

No. A152934 and A153165

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO**

THE EPISCOPAL CHURCH IN THE DIOCESE OF CALIFORNIA,
ET AL.,
Plaintiffs-Appellants,

v.

EPISCOPAL SENIOR COMMUNITIES, ET AL.,
Defendants-Respondents

**APPLICATION TO FILE BRIEF OF AMICUS CURIAE
FRIENDS OF THE EPISCOPAL DIOCESE
IN SUPPORT OF PLAINTIFFS-APPELLANTS;
AMICUS CURIAE BRIEF**

Appeals from the Superior Court of California,
City and County of San Francisco
Hon. A. James Robertson II, Judge
Superior Court No. CGC-15-547681

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(Cal. Rules of Court, Rules 8.208, 8.490, 8.494 & 8.498)**

The following entities or persons have either: (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, Rule 8.208(e)(1)), or (2) a financial interest or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, Rule 8.208(e)(2)):

None.

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**APPLICATION OF FRIENDS OF THE EPISCOPAL DIOCESE FOR
LEAVE TO FILE AMICUS CURIAE BRIEF**

Pursuant to California Rule of Court 8.200(c), Friends of the Episcopal Diocese, an unincorporated association of individuals who support the interests of the charitable class served by Episcopal Senior Communities (“ESC”) (the “Amicus” or, as set forth below, “Residents”) respectfully request leave to file the attached amicus brief in support of Plaintiffs-Appellants The Episcopal Church in the Diocese of California, et al.

The Appellants’ briefs have laid out a number of reasons why the Trial Court’s Judgment should be reversed; as set forth below, this Amicus brief focuses and elaborates on one: in finding no breach of the charitable trust at issue in this case, the Trial Court failed to correctly apply the Charitable Trust Doctrine in a way that would have a harmful impact on Amicus and more broadly charitable donors, nonprofit organizations, and charitable beneficiaries throughout California, all of which rely on the use of charitable assets exclusively for their intended charitable purposes. Allowing the Trial Court judgment to stand would potentially create a system of abuse in the charitable sector, and also suggest a problematic change to the rules governing charitable trusts in California.

This case presents an important issue of law and public policy – the application of the Charitable Trust Doctrine – which derives from common law and has been well articulated by California Courts over the course of more than a century.¹

The Charitable Trust Doctrine requires that assets held by a charitable organization may only be used for the expressly declared charitable purposes of the corporation when received, even if the

¹ See *Estate of Hinckley* (1881) 58 Cal. 457; *People ex rel. Ellert v. Cogswell* (1896) 113 Cal. 129.

corporation changes its purpose, transfers those assets, or dissolves. The Cy Pres Doctrine, which is not applicable in this case, provides the exclusive legal method for changing the charitable purposes of a charitable trust and it applies only where the charitable purpose has become illegal, impossible or impracticable to achieve.

The Trial Court's reasoning and ruling that a breach of charitable trust did not occur in this case, if affirmed, would not only have the harmful impacts on Amicus and the broader charitable community throughout California, but it would ignore and potentially overturn well-settled law in this state. Allowing the Trial Court order to stand potentially changes the law of this state to permit fiduciaries of California nonprofit corporations and charitable trusts to have free rein to divert charitable assets to their personal visions of what should be charitable to the detriment of donors and charitable beneficiaries that relied on the original promises of charitable institutions with which they interact.

Amicus respectfully requests that this Court accept and file the attached amicus brief. No party or counsel for any party has authored any portion of this brief or provided any monetary contribution or funding for the preparation or submission of this amicus brief.

INTEREST OF AMICUS CURIAE

Amicus Curiae, Friends of the Episcopal Diocese, includes as members many residents of the San Francisco Towers located at 1661 Pine Street San Francisco, California (the "Towers") (the Amicus is also hereinafter referred to as the "Residents"). The Residents associated with one another to articulate important issues of law relevant to this Court in the appeal of the Trial Court decision in *The Episcopal Church in the*

Diocese of California, et al. v. Episcopal Senior Communities, et al.,² and to highlight the impact of the Trial Court’s misapplication of the Charitable Trust Doctrine on the charitable class served by ESC.³

The Amicus have a strong interest in the outcome of this case because the Court’s decision could cause irreparable harm to the lives of all residents of residential facilities owned and operated by ESC, by upsetting their expectation of religious oversight of the Episcopal Church in the Diocese of California, a California nonprofit religious corporation (the “Episcopal Church”) and the Episcopal Bishop of California (the “Bishop”) (together, the “Church Entities”). It also threatens their economic security.

