THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013

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

v.

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

RETURN

Respondents' post-opinion motions present two types of arguments: arguments that are wrong and rehashed, and arguments that are wrong and untimely. Sections I and II of this return briefly outline the principles Appellants believe compel a ruling in their favor. Section III addresses each of Respondents' arguments for rehearing. Section IV addresses the recusal motion.

The Court should deny the motions and let stand its conclusion that the disassociated Diocese is not the successor of the Protestant Episcopal Church in the Diocese of South Carolina. The breakaways have left The Episcopal Church. They may not claim gifts to or assets of the associated Diocese of that Church.

I.

The First Amendment prevents civil authorities from interfering in church government. This principle compels a ruling in Appellants' favor.

The Dennis Canon is clear. It explains parish property is held in trust for The Episcopal Church and "the Diocese thereof." (R.p.1799). It uses familiar language: It declares a trust—a well-established property interest—and identifies the beneficiaries. The Canon is legally cognizable, excluding nebulous language like identifying the beneficiaries as the faction of the Church that has not departed from doctrine. All parts of The Episcopal Church have assented to it, most by express written language, all by historical affiliation.

The Canon is longstanding, and the Diocese had a trust canon *before* the Dennis Canon, (R.pp.1839-40), making Respondents' argument about accession baldly insincere.

The State has a compelling interest in adjudicating a dispute about property within the State's borders, but the State has no interest in adjudicating the validity or mechanics of the Dennis Canon's enactment and the First Amendment prohibits any attempt by the court system to do so. This Canon is but one of the Church's many rules involving church property, and it is particularly significant to this dispute that the Church also requires a plainspoken promise of loyalty from all of its leaders, especially its Bishops. Respondents would have this Court invade The Episcopal Church's government structure by declaring the Church's rules are meaningless and valueless. The First Amendment protects all churches from such an invasion.

II.

This Court's reversal of the circuit court is supported by the overwhelming weight of precedent. The Dennis Canon has been enforced by courts in North Carolina, New York, Connecticut, Massachusetts, Pennsylvania, California, Virginia, Colorado, Missouri, Nebraska, Ohio, Tennesee, Wisconsin, and Georgia based on the same princples argued by Appellants here. See **Attachment A**; see also (Brief of Appellants, pp.36-37). The Supreme Court of Georgia correctly recognized the Canon codified what has been implicit since the National Church's founding. *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga.*, 718 S.E.2d 237, 254 (Ga. 2011) ("*Christ Chuch II*"). The Church's polity is and always has been that parishes are stewards. A steward's job is to hold an asset for someone else's benefit.

It is helpful to contrast Respondents' circumstances with those of a different case. The local church in *Carrollton Presbyterian Church v. Presbytery of South Louisiana of the Presbyterian Church (USA)* won its property because it had complied with a provision in the governing documents of the denominational church that permitted local churches to opt out of rules governing property. 77 So.3d 975, 980-81 (La. 2011). The record here proves precisely the opposite. The Episcopal Church's governing documents contain no such opt-out provision, and most Respondents had documents with strong language tying their purposes to the denomination, while all had to pledge their accession as a condition for admission into the Diocese and The Episcopal Church. Respondents' hasty removal of such

language before filing this lawsuit is to no avail. *Jones v. Wolf*, 443 U.S. 595, 606 (1979) (neutral principles examines arrangements as they existed "before the dispute erupte[d]").

A ruling in Appellants' favor is also supported by the overwhelming weight of South Carolina precedent. These precedents include *Banks v. St. Matthew Baptist Church*, 406 S.C. 156, 750 S.E.2d 605 (2013), *Williams v. Wilson*, 349 S.C. 336, 563 S.E.2d 320 (2002), *Knotts v. Williams*, 319 S.C. 473, 462 S.E.2d 288 (1995), *Dillard v. Jackson*, 304 S.C. 79, 403 S.E.2d 136 (Ct. App. 1991), *Seldon v. Singletary*, 284 S.C. 148, 326 S.E.2d 147 (1985), *Bowen v. Green*, 275 S.C. 431, 272 S.E.2d 433 (1980), *Adickes v. Adkins*, 264 S.C. 394, 215 S.E.2d 442 (1975), and *Bramlett v. Young*, 229 S.C. 519, 93 S.E.2d 873 (1956). In *Pearson v. Church of God* this Court said its decisions were "consistent [with the U.S. Supreme Court's decisions] in letter and in spirit." 325 S.C. 45, 51, 478 S.E.2d 849, 852 (1996). This Court also has longstanding precedent explaining charitable trusts are upheld under circumstances where private trusts would fail. *Porcher v. Cappelmann*, 187 S.C. 491, 495, 198 S.E. 8, 10 (1938); *Harter v. Johnson*, 122 S.C. 96, 110, 115 S.E. 217, 221 (1922).

