

# SUPREME COURT COPY

CASE NO. S182407

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EPISCOPAL CHURCH CASES

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



SUPREME COURT  
**FILED**

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Frederick K. Ohlrich Clerk

v.

THE SUPERIOR COURT OF ORANGE COUNTY,  
Respondent.

Deputy

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 BRIEF OF REAL PARTIES IN INTEREST  
THE REV. PRAVEEN BUNYAN, ET AL.**

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## INTRODUCTION

In their Answer Brief on the Merits, The Episcopal Church, the Episcopal Diocese of Los Angeles, and their associates (“the Episcopal parties”) ignore the critical issue: *procedural posture*. Instead, grasping at language torn out of context, they repeat their mantra that *Episcopal Church Cases* (2009) 45 Cal.4th 467 (“*Episcopal Church Cases I*”) decided the property dispute’s underlying merits (including fact-dependent defenses) in an appeal from a demurrer and a special motion to strike. But saying it over and over does not make it so. The Episcopal parties cannot excise valid defenses by characterizing the reversal of a demurrer ruling (and a determination that the anti-SLAPP motion was not procedurally proper) as disposing of the entire case.

The Episcopal parties’ main claim is that this Court *implicitly* directed entry of judgment in their favor. But on appeal from a ruling on a demurrer (or anti-SLAPP motion), directing entry of judgment in the plaintiff’s favor is not an option. This Court did not direct any such draconian result, and the modified *Episcopal Church Cases I* opinion aptly clarified the very points the Episcopal parties harp on, by replacing original language and making clear that this Court was “addressing” and “analyzing,” not “resolving” or “deciding” the dispute. The prior opinion only determined the governing legal framework based on *assumed* facts given the pleadings-stage record presented. The modified opinion contains no language implying that, on remand, St. James Church and the fifteen individual defendants (collectively, “St. James” or “defendants”) are barred from putting on a full defense or from proving affirmative defenses, much less any language ordering entry of judgment.

Attempting to leapfrog over defendants’ right to answer, plead affirmative defenses, conduct discovery, and have the trial court resolve

contested factual issues, the Episcopal parties now claim that the facts in *Episcopal Church Cases I* were undisputed. To any extent defendants did not dispute plaintiffs' factual *allegations*, it was solely because of the procedural posture on appeal. On demurrer, and in reviewing a ruling on a demurrer, the facts pleaded by the plaintiff must be *assumed* to be true. Therefore, according to the standard of review, a party's briefing and argument on appeal before a case is even at issue cannot be taken as any concession that no factual disputes exist or will exist down the road.

The remaining arguments of the Episcopal parties are tortuous attempts to justify *appellate* fact-finding in their favor without opportunity for the defendants to take discovery or present a full factual defense. This arrogation of power to the appellate courts (at the expense of trial courts) by the Episcopal parties has never before been recognized or asserted; and it would completely unbalance and remake the judicial process, as well as create substantial due process concerns.

*Episcopal Church Cases I* decided the governing legal standard; it did not resolve disputed or yet-to-be discovered factual issues. Under the *neutral principles of law* approach this Court adopted, those factual issues may yet result in judgment for defendants on some or all of the Episcopal parties' claims. Defendants are entitled to the opportunity to plead and prove their factual defenses.

For all of these reasons, the Court of Appeal majority's opinion should be reversed and this Court should direct that writ relief be denied.

## ARGUMENT

### I. ***EPISCOPAL CHURCH CASES I DID NOT DECIDE THE MERITS OF THE PROPERTY OWNERSHIP DISPUTE.***

#### A. **The Episcopal Parties Avoid the Pivotal Issue on Review: That *Episcopal Church Cases I* Must Be Read in Its Procedural Context.**

The Answer Brief ignores the fundamental legal question presented on review: What rules govern interpreting this Court's opinions? The Episcopal parties studiously avoid analyzing this threshold issue. Instead, they purport to dictate to this Court, by dogged repetition, what it intended its written, published decision to mean. Speculating about the Court's subjective thought processes, the Episcopal parties' approach is to tell the Court what it must have been thinking.

But that's no way to provide certainty or direction to lower courts or litigants as to how to understand or read appellate opinions. The Episcopal parties ignore the Opening Brief's extended analysis demonstrating (both as a matter of this Court's precedents and fundamental due process principles) that appellate opinions must, like other operative writings, be understood as a whole and specifically within their procedural context. (Opening Brief on the Merits ["Op. Br."] at 22-31.) Nowhere does the Answer Brief address the oft-repeated holding that "[l]anguage used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524 n. 2; *accord, e.g., In re Tobacco II Cases* (2009) 46 Cal.4th 298, 323.) Nowhere does the Answer Brief address this Court's express holding that "[a]n appreciation of the procedural context of the case is *critical* to a proper understanding of [its prior] decision." (*Cornette v. Dep't of Transp.* (2001) 26 Cal.4th 63, 75

[emphasis added].) Nor does the Answer Brief anywhere address the host of other similar authorities discussed in the Opening Brief.

It is not surprising, however, that the Episcopal parties ignore the required procedural context prism in reading *Episcopal Church Cases I*. Procedural context necessarily precludes their crabbed interpretation. Appeals overturning demurrer rulings (or holding anti-SLAPP relief unavailable) do not – cannot – result in entry of judgment for the nonmoving plaintiffs. Instead, ignoring procedural context and posture, the Episcopal parties focus on isolated words and phrases in *Episcopal Church Cases I* that have been torn entirely out of the case’s overall context. That is deconstructionism, pure and simple.<sup>1</sup>

Procedural context should be dispositive of this appeal, but even if not, as we now explain, the Episcopal parties’ ultra-literal approach still does not support their position.