ESC operates residential facilities for the elderly, including the Towers. Residents of the Towers (and other facilities operated by ESC) enter a contract agreeing to pay a significant up-front fee plus monthly payments, in return for the promise of lifetime residence, care, and spiritual peace of mind. For residents who entered an ESC facility before June 2016, the commitment made by ESC included an explicit connection to The Episcopal Church.⁴ These residents were aware of the historic recognition

² *The Episcopal Church in the Diocese of California, et al. v. Episcopal Senior Communities, et al.*, No. CGC-15-547681, Cal. Super. Ct., County of San Francisco.

³ ESC was formed to “provide housing, related facilities, and services for elderly persons on a non-profit, religious, and charitable basis.” AA0116, art. Second. SRW was formed to “provide housing, related facilities and services for elderly persons on a nonprofit basis.” AA0098, art. Second. Accordingly, the class of beneficiaries of both ESC and SRW are the elderly persons who are or will be housed at ESC facilities or who now receive or may in the future receive services from ESC and SRW.

In this Application and Amicus Brief, the Appellants’ Appendix is cited as “AA[page],” the Reporter’s Transcript as “[volume number] RT-[page]:[line],” and the Amicus Curiae’s Appendix is cited as “ACA[page].”

⁴ The resident contracts described ESC as an “institution of the Episcopal Diocese” until at least 2016. See *Life Care Contract*, revised in July 1997,

of ESC as a Diocesan Institution with a formal connection to the Episcopal Church since its inception. Many residents chose the Towers specifically because of ESC's religious connection to the Episcopal Church and its governance structure.⁵ For many of the residents, the up-front contract costs paid by them to ESC represented all or substantially all of their wealth, so that they no longer have the means to move.

The residents of the Towers and other facilities operated by ESC are well aware as a result of this litigation that ESC's goal was to structure a merger that could result in the ultimate creation of an organization that is not faith-based, and which would extinguish ESC's connection and relationship with the Church Entities.

Achieving that goal would impose two harms upon the charitable class: (1) a loss of their relationship to, and the moral protection of, the Episcopal Church in their housing and personal care during the most vulnerable years of their lives; and (2) exposure to potential additional costs, such as property taxes and corporate overhead, if the residential facilities are sold to or merged with a for-profit corporation. There is no

pg. 1, Recital B, attached to the Amicus Curiae's Appendix ("ACA") as Exhibit A. ACA005-024. See also Residence and Care Agreement, revised in December 2010, pg. 1, para. B, attached to the ACA as Exhibit B. ACA026-093. Compare to the resident contract, revised in January 2017, which expressly states that ESC has "no formal or financial relationship with the Episcopal Church or any Diocese of the Episcopal Church." Lifetime Residence and Services Agreement, pg. 1, Recital B, attached to the ACA as Exhibit C. ACA095-169.

⁵ Many residents are aware that the governance structure required the oversight of the Episcopal Bishop of California, a California Corporation Sole, which is the legal entity that administers and manages the affairs, property and temporalities of the Diocese through the Bishop (currently, Bishop Marc Andrus) (the "Bishop"). See Plaintiffs-Appellants' First Amended Exhibit List, Exhibit 63 (June 9, 2016 Letter from James W. Guthrie and San Francisco Towers Resident's Petition, DioCal 010993-11009) (Sept. 20, 2016).

protection in their contracts against increases to their monthly fees,⁶ and under most residential contracts there is no option of a refund if they choose to leave.⁷

The Trial Court’s decision that there has been no breach “because ESC has not diverted any trust assets, which is required for there to be a breach of charitable trust” is wrong because it ignores and misapplies the Charitable Trust Doctrine in favor of inapposite breach of contract principles. The Trial Court failed to recognize that by removing the religious purposes from its stated purposes in its Articles of Incorporation, removing the Bishop’s authority and governance prerogatives, and repudiating the Sponsorship Agreement entered into between ESC and the Church Entities effective May 1, 2005 (the “Sponsorship Agreement”),⁸ the Board of ESC breached its fiduciary duty and violated the Charitable Trust Doctrine.

