Md. 650, 663-64, 241 A.2d 691, 698-99 (Ct.App. 1968) *vacated sub nom. Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 393 U.S. 528, 89 S.Ct. 850, 21 L. Ed. 2d 750 (1969). The United States Supreme Court's per curiam affirmance simply stated the "resolution of the dispute involved no inquiry into religious doctrine." *Md. and Virginia*, 396 U.S. at 367.

Where a court can "completely resolve" a church dispute using "exclusively" neutral principles of law, it must do so. *Id.* In those situations, the nature of the competing churches' organizational structure is not relevant.

> The neutral principles approach...*obviates entirely* the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.

Jones, 443 U.S. at 605, 99 S. Ct. at 3026 (emphasis added). In *All Saints*, this Court applied that concept stating that the application of neutral principles "does not turn on a single question of whether a church is congregational or hierarchical." *All Saints*, 385 S.C. at 444, 685 S.E.2d at 172. Rather, neutral principles "relies *exclusively* on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* (quoting *Jones v. Wolf*, 443 U.S. at 603, 99 S. Ct. 3020) (emphasis added); *accord*, *Presbytery of Ohio Valley v. OPC, Inc.*, 973 N.E.2d 1099, 1107-1108 (2012) ("Indiana courts should apply principles of Indiana trust and property law without regard to the organizational structure of the religious demonstration.")

As in *All Saints*, this case presented "two questions that arise out of a dispute over church property and corporate control." (R. pp. 64-66); *All Saints*, 385 S.C. at 434, 685 S.E.2d at 166. The circuit court ruled that the nature of TEC's religious organization was irrelevant to the issues before it.[49] Appellants did not contend at trial nor do they apparently contend here that the Respondent parishes did not follow the proper corporate procedures to amend their governance documents. Apps. Brief at 8 ("apparently

[49] TEC however could (and did) offer extensive evidence on the issue of its asserted right to control Respondents under neutral principles of law. (R. p. 261, lines 10-12) (R. p. 660, lines 4-8, 12-16) (R. p. 661, lines 13-19) (R. p. 754, lines 1-10) (R. p. 783, line 20- p. 784, line 22) (R. p. 819, line 16-25) (R. p. 873, line 1 – p. 877, line 5) (R. p. 980, line 18- p. 981, line 14)

following appropriate corporate procedures for making such changes").[50] (R. p. 75) Nor did they contend at trial or here that the Respondents' Diocese and Trustees did not follow the proper procedures to amend their corporate documents. Rather Appellants contend that the Respondent Diocese lacked the authority to take those actions which it asserts were *ultra vires*. Apps. Brief at 47-50. As to the property issues, Appellants do not claim that any of the deeds contained any express provisions favoring them. Nor do they contend that the Dennis Canon applies to the Respondent Diocese or Trustees' property. (R. pp. 67-68) Rather they contend that the Dennis Canon applies to Respondent parishes' property because of the deference principles throughout Appellants' brief. Apps. Brief at 33 ("These principles also mean that the Dennis Canon imposes a trust over the parish property").[51]

This action, like that in *All Saints*, is not a religious doctrinal dispute in costume. Though its origin, as that in *All Saints*, and as in most if not all church-split disputes, is found in non-justiciable issues, the court was not asked to resolve those issues. The presence of doctrinal issues here is the result of Appellants' attempt to foist them on the judiciary because Appellant TEC did not properly structure its relationship with the Diocese and her parishes to achieve the desired justiciable civil result. The *Serbian* "masquerade," referenced by *All Saints,* 385 S.C. at 445, 685 S.E.2d at 172, has no relevance here.

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[50] Respondents attempted to minimize the record designations as directed by this Court's Order of April 15, 2005 by seeking an agreement from Appellants that there was no dispute that Respondents followed the proper procedures to amend their corporate documents and that none of the deeds of real property referenced any trust in favor of TEC. Ltr. from C. Alan Runyan to Blake Hewitt and Allan Holmes (May 26, 2015). Appellants, however, did not respond.

[51] Appellants offered extensive evidence about TEC's right to control Respondents, and argued here that express trusts made by the parishes exist in favor of TEC, that the legislature intended the act creating the trustees to benefit TEC, that Respondents' marks were derived from TEC, and that the corporate actions taken by the Diocese to remove its affiliation with TEC were *ultra vires*. Apps. Brief at 39-50.

Serbian arose out of a dispute between the Bishop of the Serbian Eastern Orthodox Diocese for the United States and Canada, Milivojevich, and "The Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church (Mother Church)." *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 697-98, 96 S. Ct. 2372 (1976). There was no dispute that the polity of the Serbian Orthodox Church was hierarchical: "all parties agreed that the Serbian Orthodox Church is a hierarchical church and that the sole power to appoint and remove Bishops of the Church resides in its highest ranking origins, The Holy Assembly and The Holy Synod" *Id.* at 715.[52] The protracted dispute escalated after a committee appointed by the Mother Church to investigate complaints against Milivojevich returned to Belgrade, Yugoslavia. The Holy Synod recommended disciplinary proceedings against Milivojevich suspending him pending an investigation and reorganizing his diocese in May 1963. Thereafter, on July 26, 1963, the day before the Holy Assembly in Belgrade

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[52] In spite of the stipulations, the Court engaged in an extensive factual review of why its polity was hierarchical. The explicit provisions of this hierarchical authority were:

- The governing constitution of the Serbian Orthodox Church stated unambiguously: "The Holy Assembly of Bishops, as the **highest hierarchical body**, is legislative authority in the matters of faith, officiation, church order (discipline) and internal organization of the Church, as well as the **highest church juridical authority** within its jurisdiction." *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 716 (1976) (emphasis added).
- Also: "All the decisions of the Holy Assembly of Bishops and of the Holy Synod of Bishops of canonical and church nature, in regard to faith, officiation, church order and internal organization of the church, are valid and final." *Id.* at 716-17.
- The Supreme Court also concluded that "various provisions of the Diocesan constitution reaffirm the subordinate status of the Diocese." *Id.* at 722, n.12.
- It also relied on the diocese's submission of corporate bylaws, proposed constitutional changes, and final judgments of the Diocesan Ecclesiastical Court to the Holy Synod or Holy Assembly for approval. *Id.* at 715, n.9.
- The bishops swore an "Episcopal-Hierarchical Oath" that they would "always be obedient to the Most Holy Assembly," the very body identified in the constitution as "the highest hierarchical body." *Id* at 715, n.9.
- The Court also found that its hierarchy determination was "confirmed by the fact that respondent corporations were organized under the provisions of the Illinois Religious Corporations Act governing the incorporation of religious societies that are subordinate parts of larger church organizations." *Id.* at 715, n.9.

voted to remove him as Bishop, Milivojevich filed an action in Illinois State Court seeking an injunction to prevent interference with diocesan assets and asking for a declaration that he was "the true Diocesan Bishop." *Id.* at 702-07. Because the Diocesan Bishop controlled the corporations holding title to church property, the United States Supreme Court found that the

> "resolution of the religious dispute over [Milivojevich's] defrockment therefore determines control of the property. Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals."

Id. at 709.

Appellants would make this a dispute over who is the "true" bishop of the Diocese as was done in *All Saints* over who was the "true" vestry and as Appellants tried to do in their parallel federal court proceeding. However, the causes of action before the court are about corporate control and church property. There is no property titled in Bishop Lawrence's name nor does he control any of the Respondent non-profit corporations. Moreover, no court could determine who is the appropriate minister for a religious organization – that is a "matter strictly ecclesiastical."[53] However, courts may constitutionally determine who controls a non-profit corporation and determine matters related to real and personal property. That is the essence of neutral principles. Because of the votes of those judicially determined to have the right to control a corporation, such

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[53] *Hosanna-Tabor*, 132 S.Ct. at 709 (Roberts, C.J.). *Hosanna-Tabor* did not involve a dispute between two competing church factors (or two "churches" using a constitutional analysis), it concerned whether a church could fire a minister and be constitutionally subject to a suit under the ADD. The United States Supreme Court quoted James Madison in 1 Annals of Cong. 730-31 (1789):

> The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.

Hosanna-Tabor, 132 S.Ct. at 703. The Court also restated its injunction against the governments "lending its power to one or the other side in controversies over religious authority or dogma." *Id.* at 707.

decisions may, in turn, affect who is the "true" vestry or the "true" Bishop. Nevertheless, that result ultimately is determined by how the parties structured (or failed to structure) their civil relationships.