**B. *Episcopal Church Cases I* Contained No Direction to Enter Judgment for the Episcopal Parties (as One Would Expect If Their Reading Were Correct).**

The Episcopal parties claim that “[t]his Court made clear that Plaintiffs are entitled to the property.” (Answer Brief on the Merits [“Ans. Br.”] at 12.) Nonsense. Leaving aside for the moment this Court’s modifications that significantly qualified much of the purportedly dispositive original language, *Episcopal Church Cases I* does not direct a case-dispositive result. Nowhere does it contain the words one would expect if the opinion were intended to do what the Episcopal parties claim.

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<sup>1</sup> Deconstructionism hyperfocuses on the words as such rather than as any expression of the author’s intention. See, e.g., *Dobbs, Inc. v. Local No. 614, Int’l Bhd. of Teamsters* (6th Cir. 1987) 813 F.2d 85, 88 (“deconstructionism” gives “words [ ] only such meaning as the individual reader might arbitrarily assign to them”).

There is nothing akin to “we direct that judgment be entered for Plaintiffs on their claim for declaratory relief regarding ownership of the real property.”

This Court knows how to make “final determinations” when it wishes. (*E.g.*, *Western Telcon v. California State Lottery* (1996) [“The cause is transferred to the Court of Appeal with directions to reverse the superior court’s judgment in favor of defendants and to enter a new judgment in favor of plaintiffs”; cross-motions for summary judgment] *Phillippe v. Shapell Indus.* (1987) 43 Cal.3d 1247, 1270-71 [“We reverse the judgment in all respects and remand with directions to enter judgment including costs on appeal in favor of Shapell”; after trial]; *Fox v. Alexis* (1985) 38 Cal.3d 621, 632 [Lucas, J. dissenting] [“I would reverse the judgment and remand with directions to enter judgment for the DMV”; after superior court hearing on writ of mandate].) That *Episcopal Church Cases I* did not use any such language tells the reader that no such “final determination” occurred.

Instead of directive language, *Episcopal Church Cases I*’s sole mandate was that it “affirm[ed] the judgment of the Court of Appeal.” (*Episcopal Church Cases I*, 45 Cal.4th at 493.) Thus, the operative mandate is the Court of Appeal’s unqualified directive that “[t]he judgments of dismissal against the diocese [on the anti-SLAPP motion] and the national church [on demurrer] are both reversed. Further proceedings shall be consistent with this opinion.” (*Episcopal Church Cases* (2007) 152 Cal.App.4th 808, 876.) The Episcopal parties do not and cannot dispute that an unqualified reversal, which is what the Court of Appeal rendered, equates to “an order for a new trial, placing the parties in the same position as if the cause had never been tried.” (*People v. Moore* (2006) 39 Cal.4th 168, 174; accord *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 545 n. 4; see also *Fairmont Ins. Co. v. Superior Ct.* (2000) 22 Cal.4th 245 [new

trial or appellate reversal reopens discovery]; *Stearns v. Aguirre* (1857) 7 Cal. 443, 447-448 [rejecting claim that earlier opinion reversing judgment constituted res judicata; “(a)t common law, the Appellate Court either affirms or reverses the judgment, upon the record before it. . . . (A)fter the reversal of an erroneous judgment, *the parties in the Court below have the same rights that they originally had.*” (emphasis added)].)

The Episcopal parties all but ignore the Court of Appeal’s disposition, asserting with no explanation that it “doesn’t take away from” their position. (*See* Ans. Br. at 36.) Surely, neither this Court nor the Court of Appeal was remanding for “further proceedings” where the only further proceedings contemplated or allowed were to be entry of judgment in favor of the nonmoving plaintiffs. The law does not presume such idle acts. (*See* Civ. Code § 3532.) The Court of Appeal’s unqualified reversal put the parties in the same position as if the demurrer had been overruled and the anti-SLAPP motion denied (as both this Court and the Court of Appeal held should have been the case). *Episcopal Church Cases I* expressly “affirmed” that result.

**C. The Modified Opinion Unquestionably Clarified That It Wasn’t “Resolving” and “Deciding” the Property Dispute But Was “Addressing” and “Analyzing” It, Resulting Not in Unqualified Conclusions But in Conclusions Limited to the Pretrial Record Then Presented to This Court.**

Of course, the initial opinion was not the end of the story. St. James has already detailed this Court’s significant modifications to the original *Episcopal Church Cases I* opinion, and will not burden the record again here. (*Op.* Br. at 36-39.) Suffice it to say that the Episcopal parties’ focus on the opinion’s phrasing – such as “conclud[ing]” that the “general church owns the property” – ignores reading the opinion as a whole and the

important modifications this Court made. (*See* Op. Br. at 26.) In construing any written document, editorial changes and rejected language are particularly important. (*E.g.*, *Kelly v. Methodist Hosp. of So. Cal.* (2000) 22 Cal.4th 1108, 1116 [statutory language modifications as considered by Legislature]; *Committee of Seven Thousand v. Superior Ct.* (1988) 45 Cal.3d 491, 507 [“a material change in the language of a legislative enactment is ordinarily viewed as showing an intent on the part of the Legislature to change the meaning of the statute (citation)”].)

Here, the modified opinion substituted “address” and “analyze” for “resolve” and “decide,” and inserted the qualifier “on this record” in several places. (*Episcopal Church Cases I*, 45 Cal.4th at 473, 476, 478, 493.) The only reasonable inference from such changes is that the opinion was *not* to be conclusive on the property ownership issue. The Episcopal parties’ contrary view is nonsensical. “Address” is less dispositive than “resolve” and “analyze” is less dispositive than “decide.” Presumably, this Court modified the opinion for a reason, to make its result clearer and to effect a change in meaning. The only plausible clarification was that *no* case dispositive ruling was made, just as St. James had requested in its petition for rehearing and modification. (*See* 1 PE 67 [“For the foregoing reasons, this Court should grant rehearing or modify the Opinion filed on January 5, 2009, to make clear that the ultimate merits of the property ownership dispute in this case have not been finally decided.”].)<sup>2</sup>

The same is true of the “on this record” additions. The Episcopal parties read “on this record” as somehow expanding the opinion to mean that it is deciding even factual issues not discussed, argued or briefed on

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<sup>2</sup> “PE” refers to the Episcopal parties’ Exhibits Supporting Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief, filed on or about August 13, 2009. The citations are in the format [Volume] PE [Page(s)].

appeal. But far from “affirm[ing] plaintiffs’ position” (Ans. Br. at 25), the change from general conclusions to ones “on this record” cannot be anything but a limitation. The modification directly responded to defendants’ request pointing out potential factual issues to be addressed on remand. Most logically the added language recognized that the factual record could *change* with discovery and additional evidence on remand, which barely commenced before this current appeal. (*See* Op. Br. at 13-14.) The “record” referenced, thus, is the one discussed in the opinion. This Court’s published opinions are not, as the Court of Appeal hypothesized, private memoranda to the lower courts in the one case. They are public pronouncements that must be complete within their four corners.

