CASE NO. S182407

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EPISCOPAL CHURCH CASES

JANE HYDE RASMUSSEN, et al.,
Plaintiffs and Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,
Respondent.

THE REV. PRAVEEN BUNYAN, et al.,
Real Parties in Interest.

California Court of Appeal, Fourth District, Division Three, No. G042454
Orange County Superior Court, Case Nos. J.C.C.P. 4392; 04CC00647
The Honorable Thierry Patrick Colaw, Coordination Trial Judge

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REPLY IN SUPPORT OF PETITION FOR REVIEW

[Cal. Rules of Court, R. 8.500]

PAYNE & FEARS LLP
ERIC C. SOHLGREN, Bar No. 161710
DANIEL F. LULA, Bar No. 227295
ERIK M. ANDERSEN, Bar No. 220513
4 Park Plaza, Suite 1100
Irvine, California 92614
(949) 851-1100 • Fax: (949) 851-1212

GREINES, MARTIN, STEIN & RICHLAND LLP
ROBERT A. OLSON, Bar No. 109374
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(323) 330-1030 • Fax: (323) 330-1060
(310) 859-7811 • Fax: (310) 276-5261

Attorneys for Defendants and Real Parties in Interest
THE REV. PRAVEEN BUNYAN; THE REV. RICHARD A. MENEES; THE REV. M. KATHLEEN ADAMS; THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, A CALIFORNIA NONPROFIT CORPORATION; JAMES DALE; BARBARA HETTINGA; PAUL STANLEY; CAL TRENT; JOHN MCLAUGHLIN; PENNY REVELEY; MIKE THOMPSON; JILL AUSTIN; ERIC EVANS; FRANK DANIELS; COBB GRANTHAM; JULIA HOUTEN

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4 Park Plaza, Suite 1100
Irvine, California 92614
(949) 851-1100 • Fax: (949) 851-1212

GREINES, MARTIN, STEIN & RICHLAND LLP
ROBERT A. OLSON, Bar No. 109374
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(323) 330-1030 • Fax: (323) 330-1060
(310) 859-7811 • Fax: (310) 276-5261

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THE REV. PRAVEEN BUNYAN; THE REV. RICHARD A. MENEES; THE REV. M. KATHLEEN ADAMS; THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, A CALIFORNIA NONPROFIT CORPORATION; JAMES DALE; BARBARA HETTINGA; PAUL STANLEY; CAL TRENT; JOHN MCLAUGHLIN; PENNY REVELEY; MIKE THOMPSON; JILL AUSTIN; ERIC EVANS; FRANK DANIELS; COBB GRANTHAM; JULIA HOUTEN

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INTRODUCTION

The Episcopal Answer to the Petition for Review tries to tell this Court what it decided in *Episcopal Church Cases* (2009) 45 Cal.4th 467. This Court knows what it intended without parties instructing it. All three Court of Appeal justices – majority and dissent – have urged this Court to clarify its intent. Doing so is ample reason for review. This Court should clarify whether it really intended to *conclusively* decide the property dispute here as a factual matter in favor of the Episcopal Church and against defendants before even an answer was filed based on nothing more than a holding that a demurrer should have been overruled (and an unrelated determination that the anti-SLAPP statute did not apply).

The Answer does not dispute that the conflicting readings of *Episcopal Church Cases* raise important, critical issues going far beyond this case, especially how California trial and appellate courts will apply it in adjudicating other church property disputes now working their way through the courts.