C. *Appellants Are Collaterally Estopped From Relitigating The Issue of Whether TEC's Organizational Structure Is Hierarchical Above The Level Of A Diocese*

Civil courts wrestle with the concept of church polity when called to do so for two principal reasons. First, they generally and rightfully avoid religious issues because of concerns that church and state remain separated as required by the First Amendment. U.S. Const. Amend. I. Second, with a few clear exceptions, *infra* at 40, the nature of church governance and its many variables as to which group within a religious organization has the right of control over what issue is a legal minefield. This is especially so when a court has to maintain the balance required between preserving the free exercise of religion while not establishing it.[54] These "conflicting pressures" are prominent when a court must resolve civil issues presented when *two* religious organizations are in court as the result of a schism. Upholding a free exercise of religion argument for one can also mean establishing the religion of that one over the free exercise of religion of the other. Equally implicated is the freedom to associate and its corollary, the freedom not to associate. (R. p. 75); *Disabato v. South Carolina Assn. of School Administrators*, 404 S.C. 433, 445, 746 S.E.2d 329, 335 (2013). Neutral principles of law removes these burdens from the court and places them upon the potential parties to church disputes. Neutral principles "shares the peculiar genius of

[54] These two First Amendment clauses have an "internal tension" which "often exert conflicting pressures." *Hosanna-Tabor,* 132 S.Ct. at 702.

private-law systems in general-flexibility in ordering private rights and obligations to reflect the intentions of the parties." *Jones*, 443 U.S. at 603.

Forty-six years ago, the United States Supreme Court announced that neutral principles of law "developed for use in all property disputes" can be used to avoid having to resolve "underlying controversies over religious doctrine." *Hull*, 393 U.S. at 449. How? "...States, **religious organizations**, and individuals **must structure relationships involving church property** so as not to require the civil courts to resolve ecclesiastical questions." *Id.* (emphasis added) Thirty-nine years ago the United States Supreme Court repeated this admonition noting that occasional problems in the application of neutral principles "should be gradually eliminated as recognition is given to the obligation of 'States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.'" *Jones*, 443 U.S. at 604 (quoting *Hull, supra*). Similarly, six years ago (forty years after this solution was suggested by the United States Supreme Court) this Court in a case involving TEC, the Respondent Diocese and a parish formerly in union with the Diocese, found that TEC (and the Diocese) had not properly structured relationships to prevent a parish from withdrawing and keeping its property. *All Saints*, 385 S.C. at 445.[55] That finding applies with equal force here. TEC did not structure its relationship with Respondents to achieve a desired civil result. TEC has failed to do so not because it did not know that it should; it created the Dennis Canon for that purpose. TEC's failure to "embody in a legally cognizable form" the express trust it now claims, is

[55] This Court stated this finding positively rather than negatively:

> We find that the Diocese and ECUSA [TEC] organized their affairs with *All Saints* in a manner that makes the complete resolution of the questions presented achievable through the application of neutral principles of property, trust and corporate law.

strong evidence that TEC lacked the power to require those it claims are subordinated to it to execute the necessary instruments. Any "hierarchy" it has, is impotent.

Having failed to structure their civil relationships with Respondents to achieve the desired civil goals, Appellants nevertheless ask this Court to go where it cannot constitutionally go: to a place where TEC has been before on the same issue where it had a full and fair opportunity to litigate what Appellants so heavily rely upon here. Appellants should be estopped from so doing.

1. Any attempt to identify an authority allegedly higher than the Diocese would require "a searching and therefore impermissible inquiry into church polity"

Even if TEC's alleged organizational structure were relevant, TEC could not constitutionally secure the deference it seeks.

A religious hierarchy exists when there is "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." *Watson v. Jones*, 80 U.S. 679, 722-23 (1871);[56] *see All Saints*, 385 S.C. at 443. Respondents believe TEC is not a religious hierarchy above the level of a Diocese.[57] Appellants believe that TEC is. This is a substantial controversy a civil court cannot resolve.

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[56] Although *Watson* was a pre-*Erie* case and therefore not binding on the states, this definition of a religious hierarchy is almost universally used by state courts.

[57] Assuming that there were proof of an unambiguous "locus of control" and that locus of control is not in fact the Diocese, then there are other hoops to jump through. Does the organization have a judicatory? Has the highest judicatory ruled on the issue in question? Is that ruling a product of collusion?

A court may not constitutionally defer when "the identify of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy." *Maryland and Virginia Churches,* 396 U.S. at 369. Instead,

> [s]tates following the Watson approach [deference] would have to find another ground for decision, perhaps the application of general property law, when identification of the relevant church governing body is impossible without ... extensive inquiry into church polity.

Id. n. 4.

Nine years later, the United States Supreme Court restated these principles in response to the dissent's advocacy for a rule of compulsory deference. When applying the deference standard, "civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property." *Jones*, 443 U.S. at 605. "In some cases, this task would not prove to be difficult." *Id.* "But in others, the locus of control would be ambiguous, and 'a careful examination of the constitutions of the general and local church, as well as other relevant documents, would be necessary to ascertain the form of governance adopted by the members of the religious association.' " *Id.* In such cases deference cannot constitutionally be used because it would require "a searching and therefore impermissible inquiry into church polity." *Id.* (internal citations omitted).

As discussed *infra*, in connection with the *Quincy* decision, the only unambiguous locus of control in TEC is the Diocese, not the national church.[58] After "searching" for the existence of a TEC hierarchy and its "locus of control," a court would be back to

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[58] The only reference in TEC's Constitution and Canons to any body possessing authority by title is that of the "Ecclesiastical Authority." The ecclesiastical authority only exists with a Diocese. It appears 179 times in TEC's 2006 Constitution and Canons and is defined as "the Bishop of the Diocese or, if there is none, the Standing Committee or such other ecclesiastical authority established by the Constitution and Canons of the Diocese." (R. p. 1693)

where the *Quincy* court ended: relevant evidence under some other civil method would be necessary or the status quo would prevail because the court could not defer.[59]

2. *Diocese of Quincy v. Episcopal Church*, 383 Ill. Dec. 634, 14 N.E.3d 1245 (Ill. App. 4th Dist. 2014), *petition for leave to appeal denied*, 21 N.E.3d 713 (2014). ("Quincy")

In the late spring of 2013, a case was tried in the Illinois state court involving Respondent TEC and the Diocese of Quincy. Quincy had withdrawn from TEC and the primary issue was whether a Diocese legally could withdraw from TEC. The "exhaustive" bench trial lasted three weeks: "much if not most of the 15,000-page record on appeal dea[lt] with the church's structure, history and polity." *Quincy*, 383 Ill. Dec. at 645, 14 N.E.3d at 1256 (2014). The Illinois Court of Appeals affirmed the trial court's finding in favor of the Diocese and against TEC and the Supreme Court of Illinois denied leave to appeal.

As in most other cases of this nature, *supra* at 24-26, "a doctrinal controversy developed, which resulted in a schism between the Diocese and the Church." *Id.* at 639, 14 N.E.3d at 1250. Quincy sought a declaratory judgment that it owned its property and TEC counterclaimed for declaratory and injunctive relief against named directors of the Diocese and Trustees alleging that the counterclaim Defendants were not the "true" leaders of the Respondents, that Quincy was a subordinate part of TEC whose structure was hierarchical and that the court should defer to TEC on who were "the true leaders of the diocesan corporation." *Id.* at 640, 14 N.E.3d at 1251. In September 2013, the trial court issued a "very detailed 21-page" opinion finding that Quincy's claimed "subordinate status was 'not clear or readily apparent.'" *Id.* at 642, 14 N.E.3d at 1253,

[59] "When the identification of the relevant governing body is impossible without extensive inquiry into church polity," courts following a deference approach "would have to find another ground for decision." *Maryland and Virginia Church*, 396 U.S. at 370 n.4.

and that TEC's claimed "authority over the Diocese could not be constitutionally determined without an impermissible investigation into church polity." Findings, Op. and Or., Case No. 09-MR-31 (Adams County Circuit Court, Ill. Eighth Judicial Circuit (Sept. 9, 2013) (R. pp. 2301-2321) ("Opinion"); Final Or. and Judgment, Case No. 09-MR-31 (Adams County Circuit Court, Ill. Eighth Judicial Circuit, Oct. 9, 2013). (R. pp. 2323-2327)[60]

Among the issues TEC urged on appeal was the trial court's asserted error "in failing to defer to and enforce the Church's determination the Diocese [Quincy] had no power to withdraw from the Church." *Id.* at 642, 14 N.E.3d at 1253. The Court of Appeals extensively reviewed the testimony of TEC's expert (Robert B. Mullin) as well as an expert for Quincy. *Id.* at 641, 14 N.E.3d at 1252. The Court of Appeals noted that Illinois courts use neutral principles "to resolve the matter as it would a secular dispute."