Likewise, when this Court adjudicates a defense, it knows how to say so. (*See, e.g., Marsh v. State Bar of Cal.* (1934) 2 Cal.2d 75, 78 [“(T)hat petitioner there presented the same defense of ‘negligence’ as pleaded here, which defense is without merit”].) This Court did not say so in *Episcopal Church Cases I*, and could not have said so because the defenses had not yet been pleaded.

## **II. THE EPISCOPAL PARTIES’ ATTEMPT TO VEST APPELLATE COURTS WITH FACT-RESOLUTION POWERS IN APPEALS ARISING FROM DEMURRERS AND ANTI-SLAPP MOTIONS IS BASELESS.**

### **A. In Reviewing a Ruling on a Demurrer (or an Anti-SLAPP Motion) This Court Was Not Supposed to Make, and There Was No Notice That It Would Make, a “Final Determination” About Property Ownership.**

The Episcopal parties claim that in a preliminary-stage demurrer (or anti-SLAPP) appeal, this Court could make a “final determination”

regarding the ultimate issue of property ownership. (See Ans. Br. at 18-19.) That is simply wrong.

The Code of Civil Procedure mandates an orderly case resolution process. Nothing allows courts to leapfrog or circumvent that process. The cases the Episcopal parties cite are not to the contrary. They stand for the simple proposition that this Court can decide procedurally ripe legal issues when necessary to resolve the appeal presented; they do not confer sweeping powers on this Court to prematurely decide disputed or yet-to-be discovered factual matters on a pre-answer factual record.

*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, for example, involved a *legal* issue – Federal Arbitration Act (“FAA”) preemption – not previously raised by the parties but directly implicated by the reviewed Court of Appeal’s decision. (*Id.* at 1078, fn. 4.) In stating that “the parties [have] the opportunity to brief any issues that are fairly included within the issues actually raised,” *People v. Alice* (2007) 41 Cal.4th 668, 677, likewise, referred to *legal* issues, not procedurally unripe factual ones. Even a briefing opportunity is no substitute for an opportunity to plead, conduct discovery on, submit evidence supporting, and prove a factual defense.

*Episcopal Church Cases I* summarized the issues presented as: (1) “how the secular courts of this state should resolve disputes over church property” and (2) “the preliminary procedural question of whether this action is subject to a special motion to dismiss under Code of Civil Procedure section 425.16 . . . .” (*Episcopal Church Cases I*, 45 Cal.4th at 473.) These are pure legal framework issues, *not* questions requiring resolution of disputed facts. Nothing in the issues framed afforded defendants notice that *factual* issues and defenses would be fully and finally decided. Likewise, neither the issues presented for review, as framed in the petition for review, nor this Court’s website summary of

issues provided any notice that the ultimate issue of actual property ownership would be determined. (See 2 RPE 480-481; [http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc\\_id=1887365&doc\\_no=S155687](http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1887365&doc_no=S155687).) And nowhere did any of the briefing before St. James's rehearing petition mention its putative factual defenses, and the rehearing petition did so only as a rationale for modifying the original opinion because those factual issues needed to be adjudicated by the trial court on remand.<sup>3</sup>

Nor did *Episcopal Church Cases I*'s procedural posture put defendants on notice that a "final determination" of property ownership was in the offing. A successful demurrer defendant (or anti-SLAPP movant) can expect on appeal, at most, that the adversary's case might be permitted to proceed – *not* that judgment would be entered against it. Nothing in this Court's grant of review, or the procedural posture, put St. James Church on notice that it should consider *Episcopal Church Cases I* its first, last, and only chance to put on a full and complete factual defense case. In the trial court, no party had yet begun discovery and once the Episcopal parties filed their original notices of appeal in late 2005, no discovery could be taken. And even had there been notice, there is no mechanism by which defendants could have undertaken discovery or made an evidentiary record on appeal as to disputed fact issues.

*Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, relied on by the Episcopal parties, is not to the contrary. *Penziner* stands for the unremarkable proposition that "when the precise question before the court has been decided in a former appeal in the same action and *under*

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<sup>3</sup> The one exception is that St. James mentioned in passing in a footnote that it disputes whether the so-called Episcopal trust canon was validly enacted, i.e., is, in fact, part of the Episcopal Church's governing documents. (4 PE 1046 n. 13.)

*substantially the same state of facts*, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts.” (*Id.* at 169 [emphasis added].) The key, thus, is “substantially the same set of facts.” In *Penziner*, the facts at issue remained identical in the first appeal and on remand. (*Id.* at 168.) Under *Penziner*, where the facts remain the same, this Court’s prior legal determination controls. But the Episcopal parties seek to preclude defendants from showing or even discovering that the actual facts differ substantially from those the Episcopal parties alleged and were necessarily accepted as true in the prior procedural posture.