The Court's decision correctly follows precedent recognizing the associated Diocese as the lawful successor and the beneficiary of property owned by the Trustees Corporation. *Harmon v. Dreher* is directly on point. 17 S.C. Eq. (Speers Eq.) 87, 123-24 (1843). So is *Department of Mental Health v. McMaster*. 372 S.C. 175, 182, 642 S.E.2d 552, 555-56 (2007). Respondents have implied they intend to claim Appellants won no Diocesan property other than Camp St. Christopher. Their

position disregards Chief Justice Beatty's footnote explaining the disassociated Diocese may not claim to be the successor of the Protestant Episcopal Church in the Diocese of South Carolina and may not claim to own or be the beneficiary of assets held for the Diocese of that Church.

Unlike Appellants' arguments, Respondents' contentions have great difficulty with precedent. Respondents ignore the cases explaining this is an action in equity, not an action at law. *Williams*, 349 S.C. at 339-40, 563 S.E.2d at 322; *Bramlett*, 229 S.C. at 534-35, 93 S.E.2d at 881. Respondents ignore the cases explaining the burden is on the challenger to prove a church structure that is different than the structure commonly associated with a denomination. *Williams*, 349 S.C. at 342, 563 S.E.2d at 323; *Bowen*, 275 S.C. at 435, 272 S.E.2d at 435. Respondents ignore the cases explaining deference is required when a property dispute is merely a masquerade for a dispute about governance, and one of those cases is *All Saints*. See *Banks*, 406 S.C. at 165-66, 750 S.E.2d at 610; *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 385 S.C. 428, 445, 685 S.E.2d 163, 172 (2009). The present case is plainly a masquerade as Respondents are attempting to upend through the civil court system intrachurch arrangements the parties established over a centuries-old relationship.

III.

The Court should reject each of Respondents' alleged grounds for rehearing. Most of these arguments are barred from consideration because they were not argued to the trial court or to this Court and a party may not raise an issue for the first time in

a petition for rehearing. *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011). Rehearing is also not an opportunity to present points *the lawyers* overlooked or misapprehended, nor is rehearing an opportunity to try the case in the appellate court a second time. *Id.* at 469, 719 S.E.2d at 644.

Different Standards for Secular and Religious Organizations

Respondents repeatedly argue the Court has improperly treated religious organizations differently than the Court would treat non-religious organizations.

The U.S. Supreme Court has explained "[t]he text of the First Amendment . . . gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.*, 565 U.S. 171, 189 (2012). The First Amendment protects a church's right to have whatever governing structure it chooses.

The Episcopal Church has extensive rules about church property, and the Diocese and parishes assented to these rules either through express language or conduct. Maintaining neutrality towards religion requires a civil court to respect these rules. The same principle prevents a court from deconstructing these rules when a majority of a church's local congregants wish to go their own way.

Respondents cite Justice Rehnquist's decision in *Synanon Foundation v. California*, which they read to mean religious trusts are not treated differently than other charitable trusts. The statement is obviously true in the context of *that* case—a case brought by the Attorney General under a statute allowing him to sue when he has reason to believe a trust is not being lawfully administered. See 444 U.S. 1307, 1307 (1979). There are no special rules exempting religious trusts from prosecution for

fraud. By contrast, Justice Rehnquist also wrote that, in "intrachurch disputes," the constitution limits the extent to which the civil court system may inquire into and determine "matters of ecclesiastical cognizance and polity." *Gen. Council on Fin. & Admin. of United Methodist Church v. Sup. Court of Cali.*, 439 U.S. 1355, 1372 (1978). Chief Justice Toal expressed similar sentiments in *Knotts* when she wrote for a unanimous court and explained a civil court deciding an intrachurch dispute is mindful of "the implied obligations imputed to those parties to the controversy who have voluntarily submitted themselves to the authority of the church by connecting themselves with it." 319 S.C. at 478, 462 S.E.2d at 290. The First Amendment requires a different approach when factions of a church are fighting with each other over church polity.

The Court Has Not Imposed a New Rule or New Standard

Respondents argue the Court has retroactively applied a new standard to them.

There is no new standard. As noted above, this Court's decision is supported by over 100 years of precedent. *All Saints* thus correctly held "where 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" and where there is no such masquerade the court should examine how the parties "organize[d] their affairs" in order to resolve the dispute. 385 S.C. at 444-45, 685 S.E.2d at 171-172. To the extent the Court's decision rests on overruling *All Saints*, Appellants gave notice of their intent to argue against that precedent. Yet

Respondents never argued their rights would be infringed by overruling *All Saints* or by giving effect to the Dennis Canon under circumstances plainly distinguishable from those in *All Saints*. The argument is wrong on the merits, but the Court need not even consider the argument because it is improperly asserted for the first time on rehearing.