First, the Episcopal Answer does dispute that its reading – and the Court of Appeal majority's reading – of this Court's opinion creates a rule that in reviewing a trial court's ruling on a demurrer (or an anti-SLAPP motion), an appellate court can direct entry of judgment *in favor of a plaintiff* without a defendant ever having been afforded the opportunity to answer the complaint, raise affirmative defenses, engage in discovery, or present or to obtain resolution of disputed facts. Like the Court of Appeal majority opinion, the Episcopal Church does not cite a single case in support of its claim that this Court– or *any* court – has the power to decide the factual issues necessary to resolve a case before they have been litigated below, or when overruling a demurrer, to decide a case *against* a defendant before it has answered or engaged in any discovery. The Answer does not

dispute that, published or not, the Court of Appeal's decision here chillingly warns defendants (and counsel) in *all* cases, especially church property disputes, that regardless of the formal rules, they must make full factual evidentiary presentations even at the demurrer stage. If defendants in this State are subject to suffering an adverse judgment as a result of bringing a demurrer, they and their counsel need to know that in advance with notice that they are expected to present a full-on case, including presenting all disputed fact issues, before challenging the allegations in a complaint on the ground that they do not state a cause of action.

Second, the Episcopal Church does not dispute that its (and the Court of Appeal majority's) strict linguistic and grammatical ("plain language") approach is at odds with the procedural context approach of dissenting Justice Fybel and prior case law. These strongly conflicting means of judicial analysis cry out for clarification.

Finally, the Answer avoids, but does not dispute, that in the eighteen months since *Episcopal Church Cases*, at least two sister-state Supreme Courts, one on virtually identical facts, have come to the opposite conclusion from this Court as to what religiously neutral legal principles dictate. This new development since *Episcopal Church Cases* strongly suggests that this Court should at least revisit its conclusions to avoid whipsawing church litigants between different "neutral principles" approaches in different states, often involving the same denomination.

This Court should grant review to address these important issues, and either clarify what it intended to mandate in *Episcopal Church Cases* or retransfer the matter to the Court of Appeal with directions to deny the writ petition and to allow the trial court to conduct further proceedings consistent with *Episcopal Church Cases*.

WHY REVIEW IS NECESSARY

I. ONLY THIS COURT CAN RESOLVE THE CONFLICT AMONGST LOWER COURT JUDICIAL OFFICERS ABOUT WHAT *EPISCOPAL CHURCH CASES* MANDATES.

We will not presume to tell this Court what it intended to mandate in deciding Episcopal Church Cases or in modifying the opinion there. This Court knows much better than the parties what it intended. But the fact remains that not only do the parties disagree about how to read *Episcopal Church Cases*, as modified, so do the lower courts, illuminating an interpretational conflict that, unless remedied, will only continue in the trial and appellate courts as they seek to understand *Episcopal Church Cases* in other church property disputes. Two judicial officers (the Court of Appeal majority) read the opinion's direction one way, and two others (the civil complex trial judge and the dissenting Court of Appeal justice) read it completely differently. That confusion alone justifies review.

The Answer ignores that two out of four judicial officers disagree with the Episcopal Church's spin on the modified *Episcopal Church Cases* opinion. Indeed, the Answer does not even mention that Justice Fybel dissented, let alone that he did so vigorously, urging this Court to grant review. The Answer does not dispute that, given the 50-50 split amongst lower court judicial officers interpreting *Episcopal Church Cases*, this Court should grant review to explain what it really intended – both for the benefit of the judicial officers and litigants in this case but also for the benefit of other judges and litigants reading and applying *Episcopal Church Cases* in comparable circumstances. Nor does the Answer dispute that if the Court of Appeal majority read this Court's intent incorrectly, this Court

should intervene, as the Court of Appeal majority presumed it would and as Justice Fybel urged it to do.

Instead, the Answer attempts through linguistic and grammatical constructs to argue that this Court's opinion ties lower courts to a procedurally nonsensical result. Justice Fybel's dissent more than adequately rebuts the Episcopal Church's attempt at an overly narrow and noncontextual reading. We need not repeat its analysis here. Further, notwithstanding the Episcopal Church's attempt to linguistically dissect this Court's opinion and spin the record in their favor, the procedural context remains undisputed and indisputable:

- The matter was before this Court having proceeded no further than the sustaining of a demurrer and the grant of an anti-SLAPP motion. There had been *no* answer, *no* affirmative defenses, *no* discovery, and *no* factual development by the St. James defendants ("St. James").
- The standard of review in that procedural context required St. James – and the reviewing courts – to state all of the evidence in the light most favorable to the Episcopal Church and its Los Angeles Diocese, and barred St. James from presenting its own factual, or at least disputed factual, case.
- The 1991 letter that the Episcopal Church claims to have been adjudicated in *Episcopal Church Cases* was *never* mentioned in any of the merits briefs or at oral argument in either this Court or the predicate Court of Appeal proceeding. It was *never* litigated on appeal. It was *not* discussed or relied upon by the trial court in sustaining the demurrer or granting the anti-SLAPP motion from which the Episcopal Church appealed. In concluding that the Episcopal Church had not stated facts sufficient to constitute causes of action, and that its Diocese of Los Angeles did not have a

probability of prevailing on its claims, the trial court never addressed the 1991 letter.

- The *first* appellate mention of the 1991 letter was in St. James's rehearing petition before this Court. Even then, St. James referenced it only as an *example* of the type of evidence that might be developed in a *factual* record on remand to support its argument that this Court should modify its opinion to clarify the procedural posture. Neither St. James nor the Episcopal Church *ever* asked this Court to rule on the 1991 letter itself as a factual matter (nor did this Court do so), and St. James *never* waived its rights to answer and develop other favorable facts through discovery which had not occurred yet.
- On remand St. James answered and began to develop a factual record supporting its defense, including deposition testimony from a Bishop of the Episcopal Church that the Episcopal Church had waived any beneficial interest in the St. James property on 32nd Street in Newport Beach. (1 RPE 11:2-12, 14:18-15:3; *see* 1 PE 174, ¶¶ 10-12, 175, ¶13; Real Parties' Writ Return, pp. 11-16.) Like other affirmative defenses St. James did not plead until after remand, this Court never addressed waiver or estoppel in *Episcopal Church Cases*. The Episcopal Church's assertion that St. James has not referenced any facts beyond the 1991 letter (*see* Ans. at pp. 2 fn. 1, 12), or has none to present, is simply wrong.[1]

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[1] St. James's post-remand answer controverted *every* material allegation of the Episcopal Church's complaint-in-intervention, creating a presumptively *disputed* factual record. (*See* 1 PE 186-187; *Warren v. Hartoonian* (1961) 189 Cal.App.2d 546, 548 ["The answer denied all of the material allegations of the complaint, thus creating issues of fact as to the relief sought by plaintiffs."]; Code Civ. Proc. § 431.30(d) [authorizing general denials to non-verified complaints].)

- The Episcopal Church's reading of *Episcopal Church Cases* as *conclusively* resolving the case's factual controversies in its favor based upon nothing more than the overruling of a demurrer (and a finding that an anti-SLAPP motion does not lie) appears to be a novel and unprecedented result in California, and probably in the history of American jurisprudence. Certainly, the Episcopal Church cites no case law, constitution or statute for support of this proposition. Rather, it advances, ipse dixit, an overly expansive view of this Court's powers upon review, and an overly expansive view of its ability as a religious institution to obtain a civil court's judgment and imprimatur on the mere filing of a complaint. (*See* Ans. at pp. 10-11 & fn. 4; Slip Opn. at p. 1, Fybel, J., dissenting.)

As persuasive as these circumstances and Justice Fybel's analysis are, only this Court can say what it truly intended to mandate in *Episcopal Cases*. It should do so.

II. SUBSTANTIAL AND FAR-REACHING DUE PROCESS ISSUES ARE RAISED BY THE COURT OF APPEAL MAJORITY'S NOVEL APPROACH THAT A COURT CAN ORDER ENTRY OF JUDGMENT FOR A PLAINTIFF BASED ON NOTHING MORE THAN THE OVERRULING OF A DEFENDANT'S DEMURRER (OR A FINDING THAT THE ANTI-SLAPP STATUTE IS INAPPLICABLE).