Furthermore, *Penziner* was premised on the law of the case doctrine. (*Id.* at 170.) That “doctrine applies only to an appellate court’s decision on a question of law; it does not apply to questions of fact. [Citation.] . . . [T]he law of the case doctrine is subject to an important limitation: it ‘applie[s] only to the *principles of law* laid down by the court as applicable to a retrial of fact,’ and ‘does not embrace the facts themselves. . . .’ (*Moore v. Trott* (1912) 162 Cal. 268, 273, 122 P. 462 [italics added].)” (*People v. Barragan* (2004) 32 Cal.4th 236, 246; see also *England v. Hospital of the Good Samaritan* (1939) 14 Cal.2d 791, 795 [under modern view doctrine “should not be adhered to when the application of it results in a manifestly unjust decision. . . . (and) (w)here there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before”].) Thus, even under *Penziner*, *Episcopal Church Cases I* cannot be read as determining the merits of the case.

**B. Judgment on the Pleadings Is Limited to Instances Where No Conceivable Fact Dispute Exists.**

The Episcopal parties argue that Code of Civil Procedure Section 438 authorizes entry of judgment on the pleadings even in the face of disputed fact issues. (Ans. Br. at 26-27.) Again, the Episcopal parties stretch a procedural vehicle far beyond its statutory and practical limits.

Section 438 is clear: “The grounds for motion provided for in this section shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice.” (Code Civ. Proc. § 438(d).) The same limits that constrain a demurrer constrain judgment on the pleadings, including barring judgment where actual or *potential* fact disputes are outstanding, and construing all facts, inferences and unresolved matters in the nonmoving party’s favor. (*Wise v. Pacific Gas & Elec. Co.* (2005) 132 Cal.App.4th 725, 738.)

Here, the pleadings at the time of the Episcopal parties’ section 438 motion could not possibly have supported judgment. The Episcopal parties conveniently omit that after remand following *Episcopal Church Cases I*, defendants answered, *generally denying* the First Amended Complaint-in-Intervention’s allegations. (1 PE 186-195.) They thereby disputed and put in issue all material allegations of the complaint. (Code Civ. Proc. § 431.30; *Advantec Group, Inc. v. Edwin’s Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 627 [“The effect of a general denial is to ‘put in issue the material allegations of the complaint.’” (citation omitted)].) The pleadings at issue *precluded* judgment on the pleadings. If The Episcopal Church wants judgment, it will need to marshal its evidence and make a properly supported motion for summary judgment or prevail at trial (St. James believes it can prevail at neither).

Similarly, the Episcopal Diocese of Los Angeles's demurrer to St. James Church's cross-complaint cannot be equated with a request for judgment on the pleadings. On its face, the cross-complaint pleads a valid claim. (See Section D.1. below.)

The *pleadings* present valid defenses and cross-claims. That ends the inquiry under section 438.

**C. There Was No “Undisputed Factual Record” In *Episcopal Church Cases I*.**

The Episcopal parties next argue that this Court had an “ample factual record containing undisputed material facts” which “constituted a complete record for application of the neutral principles test.” (Ans. Br. at 18, 19-20.) Disregarding the procedural posture, they attempt to convert pleading-stage *assumed* facts into incontrovertible *actual* facts.

**1. An Appeal From a Pleadings-Stage Challenge, By Its Very Nature, Does Not Provide an Appellate Court With Sufficient “Undisputed Facts” to Direct Entry of Judgment for a Plaintiff.**

On appeal from a demurrer, the facts alleged in the complaint *cannot* be disputed. Rather, they must be *assumed* true. (*Miklosy v. Regents of University of Cal.* (2008) 44 Cal.4th 876, 883 [“(O)n appeal from a judgment sustaining a demurrer, we assume the truth of the facts alleged in the complaint . . .”].) A demurring defendant admits the complaint's allegations *for the purposes of demurrer*. Those are the “facts” contained in *Episcopal Church Cases I*. But that legal construct cannot be used as a sword against the demurring defendant. The facts are undisputed only in the sense that the defendant cannot contest them *at that particular procedural stage*.

Likewise, even if this Court had reached the “merits” of the anti-SLAPP motion (which it did not), it must accept the evidence submitted by the plaintiff as true. (Code Civ. Proc. § 425.16(b).) There is no mechanism by which a court faced with an anti-SLAPP motion can determine whether facts are truly undisputed. The Code itself bars treating an unsuccessful anti-SLAPP motion as a reverse summary judgment motion against a moving defendant. (Code Civ. Proc. § 425.16(b)(3) [anti-SLAPP determination *inadmissible* at any later litigation stage].) An anti-SLAPP determination, thus, statutorily, cannot be law of the case. The point is all the more compelling because *Episcopal Church Cases I* held that the anti-SLAPP motion was procedurally inapplicable here.

In fact, there was no mechanism by which even to *raise* factual disputes. The parties could not submit separate statements of undisputed or disputed material facts, either to the Superior Court or to the Court of Appeal. (*Cf.* Cal. R. Ct., Rule 3.1350(d).) The defendants could not cite to factual disputes not in the record or yet to be pleaded or discovered. The record, thus, by definition was not and could not be “full” or “complete.” Without a proper vehicle for discovering and presenting all relevant facts, whether disputed or not, the Episcopal parties’ speculation that “enough” facts are agreed upon to permit entry of judgment is unfounded. Enough facts for whom? Certainly not for defendants.<sup>4</sup>

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<sup>4</sup> The Episcopal parties argue that deeds, local church incorporation documents, and the denomination’s self-asserted governing documents necessarily are *all* the evidence upon which church property disputes may be decided. Implicitly, they argue that local churches cannot assert factual defenses – waiver, estoppel, unclean hands, fraud, contract breach, and the like – or contest the authenticity or bona fides of proffered denominational governing documents with testimony or other evidence. That is not the law. Rather, that would create the very “principle of government” or “deference to hierarchy” test that *Episcopal Church Cases I* rejected.

Procedurally, the facts recited in *Episcopal Church Cases I* had to be *presumed* undisputed. But that presumption was only for testing the legal sufficiency of *the Episcopal parties' claims*. Such a presumption cannot be turned into a constraint on the ability of defendants to later contest those same presumed facts.