Favoring One Religious Group Over the Other

The command in *All Saints* to determine first whether there is a "masquerade" and, absent that, to examine how the parties "organized their affairs" is a neutral standard. It does not favor one religious group over another. Rather, the outcome of any case will turn on facts showing how the parties historically arranged their relationship and affairs. The Court's decision is no different from any case enforcing a hierarchical denomination's beneficial interest in local church property, and there have been many such cases in South Carolina and in other jurisdictions. Finding for one church in a legal battle does not "establish" that church, as that is the nature of litigation—litigation Respondents here initiated.

***Jones v. Wolf* Did Not Create a Federal Law of Trusts**

Reading *Jones* as a whole, the case stands for the proposition that a court may use neutral principles to resolve a property dispute by examining evidence of the historical relationships between the parties as well as evidence of the parties' understandings of their relationship before the dispute arose. Courts in fourteen states have enforced trusts in favor of The Episcopal Church and its Dioceses. See **Attachment A**. It is also worth noting that of the five states from which Respondents

cite cases to support their argument, The Episcopal Church and its Dioceses have litigated over property in two of them—Missouri and Ohio—prevailing in each.

Individual Parish Accession

Respondents contest varying issues with respect to their accession. All of these arguments are improper, having not been raised in Respondents' brief.

Respondents dispute each parish's accession. Not only was this not raised in their appellate brief, but it has never been raised in this litigation and there were multiple opportunities to do so. Appellants gave the circuit court an 89-page proposed order, citing hundred of pages of trial exhibits, outlining their express accession argument for 29 of the 36 parishes. Respondents did not contest the evidence. Appellants filed a motion for reconsideration restating the same arguments. Again, Respondents did not contest the evidence. Appellants made the same argument in their appellate brief. (Brief of Appellants, p.38). Respondents did not contest the evidence. Respondents may not wait until rehearing to raise this dispute.

Respondents argue their accession documents are non-specific and not signed. Bogert says the signing requirement is satisfied by "placing in the document [] words, letters, or other symbols intended to stand for the name of the party in question." 2 George G. Bogert et al., *The Law of Trusts and Trustees* Sec. 86 (3d ed. Rev. 2008) (internal citations omitted). The accession documents are the typical governing documents of a local church: they are parish constitutions, parish bylaws, and vestry resolutions. Respondents produced these during discovery as their own documents and the documents acknowledge, in one form or another, Respondents' understanding

that they were a part of The Episcopal Church and subject to its rules.

Revocability

Respondents argue that any trusts were revocable. This argument has not been made until now, and Respondents ignore South Carolina law, which presumes the trusts to be irrevocable. S.C. Code Ann. § 62-7-602(a). They also ignore the clear terms of the Dennis Canon, which states: "The existence of this trust . . . shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property *so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitution and Canons.*" (R.p.1799) (emphasis added). Parishes that acceded relinquished any ability to remove property from the denomination by making themselves no longer "subject to" The Episcopal Church and its governance.

Respondents' supplementary argument—that a trust modifiable by a beneficiary (here, The Episcopal Church) cannot be irrevocable—also fails. South Carolina's statutory law allows irrevocable trusts to be modified by beneficiaries, albeit with court approval. S.C. Code Ann. § 62-7-411.

The Trust Will Disrupt the Business World

Respondents say the trust will cause chaos for mortgage lenders and title insurers. Again, courts in fourteen states have found trusts to exist based on similar facts involving The Episcopal Church and its parishes. See **Attachment A**. Respondents present no evidence of such disruption, and Appellants are aware of none. North Carolina rejected this same argument. *Daniel v. Wray*, 580 S.E.2d 711,

719 (N.C. Ct. App. 2003).

It Does Not Matter That the Dennis Canon Is Not in the Constitution

Respondents argue the Dennis Canon is not effective because it is a Canon and not part of The Episcopal Church's Constitution. This argument has been raised in multiple jurisdictions and no court has been persuaded by it. The Supreme Court of Georgia explicitly rejected it. *Christ Church II*, 718 S.E.2d at 246 n.8.

Respondents Dispute The Episcopal Church's Locus of Control

Respondents contend deference is not permissible because they dispute the locus of control between The Episcopal Church's General Convention and its Dioceses.

The Court of Appeals of Tennessee found the so-called "statement of polity" contesting locus of control was nothing more than the opinions and interpretations of those Bishops signing the statement and that The Episcopal Church's governing documents on hierarchy "speak for themselves and are determinative." *Diocese of Tenn. v. St. Andrew's Parish*, No. M2010-01474-COA-R3-CV, 2012 WL 1454846, at *17 (Tenn. Ct. App. Apr. 25, 2012). The Fourth Circuit plainly described The Episcopal Church as a three-tiered hierarchy with the General Convention at the top. *Dixon v. Edwards*, 290 F.3d 699, 704-05 (4th Cir. 2002). The Church's control over and polity with respect to schismatic leaders was conclusively established with the discipline of Bishops Schofield and Duncan. (R.pp.836-838). No searching inquiry is required to learn The Episcopal Church's polity is to defrock the Bishops who tried to lead their Dioceses out.