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[60] The Final Order incorporated the Opinion. It also made specific findings of fact which derived from the longer and more detailed Opinion. The findings included the same issues presented here:

> 12. There is no provision in TEC's Constitution and Canons requiring that a diocese receive approval prior to amending its own constitution or canons nor is there anything in the provisions of TEC's Constitution which incorporates religious doctrine relating to the ownership of diocesan property which would require deference.

Final Or. and Judgment (Oct. 9, 2013) (R. p. 2325 at ¶ 12)

> ....
> 13. There is no explicit provision in TEC's Constitution and Canons specifying the office or body having supremacy or ultimate authority over a diocese and there is no explicit or clearly delineated expression in TEC's governing documents that the General Convention is the ultimate authority or judicatory of TEC. TEC's own expert witness, Dr. Bruce Mullin, conceded that there is no such express provision in TEC's Constitution.

(R. p. 2325 at ¶13)

> ....
> 14. There is no express provision in TEC's Constitution or Canons prohibiting a diocese from withdrawing its association with TEC.

(R. p. 2325 at ¶13)

> 22. The parties presented voluminous and conflicting evidence, extrinsic to TEC's governing documents, on the issue of whether there existed any hierarchy above the Diocese of TEC (Page 13).

(R. p. 2326 at ¶22)

> ....
> 24. TEC's "Dennis Canon" does not apply to diocesan property.

(R. p. 2326 at ¶24)

"Simply put, if the analysis can be done in secular terms, the court should do so." *Id.* at 644-45, 14 N.E.3d 1255-66. It then affirmed the trial court's finding that it could not "constitutionally determine the highest judicatory authority or locus of control regarding the property dispute to which it would be required to defer," and that the "deference approach is unavailable where a determination of a church's hierarchical structure is not easily discernable." *Id.* at 645, 14 N.E.3d at 1256.[61]

Parties in South Carolina courts are collaterally estopped from relitigating issues decided in a previous action to which they were a party, when the issue of fact or law was actually litigated and determined by a valid and final judgment, and the issues so determined were essential to the judgment. *S.C. Prop. and Cas. Inc. Guar. Assn. v. Wal-Mart Stores, Inc.* 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). This is so even though the party arguing for preclusion was not a party to the previous litigation, so long as the precluded party had a full and fair opportunity to litigate the issue in the previous action.

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[61] In reviewing the evidence, the Court of Appeals reviewed the cross-examination testimony of TEC's expert witness on the "structure and history" of TEC:

- TEC's Constitution does not say that TEC is hierarchical. *Id.* at 641, 14 N.E.3d at 1252.
- TEC's Constitution and Canons do not reference a three-tiered form of governance. *Id.*
- TEC's Constitution and Canons do not prevent a diocese from withdrawing from the Church. *Id.*
- TEC cannot compel a diocese to contribute any money – The Church "suggests" what should be contributed. The result is diocesan lack of support being a "frequent problem." *Id.*
- TEC's Constitution and Canons do not provide for the discipline of a diocese. *Id.*
- TEC's expert's testimony "does not clearly demonstrate the existence of a hierarchical relationship between the diocese and the Church." *Id. at 645-46, 14 N.E.3d at 1256-57.*

From the testimony of the Diocese's expert "in church history," the Court of Appeals noted that:

- TEC is "an extremely decentralized association" of state churches or dioceses. *Id.* at 641, 14 N.E.3d at 1252.
- TEC's Constitution lacks a supremacy clause and a mechanism to enforce its Canons against a diocese. *Id.*
- TEC lacks any supreme judiciary. *Id.*
- TEC has no provisions in its Canons which give it authority to assert control over a diocese's property. *Id.*

Id; accord, Catawba Indian Nation v. State of South Carolina, 407 S.C. 526, 536-37 756 S.E.2d 900, 906 (2014); *Carolina Renewal Inc. v. S.C. Dept. of Transp.*, 385 S.C. 550, 554-57, 684 S.E.2d 779, 782-83 (Ct. App. 2009).[62]

TEC was a party in *Quincy*. The same national counsel represented TEC in *Quincy* that represented TEC during the proceedings in the circuit court.[63] The issue of whether TEC's alleged hierarchy above the level of a Diocese could be readily ascertained was exhaustively litigated by TEC in *Quincy*. The trial's court's judgment there was both valid and is now final. The trial court found this issue to be essential to its judgment.[64] The Court of Appeals affirmed that finding. The Illinois Supreme Court refused to allow an appeal from the Court of Appeals and TEC did not petition the United States Supreme Court for a writ of certiorari. *Quincy* is the first, final judgment involving the issue of whether a Diocese can leave TEC. It is also the first final judgment which determined the issue of whether the hierarchy alleged to exist above the level of a Diocese in TEC is constitutionally discernable.

Even if TEC's polity were relevant, it should be precluded from relitigating the issue of whether a hierarchy in its organizational structure exists above the level of a Diocese.

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[62] TECSC is likewise precluded from relitigating these issues. Appellants' interests are identical. The Respondents and Appellants are united in their respective interests. (R. p. 44) In April 2013 when *Quincy* was tried, TEC & TECSC were advocating the same issues in the present action as those tried in *Quincy*. Moreover, TECSC's contention, that it is the "true Diocese" depends for its success on the same position taken here by TEC which was tried in *Quincy* – that a diocese may not withdraw from TEC. TEC should not prevail here because it has litigated those issues to a final and valid judgment in *Quincy*, thus TECSC is likewise precluded.

[63] TEC was represented by "David Beers and Mary E. Kostel (argued), both of Goodwin Proctor LLP of Washington, D.C. for Appellant." *Quincy*, 383 Ill. Dec. at 637, 14 N.E.3d 1249.

[64] The *Quincy* trial court stated it was necessary to consider the issue of TEC's alleged hierarchy above the level of a Diocese. (R. p. 2306) It then reviewed the evidence in detail, *Id.* at 15, concluding it "cannot constitutionally determine the highest judicatory authority or the locus of control regarding the property dispute to which it would be required to defer." *Id.* at 15.

D. *TEC Is Not A Hierarchical Religious Organization Above The Level Of The Diocese*

In spite of *All Saints*, Appellants argue that TEC is "a hierarchical church." Apps. Brief at 27-32. As in *All Saints*, "adjudication of this matter does not *require* [the Court] to wade into the waters of religious law, doctrine or polity." *Id.* at 445, 685 S.E.2d at 172 (emphasis added). TEC's polity is not relevant. Therefore, Appellants' argument about the underlying nature of this action is an argument against precedent in masquerade.

The evidence that TEC is not the hierarchy it claims was "exhaustedly" considered in Quincy. It was also presented to the circuit court in response to TECSC's motion for a preliminary injunction, *supra* at 4-5. To the extent that TEC's assertion of hierarchy is related to TEC's assertion that it had the right to control Respondents, it is also reflected in the circuit court's findings, in exhibits and in testimony.[65] Moreover, there is no language in TEC governance documents similar to that in churches whose polity is unambiguously hierarchical.

Concepts of hierarchy are clearly and unambiguously expressed in the code of canon law of the Roman Catholic Church, which is clearly distinguishable from a Protestant Episcopal Church. *Wilson Presbyterian Church of John's Island,* 19 S.C. Eq. 192, 213 (1846). These include legal terms indicating supremacy, preemption and finality. (R. p. 1372) The Catholic Church's code includes a chapter titled "The Hierarchical Constitution of the Church," and Section I titled "The Supreme Authority of the Church." Article 1, titled "The Roman Pontiff" states "he possesses supreme, full,

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[65] In response to questions on cross-examination by counsel for TEC, Dr. Guelzo, Respondents' undisputed expert in church history, testified that a landmark treatise on the structure of TEC maintained, "that the Episcopal Church was not in any way a type of the English church, it was not monarchical. Its genius, Colton said, is republican, with a small r; in other words, meaning there is no hierarchy, no monarchy, no top-down authority, rather authority moves from the bottom up." (R. p. 914, lines 2-23)

immediate, and universal ordinary powers in the Church, which he is always able to freely exercise" and "also obtains the priority of ordinary power over all particular churches and groups of them." *Id.* (quoting Roman Catholic Church, *Codex Innis Canonizi* (1983)). Dioceses are created by the Pontiff who also appoints or confirms Bishops. *Id.*

Similarly, the Serbian Orthodox Church expresses its governance in unambiguous hierarchical language. *Supra* at 29 n. 52. What then may be said of the cases cited by Appellants that TEC is hierarchical "as multiple other courts have held?" Apps. Brief at 28-29.