For the reasons set forth below, Amicus respectfully urges this Court to overturn the Trial Court’s rulings in this case, and find and hold that ESC’s actions constitute a breach of charitable trust based on a proper interpretation and application of the Charitable Trust Doctrine.

⁶ In 2017, the Towers required an entrance fee that exceeded \$200,000, and a monthly occupancy fee that exceeded \$4,000, which can be modified at ESC’s discretion. See, e.g., Lifetime Residence and Services Agreement, pgs. 10-11, Sections 5.2 and 5.3, attached to the ACA as Exhibit C. ACA095-169.

⁷ The resident contract, revised in January 2017, provides that the resident will receive no refund if the resident leaves the Towers after a 50-month cancellation period. *Id* at pgs. 23-24, Section 9.3.

⁸ AA0150-AA0161.

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

Amicus support the Plaintiffs-Appellants' position that the Trial Court's judgment should be reversed in this case. Amicus will not repeat or address all of the issues in the case briefed by the Parties in this appeal, but instead will focus and elaborate on one key point on which the Trial Court's judgment should be reversed: in finding no breach of the charitable trust at issue because there was no diversion of assets, the Trial Court misunderstood and misapplied the Charitable Trust Doctrine in California; the error was prejudicial and should be reversed.

In this brief, Amicus explain how the Trial Court decision, if upheld, will set precedent for the incorrect application of the Charitable Trust Doctrine, contrary to well-settled law in this state, will directly harm the Residents of ESC's numerous facilities in Northern California, and will negatively affect nonprofit public benefit corporations state-wide.

II. BACKGROUND

The Episcopal Diocese chartered ESC and SRW to provide senior housing and services on a religious basis on behalf of the Episcopal Church. ESC was formed in 1965 and its original articles of incorporation stated that its purpose was to "provide housing, related facilities, and services for elderly persons on a non-profit, religious, and charitable basis; and to receive donations, gifts, and other funds for use in the advancement of the religious and charitable work done on a non-profit basis by the Protestant Episcopal Church in the Diocese of California, its Diocesan Institutions, and the parishes and missions affiliated with it."⁹ Further, its Articles stated that "the property of this corporation is irrevocably dedicated to religious and charitable purposes," and upon liquidation or

⁹ AA0116, art. Second, para. (a)(emphasis added).

dissolution, “all properties and assets of this corporation remaining after paying or providing for all debts and obligations shall be distributed and paid over to a fund, foundation or corporation organized and operated exclusively for charitable purposes by the Diocese of California of the Protestant Episcopal Church.”¹⁰

SRW was formed in 1963 and its original articles of incorporation¹¹ similarly stated that its purpose was to “provide housing, related facilities and services for elderly persons on a nonprofit basis” and declared that “the property is irrevocably dedicated to religious and charitable purposes.”¹²

ESC’s original Bylaws¹³ provided certain governance rights to the Bishop, and from 1965 until at least 2014, ESC’s Bylaws stated it would either obey all applicable canon laws of the Episcopal Diocese and operate as a Diocesan Institution, or some variation of how it would do so as long as the corporation is “accepted and certified” as a Diocesan Institution.¹⁴ Similarly, until 2007, SRW’s Bylaws also stated it would obey all applicable canon laws of the Episcopal Diocese and operate as a Diocesan Institution.¹⁵

Beginning in 2003, the Directors of ESC took actions to separate ESC from the Episcopal Church and the Bishop (together, the “Church

¹⁰ AA0116-117, art. Second, para. (d)(emphasis added).

¹¹ AA0098, art. First. SRW was incorporated in 1965 under the name John Tennant Memorial Homes, Inc..

¹² AA0098-0100, arts. Second and Ninth.

¹³ AA0119 By-Laws, art I, sect. 2 (EX 207), AA2537:10 (Statement of Decision).