Echoing the Court of Appeal majority, the Episcopal Church asserts that this Court can, in its discretion, unilaterally expand and decide factual issues in a procedural context – overruling of a demurrer and finding the anti-SLAPP statute procedurally inapplicable – where only purely legal issues are before the Court. The Answer does not dispute that such a result

is an unprecedented and far-reaching expansion of previously understood limits of this Court's powers on review (or of any court's powers on appeal), which raises serious due process issues, not only in this case but in a multitude of future cases before this Court.

The essence of due process is notice, including notice of what is at issue.[2] A demurrer tests the legal sufficiency of the complaint; an anti-SLAPP motion (which *Episcopal Church Cases* held was not procedurally available) tests the *plaintiff's* prima facie factual case. Neither procedure affords notice to a defendant that it has to present a full factual case in the early pleading stage of litigation.

To the contrary, in objecting to a complaint by demurrer, a defendant does not and cannot present its factual case. (Civ. Proc. Code § 430.10.) Similarly, while a defendant can present affidavits in support of an anti-SLAPP motion, nothing under law requires a defendant to present its full factual case or permits a defendant to obtain a judicial determination on *contested* facts when the sole issue before the trial court (assuming there is protected activity) is whether "the *plaintiff* has established that there is *a probability* that the plaintiff will prevail on the claim [subject to the anti-

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[2] The essence of *procedural* due process is that parties are entitled to be heard and that, in order to enjoy that right, they must have *notice* and the opportunity to present any defenses or claims in their behalf. As Mr. Webster argued in the case of *Trustees of Dartmouth College v. Woodward* (1819) 17 U.S. 518, a court "hears before it condemns, proceeds on inquiry, and renders judgment only after trial."

SLAPP statute]."[3] (Civ. Proc. Code §§ 425.16(b)(1), (2) (emphasis added).) Thus, on appeal, the standard of review – judicially enshrined notice afforded to all parties on appeal – *requires* defendants such as St. James (and the reviewing courts) here to *assume* the validity of the plaintiff's allegations (and on an anti-SLAPP motion, the plaintiff's proffered factual evidence).

For example, what the Episcopal Church labels as a "strategic decision not to argue the 1991 letter" (Answer, p. 12, fn. 9), in fact, was nothing more than a recognition that the procedural posture of the case – from the trial court all the way to this Court – *prevented* St. James from presenting its full factual defense or from seeking to end the case on contested factual issues, especially before it answered or any discovery took place. The Episcopal Church recognized and capitalized on these standards in its briefing in the prior proceeding before this Court. It recognized that "the record in this case is limited, given its procedural context." (Episcopal Church's Answer Br. On the Merits at p. 5, fn. 1.) And, it argued its case based on "[t]he facts *alleged* here . . . ." (*Id.* at p. 49, emphasis added.) There is *no* notice that a defendant has to present its complete *factual* case in this procedural posture.

Far from the "mature" factual record the Episcopal Church now concocts in hindsight *before* St. James answered or *any party* conducted

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[3] In finding that the anti-SLAPP statute was inapplicable to this dispute, this Court did not reach the second prong of the anti-SLAPP statute – plaintiff's showing of a probability of success – in *Episcopal Church Cases*. But even had it "determine[d] that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination [would] be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable [would] be affected by that determination in any later stage of the case [e.g., on remand] or in any subsequent proceeding." (Cal. Code Civ. Proc. § 425.16(b)(3).)

any discovery, St. James, the trial court, and the appellate courts were constrained to the facts as the Episcopal Church alleged or asserted. The sole issues were (1) whether the complaints stated facts sufficient to state a cause of action (Code Civ. Proc. §§ 430.10, 430.30), (2) whether the plaintiffs' claims arose from any act by defendants in furtherance of the right of petition or free speech (*id.* at § 425.16(b)(1)), or (3) whether plaintiffs had established a probability of prevailing, *id.* Instead, the Episcopal Church now wants to spring on St. James, after-the-fact, the novel idea that what was at issue in *Episcopal Church Cases* was not the potential legal implications of merely *alleged* facts (the demurrer standard) or the prima facie sufficiency of plaintiffs' evidence (the anti-SLAPP standard) but rather the full panoply of possible factual scenarios that have not even been discovered yet, including scenarios that require judicial resolution of disputed facts. They do so even though the appellate courts never reached the prima facie sufficiency of that evidence because they held that the anti-SLAPP statute was procedurally inapplicable. Given the procedural posture, any discussion of the 1991 letter in the Court of Appeal majority opinion "is totally irrelevant," as Justice Fybel aptly noted. (Slip Opn. at p. 6, Fybel, J., dissenting.)