**2. Defendants Have Never Admitted That the Relevant Facts Are Either “Undisputed” or Completely Presented.**

The Episcopal parties' main “record” argument is the claim that facts are “uncontroverted based on admissions made by defendants in the record.” (Ans. Br. at 8.) The claim is not only wrong but disingenuous. The Episcopal parties cite only to St. James' Opening Brief in the Court of Appeal in *Episcopal Church Cases I*. (1 RPE 185-245; 2 RPE 364-427.) But statements in legal memoranda are *not* admissions. (*Do It Yourself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 37 [An “attempt to elevate an unsworn statement made as part of the points and authorities supporting a motion to the level of a judicial admission is unfounded”]; *People v. Kiney* (2007) 151 Cal.App.4th 807, 815 [“statements of counsel in argument are not deemed judicial admissions unless they have the formality of an admission or a stipulation”].)

And for good reason. Counsel's statements in briefs are necessarily framed in the case's procedural context. In an appeal from a successful demurrer, a defendant has to treat the facts alleged as if they were true and not discuss additional facts not alleged. To deem a brief discussing facts according to the appropriate standard of review as an admission that such facts are forever undisputed would be a travesty. Parties should not have to preface every factual statement in an appellate brief with “for the purposes

of this brief only and based on the applicable standard of review.” That is implicit in appellate briefing.

Because procedural context matters, judicial admissions are only made in pleadings, by stipulation during trial, or by response to requests for admission. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.) “Not every document filed by a party constitutes a pleading from which a judicial admission may be extracted.” (*Id.*) “The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints.” (Code Civ. Proc. § 422.10.) Appellate briefs don’t qualify.

The Episcopal parties also ignore that the snapshot of “facts” alleged in their pleadings do not show the whole picture. They list a series of items that they claim to be “undisputed” (as just discussed not all are). (Ans. Br. at 19-21.) Their list, though, is a truncated version of those facts relevant under neutral legal principles. They ignore affirmative factual defenses such as estoppel or waiver. And, they ignore other factual defenses.

In *Episcopal Church Cases I*, neither the record nor the briefing addressed, much less provided a “complete record” on such vital issues, *nor could it* given the procedural posture. The briefs in the prior appeal were thorough and complete *given the procedural posture of the case and the limited issues as to which review was granted*. They did not *and could not* represent a full, fair and complete litigation of every material controversy that could bear on the ultimate outcome of this case.

#### **D. Unresolved Fact Issues Remain.**

The prospect for unresolved factual issues is not merely potential or hypothetical here. It is tangible. Clearly identified, factually supported or at least plausible defenses exist, both affirmative and in contravention of the Episcopal parties’ prima facie case. These include (1) waiver and estoppel, including *but not limited to* evidence concerning the 1991 waiver

letter (e.g., post-remand deposition testimony ignored by the Episcopal parties); (2) whether The Episcopal Church is a “superior religious body or general church” within the meaning of Corporations Code section 9142, subdivision (c); and (3) whether the so-called Dennis Canon, in fact, is a validly-enacted part of The Episcopal Church’s governing documents or rather is a spurious invention of a self-appointed hierarchy.

The Episcopal parties’ claim that defendants have not presented any *evidence* in these regards is both procedurally improper and factually incorrect. Procedurally, having sought judgment before discovery and barely after the answers had been filed, the standard is not what evidence currently exists, but whether any conceivable evidentiary record *might* be developed that would preclude judgment in the Episcopal parties’ favor. The answer is undoubtedly “yes.” In addition to entirely new facts that might emerge in discovery to support its defenses, and a right to amend its answers to plead new defenses, in its briefing St. James has presented either evidence or a good faith expectation of further evidence to be adduced in discovery, as we now discuss.

**1. An Unresolved Fact Issue Remains About the Episcopal Parties’ Express Written Waiver of Any Trust Interest in St. James’s “32nd Street” Property.**

One thing that is undisputed is that the Diocese sent St. James a letter in 1991 expressly waiving any beneficial interest in St. James’s “32nd Street” property. (*See* 1 PE 181.) After remand, The Episcopal Church’s own bishop so *conceded* under oath. (1 RPE 10, 13-14.) In reliance, St. James acquired and undertook to maintain that property. (1 PE 176.)

“The defense of waiver raises an issue of fact to be decided after a consideration of all the circumstances of the particular case, and is a

question primarily for the trial court.” (*Hefferan v. Freebairn* (1950) 34 Cal.2d 715, 722.) Under well-recognized law, a party may waive, or be estopped from asserting, trust rights, either expressly or by leading an opposing party to believe such rights will not be asserted. Nothing in Corporations Code section 9142 precludes application of such equitable doctrines. (*See Goss v. Edwards* (1977) 68 Cal.App.3d 264, 269-270, 271-270 [statutory bar on voting trusts subject to equitable defenses].) If a beneficial interest in land can be created by estoppel (*see Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1071), such an interest should be extinguishable in the same manner.

The Episcopal parties have no response other than to claim that *Episcopal Church Cases I* somehow sub silentio rejected this theory or evidence. Of course, there was not a word about the letter and the Episcopal parties’ waiver in *any* of the appellate briefing or either the original or modified opinion in *Episcopal Church Cases I*. Nor did there need to be, given the issues for review and the procedural posture which tested whether the Episcopal parties’ *complaints* could proceed. St. James first raised the letter in its Petition for Rehearing as an *example* of a remaining fact issue to be explored in discovery and adjudicated upon remand after it answered. (*See Ans. Br.* at 24-25.) The original opinion cannot possibly have ruled on an issue that it did not discuss and that no party had argued, regardless of what nascent facts lay buried and unexamined in tangential documents in the appellate record. The rehearing petition is clear that defendants wished to have an *opportunity* to take discovery regarding, and to fully argue and brief, the waiver letter in the Superior Court – the proper venue for resolving such an intensely factual issue as waiver or estoppel. Nowhere did the rehearing petition suggest that this Court did or should decide the factual waiver issue itself on the merits.