¹⁴ AA0119-0123 (By-laws, Nov. 4, 1965, art. VI, sec. 2); AA0131- 0136 (By-Laws, May 10, 1971, art. VI), AA0412-0421 (By-Laws, June 25, 2003, art. X), AA0167-0188 (By-Laws, April 30, 2007, art. XII).

¹⁵ AA0401-0411 (By-Laws, June 25, 1980, art I), AA0184-AA0185 (By-laws, Apr. 30, 2007, art. XII).

Entities”).¹⁶ They first proposed an affiliation with Northern California Presbyterian Homes (“NCPHS”) that would have eliminated the Bishop’s governance prerogatives in the resulting affiliated entity. The Bishop initially objected to the proposed merger,¹⁷ and wrote an open letter opposing the merger effort.¹⁸ After that time, ESC’s Board voted to terminate the proposed affiliation with NCPHS.¹⁹

After the failed affiliation with NCPHS, ESC and the Church Entities negotiated the Sponsorship Agreement in 2005, which permitted ESC to enter into a new affiliation without the Church’s approval so long as certain governance rights and prerogatives were maintained.²⁰

In June 2007, by restatement of its articles of incorporation, the word “religious” was removed by SRW’s Board from SRW’s irrevocable dedication clause.²¹ And in August 2007, ESC filed restated articles reaffirming ESC’s stated purpose, but changed the liquidation and dissolution clause so that all properties and assets of the corporation would

¹⁶ Appellant’s Opening Brief, pg. 39-40.

¹⁷ 5RT1414:22-1416:4; EX213.

¹⁸ See Trial Exhibits 1271, Exhibit 214 (Open Letter from Bishop Swing dated October 27, 2003, DioCal 004847).

¹⁹ See Trial Exhibits 0287, Exhibit 32 (Letter to Bishop Swing from Laurence Pratt dated August 11, 2004, DioCal 004776).

²⁰ AA0151-AA0152, §2.1. These included: (i) the appointment of a Bishop’s Representative to the governing board, who cannot be removed without the consent of the Bishop and the Episcopal Diocese’s Standing Committee, (ii) an Episcopalian majority on the governing board, (iii) Church consent to any transfer or encumbrance of ESC real estate assets if they would no longer be used to provide senior housing and related programs and services, and (iv) in the event of a dissolution or winding up on ESC’s operations, for the assets to revert to the control of the Episcopal Diocese in order to fund another Church-affiliated ministry. AA0152-AA0153, §§2.3-2.5.

²¹ AA0162, art. 3(e).

be distributed to an unspecified nonprofit.²² In other words, ESC attempted to take away the Episcopal Church’s reversionary interest in ESC’s assets.

ESC and SRW subsequently entered into renewed discussions to affiliate with NCPHS and ESC executed the NCPHS Affiliation Agreement in January 2015, which expressly required ESC to terminate the Bishop’s governance rights and prerogatives and to “withdraw its election and cease to be an Institution of the Episcopal Diocese of California.”²³

In June 2015, the ESC Board Chair notified the Bishop that he would ask both the ESC and SRW Board’s to abrogate the Episcopal Church’s governance role,²⁴ and both Boards voted to approve new corporate articles and bylaws abrogating the Church’s governance role, effective when the NCPHS affiliation closed.²⁵ ESC’s Articles were revised to delete the word “religious” from the purpose and irrevocable dedication clauses,²⁶ and ESC’s Board announced in June 2016 that it was withdrawing as an Institution of the Episcopal Church.²⁷ Since the trial, ESC changed its name to “COVIA COMMUNITIES”--an opaque corporate-style name-- that eliminates any reference to the Episcopal Church.²⁸ This litigation revealed that ESC’s General Counsel expected the

²² AA0189-AA0190, art. Third, paras. (b)-(c), art Fourth para. (e).

²³ Trial Exhibits 0379-0380, Trial Exhibits Designated by Appellants (ORDERED UNSEALED by the Court of Appeal (Feb. 27, 2019), Affiliation Agreement, Sections 1.3-1.6).

²⁴ AA0222-AA0223.