Accession Was not in Appellants' Statement of Issues on Appeal

Respondents claim the Court improperly considered Appellants' argument that parish accession to the Constitution and Canons imposed an express trust because the argument was not articulated in Appellants' statement of issues on appeal. This Court has explained an appellate court may consider an issue not set forth in the issue statements if the issue is reasonably clear from the appellant's arguments. *Herron*, 395 S.C. at 466, 719 S.E.2d at 642. Appellants' brief clearly identified this argument under its own heading. (Brief of Appellants, pp.33-39).

Statute of Limitations

This argument is barred because it is raised for the first time on rehearing.

The Parishes Have an Undivided ½ Interest in Their Property

Good Shepherd argues the quitclaim deeds returned the Diocese's beneficial interest to the parishes and gave each parish ½ of the beneficial interest created by the Dennis Canon. This argument is barred because it is raised for the first time on rehearing, but it is also wrong. The quitclaim deeds are ultra vires because a Bishop may not contravene his oath or the Constitution and Canons, but if the quitclaim deeds *were* effective, each parish's beneficial interest received from the Diocese would merge with the parish's legal interest, leaving The Episcopal Church as the only holder of a beneficial interest. *Epworth Children's Home v. Beasley*, 365 S.C. 157, 171, 616 S.E.2d 710, 718 (2005) (explaining merger doctrine).

Walter Dennis Drafted the Dennis Canon Unprofessionally and Secretly

This argument has never been made before in this litigation. Connecticut and

Pennsylvania rejected the argument that parishes had no notice of the Canon's enactment. *Episcopal Church in Diocese of Connecticut v. Gauss*, 28 A.3d 302, 323 n.25 (Conn. 2011); *In re Church of St. James The Less*, 888 A.2d 795, 808 (Pa. 2005).

The Attorney General Was an Indispensable Party

This argument is improperly made for the first time on rehearing. Also, Appellants could not locate any authority supporting the idea that the Attorney General is an indispensable party for this case. Section 62-7-405(e) of the South Carolina Code only says the Attorney General is among the people who "may" bring proceedings to enforce a charitable trust. Section 1-7-130 empowers the Attorney General to enforce and protect public charities but does not require his involvement.

Every Church Dispute is Doctrinal in Origin

True. But this Court's precedent and U.S. Supreme Court precedent explain some intrachurch disputes are different than others. *Jones* says the First Amendment does not require "compulsory deference . . . in resolving church property disputes[] even where no issue of doctrinal controversy is involved." 443 U.S. at 605. Justice Frankfurter described some church cases as being "generated by conflicts of faith" but also being "fairly isolated as controversies over property." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 122 (1952) (Frankfurter, J., concurring). Other cases are polity disputes "masquerading" as property disputes. *All Saints*, 385 S.C. at 444, 685 S.E.2d at 172. The Episcopal Church has determined a Diocese may not secede and that a Bishop may not try to lead a Diocese out. Respondents dispute this. That dispute is a controversy over

polity, not property.

IV.

Appellants offer three points respecting the recusal motion.

a.

The two leading opinions which would have reversed the circuit court outright are amply supported by the record and by precedent.

This case plainly qualifies as a polity dispute masquerading as a property dispute. Respondents themselves told the circuit court the case was about a Diocese's right to withdraw from The Episcopal Church. (R.p.221, lines 14-24). The disassociated Diocese's withdrawal resolution was based on a dispute about church governance and structure, springing into effect once The Episcopal Church asserted its hierarchical authority over Bishop Lawrence. (R.pp.1124-1125). A 2011 investigation into Bishop Lawrence deemed "significant" Lawrence's repeated statements he did not intend to lead the Diocese out of The Episcopal Church and that he was instead seeking a "safe place" *within* the Church. (R.p.1989). Nevertheless, the disassociated Diocese had been sending out quitclaim deeds since at least 2010, (R.pp.494-95), and Respondents admitted these deeds were not recorded because of fear The Episcopal Church would discipline Bishop Lawrence. (R.pp.155-156).

Other jurisdictions have noted that the schismatic movement in The Episcopal Church is based on "several doctrinal controversies" including the ordination of women in the priesthood. See, e.g., *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 89 (Colo. 1986). Appellants cited this decision in their brief to this Court. Again,

there are 14 states across the country that have found in favor of the The Episcopal Church or its recognized diocese on the basis of a trust. See **Attachment A**.

Respondents claim a member of the Court has a financial interest in the litigation, yet Respondents themselves presented evidence indicating worshipers at St. Anne's disavowed any interest in St. Paul's parish property before this lawsuit began and that St. Paul's property is encumbered with substantial indebtedness. (R.pp.769-773).