The modified opinion *still* did not mention the letter. Nothing in that modification suggested that it was adjudicating any factual defense – actual or prospective – that had been discussed in the rehearing petition. Rather, it left open further factual development on remand. And that is precisely what defendants commenced, starting with a deposition and favorable admission from the Episcopal bishop who signed the letter.

If *Episcopal Church Cases I* intended to usurp full discovery and the traditional fact-finding role of the trial court, one would expect it to have expressly said so.

**2. An Unresolved Fact Issue Remains About Whether The Episcopal Church Falls Within Corporations Code Section 9142, Subdivision (c).**

Another potential fact issue remains to be litigated. Corporations Code section 9142, subdivision (c), only applies to a “superior religious body or general church.” In *Episcopal Church Cases I*, this Court had to *assume* that fact, because that is what the Episcopal parties *alleged*. Whether that is true or not is a factual question that still has to be determined.

The Episcopal parties’ position is that since *they* have *said* that the Episcopal Church is a “superior religious body,” or other courts have treated it as such, that must be accepted as true here. (Ans. Br. at 32-33.) But asserting a fact is not proving it. The defendants are not bound by factual assumptions or statements in other cases. The complex nature of a religious organization is not a question of law or judicially noticeable. Defendants have denied the Episcopal parties’ self-serving factual characterization, and in fact there is a raging controversy within The Episcopal Church itself about whether, and the extent to which, it is a “hierarchical,” “superior” or even a “general church.” Indeed, in a post-

remand deposition, the Episcopal parties' own bishop described The Episcopal Church (the only entity with a supposed unilateral trust provision) as "a voluntary association of equal dioceses" (1 RPE 16, Ins. 11-24) with no overarching authority over the dioceses, reflecting a federational – rather than hierarchical or superior – structure. (1 RPE 18, Ins. 17-25; 19, Ins. 1-2.)

Whether The Episcopal Church is "superior" or a "general" church is an issue yet to be determined; otherwise, any religious entity that wished to avail itself of section 9142(c) would simply describe itself as a "general church." But crediting such a move would be the very deference to self-anointed hierarchy approach that *Episcopal Church Cases I* rejected. If neutral legal principles are to apply, the nature of the denominational structure needs to be proved, not just assumed after one party's self-declaration.

**3. An Unresolved Potential Fact Issue Exists About Whether the So-Called "Dennis Canon" Constitutes a Valid Part of The Episcopal Church's Constitution or Governing Documents.**

At the heart of *Episcopal Church Cases I* was the Episcopal Church's supposed trust rule known as the "Dennis Canon." The Episcopal parties suggest that defendants have conceded that the Dennis Canon was validly and properly adopted and therefore an integral part of the relevant governing documents. (Ans. Br. at 20-21.) Not so. Given the demurrer and anti-SLAPP procedural posture, defendants had to *assume* for the sake of argument that the Dennis Canon was validly part of The Episcopal Church's governing documents. Even so, defendants were careful to repeatedly refer to the "purportedly adopted" or "purportedly enacted"

Dennis Canon. (See 4 PE 989 [“purported trust rule”]; 4 PE 1046 [“purporting to enact Canon I.7.4].)

*Episcopal Church Cases I* admittedly contains dicta directed at some, but not all, potential challenges to the Dennis Canon’s effect. But if neutral secular law principles govern at a later *evidentiary* stage, the trial court must address preliminary questions of authentication and validity of proffered governing documents.<sup>5</sup> Those documents are no more self-validating because they are proffered by a religious entity than in any other context: “If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness.” (*Serbian Eastern Orthodox Diocese for United States & Canada v. Milivojevich* (1976) 426 U.S. 696, 727 [Rehnquist, J., dissenting].)

Under the neutral principles framework, defendants should have the right to discover the claimed authenticity, adoption or amendment of The Episcopal Church’s governing documents at issue in this case. Courts and parties do *not* and cannot just take one party’s word for it. Whether “dubious” (see *Episcopal Church Cases I, supra*, 45 Cal.4th at 492) or not at the pleading stage of the case, the true state of the governing documents The Episcopal Church has proffered is a valid and important question for post-remand inquiry.

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<sup>5</sup> For example, if the Dennis Canon was not approved by both houses of its bicameral General Convention, or if it was approved without the notice required by the governing documents themselves, that would be a formal deficiency that should be reviewable under neutral secular law, no different from the determination of the authenticity or formal validity of any other nonprofit organization’s governing documents.

#### 4. The Episcopal Parties Admit That Unresolved Fact Issues Remain About the Individual Defendants.

The Episcopal parties dismiss in one paragraph the individual defendants' concern that they will be swept up in the Episcopal parties' "final determination" argument. (Ans. Br. at 36.) The Episcopal parties concede that claims against the individual defendants are *not* part of the judgment they seek in this writ proceeding: "Plaintiffs' claims for damages and an accounting were left to be resolved during further proceedings consistent with the Court's opinion." *Id.* (internal quotations omitted).

But the concession rings hollow. What the Episcopal parties do *not* admit is that any determination in this proceeding will not bind the individual parties, who are church volunteers being sued for monetary damages in a dispute over property held by the St. James nonprofit corporation.<sup>6</sup> The Episcopal parties also carefully do *not* admit that individual defendants' liability will remain open. Thus, the individual defendants are faced with the prospect of not being able to have a say in a property ownership determination to which the Episcopal parties may then seek to bind them and their personal bank accounts.

This is not a baseless fear. The Episcopal parties glibly throw all of the defendants together when it suits their purposes while at the same time claiming that they should not be concerned about such tactics. For example, the Episcopal parties inaccurately assert that the "defendants 'promis[ed] to follow the [(Episcopal) Church's Canons]'" in 1947. (Ans. Br. at 9; *see* 2 RPE 380.) No individual defendant here made any such promise; in 1947, 15 of the 16 were either minors or not yet born. This

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<sup>6</sup> Indeed, the individual defendants had the Episcopal parties' 1991 waiver letter before them when they made the decisions they did in 2004, and so they are particularly interested in an orderly and proper factual development and resolution of that defense.

imprecise broad brush assertion (similar to asserting that the overruling of a demurrer equates to requiring entry of judgment for the plaintiff) fuels the well-founded fear that the Episcopal parties are using their “everything-has-been-decided, move-along, nothing-to-see-here” *leitmotif* as a stalking horse to obtain a money judgment against the individual defendants. A judgment on the pleadings that might be claimed to adjudicate the individual defendants’ rights – including their right to contest property ownership issues – without any opportunity for discovery or factual contest on their part is inappropriate on this ground alone.