The Episcopal attempt to leave St. James twisting in a procedural wind is fundamentally unfair and undoubtedly raises substantial questions of the notice that it – and that any other party trying to defend a case in a similar procedural posture – must be afforded under Constitutional norms of due process before being deprived of property.[4] The Episcopal Church's

[4] The Episcopal Church's claim that due process is served because St. James has had 2,088 days in which to litigate the *facts* in this case is nonsense. Roughly 75% of the time has been tied up in appellate proceedings *initiated by the Episcopal Church.* In the brief time available to it after remand from this Court in 2009, St. James answered the complaints, asserted affirmative defenses, and obtained substantial

position, essentially, is that St. James – and indeed all defendants – must anticipate such a complete and unexpected change in the procedural rules of the game midstream. The Episcopal Church is essentially saying that in order to avoid such an unprecedented result, St. James should have flouted the established evidentiary standards for demurrers and anti-SLAPP motions, in the trial court, on appeal, and before this Court. If that is true, then defendants throughout California need to know that if they comply with the relevant motion evidentiary standards and appellate standards of review, they do so at their own peril. Review is necessary to resolve just what powers this Court has to resolve fact issues in the first instance and what notice must be given to parties and counsel regarding the need to litigate fact issues on demurrer.

III. THE EPISCOPAL ANSWER DOES NOT DISPUTE THAT IMPORTANT LEGAL ISSUES EXIST REGARDING HOW TO READ THIS COURT'S OPINIONS – WHETHER STRICTLY LINGUISTICALLY OR IN THEIR PROCEDURAL CONTEXT.

The Episcopal Church does not (and cannot) dispute that there is a substantial difference in approach in how it and the Court of Appeal majority read this Court's opinion in *Episcopal Church Cases* – a "plain

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supporting factual evidence supporting its defenses, including deposition *admissions* that the Episcopal Church now claims should be ignored. Most of the time has been taken up by the *Episcopal Church's* appellate efforts, first in its appeal to the Court of Appeal (665 days through denial of rehearing), and the related petition for review to this Court and this Court's review (588 days from Court of Appeal finality to this Court's rehearing denial and issuance of remittitur), and then its present writ petition proceeding (287 days). Another 169 days elapsed between remittitur and the Episcopal Church's present writ petition, time that St. James used to its advantage in developing evidence adverse to the Episcopal Church.

meaning" approach that relies on strict linguistic and grammatical contrivances devoid of procedural context – and how Justice Fybel, the civil complex trial judge, and St. James read the opinion – relying on its procedural context and the applicable procedural rules. Nor does the Answer dispute that a substantial line of authority supports the contextual approach to understanding opinions or that the Court of Appeal majority's approach is at odds with that authority. (*See* Petn. for Rev. at 22-23; *see generally Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38.[5]) Rather, the Episcopal Answer simply *assumes* that strict linguistic analysis is the *only* way to obtain meaning and direction from this Court's opinions, thus ducking a substantial issue requiring review. This Court can hardly perform its function of affording certainty and guidance in the law where courts and parties do not even agree on the standard by which its opinions are to be read. Review should be granted to resolve the conflicting approaches, exemplified in this case, as to how lower courts are to read this Court's opinions.

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[5] "If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, ...' The meaning of particular words or groups of words varies with the '. . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.'." (internal citations omitted.)

IV. NEW SISTER-STATE SUPREME COURT DECISIONS CONFLICTING WITH *EPISCOPAL CHURCH CASES* WARRANT REVIEW, WHICH THE ANSWER NEVER CONFRONTS.