Respondents claim a member of the Court incorrectly found The Episcopal Church's Constitution and Canons trump local rules of governance. There is ample evidence of record indicating supremacy of the Church's governing documents and that neither a Diocese nor a parish can circumvent the Constitution and Canons via local majority rule. (R.pp.822-830, 1485-1486, 1528, 1561-1563, 1641, 1568, 1803-1804).

Respondents allege a member of this Court and her husband "were personally involved in the entire schism" and that her husband "was a critical player in the underlying events of this case," which is utterly and totally baseless.

Respondents say George Hearn was a material witness, yet he was not called as a witness and his deposition was not introduced at trial.

Respondents claim a member of this Court participated in "an Episcopal Church institution [The Episcopal Forum] that pushed for sanctions against Bishop Lawrence." There is no evidence The Episcopal Forum is associated with or an institution of The Episcopal Church and there is no evidence a member of this Court

has participated in any of this organization's activities.

Respondents amazingly claim a member of this Court is a party to the case by virtue of membership in The Episcopal Church. This ludicrous and baseless argument does not merit a response.

Respondents' related argument that a member of this Court faces potential personal liability in this case based on her membership in The Episcopal Church is similarly absurd. Being a "member" of a church in the ecclesiastical sense is not the same as being a "member" of an unincorporated business association such that the person is liable for association's debts. A rule extending such financial liability to all baptized, confirmed, and received Episcopalians would come as a surprise to many and is as laughable as it is untenable.

The list of Respondents' errors and inaccuracies could go on. Respondents' real complaint is not about any contrived financial interest or imagined bias. Respondents' real complaint is that a member of the Court is an Episcopalian. This is not a new approach for them: Their brief criticized the author of the Georgia Supreme Court's decision in *Christ Church II* on this basis. (Brief of Respondents, p.51 n.91). Yet, the Georgia Supreme Court ruled 6-1 against the breakaways, and other favorable decisions have been just as lopsided. E.g., *Episcopal Church in Diocese of Conn.*, 28 A.3d at 463 (unanimous); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) (unanimous); *Parish of the Advent v. Diocese of Mass.*, 688 N.E.2d 923, 936 (Mass. 1997) (unanimous). Religious affiliation is not a recognized ground for recusal. *State of Idaho v. Freeman*, 507 F.

Supp. 706, 729 (D. Idaho 1981). Neither is knowing parties and potential witnesses. *Sexson v. Servaas*, 830 F. Supp. 475, 482 (S.D. Ind. 1993).

A judge examines whether his or her impartiality might reasonably be questioned by considering how the facts would appear to a "well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person." *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995). There is a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The law therefore presumes judges are impartial, and those seeking recusal "bear the substantial burden of proving otherwise." *In re Larson*, 43 F.3d 410, 414 (8th Cir. 1994). It is only in "rare instances" where a judge will violate this standard. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890 (2009). Motions to recuse cannot rest on speculation, conjecture, conclusory statements, or innuendo. *Davis v. Parkview Apartments*, 409 S.C. 266, 288, 762 S.E.2d 535, 547 (2014); see also *Sensley v. Albritton*, 385 F.3d 591, 599 (5th Cir. 2004) ("Courts should take special care in reviewing recusal claims as to prevent parties from abusing [the recusal process] for a dilatory or litigious purpose based on little or no substantiated basis." (internal citations and quotations omitted)).

One member of this Court is an Episcopalian. The only evidence about this Justice's local worshiping group is that it has no interest in the Dennis Canon's enforcement. All Respondents proffer is rhetoric and unfounded allegations. There is no evidence the Justice has any animus towards (or even knowledge of) many of the parties. Outside of this Court's opinions, there is no evidence the Justice expressed a

view on anything at issue in this case.

Again, recusal is judged based on the standard of a reasonable observer who is informed of all the surrounding facts and circumstances. *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 924 (2004) (statement of Justice Scalia on recusal). A judge also has a duty *not* to recuse when recusal is *not* required. *Laird v. Tatum*, 409 U.S. 824, 837 (1972); see also Canon 3(B)(1), Rule 501, SCACR. The lead opinions followed the law and the record. There is no reasonable basis for questioning anyone's impartiality.

b.

The motion to recuse is untimely. In fact, the timing of the motion indicates it is not offered in good faith. If Respondents desired a member of this Court's recusal, they should have requested recusal at the first opportunity. *Davis*, 409 S.C at 289, 762 S.E.2d at 547. The motion is remarkable: conspicuously advertising as its basis information Respondents themselves admit knowing since before the *trial* in this case occurred. Yet, Respondents said nothing about recusal when the parties jointly sought to transfer the case to this Court. They said nothing about recusal when the parties filed their appellate briefs. They said nothing about recusal before the oral argument or in the nearly two years between the oral argument and publication of the Court's decision. Respondents never gave any indication they had an issue with the Court's composition—until they lost.