²⁵ AA0318-AA0324.

²⁶ AA0252, art. II, para. (B), art. III, para. (A), art. IV, para. (A)-(B).

²⁷ AA0728-AA0729.

²⁸ Certificate of Amendment of Amendment and Restatement of Articles of Incorporation of Episcopal Senior Communities, attached to Appellants’ Motion for Judicial Notice, Exhibit B (judicial notice granted by order dated Nov. 7, 2018).

affiliation to result in ESC's dissolution and a merger into a new company.²⁹

III. ARGUMENT

A. The Trial Court's Decision Should Be Reversed Because It Improperly Interpreted And Applied The Charitable Trust Doctrine And What Actions Constitute A Breach, Thereby Incorrectly Ruling That A Breach Did Not Occur.

1. California courts address breach of charitable trust cases by first ascertaining the purposes for which the trust exists.

California law provides that a charitable corporation organized exclusively for charitable purposes holds its assets in trust for the purposes enumerated in its articles of incorporation. This is the case even where the assets were not otherwise expressly ear-marked for charitable trust purposes when acquired by the corporation.³⁰

Courts in California define “charitable purpose” broadly to include the following: (i) relief of poverty, (ii) advancement of education or religion, (iii) promotion of health, (iv) governmental or municipal purposes, and (v) other purposes beneficial to the community.³¹ A “religious”

²⁹ AA2833-AA2982. General Counsel William Tobin admitted in a post-trial deposition that ESC intended to divert all of its assets into a new corporate entity. AA2973-AA2975.

³⁰ *In re Veterans' Industries, Inc.* (1970) 8 Cal. App.3d 902, 918; *Lynch v. Spilman* (1967) 67 Cal.2d 251, 263; *Pacific Home v. County of Los Angeles* (1953) 41 Cal.2d 844, 852; *In re Los Angeles County Pioneer Society* (1953) 40 Cal.2d 852, 860.

³¹ *Lynch* at 261; *Estate of Breeden* (1989) 208 Cal.App.3d 981, 985; Rest. 3d Trusts § 28.

purpose is a qualifying charitable purpose for a corporation created under California nonprofit public benefit corporation law.³²

The Charitable Trust Doctrine is a principle long recognized in common law that requires that assets held by a charitable organization are permitted to be used only for the expressly declared charitable purposes of the corporation. A charitable trust is defined as a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.³³ Where property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation's directors have a duty not to divert the assets to other purposes, and must apply it to one or more of the charitable purposes for which it is organized.³⁴ A charitable corporation can hold assets which are impressed with one or more charitable trusts.³⁵

³² California corporations may be formed as nonprofit public benefit corporations for any public or charitable purpose. Cal. Corp. Code § 5111. Further, corporations that operate exclusively for religious or charitable purposes qualify for exemption. Cal. Rev. and Tax. Code § 23701(d). Trusts for the advancement of religion include trusts to disseminate religious beliefs or doctrines. Rest.2d Trusts § 371. A trust may be charitable as one for the advancement of religion although the terms of the trust do not state in specific terms that its purpose is religious. Thus, the fact that a devisee is a religious organization or a person holding a religious office may indicate that it is to be applied solely for religious purposes, although the terms of the trust do not specifically so limit its purposes. Rest.3d Trusts § 28.

³³ *L.B. Research & Educ. Found. v. UCLA Found.* (2005) 130 Cal.App.4th 171, 177 (quoting *Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 161); Rest.2d Trusts § 348.

³⁴ Similarly, where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty to devote the property to that purpose. Rest.2d Trusts § 348.

³⁵ Rest.3d Trusts § 28.

California corporate law works in tandem with the Charitable Trust Doctrine insofar as it requires that each director strive to advance the organization's charitable purposes, and to act exclusively to promote the best interests of the organization, and not for his or her own interest or the interest of any other person or entity.³⁶ The actions taken by directors of a California nonprofit public benefit corporation are limited to actions that further the purposes set forth in its articles of incorporation; the board of directors of any California corporation are not permitted to take an action, approve a contract, or carry out activities contrary to a corporation's purposes.³⁷ Well-settled law in this state analyzes the lawfulness of actions taken by the board of directors of a nonprofit corporation first and foremost by reference to California corporate and charitable trust law.