The Answer does not dispute that a changing trend in decisions by sister-state supreme courts is a compelling reason for this Court to revisit an issue. The Episcopal Church gives short shrift – relegating its discussion to a footnote (Answer, p. 8, fn. 3) – to the recent disagreement by two sister-state supreme courts with the holding of *Episcopal Church Cases*, specifically what secular neutral legal principles dictate. Other than generically disparaging the South Carolina Supreme Court's analysis, the Answer does not dispute that the South Carolina Supreme Court came to the opposite conclusion from *Episcopal Church Cases* on nearly identical facts (e.g., same denomination, same supposed Dennis Canon, etc.), namely that well-established secular neutral principles of law do not allow a putative beneficiary to self-settle a trust in someone else's property. (*All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina* (S.C. 2009) 685 S.E.2d 163, *cert. petition dismissed.*) Nor does the Answer dispute that the Arkansas Supreme Court reached the same result – at odds with *Episcopal Church Cases* – in a similar dispute involving another denomination. (*Arkansas Annual Conf. of AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc.* (2009) 375 Ark. 428, 435, *cert. denied*, 130 S.Ct. 70.) Both of these sister-state decisions came *after Episcopal Church Cases* and, thus, were not available for this Court's consideration.

With these recent, conflicting decisions, whether local churches – even within the same denomination – can retain their property upon a change of denominational affiliation now depends, to a large degree, on

which state the churches are located and which state's courts are interpreting the First Amendment. (*See* Petition at pp. 27-28.)

The Episcopal Church claims there are other, older state high court cases that support its view, but does not identify them or describe whether they were decided on similar facts. Even if so, that merely suggests there is a new controversy, not apparent when this Court considered *Episcopal Court Cases*, that this Court should address.

The Answer also suggests that California Corporations Code section 9142 creates a unique statutory privilege specially entitling certain denominations to favored status and treatment, an approach that we submit violates the First Amendment's Establishment Clause. Yet that is the approach concurring Justice Kennard said the Court was taking, despite the opinion purporting to decide *Episcopal Church Cases* on secular neutral legal principles. We submit that no less than judicial favoritism, statutory favoritism to existing denominational structures creates a looming Establishment Clause problem that this Court should revisit.

We do not know what conclusion this Court would reach in reconsidering the fundamental Constitutional issues in this case in light of the recent contrary rulings by the South Carolina and Arkansas Supreme Courts, but those determinations certainly warrant this Court revisiting those issues.

CONCLUSION

This Court should grant review:

(1) to clarify the meaning of its mandate in *Episcopal Church Cases*;

(2) to resolve whether this Court's – or any court's – powers on reviewing a demurrer ruling include deciding the ultimate factual issues in the case *in favor of the plaintiff*; and;

(3) to address the judicial quandary exemplified by this case as to whether this Court's opinions are to be read in a linguistic and grammatical straightjacket or are to be considered in their procedural context;

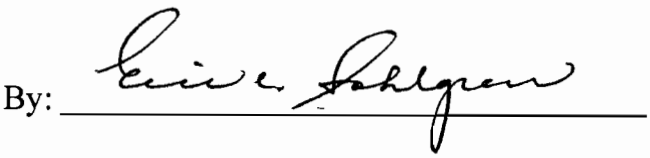
(4) to revisit the important Constitutional issues in *Episcopal Church Cases* in light of the recent, contrary sister-state Supreme Court holdings.

In the alternative, as dissenting Justice Fybel suggested, this Court should grant review and retransfer to the Court of Appeal with directions that it deny the writ petition and allow the trial court to proceed resolving disputed fact issues.

DATED: June 3, 2010

PAYNE & FEARS LLP
ERIC C. SOHLGREN
DANIEL F. LULA
ERIK M. ANDERSEN

GREINES, MARTIN, STEIN & RICHLAND LLP
ROBERT A. OLSON

By: 

Attorneys for Defendants and Real Parties in Interest THE REV. PRAVEEN BUNYAN, *et al.*

CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rules 8.504(d)(1))

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, that the **REPLY IN SUPPORT OF PETITION FOR REVIEW** is produced using 13-point Roman type including footnotes and contains **3,959** words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: June 3, 2010

Daniel F. Lula

PROOF OF SERVICE

Jane Hyde Rasmussen, et al. vs. Superior Court of Orange County
Case No. S182407; Appeal No. G042454

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action; my business address is Jamboree Center, 4 Park Plaza, Suite 1100, Irvine, California 92614.