What may first be said is that in their own nature, these cases are examples of the absence of a hierarchy above the level of a Diocese because they involve disputes between a Diocese and a parish, not between a Diocese and TEC.[66] TEC does not sue parishes directly. TEC uses a Diocese to assert its legal claims as it did in *All Saints*.

Additionally, in these cases there was no dispute as to the hierarchical nature of the parish-diocese relationship.[67] The Quincy trial court recognized these distinctions as

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[66] Equal support for this is found in *All Saints*. TEC had the same Dennis Canon in its canons as the Diocese. Since this Court ruled that the Dennis Canon gave the Diocese no interest in *All Saints'* property, obviously it did not give TEC any either as it was also a party and a trust was not found in its favor.

[67] *See Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002) ("In their appeal, the Defendants **implicitly concede** that the Church is hierarchical."); *The Falls Church v. The Protestant Episcopal Church in the United States of America*, 285 Va, 651, 659, 740 S.E.2d 530, 534 (2013) ("TEC is a hierarchical denomination founded in 1789. *Id.* at 13, 694 S.E.2d at 558.") (citing *Protestant Episcopal Church In Diocese of Virginia v. Truro Church*, 280 Va. 6, 14, 694 S.E.2d 555, 558 (2010) ("**It is not disputed** that the entities involved in this litigation are part of a hierarchical church")); *Rector, Wardens, Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 290 Ga. 95, 96, 718 S.E.2d 237, 240 (2011) *cert. dismissed*, 132 S.Ct. 2439, 182 L. Ed. 2d 1059 (U.S. 2012) ("**The parties agree** that the Episcopal Church is a hierarchical religious denomination") *affirming Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45 (Ga. Ct.App. 2010); *Episcopal Church Cases*, 198 P.3d 66, 71, 80-81 (Cal. 2009) (this case does not explicitly state TEC is hierarchical, but suggests it relies on the findings in *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 627-28, 171 Cal. Rptr. 541, 557 (Ct.App. 1981) (dissent noting that "The findings of fact of the trial court are supported with detailed and undisputed evidence with respect to every step of the long coexistence between the four parishes and respondents" and "the hierarchical structure of PECUSA should

well.[68] These authorities do not support Appellant's argument. TEC is not a hierarchical religious organization above the level of a Diocese.

II. APPELLANTS HAVE NO INTEREST, BENEFICIAL OR OTHERWISE IN THE REAL PERSONAL OR INTELLECTUAL PROPERTY OF THE RESPONDENTS

There is no claim asserted that an express trust was created by the Diocese in favor of Appellants. Rather, similar to *All Saints*, Appellants assert that the Respondent parishes declared an express trust in favor of them through the Dennis Canon. App. Brief 33-39.

A. *An Express Trust Has Not Been Declared In Favor Of Appellants*

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be, as it was in the trial court, the controlling consideration")); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 921, 922 (N.Y. 2008) (Trial court relied on *Trustees of Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 250 A.D.2d 282, 684 N.Y.S.2d 76 (1999) (Court found **uncontroverted affidavits** and evidence by the Diocese established parishes membership and acceptance of hierarchical church's principles and policies), in granting summary judgment for the Diocese of Rochester.)); *Episcopal Diocese of Massachusetts v. Devine*, 59 Mass. App. Ct. 722, 723, 797 N.E.2d 916, 918 (2003) (citing *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 426 Mass. 268, 270, 281, 688 N.E.2d 923 (1997) ("The following pertinent **facts are undisputed** or have been established by the defendants" ... "We conclude that the Protestant Episcopal Church is hierarchical."); *Daniel v. Wray*, 158 N.C. App. 161, 168, 580 S.E.2d 711, 717 (2003) ("In the instant case, **it is undisputed** that St. Andrew's is a connectional [or hierarchical] church."); *Bennison v. Sharp*, 329 N.W.2d 466, 473 (Mich. Ct.App. 1982) ("No material fact was adduced by defendants which could lead the trial court to find that the Protestant Episcopal Church is not hierarchically structured"); *Episcopal Church in Diocese of Connecticut v. Gauss*, 302 Conn. 408, 445, 28 A.3d 302, 325 (2011) ("we reject the defendants' claim that the reasoning in *Trinity–St. Michael's Parish* is inconsistent with the reasoning in this opinion" (*Rector, Wardens & Vestrymen of Trinity-Saint Michael's Parish, Inc. v. Episcopal Church in Diocese of Connecticut*, 224 Conn. 797, 807, 620 A.2d 1280, 1285 (1993) ("The **uncontroverted evidence** at trial demonstrated that the polity of the Protestant Episcopal Church of the United States of America (PECUSA) is hierarchical."))); *Diocese of Newark v. Burns*, 83 N.J. 594, 599, 417 A.2d 31, 34 (1980) ("The judgment of the trial court is affirmed for the reasons set forth herein and in our opinion in *Graves*, also decided today" (*Protestant Episcopal Church in Diocese of New Jersey v. Graves*, 83 N.J. 572, 575, 417 A.2d 19, 21 (1980) ("In short, **the undisputed facts** demonstrate that from the time of its incorporation, St. Stephen's was an integral part of the hierarchical structure of the Church and submitted to the Church's authority in all matters connected with parish affairs."))); *Bishop & Diocese of Colorado v. Mote*, 716 P.2d 85, 90 (Colo. 1986) (**accepted the trial court finding** that TEC was hierarchical finding that "that deference was 'necessary' because high church officials had testified that the ownership of local parish property was a matter of church." *Bishop & Diocese of Colorado v. Mote*, 668 P.2d 948, 950 (Colo. App. 1983) *rev'd*, 716 P.2d 85 (Colo. 1986)); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 183-84 (Nev. 1980) (as with every case cited by the Plaintiff, each case involves a Diocese suing a Parish to retain title to the property).

[68] The court has reviewed the cases cited in TEC's brief in support of this proposition...but the court notes a number of factors that render the holdings in these cases distinguishable from the present case. All these cases involved disputes between a parish or congregation and a Diocese of the Episcopal Church.

(R. p. 2307)

In South Carolina, an express trust may be created by a "(i) transfer of property to another person as trustee" or "(ii) written declaration signed by the owner of property that the owner holds identifiable property as trustee." S.C. Code Ann. §§ 62-7-401(a)(1)(i) and (ii).[69] The cornerstone of a trust is the settlor/declarant's intent. *Bowles v. Bradley*, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995) ("The primary consideration in construing a trust is to discern the settlor's intent."); *accord, Restatement of the Law of Trusts (3rd)* § 13, 22 ("Intention to Create a Trust" and "Writing Required by Statute of Frauds") ("A trust is created only if the settlor properly manifests an intention to a create a trust relationship." The required writing must "manifest the trust intention."); *see also* S.C. Code Ann. § 62-7-102(17) (defining "terms of the trust" as "the manifestation of the settlor's intent regarding a trust's provisions..."). When the express trust is of real estate, a declaration that "manifests the trust intention," *Id.* at § 22, "must be proved by some writing signed by the party creating the trust." S.C. Code Ann. § 62-7-401(a)(2). Here, that would be the Respondent parish property owners.[70]

The writing must contain "the object and purpose of such a trust, as well as the beneficiaries thereof, ... expressed with such reasonable clearness and definiteness as to render [it] enforceable, if necessary, by the Court." *Harter v. Johnson*, 122 S.C. 96; 115 S.E. 217, 222 (1922); *see* Karesh, Coleman, *On Trusts*, § V.C.2 at pg. 10 (S.C. Bar 1977)

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[69] Effective January 1, 2006, express trusts are governed by the South Carolina Trust Code (the "SCTC"), although "the common law of trusts and principles of equity supplement [the SCTC] except to the extent modified by [the SCTC] or another statute of this state." S.C. Code Ann. §§ 62-7-102, 62-7-106, 62-7-1106. Further, the SCTC provides that creation of a trust requires (i) the settlor to have the capacity to create a trust, (ii) the settlor to indicate the intent to create a trust, (iii) the settlor to identify a definite beneficiary or charitable purpose, (iv) the trustee to have duties to perform and (v) a sole trustee who is not the sole current and future beneficiary. S.C. Code Ann. § 62-7-402(a).

[70] As the *Restatement of the Law of Trusts (3d)* § 23 ("Signing Requirement: When and by Whom") explains at the General Comment: "The typical statute of frauds provides, or is construed as providing essentially, that the writing it requires shall be signed by a party who is by law enabled to declare the Trust."