### **III. THE EPISCOPAL PARTIES’ REMAINING ARGUMENTS ARE WITHOUT MERIT.**

#### **A. Other Court of Appeal Decisions Involving Different Procedural Postures and Facts Have No Application Here.**

The Episcopal parties ask this Court to affirm the Court of Appeal’s grant of writ relief on a ground never before asserted by them, not briefed by any of the parties below, nor even mentioned by the Court of Appeal – namely, that three Court of Appeal decisions in *other* cases (according to them) state that courts must always rule for The Episcopal Church in property disputes.

Of course, decisions on factual issues in other cases are not binding on the St. James defendants as they are not in privity with other parishes. (*Nein v. HostPro* (2009) 174 Cal.App.4th 833, 844; *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 86 [no privity even though same counsel represented other plaintiff on similar claim against same defendant].) The three decisions the Episcopal parties cite fundamentally differ from the case here, involving different claims and legal theories and most importantly different procedural postures.

*New v. Kroeger* (2008) 167 Cal.App.4th 800, was an action brought by the Episcopal Diocese of San Diego (not a party here) under Corporations Code section 9418 to determine the validity of an election of the local church's board of directors. (*Id.* at 807.) Defendants here were neither parties nor in privity with any of the parties. No direct property ownership claims were made and there was no discussion of waiver, estoppel or any other affirmative defense. The appeal arose after a full evidentiary hearing under a special summary procedure for corporate election challenges. To the extent that *New* discusses The Episcopal Church's supposed structure, that discussion is based on the facts assumed or developed in that case. Such a *factual* determination is not binding on other parties in other actions.

*Huber v. Jackson* (2009) 175 Cal.App.4th 663, supports St. James's position, not that of the Episcopal parties. Again, neither St. James nor the individual defendants here were parties or in privity with any. Most important, the appeal was after judgment on cross-motions for *summary judgment* where all parties agreed the material facts were undisputed. (*Id.* at 671.) Summary judgment is an appropriate procedural place at which to determine whether disputed fact issues exist. Demurrer and anti-SLAPP motions are not. If the Episcopal parties believe that all material facts are undisputed, summary judgment – not judgment on the pleadings after demurrer – is the appropriate procedure. And, again, significant factual differences exist between *Huber* and this case, which under a neutral principles analysis can make all the difference. Critically, for example, in *Huber* there was no hint of an express written waiver as there is here, and the local churches' corporate documents are different.

The Episcopal parties also argue that *Huber* and another case, *Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American District* (2009) 173 Cal.App.4th 420, establish that *Episcopal Church Cases I* has been

“widely perceived” as disposing of the ultimate property ownership issue in all situations where the Episcopal parties might lay claim to local church property. Those two cases do refer to *Episcopal Church Cases I* and the property of St. James as having reverted to the Episcopal parties. But neither case addressed *Episcopal Church Cases I*’s procedural posture.

That’s not surprising. Both cases involved fully developed factual records: in *Huber*, on summary judgment (*Huber*, 175 Cal.App.4th at 671); in *Iglesia Evangelica*, after a multi-day bench trial (*Iglesia Evangelica*, 173 Cal.App.4th at 430-431). Neither case considered whether *Episcopal Church Cases I* cut short or could cut short the normal fact-finding process, which is not surprising as *Episcopal Church Cases I* makes no mention of doing so. Cases do not stand for propositions not considered. (E.g., *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 323.) In any event, Court of Appeal dicta is hardly definitive as to the meaning of this Court’s opinion.

In contrast, in response to St. James’s petition for certiorari to the United States Supreme Court, the Episcopal parties argued that *Episcopal Church Cases I* was *not* a “final determination” of the merits. (See 5 RPE 1276.) Unlike appellate decisions involving other parties and premised upon different facts, the Episcopal parties’ avowed view *in this case* was that *Episcopal Church Cases I*, by its own force, was *not* case dispositive.

*New, Huber* and *Iglesia* are not binding here. If anything, they illustrate that a full factual and evidentiary opportunity must be provided before a local church’s property rights can be adjudicated.

**B. The “Miscarriage of Justice” Standard Is Inapplicable Because No Judgment for The Episcopal Parties Has Ever Been Entered; In Any Event, Denying a Party the Right to Discover and Contest Facts Is a Miscarriage of Justice.**

The Episcopal parties argue that skipping over discovery and disputed facts is justified because the Court of Appeal’s decision created no “miscarriage of justice.” That position is wrong, both procedurally and substantively. The Episcopal parties rely on California Constitution, Article VI, Section 13. But that section only directs that “[n]o *judgment* shall be set aside, . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Emphasis added.) By its plain language, section 13 applies only to *judgments* – not to a Court of Appeal’s improper writ relief. (See *People v. Alexander* (2010) 49 Cal.4th 846, 896] [distinguishing *Barber v. Municipal Ct.* (1979) 24 Cal.3d 742, on this basis].) The Episcopal parties fail to mention that *no judgment has been entered*. The defendants are not seeking to set aside a judgment, but contending that writ relief directing entry of judgment is improper.

In any event, there *is* a miscarriage of justice here. Denying a party an opportunity to obtain discovery and to have a *fact-finder* resolve disputed fact issues is a miscarriage of justice. Under the Episcopal parties’ theory, disputed fact issues would not suffice to reverse a judgment after summary judgment or a demurrer ruling. Instead, the appellate courts would get to weigh the evidence in dispute to determine whether, in their view, there had been a miscarriage of justice. That clearly is not the law. (*Callahan v. Chatsworth Park, Inc.* (1962) 204 Cal.App.2d 597, 610

[summary judgment granted despite disputed fact issues denies fair trial and is per se miscarriage of justice].)