I am employed bv Payne & Fears LLP. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service and common carriers promising overnight delivery. In the ordinary course of business, such correspondence is deposited with the United States Postal Service or the common carrier on the same day I submit it for collection and processing.

On June 3, 2010, I served the following document(s) described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes, with first-class postage prepaid, addressed as follows:

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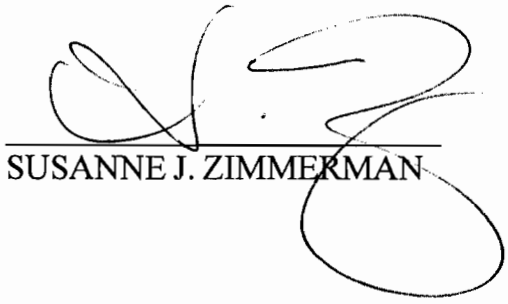
I then deposited such envelope(s) for collection in the ordinary course of business and deposit with the United States Postal Service for delivery to the addresses listed on the attached list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 3, 2010, at Irvine, California.



SUSANNE J. ZIMMERMAN

Jane Hyde Rasmussen, et al. vs. Superior Court of Orange County
Case No. S182407; Appeal No. G042454

SERVICE LIST

John R. Shiner Brent E. Rychener Holme Roberts & Owen LLP 888 W. Olympic Boulevard, 4th Floor Los Angeles, CA 90015 (213) 572-4300 Fax: (213) 572-4400	*Attorneys For Plaintiffs and Petitioners Jane Hyde Rasmussen, the Protestant Episcopal Church in the Diocese of Los Angeles, the Rt. Rev. J. Jon Bruno, and the Rt. Rev. Sergio Carranza*
Jeremy B. Rosen James A. Sonne Horvitz & Levy LLP 15760 Ventura Blvd., 18th Floor Encino, CA 91436-3000 (818) 995-0800 Fax: (818) 995-3157	*Attorneys For Plaintiffs and Petitioners Jane Hyde Rasmussen, the Protestant Episcopal Church in the Diocese of Los Angeles, the Rt. Rev. J. Jon Bruno, and the Rt. Rev. Sergio Carranza*
Lynn E. Moyer Law Offices of Lynn E. Moyer 200 Oceangate, Suite 830 Long Beach, CA 90802 (562) 437-4407 Fax: (562) 437-6057	*Attorneys For Defendants in Los Angeles County Superior Court Case Nos. BC321101 and BC321102*
Kent M. Bridwell 3646 Clarington Avenue, No. 400 Los Angeles, CA 90034-5022 (310) 837-1553 Fax: (310) 559-7838	*Attorneys For Defendants in Los Angeles County Superior Court Case Nos. BC321101 and BC321102*
Floyd J. Siegal Spile & Siegal LLP 16501 Ventura Blvd., Suite 610 Encino, CA 91436 (818) 784-6899 Fax: (818) 784-0176	*Attorneys for Defendants and Real Parties in Interest*

David Booth Beers
Heather H. Anderson
Jeffrey D. Skinner
Goodwin Procter LLP
901 New York Ave, NW
Washington, DC 20001
(202) 346-4000
Fax: (202) 346-4444

Attorneys for Plaintiff in Intervention and Petitioner The Episcopal Church

Clerk of the Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Appeal No. G042454

[1 copy of Reply]

Clerk to the Hon. Thierry Patrick Colaw
Orange County Superior Court
Civil Complex Center
Dept. CX-104
751 West Santa Ana Blvd.
Santa Ana, CA 92701

Case No. JCCP 4392

[1 copy of Reply]