This recusal request looks like the same sort of eleventh-hour desperation the Court of Appeals discussed in *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12,

23 (Ct. App. 2004). There are ample cases in state and federal courts refusing to entertain recusal motions filed by parties who wait to request recusal until after receiving an adverse ruling. *In re Steward*, 828 F.3d 672, 682 (8th Cir. 2016); *GeorgiaCarry.Org, Inc. v. James*, 782 S.E.2d 284, 286 (Ga. 2016); *Jackson v. Leon Cnty. Elections Canvassing Bd.*, 214 So. 3d 705, 706 (Fla. Dist. Ct. App. 2016); *Baker v. McCormick*, 380 P.3d 706, 717 (Kan. Ct. App. 2016); *Appeal of the Local Government Center, Inc.*, 85 A.3d 388, 406 (N.H. 2014); *Gauthier v. Gauthier*, 931 A.2d 1087, 1090-91 (Me. 2007); *In re Kensington Intern. Ltd.*, 368 F.3d 289, 314-15 (3d Cir. 2004); *U.S. v. Sanford*, 157 F.3d 987, 988-89 (5th Cir. 1998); *Demoulas v. Demoulas Super Markets, Inc.*, 703 N.E.2d 1141, 1144-46 (Mass. 1998); *Sine v. Local No. 992 Int'l Broth. of Teamsters*, 882 F.2d 913, 916 (4th Cir. 1989). Timeliness requirements preclude litigants from lying in wait and keeping evidence of purported bias up their sleeve to use as an ace card in the event the court rules against them. *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) ("A timeliness requirement forces the parties to raise the disqualification issue at a reasonable time in the litigation. It prohibits knowing concealment of an ethical issue for strategic purposes."); see also *GeorgiaCarry.Org*, 782 S.E.2d at 286. That sort of gamesmanship is also wasteful of everyone's resources. *GeorgiaCarry.Org*, 782 S.E.2d at 286.

Respondents say South Carolina does not have a timeliness requirement. They disregard this Court's language in *Davis*, but equally instructive is the fact that the chief federal recusal statute does not express a timeliness requirement either, yet

circuit courts "have overwhelmingly found a timely filing requirement to be implied despite the text's silence." *Kolon Indus. v. E.I. duPont de Nemours & Co.*, 748 F.3d 160, 169 (4th Cir. 2014).

Respondents argue their delay was induced by failure to disclose what they already knew, yet as Respondents' own motion posits, counsel has "an independent duty as an officer of the court" to seek recusal irrespective of what the judge does or does not do. (Mot. at 4 (quoting *In re Bernard*, 31 F.3d 842, 847 (9th Cir. 1994) (Kozinski, J.)).

This motion is a sham. Like Respondents' longstanding association with The Episcopal Church and their recent attempts to disavow that association, the recusal motion conveys a complaint over something that was perfectly acceptable to Respondents until it wasn't. Compare *Davis*, 409 S.C. at 289, 762 S.E.2d at 547 (finding timeliness of recusal motion questionable when made on the eve of decision and more than two years after learning of facts allegedly warranting recusal).

c.

Finally, and further indicating bad faith, Respondents' filings with this Court indicate their willingness to overlook their claim about the judiciary's impartiality if they can obtain a satisfactory settlement. Respondents' motion alleges judicial bias and violation of the Judicial Canons, which would be grounds for discipline, yet Respondents sought a second extension of their rehearing deadline before filing their recusal request and claimed in their extension that the case might be resolved in whole or in part during a voluntary mediation being conducted by Judge Joseph F.

Anderson. This violates Rule 4.5 of the Rules of Professional Conduct. Claims of misconduct are not leverage for negotiation.

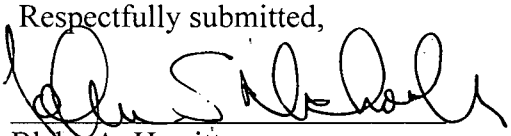
Respondents' motion professes their high regard for the Court and discusses a lawyer's professional obligation to raise issues of impartiality and recusal, but Respondents' conduct suggests the recusal motion is nothing more than partisan posturing. The manner in which Respondents have conducted themselves demonstrates little regard for the Court and one of its members.

Justice Hearn's opinion is legally sound and follows the overwhelming number of other jurisdictions. Her religious beliefs and those of her husband are not grounds for recusal. Respondents knew she was an Episcopalian from the beginning yet they waited until they lost to raise the issue and they are now asking for a re-do. This is an abuse of the judicial system.

CONCLUSION

The post-opinion motions should be denied.