(the writing is "sufficient if it shows with reasonable definiteness the beneficiary, the trust property and the purposes of the trust"); *see also Whetstone v. Whetstone*, 309 S.C. 227, 231, 420 S.E.2d 877, 979 (Ct.App. 1992).[71]

While the necessary writing may consist of one or more writings, *Foster v. Foster*, 393 S.C.95, 97-98 711 S.E.2d 878, 879 (2011) (citing *Ramage v. Ramage*, 283 S.C. 239, 322 S.E.2d 22 (Ct. App. 1984)), "**each** writing [must be] signed by the settlor and the writings [must] indicate they relate to the same transaction." *Id.* (emphasis added); *see also Scott and Ascher on Trusts* § 6.7 (5th ed. 1995) (citing *Ramage*). Appellants cite 2 Bogert et. al., *The Law of Trust & Trustees* § 86 (3rd ed. Rev. 2008), for the proposition that "words, letters or other symbols intended to stand for the name of the party in question" constitute a sufficient signature. Bogert cites no authority for that statement, which is contained in a survey of the law of various states. However, in a footnote Bogert does cite *Smith v. Williams*, 141 S.C. 265, 139 S.E. 625, 54 ALR 964 (1927) for the proposition that "[i]t is not enough that the document is proved to be in the handwriting of the party having power to make the writing. Such party must also affix his name." Bogert, *supra*, at n. 11: Karesh agrees.[72]

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[71] The "definiteness" required appears to be the "clear and convincing evidence" standard required of oral trusts in South Carolina and of express trusts generally in other jurisdictions. *See* S.C. Code Ann. § 62-7-407 (requiring clear and convincing evidence); *see also* Black's Law Dictionary 423 (6th ed. 1990) (defining "definite" as "[t]hat which finally and completely ends or settles a controversy"); *Heartland Presbytery v. Gashland*, 364 S.W.3d 575, 588 (Mo. Ct.App. 2012) ("While it may be that 'words of technical and legally definitive meaning,' such as 'trustee' or 'trust,' are unnecessary, under Missouri law, 'the evidence to establish a trust must be cogent, clear and convincing and ... ordinarily it should dispel all doubt'; 'the court must be fully convinced that a trust was created.'");

[72] **2. Memorandum**. The requirements of writing are substantially the same as for a memorandum under the land contract clause of the Fourth Section of the [English] Statute of Frauds, i.e., contain the essential features . . .

> "The writing is insufficient if it is not signed. *Smith v. Williams* 102 S.C. 186 [erroneous citation; correct citation is 141 S.C. 265, 139 S.E. 625, 1927 SC Lexis 78, 54 A.L.R. 964 (1927)]."

Karesh, *supra* at 9-10.

It is undisputed that Appellants are not the titled owners of the parish real property nor are they listed in any of the real property documents as having any beneficial interest. It is equally undisputed that there is no writing which creates an express trust in Appellants' favor that are signed by each of Respondent parishes. Appellants instead rely upon the same principles of deference as TEC did in *All Saints*: "The Episcopal Church is a hierarchical church and courts must defer to determinations made by the national church bodies." Apps. Brief at 27. This is insufficient to create the requisite "legally cognizable form" in South Carolina.

Nevertheless, and in spite of *All Saints*, Appellants claim the weight of appellate authority from other states is that the Dennis Canon creates an express trust in favor of Appellants. Apps. Brief at 35-37.

B. *Appellants' Reliance On Cases From Other States*

Nothing in the *Jones* requirement of a "legally cognizable form" compels every state to reach the same conclusion as to the existence of an express trust. "[B]ecause there is no federal law governing the creation of trusts, that phrase must include at least the trust laws of the fifty states."[73] *Hope Presbyterian Church of Rogue River v. Presbytery of the Cascades*, 291 P.3d 711, 722 (Or. 2012).

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[73] The Oregon Supreme Court perhaps best captures the fallacy of asserting that the Dennis Canon somehow must lead to the same result in every state. While ultimately deciding under Oregon law and the specific facts of that case that a trust did exist in favor of the national church, the Oregon Supreme Court noted:

> "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."

Hope Presbyterian Church of Rogue River v. Presbytery of the Cascades, 291 P.3d 711, 722 (Or. 2012) (emphasis added; internal citations omitted).

In *Hope* the Oregon Supreme Court dealt with the issue of whether the "Property-Trust Clause" in the Book of Order created an express trust. While the court in *Hope* determined that an express trust did exist, it rejected the notion that the provision in the Book of Order itself created an express trust. Instead, while noting that Hope had taken actions, including adopting bylaws that expressed an intent to be bound by the Book of Order, the court appears to find dispositive (and clearly dispositive of the writing requirement of

In doing so, Appellants (i) ignore contrary results that arise under almost identical versions of the "Dennis Canon" found in Presbyterian denominational constitutions (even while Appellants cite to *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 290 Ga. 272, 719 S.E.2d 446 (Ga. 2011) or to cases like *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga.*, 290 Ga. 95, 718 S.E.2d 237 (Ga. 2011) (*Christ Church II*) that make reference to such Presbyterian cases), and (ii) fail to disclose key distinctions in the TEC cases on which other state courts have relied and for which there are no corollary South Carolina counterparts.

1. Presbyterian cases

Recent Presbyterian cases in Missouri, Arkansas and Indiana, not cited by Appellants, have addressed the issue of the writing necessary to create an express trust and have concluded that the "Property-Trust Clause" contained in the PCUSA Book of Order (part of the PCUSA Constitution) which is similar to the Dennis Canon does not create an express trust. *Heartland Presbytery v. Gashland*, 364 S.W.3d 575, 588 (Mo. Ct. App. 2012); *Colonial Presbyterian Church v. Heartland Presbyter,* 375 S.W.3d 190 (Mo. Ct. App. 2012); *Arkansas Presbytery v. Hudson*, 40 S.W.3d 301 (Ark. 2001); *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012).

In *Gashland*, the national church argued that the "Property-Trust Clause" in the PCUSA Book of Order,[74] both standing alone and in connection with other governance

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the Oregon statute of frauds) the fact that Hope adopted and signed (though never filed) an amendment to its articles of organization that specifically provided that Hope "is a church congregation of and holds all property as trustee for the Presbyterian Church (U.S.A.)." *Hope*, 291 P.3d at 723-25.

[74] This clause provides that

> All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a

instruments of Gashland Presbyterian Church (including By-Laws and Article of Agreement), created an express trust in favor of Heartland. Rejecting this argument, the Missouri Court of Appeals, citing *All Saints*, stated that it had adopted neutral principles of law as the "sole method for resolution of church property disputes," *Gashland*, 364 S.W.3d at 581 (citing *Jones*, 443 U.S. at 603).

First, the Missouri Court of Appeals rejected the argument that *Jones* created a federal law of trusts. The court refused to "read the quoted passage [from *Jones*] as itself establishing the substantive property and trust law to be applied to church property disputes, particularly where the very same passage (in its reference to '*other* neutral principles of law') [provides] that the applicable law – like American property and trust law in general – would be *state*, rather than *federal*, law." *Id.* at 589 (emphasis in original).

The Missouri Court of Appeals was also not persuaded that Gashland's By-Laws and Article of Agreement expressed the necessary intent to create a trust in favor of Heartland. *Id.* at 586-88.[75]

At the same time, Heartland Presbytery's claims also were rejected by another division of the Missouri Court of Appeals. *Colonial Presbyterian Church v. Heartland Presbytery*, 375 S.W.3d 190 (Mo. Ct. App. 2012). In *Colonial,* there was no deed

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> corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).

Gashland, 364 S.W.2d at 578.

75 > ...We would be hard-pressed to find that the By-Laws' general statements concerning subordination to the PCUSA's Constitution establish a trust by clear, cogent and convincing evidence, dispelling all doubt as to whether *Gashland* intended a trust relationship.

Id.

purporting to grant a trust in its property to Heartland. In spite of provisions in Colonial's Articles of Incorporation[76] and bylaws,[77] the Missouri Court of Appeals, rejected both the argument that the "Property-Trust Clause" provision in the Book of Order by itself created a trust and the argument that Colonial's organizational documents created a trust. PCUSA adopted the "Property-Trust Clause" provision to the Book of Order (a part of the PCUSA constitution) in 1983, but "the national church's constitution was never signed by Colonial." *Id.*

> "Missouri law is designed to effect the settlor's intent. . . . Our 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."

Id. at 196-97; s*ee also*, *Arkansas Presbytery v. Hudson*, 40 S.W.3d 301 (Ark. 2001).

Finally, In *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012), the Supreme Court of Indiana considered the same "Property-Trust Clause" of the PCUSA Book of Order. The local church had acquired the property in its own name with no reference to a trust and had subsequently paid from its own funds for all improvements to the property. Following the 1983 inclusion of the "Property-Trust Clause" in the Book of Order, the clerk of the session (local church) had signed meeting minutes which "requested" the bylaws be updated to bring them in line with the Book of Order. The local church had also amended its bylaws in 1998 and 2000 recognizing "the constitution of [the PCUSA] as the authority for the governance for of the church and its

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[76] The Articles of Incorporation provided that "the purpose for which this corporation is formed is to incorporate as a congregation of [the national church] under the laws and regulations of the national denomination." *Colonial,* 375 S.W.3d at 193-94.