**C. The Episcopal Parties’ “Enough Is Enough” Argument Is No Substitute for Due Process and a Fair Evidentiary Opportunity; If Anything It Supports St. James.**

Lastly, the Episcopal parties claim that the Court of Appeal majority’s decision should be upheld because “enough is enough” – shorthand for the idea that the Episcopal parties feel that judicial wheels should grind faster. (Ans. Br. at 7-8, 30.) But “enough is enough” is not a legal standard, and certainly not one that allows for depriving parties of valuable property rights without due process and an opportunity to present an evidentiary case. In any event, an “enough is enough” standard favors *defendants*, not the Episcopal parties.

The Episcopal parties complain of “nearly six years of litigation” yet the matter remains at an early procedural stage due to their own litigation choices. (*Id.* at 30.) The Episcopal parties make it sound as if defendants have been dilatory. Not so. Defendants filed two preliminary challenges (a demurrer and an anti-SLAPP motion) to the complaints. (1 RPE 54-71; 1 RPE 72-78.) The Episcopal parties did everything they could to delay resolution, including filing an amended complaint while an anti-SLAPP motion was pending (*see Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.* (2004) 122 Cal.App.4th 1049 [barring just that]). Nonetheless, defendants’ challenges were resolved within a year.

The Episcopal parties then embarked on a 39-month appellate detour. On remand, the defendants promptly answered the complaints and began to take discovery. After less than 6 months, the Episcopal parties sought interlocutory appellate court intervention. The delay since then (now 15 months) again is attributable solely to them.

The Episcopal parties could have accepted the superior court's 2009 nondispositive denial of their motion for judgment on the pleadings and overruling of their demurrer, propounded discovery, and then brought a properly supported motion for summary judgment (as Judge Colaw suggested in his minute order). Had they done so, that motion would long ago have been determined (and we believe denied). Instead, the Episcopal parties insisted on seeking interlocutory appellate intervention. Thus, of the "six years" the Episcopal parties complain about, the great bulk – 4½ years – have been consumed by appellate proceedings *commenced by them!* Meanwhile, over a dozen defendant church volunteers and clergypersons are waiting for their day in court while enduring the stress and personal inconveniences of having been sued. If anyone is responsible for delay, it is the Episcopal parties which have consistently frustrated development of a full factual record and a procedurally proper case resolution through summary judgment or trial.

But even if the Episcopal parties' complaint about the duration of the proceedings were well founded, it is irrelevant. Thankfully, our justice system does not cut short important rights simply because one side, or even the tribunal, thinks that matters have gone on too long. A substantial part of the time involved here is that twice this Court has thought the issues weighty enough to warrant its review. Surely, this Court's review cannot be viewed as an unnecessary delay or a reason to declare "enough is enough." The Code of Civil Procedure specifies the ways in which a case can be determined and judgment entered – most often through trial or summary judgment; occasionally as a sanction for extreme discovery misconduct; and on the pleadings *only* where the pleadings themselves and judicially noticeable facts mandate entry of judgment. The prolonged nature of these appellate proceedings, standing alone, is no reason to enter judgment in favor of the party seeking appellate relief.

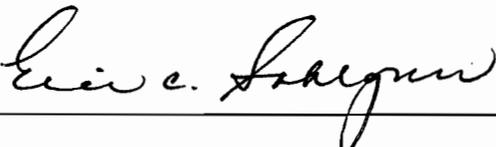
If anyone is entitled to “enough is enough” relief, it is defendants. The Diocese long ago expressly, in writing, waived any beneficial interest in St. James’s property. Yet, the Episcopal parties have waged this time-consuming and expensive litigation for years hoping to avoid their own written promise. Enough is enough. St. James should be allowed to fully discover and prove facts concerning the waiver to keep its property and move on with its religious mission. So, too, a group of church volunteers are being personally attacked over corporate property for having made a religious decision based on conscience. Enough is enough. They, too, should be allowed to proceed with their lives unburdened by The Episcopal Church’s legal attack.

## CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeal majority's opinion and direct that the petition for writ of mandate be denied in accordance with dissenting Justice Fybel's opinion. It should clarify that *Episcopal Church Cases I* remanded the case for further proceedings, including discovery, motion practice and trial, as in any other case reversing a trial court's demurrer and anti-SLAPP rulings.

DATED: November 19, 2010    **PAYNE & FEARS LLP**  
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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 BRIEF OF REAL PARTIES IN INTEREST THE REV. PRAVEEN BUNYAN, ET AL.** is produced using 13-point Roman type including footnotes and contains **8,400** words, which is less than the total words permitted by the California Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: November 19, 2010

  
\_\_\_\_\_  
Daniel F. Lyla

**PROOF OF SERVICE**

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

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 by 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.

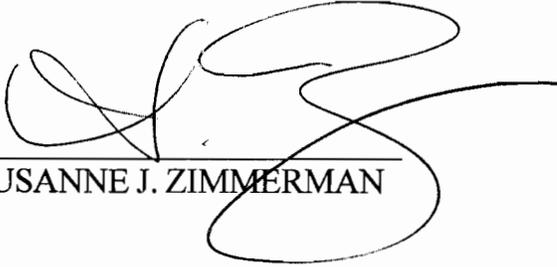
On November 19, 2010, I served the following document(s) described as **REPLY BRIEF OF REAL PARTIES IN INTEREST THE REV. PRAVEEN BUNYAN, ET AL.** on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes, with first-class postage prepaid, addressed as follows:

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

Executed on November 19, 2010, at Irvine, California.

  
\_\_\_\_\_  
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*Jane Hyde Rasmussen, et al. vs. Superior Court of Orange County*  
Case No. S182407

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