Respectfully submitted,



September 18, 2017

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Attachment A

Episcopal Church cases

California:

- *In re Episcopal Church Cases*, 198 P.3d 66, 84 (Cal. 2009), as modified (Feb. 25, 2009) (when majority of parishioners "disaffiliated from the Episcopal Church, the local church property reverted to the general church"), *cert. denied*, 558 U.S. 827 (2009)

- *Huber v. Jackson*, 96 Cal. Rptr. 3d 346, 357 (Cal. Ct. App. 2009) (parish holds property "in trust for the Episcopal Church and the Los Angeles diocese, and by disaffiliating from the church defendants and their new parish under another church have no right in the property"), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (Sep. 17, 2009), *cert. denied*, 559 U.S. 971 (2010)

- *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 482, 486 (Cal. Ct. App. 2008) (noting "the Episcopal Church impressed a trust on local church property" and holding "[o]nce defendants renounced their membership in the Episcopal Church, they could no longer serve as members of the vestry and directors of the Parish corporation")

- *The Episcopal Diocese of San Diego v. Rector, Wardens & Vestry of St. Anne's Parish in Oceanside*, No. 37-2007-00068521, Judgment at 2 (Cal. Super. Ct. June 4, 2010) (parish property "is held in trust for The Episcopal Church and The Episcopal Diocese of San Diego")

- *Diocese of San Joaquin v. Dietze*, No. 271404-SPC, Order at 10 (Cal. Super. Ct. Jan. 11, 2013) (granting Diocese's motion for summary judgment as to issue of corporate control of parishes and holding that Episcopal Bishop "determined that the actions of [breakaway] vestries and members in attempting to remove the parishes from the Church were not in compliance with the Church's canons & Constitution, and retroactively declared that these individuals held no office in the Church as of the time of the purported disaffiliation. Membership issues are matters of ecclesiastical law left to the intentional decision making of the Church. Therefore, the Court has no jurisdiction to find otherwise.") (internal citations omitted)

- *Episcopal Church Cases (Rasmussen)*, No. J.C.C.P. 4392, Minute Order at 10-11 (Cal. Super. Ct. May 1, 2013) (granting Diocese's motion for summary adjudication, holding that 1991 letter from bishop "did not purport to and – in any event, could not – constitute an amendment to Canon I.7.4" and concluding "[a]s a matter of law, the property now under the control of the Local Church belongs to the Diocese and the Episcopal Church")

Colorado:

- *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (enforcing "trust [that] has been imposed upon the [parish's] real and personal property for the use of [The Episcopal Church]")

- *Grace Church & St. Stephen's v. Bishop & Diocese of Colo.*, No. 07 CV 1971, Order at 26 (App. 45a) (Colo. Dist. Ct. Mar. 24, 2009) ("trust [in favor of The Episcopal Church] that has been created through past generations of members of [the parish] prohibits the departing parish members from taking the property with them")

Connecticut:

- *Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302 (Conn. 2011) (adopting neutral principles of law approach and holding that parish property is held in trust for the Church and the

Diocese based on Canon I.7(4) and the parish's agreement to abide by the constitution and canons of the Church and Diocese at the time of its formation), *cert. denied*, 567 U.S. 924 (2012)

- *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1292 (Conn. 1993) (enforcing "trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [The Episcopal Church] in 1789")

Georgia

- *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237 (Ga. 2011) ("Having reviewed the governing documents of the local church and the general church, we conclude, as did the trial court and the Court of Appeals before us, that a trust on Christ Church's property in favor of the Episcopal Church existed well before the dispute erupted that resulted in this litigation"; "like the highest courts of other states, we view the Dennis Canon as making explicit that which had always been implicit in the discipline of the Episcopal Church (and the Church of England before it ....")))

Massachusetts:

- *The Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 923 (Mass. App. Ct. 2003) (parish "holds its property in trust for the Diocese and [The Episcopal Church]")
- *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 933-34 (Mass. 1997) (dismissing complaint filed by representatives of disaffiliating parish seeking control of parish corporation)

Missouri

- *Smith v. Church of the Good Shepherd*, No. 04CC-864, Judgment and Order at 4-5 (Mo. Cir. Ct. Oct. 12, 2004) (granting summary judgment to the Church and diocese and holding amendments to parish's corporate documents null and void; "The Canons and constitution of both the Dioceses and PECUSA prohibit the transfer or encumbrance of property without the approval of the Bishop and Standing Committee. The Articles of Association states the real property was to be held for the purposes and to the use of those who are in communion with and under the authority of the Protestant Episcopal Church. Defendants clearly no longer consider themselves in communion and under the authority of the Dioceses or PECUSA. Further, defendants no longer have an official capacity with the Dioceses or PECUSA and thus lack the authority to transfer the property.")