[77] Colonial's bylaws, until certain amendments leading to the action in question, noted that "[b]eing a union congregation of [the national church], we recognize that these Bylaws and all of their provisions are subject to the Constitution of [the national church]." *Id.* at 194.

congregations' but were silent on whether Olivet adopts or recognizes the PCUSA Constitution as the authority controlling property ownership." *Id.* at 1111. Nevertheless, the session minutes and the by-law changes were not transactionally related and reading them together did not constitute the signed writing ending of a "clear and unequivocal" intent of the local church "to create a trust on its property.[78]

2. Dennis Canon cases

The "Dennis Canon" cases Appellants rely upon for the argument that it creates an express trust when viewed under neutral principles of law, are distinguishable for the very reason the *Hope* court mentions above: state laws are different.

Among the cases from other jurisdictions Appellants cite to support their contention *All Saints* should be altered, is the decision by the California Supreme Court *In Re Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009). In finding a trust for the Diocese of Los Angeles and TEC[79], the court relied on a California statute, passed in 1982, which altered California's trust law to permit the unilateral creation of a trust solely by the declaration of a general church in which the local church was a member.[80] Prior to

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[78] Further, and more importantly in the instant case, the Supreme Court of Indiana noted that the trust provisions were in the PCUSA constitution and "the 1983 session meeting minutes and the 1998 and 2000 bylaws do not refer and connect with each other such that they can be read as part of the same transaction." *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d at 1113. The court went on to add that even if these documents, taken together, "could constitute a signed writing, the relevant language is not a 'clear and unequivocal' statement of Olivet's intent to create a rust on its property" and granted Olivet's motion for summary judgment on the issue. *Id.*

[79] Respondents are unaware of any parish property dispute where TEC sued a parish directly. Usually the Diocese would sue the parish to reclaim the real property and TEC either sues along side the Diocese or the Diocese is the sole party.

[80] The California statute provided in part that "[n]o assets of a religious corporation are or shall be deemed to be impressed with a trust, express or implied, statutory or at common law ... unless and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide." *Id.* at 81 (citing Cal. Com. Code § 9412(c)). California expressly changed its laws to create a "legally cognizable" method for creating an approach that would defer to the Dennis Canon. Indeed, the dissent in that case, while agreeing that the statute in question controlled and impressed a trust, disagreed with the idea that the court had applied neutral principles of law, but rather explained that "through legislative fiat a 'superior religious

this legislation, California courts had found there was no express trust for the Diocese or TEC in parish property. In *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (Ct. App. 1981), the Court of Appeals found "no express trust exists in [three of the four parish] propert[ies]."[81] The court determined the hierarchical theory[82] and implied trust theory[83] were not permissible methods of determining property disputes between church groups because they inevitably forced courts to examine ecclesiastical controversies. Finally, the court examined whether an express trust was created because the articles declared "in substance that the Constitution, Canons and discipline of PECUSA [TEC] and the Diocese shall always form part of the Articles of Incorporation and prevail against anything repugnant." *Id.* at 623. The Court found these

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body or general church' may unilaterally create trusts in its favor" and also noted, just as this court did in *All Saints*, that "no principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner." *Id.* at 85-86. California expressly changed its laws to create a "legally cognizable" method for creating an approach that would defer to the Dennis Canon. Indeed, the dissent in that case, while agreeing that the statute in question controlled and impressed a trust, disagreed with the idea that the court had applied neutral principles of law, but rather explained that "through legislative fiat a 'superior religious body or general church' may unilaterally create trusts in its favor" and also noted, just as this court did in *All Saints*, that "no principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner." *Id.* at 85-86.

[81] The Parishes "held title to their property in their own names, paid for it out of their own funds, did not alienate it in any express manner in their articles of incorporation, and did not subject themselves to express restraints on their property by reason of the constitution, canons, and rules of PECUSA and the Diocese." *Barker*, 115 Cal. App. 3d at 625. The fourth parish was found to have an express trust because when the parish was formed the Diocese Constitution and Canons had a reverter clause that when the charter of the parish was revoked, the property reverted back to the Diocese. This language was not present in the Diocese Constitution and Canons when the other three parishes were formed.

[82] The "use of the hierarchical theory is restricted to doctrinal and ecclesiastical controversies and does not extend to property disputes; that property disputes between ecclesiastical claimants, like property disputes between temporal claimants, must be resolved by neutral principles of law. We, therefore, reject and disapprove the reliance placed by the trial court on hierarchical theory as a means of adjudicating this cause."

Barker, 115 Cal. App. 3d at 615.

[83] The implied trust theory almost inevitably puts the civil courts squarely in the midst of ecclesiastical controversies, in that every dispute over church doctrine which produces strongly held majority and minority views forces the court to determine the true implied beneficiaries of the church entities involved. If the civil courts cannot properly determine which competing group is the bearer of the true faith, they cannot determine for whose benefit title to church property is impliedly held in trust.

Barker, 115 Cal. App. 3d at 618.

premises "were a far cry from an express trust for the benefit of the Diocese and PECUSA." They were merely "expressions of present intention."[84] *Id.* at 623, "As in matrimony, *always* and *forever* do not preclude a change in heart and do not create an express trust in another's property. *Id.* The parishes "did not subject themselves to express restraints on their property by reason of the constitution, canons, and rules of PECUSA and the Diocese." *Id.* at 625.

Appellants also cite to *Episcopal Diocese of Massachusetts v. DeVine*, 797 N.E.2d 916 (Mass. App. 2003) (TEC was not a party to this case), although the court in that case specifically declined to apply neutral principles of law to the issue at hand and instead deferred[85] to Diocesan authority.[86] *Id.* at 919. The court discussed the existence of an express trust, but in its conclusion stated the "judgment in the first action shall be modified to delete the declaration that St. Paul's in Brockton holds its real and personal property in trust for the Diocese and PECUSA and, as so modified, is affirmed." *Devine*, 797 N.E.2d at 925.[87]

Appellants' reliance on *Christ Church II* and *The Falls Church v. The Protestant Episcopal Church in the United States of America*, 285 Va. 651, 740 S.E.2d 530, (Va.

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[84] The court found that "such declarations no more restrictive of future amendments to the articles of incorporation than would be similar statements in an automobile dealer's articles that it would always distribute General Motors products and always be bound by General Motors rules and policies, or statements in a political club's articles that it would forever support the Democratic Party and be forever bound by the latter's rules and platform. *Barker*, 115 Cal. App. 3d at 623.

[85] The court found that "the right to use and possess" the property "inextricably intertwined with the question of which individuals hold authority" ... "a question that essentially depends on the authority of the Diocese and its bishop over the mission or parish." *Id.* at 921-22.

[86] The court found it had jurisdiction since "the present case arises on a request by the Diocese for civil enforcement of the rights determined by ecclesiastical authority." *Devine*, 797 N.E.2d at 922 (in this case, the ecclesiastical authority was the Bishop of the Diocese, not TEC since it was not a party to the litigation nor had it made any determinations. The court relied on its deference precedent in that the court is required to "defer to the determination of diocesan authority." *Devine*, 797 N.E.2d at 918-19 (citing *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 426 Mass. 268, 281, 688 N.E.2d 923 (1997)).

[87] TEC was not a party to this case and could not have its property rights determined by the court and the court directed the trial court to remove the finding of a trust for the Diocese and TEC from its final order.

2013), in the context of express trusts, is especially misguided. The court used prior Georgia case law to state the case involved a trust implied under neutral principles of law[88] even though trust was not created under Georgia's express of implied trust statutes.[89] The court in *Christ Church II* ultimately concluded that "neutral principles of law demonstrate that an implied trust in favor of the Episcopal Church exists on the property of Christ Church," *Christ Church II*, 718 S.E.2d at 255, rather than the Dennis Canon creating an express trust.[90] However, the dissent in *Christ Church II* argued that such a concept was not even legally cognizable in Georgia. *Id.* at 271 (Brown, J., dissenting) ("the majority declares a new type of implied trust in violation of existing Georgia law").[91]

With respect to *Falls Church*, the Virginia Supreme Court did not determine that an express trust was created (indeed a relevant statute forbid it from reaching that result) and instead found that a constructive trust existed. *Falls Church*, 740 S.E.2d 539-42. However, as noted in *Falls Church*, the Virginia Supreme Court in deciding the *Falls Church* case relied on a statute that permitted denominational trusts[92] and an implied trust

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[88] "This case, like previous cases, involves a trust implied under neutral principles of law, even though one aspect of that analysis is consideration of trust language expressly included in the documents establishing the governmental rules of the general church." *Christ Church II*, 718 S.E.2d at 245.

[89] "[T]he fact that a trust was not created under our State's generic express (or implied) trust statutes does not preclude the implication of a trust on church property under the neutral principles of law doctrine. *Id.*

[90] "we need not rely exclusively on the Dennis Canon. Instead, we consider the canon as one—although a strong one—of the many indications that Christ Church holds its property in trust for its parent church." *Id.* at 254.

[91] Christ Church II's author, Justice David Nahmias is an Episcopalian. About Justice Nahmias, http://web.archive.org/web/20101105020635/http://www.justicenahmias.com/about.php (accessed June 13, 2015) (Justice Nehmias's campaign website for the 2010 election).

[92] The Virginia Supreme Court used the presence of the Virginia statute, Code § 57-7.1, permitting denominational trusts in real or personal property, to find the existence of an implied trust through Virginia's constructive trust doctrine, specifically, the provisions regarding the creation of such a trust after the breach of a fiduciary duty. *Fall Church*, 740 S.E.2d at 539-42.

and created a constructive trust based on the violation of a fiduciary duty; a concept foreign to constructive trusts in South Carolina.[93] Constructive trusts arise not out of an express declaration of trust but as an equitable remedy and are, therefore, creations of courts and not individuals. Therefore, *Christ Church II* or *Falls Church* cannot be cited for the proposition that the Dennis Canon creates a trust in favor of Appellants in South Carolina.

Finally, Appellants' claim that *Jones v. Wolf* requires that the embodiment of any trust interest in "some legally cognizable form" must involve only a "minimal burden." Apps. Brief at 35. Appellants state "This argument was not presented in *All* Saints..." *Id.* They are correct; neither was it presented here. Rather than citing the record of this case for evidence or argument that complying with South Carolina law would create a substantial burden, they argue cases from other states. This argument has no merit.[94] Even if it did, it has been waived. It was not raised at trial nor in Appellants' 182-page Motion to Reconsider. It cannot now be raised on appeal. *S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 902, 907 (2007).

C. No Constructive Trust Exists In Favor Of Appellants

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[93] Virginia case law on the creation of constructive trusts differs from South Carolina since "certain species of constructive trusts [in Virginia] can ... spring from the violation of some positive fiduciary obligation..." *Id.* at 539.

[94] The record demonstrates that all of the plaintiff parishes have prepared or executed more complex legal instruments related to their property and corporate affairs than a legally cognizable trust document, including recorded deeds, newly recorded quitclaim deeds, amendments to corporate charters, including the filing of these instruments with the Secretary of State, and resolutions of disaffiliation. They could easily have prepared such a trust document with minimal burden had they wished to do so.

This case does not involve a question of burden, but a lack of control. As an association, TEC's only remedy for dioceses and parishes that will not grant it a trust interest is expulsion of the diocese from membership in the association comprising TEC. As the record in this case shows and the failure to obtain trust documents further demonstrates, TEC lacks the control mechanisms necessary to compel creation of such a trust. It therefore seeks to have this court compel what it cannot.

Appellants argue that the Respondent parishes' property is subject to a constructive trust.[95] Appellants cite no authority for the proposition that a constructive trust can be imposed upon property not obtained by a purported bad actor through some malfeasance during its acquisition.[96] *Bank of Williston*, 106 S.C. 386, 391, 91.S.E. 296, 298 (1917) ("[C]onstructive trusts do not arise by agreement or from intention, but by operation of law; and fraud, actual or constructive, is their essential element. Actual fraud is not necessary, but such trust will arise whenever the circumstances under which property was *acquired* make it inequitable that it should be retained by him who holds the legal title.") (emphasis added).[97] Moreover, Appellants' argument for a constructive trust is conclusory. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal); *Eaddy v. Smurfit–Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.") As the circuit court

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[95] Other than express trusts, the only other recognized trusts in South Carolina law are resulting trusts and constructive trusts. These are judicially created that are not founded on general trust law principles. S.C. Code Ann. § 62-7-102, cmt. (explaining why resulting trusts and constructive trusts are not covered by the SCTC); Karesh, *supra*, § XIV at pp. 66-67 (citing *Scott v. Scott*, 216 S.C. 280, 57 S.E.2d 470 (1950); *Wolfe v. Wolf*; 215 S. C. 530, 56 S.E.2d 343 (1949); *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296 (1917).

[96] Rather, constructive trust cases in South Carolina focus on actions or omissions relative to the acquisition of a property interest. *See, e.g., Searson v. Webb*, 208 S.C 453, 38 S.E.2d 654 (1946) (cousin purchased property in own name when he told second cousin he did not have money to purchase the same property both had agreed to purchase together); *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E.2d 168 (1943) (husband/executor of intestate wife took share of property that was to be transferred to couple's two sons and managed for husband's exclusive benefit); *see also* Karesh, *supra*, § XIV.B at 67-70 (generally discussing constructive trusts arising in acquisition of title).

[97] *See Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987) ("constructive trust will arise whenever circumstances under which property was acquired make it inequitable that it should be retained"); *see also Restatement of Restitution and Unjust Enrichment* § 55 cmt. b (Tent. Draft No. 6 2008) (component of constructive trust analysis is that one party's "acquisition" of property leads to that party's unjust enrichment).

held, "The undisputed evidence is that all the real and personal property at issue was purchased, constructed, maintained and possessed exclusively by the Plaintiffs." (R. p. 79) Indeed, were the property titled in TEC's name rather than in the Respondents, the likelihood of a constructive trust existing in Respondents' favor would be great as TEC has invested very little, if anything, in the real or personal property at issue. "There is no 'clear, definite and unequivocal' evidence of the existence of a constructive trust in TEC or TECSC's favor." *Id.*

III. THE ALLEGED INFRINGEMENT OF TEC'S MARKS WAS NOT AN ISSUE IN THIS CASE

TEC alleged Lanham Act and other trademark claims only against individual counterclaim defendants,[98] and Appellants' motion to add those parties was denied by the trial court because those parties were not "necessary." Or. Denying Def. Mot. to Join Additional Counterclaim Defs. (Sept. 27, 2013). (R. pp. 33-38) TEC never moved to reconsider the decision of the trial court, nor did TEC file an appeal. "An unappealed ruling is the law of the case and requires affirmance" ... "should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case. *Dreher v. S. Carolina Dep't of Health & Envtl. Control*, __ S.E.2d __, 2015 WL 1223709, at *3 (S.C. Mar. 18, 2015) (citing *Shirley's Iron Works, Inc. v. City of Union,* 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)).

Similarly, Appellants raise the issue of cancellation of the Respondents' marks. It was neither pled nor was it tried.[99] As the circuit court held, Appellants made no

[98] Ans. and Counterclaims of TEC at 39-40, 51-55 (Mar. 27, 2013)

[99] Appellant's argument on appeal concludes with the assertion that the Respondents' "registrations should be cancelled." Apps. Brief at 44. A cause of action for cancellation of a registered mark is not found

statutory or common law trademark claims against Respondents. Or. Def. TECSC Mot. For a Prelim. Inj. at 6 (Nov. 8, 2013).

The circuit court found that the Appellants intentionally used the Respondent's marks after the Diocese's withdrawal from TEC. It was that unauthorized use *by Appellants* that created the instances of confusion described at trial.[100] Appellant TECSC's only defense to using the subject marks[101] was "that the marks were derived from the marks of TEC."[102] (R. p. 84) The circuit court found that the historical record presented at trial did not support that defense. Appellants identify nothing in the record to challenge the finding that the words "Episcopal" and "Protestant Episcopal Church" are neither unique to, nor were first used by, TEC. "If anything," the Circuit Court noted, "the record supports the conclusion that TEC derived its name from those of the preexisting 'Protestant Episcopal Churches' which formed it including that of the Diocese and its preexisting 'Protestant Episcopal' parishes." (R. p. 85)

Appellants argue that Federal and State registrations "are not equals" because a federal registration is *prima facie* evidence of protected ownership and validity, while "state registration is not." Apps. Brief at 39. That distinction is mooted, however, by admissions in the record made by the Appellants. The Appellants admit that the Diocese is the owner and registrant of its marks and also admit that those marks are "famous" within the meaning of §39-15-1165. (R. p. 81) *Ans. and Counterclaim of The Episcopal Church* at ¶ *341*; *Ans. and Counterclaim of TECSC* at ¶ 498, *The Episcopal Church in*

among the Appellants' counterclaims. Indeed, there are statutory requirements and prerequisites for an action for cancellation of a registered mark, *see* S.C. Code Ann. §39-15-1175, which have not been met by Appellants.