Nebraska:

- *Diocese of Nebraska v. Scheiblhofer*, Doc. 1089 No. 282 CI 10-9380050, Finding & Order at 8-10 (Neb. Dist. Ct. Sept. 24, 2012) (granting Diocese and Church's motion for summary judgment and ordering parish property belongs to the Diocese of Nebraska)

New York:

- *The Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) (The Episcopal Church's rules "clearly establish an express trust in favor of the Rochester Diocese and the National Church")
- *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 81 (N.Y. App. Div. 1999) (enforcing "trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the ... Episcopal Church")

- *Diocese of Cent. N.Y. v. Rector, Church Wardens, & Vestrymen of the Church of the Good Shepherd*, 880 N.Y.S.2d 223 (N.Y. Sup. Ct. Jan. 8, 2009) (enforcing The Episcopal Church's trust interest in parish property)
- *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05, Mem. at 31 (N.Y. Sup. Ct. Mar. 12, 2008) ("all real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island")
- *Protestant Episcopal Church in the Diocese of New York v. Church of the Holy Comforter*, 628 N.Y.S.2d 471, 475-76 (N.Y. Sup. Ct. May 28, 1993) (awarding property to disaffiliating parish because the "court is unable to conclude that either an implied or express trust existed" and "there is no legal justiciable controversy between the parties and that the controversy between the parties is ecclesiastical in nature and cannot be determined pursuant to secular rules by this court")

North Carolina:

- *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003) (The Episcopal Church's rules "precluded the seceding vestry from taking control of the [parish] property")

Ohio:

- *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973, Omnibus Opinion and Order at 15-16 (Ohio Ct. Common Pleas Apr. 15, 2011) (finding "that the Dennis Canon governs the outcome of this litigation.... The real and personal property at issue is impressed with a trust in favor of the ECUSA and the Episcopal Diocese.")

Pennsylvania:

- *In re Church of the Good Shepherd Rosemont*, No. 09-0609, Mem. Op. at (Pa. Ct. Common Pleas Aug. 25, 2011) (ordering that former rector and vestry members "no longer have any right to serve as rector and vestry members of The Church of The Good Shepherd, Rosemont Pennsylvania, and they are hereby removed from those positions")
- *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) (parish "is bound by the express trust language in [The Episcopal Church's canons] and therefore, its vestry and members are required to use its property for the benefit of the Diocese")

Tennessee:

- *Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens, & Vestrymen of St. Andrew's Parish*, No. M2010-01474-COA-R3-CV, 2012 WL 1454846, at *19-20 (Tenn. Ct. App. Apr. 25, 2012) (affirming summary judgment for Diocese and The Episcopal Church and holding that the parish "has held or controlled the Property under an express trust in favor of the Diocese and/or The Episcopal Church"); *see also id.* at 23-24 (finding that "the hierarchical organization of the church is ... applicable to the control and ownership of real property"); *id.* at 28-29 (under neutral principles, the parish "holds the Property in trust for the Diocese, and the disassociating members of [the parish] are not entitled to claim any ownership interest in the Property")

Virginia

- *The Falls Church v. The Protestant Episcopal Church in the United States of America*, 740 S.E.2d 530 (Va. 2013) (finding "that TEC and the Diocese have proven that they have a proprietary interest and impose a constructive denominational trust in the properties"); *see also id.* at 681 (McClanahan,

J., concurring) ("I would join the other courts that have determined that the Dennis Canon established an express trust for the benefit of TEC and its Dioceses in their respective states in the context of the nationwide church property dispute between TEC, its Dioceses and local Episcopal congregations.")

- *Diocese of Sw. Va. of the Protestant Episcopal Church v. Wyckoff*, Opinion at 7-8 (Va. Cir. Ct. 1979) (holding that the "congregational vote [to disaffiliate] did not and could not extinguish that part of the Protestant Episcopal congregation known as Ascension Episcopal Church, Amherst remaining loyal to the Diocese of Southwestern Virginia and the National Episcopal Church. The vote may well have indicated that fifty-nine members of the congregation transferred their allegiance to the Anglican Catholic Church which is unquestionably a separate entity. Nothing, however, has occurred under neutral principles of law to transfer the title and control of the property in question from the beneficial use of the remaining congregation of the Ascension Episcopal Church, Amherst....")
- *Diocese of Sw. Va. of the Protestant Episcopal Church v. Buhrman*, No. 1748, 1977 WL 191134, at *7 (Va. Cir. Ct. 1977) (holding parish property must remain with The Episcopal Church, that "the withdrawn trustees, having violated the express language of the deeds and their contractual obligations to the general church, have no further right or interest in the subject property, [and] that neither they nor the others who have renounced The Episcopal Church have any proprietary or possessory rights in said property")

Wisconsin

- *Episcopal Diocese of Milwaukee, Inc. v. Ohlgart*, No. 09-CV-00635, Order Granting Mots. For Partial Summ. J. at 1-2 (Wisc. Cir. Ct. Apr. 3, 2012) (finding "The Episcopal Church is a hierarchical church" and holding, under neutral principles of law, that "Defendants had no authority to control, remove, take, or keep the real and personal property of St. Edmund's Episcopal Church, Inc. for uses inconsistent with or in violation of the Canons and Constitutions of the Diocese and Episcopal Church and its Doctrine, Discipline, and Worship")

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013

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

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Return* by electronically mailing copies of the same to the following addresses:

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