[100] (R. p. 84)

[101] The subject marks listed by Appellants are the three word marks, but notably omits the Diocesan Seal logo registrations.

[102] Appellant TEC only plead two defenses: failure to state facts sufficient to state a cause of action and lack of authority to bring this suit.

South Carolina's Response to Request for Admissions by Certain Parishes, October 3, 2013, No. 13. Likewise, the Appellants' defense that the Respondents marks are invalid[103] is defeated by their own admissions.

Appellants fail to address Respondents' cause of action based on S.C. Code Ann. §16-17-310 "Improper Use of Names." [104] That statute prevents any society or organization from mimicking the identity of an existing charitable organization in this state by using their names or emblems. The circuit court found that this statute provided additional grounds for injunctive relief. Appellants have simply ignored it.[105]

The only issue Appellant TECSC raised before the trial court was the validity of the Respondents' mark registrations. Appellants admitted the Diocese was the owner and the registrant of the marks. The circuit court found that the record did not support the Appellant's claim that the Respondents' derived their marks from the marks of TEC[106] and that Respondents names and marks were used before TEC's existence. [107] (R. p. 84)

IV. THE LEGISLATURE DID NOT INTEND APPELLANTS TO HAVE ANY INTEREST, BENEFICIAL OR OTHERWISE IN THE ASSETS HELD BY THE TRUSTEES

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

[104] The text of that statute was recited in the circuit court's Order. (R. p. 80 at n. 20)

[105] "An unappealed ruling is the law of the case and requires affirmance" ... "should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case. *Dreher*, 2015 WL 1223709 at *3.

[106] TEC's marks were admitted into evidence in an attempt to show Respondents marks were derived from TEC's. This effort failed when evidence was submitted showing use of these names before TEC's existence.

[107] Appellants cite *Purcell v. Summers*, 145 F.2d 979 (4th Cir. 1944), and a trademark treatise for the proposition that a "parent religious group" may prevent a "schismatic group" from "use of the same name." Apps. Brief at 43. The Purcell case involved use of the *exact same* name. The proposition, therefore, does not fit the present case, where the Respondent Diocese's name is not the same as Appellants. The proposition also does not address the temporal situation that exists in the present case, where the Respondent Diocese existed before the Appellant.

The rules of statutory construction in South Carolina are designed "to ascertain and effectuate the intention of the legislature." *Rhame v. Charleston County School District.*, __ S.E.2d __, 2015 WL 1814019 (S.C. 2015). "Where a statute's terms are clear and unambiguous on their face," it must be applied "according to its literal meaning," with the words given "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* It is "proper to consider the title or caption in aid of construction to show the intent of the legislature." *Id.*

Reduced to its simplest form, Appellants' argument is that the legislature in 1880 (R. pp. 1097-1098) and again in 1902 (R. pp. 1100-1102) created the "Trustees of the Protestant Episcopal Church in South Carolina" with the intent that it hold property in trust for the Protestant Episcopal Church in the United States of America because of this phrase: "said church, in said Diocese." Apps. Brief at 45.

The Act creating the Trustees intended to grant powers to persons exclusively associated with "The Protestant Episcopal Church for the Diocese of South Carolina." Neither Act even mentions "The Protestant Episcopal Church in the United States of America." In 1880, the Protestant Episcopal Church for the Diocese of South Carolina was a South Carolina unincorporated association which had been in existence since May 1785. The Protestant Episcopal Church in the United States of America was a different unincorporated association created by the Diocese along with six other state church associations. The Diocese used the same name the legislature put in the title of the Act, "The Protestant Episcopal Church for the Diocese of South Carolina." (R. p. 1836) It had also used others. (R. p. 47 at ¶ 2) (R. pp. 1177-1185) The legislature directed that

reporting be made to the Diocese not to TEC. Since its creation in 1880, TEC has had no role of any kind in the Trustees' governance.

The circuit court's finding was not erroneous. Its statutory interpretation agrees with the actual operation of the Trustees. (R. p. 76 at n. 14) Appellants resort to "subtle" and "forced" construction in their argument that the legislature, having never mentioned TEC by name, meant that "said church" was TEC. (R. p. 238, line 21 - p. 239, line 6)

V. RESPONDENT DIOCESE'S CORPORATE ACTIONS WERE NOT *ULTRA VIRES*

Appellants argue lack of corporate authority on the part of the Diocese's Board of Directors (Standing Committee) and its President, Mark Lawrence to amend the Diocese's Articles of Incorporation in 2010. Apps. Brief at 47-50.

The circuit court correctly found that Appellants, either as alleged members of the Diocese or as third parties could not challenge the validity of the Diocese's amendment of its corporate purpose. (R. p. 70 at. n. 9) S.C. Code Ann. §§ 33-31-304, 33-31-630. Even if Appellants could challenge that action, the Diocese had the power to amend its Articles of Incorporation as did the parish religious corporation in *All Saints*, 385 S.C. at 450. ("Pursuant to the South Carolina Non-Profit Act, a religious corporation may amend its Articles of Incorporation to add or change a provision not required in the articles. S.C. Code Ann. §33-31-1001.")

Appellants argue the circuit court's findings were wrong because Appellants disagree with the circuit court. In Appellants' view, the circuit court should have accepted their legal expert witnesses' view of the evidence. Apps. Brief at 47-48. Appellants also appear to challenge the circuit court's finding that The Standing

Committee was the Board of Directors of the Diocese in civil matters. However, they do not argue that finding is not reasonably supported by the evidence, nor could they. (R. p. 120, lines 13-14) (R. p. 138, line 1 – p. 139, line 21) (R. p. 139, lines 3-8) (R. p. 165, lines 1-4, 14-23) (R. p. 198, lines 7-11) (R. p. 755, line 25 – p. 756, line 1) (R. p. 1445). Ultimately, the basis of their arguments becomes clear: the Diocese was a subordinate and the circuit court should have deferred. Apps. Brief at 49. "...The order simply does not take the appropriate view of this case's nature." *Id.*

CONCLUSION

Six years ago two parties in this case were also parties in *All Saints*. They were on the same side then. This Court disagreed with their legal arguments. One of them accepted this Court's ruling; one of them has not. That is why the same issues are before this Court again.

There is no dispute that Respondents followed the appropriate corporate procedures "explicitly severing any legal relationship with [Appellants]." *All Saints,* 385 S.C. at 451. Recognizing these facts, Appellants make the existence of underlying disputes over doctrine the foundation of the argument that Respondents' straight-forward neutral principles causes of action are a masquerade. Surely if there is a masquerade, it is not Respondents' claims, for *All Saints* had its origin in "theological differences" as well. With that fact, Appellants' disguise is revealed: they argue against the precedence of *All Saints*.

Appellants contend they should be deeded the real and personal property of thirty-six parish churches spread across the South Carolina low country. Seventeen of these predate TEC's existence. Thirty-six predate TEC's Dennis Canon. All left when they

amended their governing documents and voted to withdraw. There was no Dennis Canon in South Carolina in effect at that time. Appellants nevertheless contend TEC's Dennis Canon is sufficient to create a trust in these historic properties.

TEC's unilaterally created "trust" flies in the face of both the United States Supreme Court decision upon which it was based and South Carolina law. The Dennis Canon's creation did not "reflect the intentions of the parties," nor was it "in accord with the desires of the members," nor did it "give effect to the result indicated by the parties." *Jones*, 443 U.S. at 604, 605, 606. The fact that the Dennis Canon was not the product of a consensual agreement "embodied in some legally cognizable form" is proof in itself that TEC lacks the very control Appellants argue exists. Appellants therefore ask this Court to compel what TEC cannot.

It is respectfully submitted that the circuit court order should be affirmed.

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Dated: August 10, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013

Appellate Case No. 2015-000622

The Protestant Episcopal Church
In the Diocese of South Carolina et, al. .....Respondents,

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The Episcopal Church (a/k/a/ The Protestant
Episcopal Church in the United States
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in South Carolina .....Appellants.

CERTIFICATE OF COMPLIANCE WITH RULE 211 (b)

Pursuant to Rule 211(a), SCACR, I hereby certify that the Brief of Respondents comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

C. Alan Runyan

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PROOF OF SERVICE

I, Lisa P. Whitehurst, an employee of Nelson, Mullins, Riley & Scarborough, attorneys for the Respondents, do hereby certify that I have served a copy of Final Brief of Respondents and Proof of Service, on this the 10th day of August, 2015, by electronically mailing copies of the same to the attorneys identified below:

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