California courts have a long history of addressing breach of charitable trust cases by first ascertaining the purposes for which the charitable trust(s) exist.

The California Supreme Court in *Holt v. College of Osteopathic Physicians & Surgeons* made clear that charitable contributions must be used only for the purposes for which they were received in trust. In that case, the majority trustees threatened to repudiate the charitable purpose of

³⁶ A director of a California nonprofit public benefit corporation is required to perform his or her duties as a director in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. Cal. Corp. Code § 5231(a). California courts have recognized that directors of nonprofit corporations have a fiduciary duty to operate the corporation consistently with the nonprofit's mission. See *Health Maintenance Network v Blue Cross of S. Cal.* (1988) 202 Cal.App.3d 1043, 1057; *Queen of Angels Hosp. v Younger* (1977) 66 Cal.3d 359, 369.

³⁷ Acts beyond the powers conferred upon a corporation by its charter or the laws of the state of incorporation are impermissible as "ultra vires" acts. *Huber v. Jackson* (2009) 173 Cal.App.4th 663, 683.

the corporation, which was to conduct an osteopathic medical and surgical college, by converting it to a school teaching medicine and surgery according to the allopathic school of medicine.³⁸ The Supreme Court determined that the minority trustees had capacity to bring the action on behalf of the corporation against the majority trustees and were entitled to a judicial declaration of the charitable purposes of the College's trust.³⁹ The Supreme Court held that conduct by the College's Trustees to convert the school would be contrary to the corporation's charitable purposes and therefore the Plaintiff's complaint states a cause of action for enjoining a threatened breach of charitable trust.⁴⁰

This principle in *Holt* was subsequently applied in other cases. In *Queen of Angels Hospital v. Younger*, a corporation was formed to operate a hospital, to perform and foster acts of Christian charity among the sick and ailing, but it was not formed to operate clinics.⁴¹ The Second District Court of Appeal held that the corporation was bound by its articles of incorporation, and that it may "maintain a hospital and retain control over its assets, or it may abandon the operation of a hospital and lose those assets to the successor distributees."⁴²

In *Brown v. Memorial National Home Foundation*, the Second District Court of Appeal determined that two separate charitable trusts applied to certain assets held by a California nonprofit charitable corporation, one of which grew out of the specific declaration of the organization's original articles of incorporation prior to amendment, and

³⁸ *Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750, 759.

³⁹ *Id.* at 760.

⁴⁰ *Id.* at 759.

⁴¹ *Queen of Angels Hospital v. Younger* (1981) 66 Cal.App.3d 359, 366.

⁴² *Id.* at 369.

the second out of circumstances attending the acquisition of a specific property. The controlling director had caused the name of the corporation to be changed to “Memorial National Home Foundation.” The words “American Gold Star Mothers, Incorporated,” were removed, and the director eliminated the provision that required a majority of directors to be the members of Gold Star.⁴³ The Appellate Court determined this “was a plain attempt to change the scope of a charitable trust by mere amendment” of the Articles of Incorporation.⁴⁴ It held that the evidence was sufficient to find that the organization’s trustee, the controlling director, and Memorial National Home Foundation had abandoned the organization’s charitable trusts, and new trustees should be appointed to carry out the terms of these trusts.⁴⁵ The Appellate Court noted that in charitable trust cases, “the public interest requires a prompt determination of the nature and scope of the charitable trust or trusts involved, and the designation of the proper trust or trustees to accomplish the purpose or purposes of the same.”⁴⁶

In *Solheim Lutheran Home v. Los Angeles County*, the Second District Court of Appeal read the “purposes” clause of the corporation’s articles of incorporation in conjunction with the “irrevocable dedication” clause, and when so considered together, determined that the proceeds of any activity authorized by the organization’s stated purposes are impressed with a trust by the irrevocable dedication of that property for such purposes.⁴⁷ In *Solheim*, a corporation was organized for the primary

⁴³ *Brown v. Memorial Natl Home Foundation* (1958) 162 Cal.App.2d 513, 523.

⁴⁴ *Id.* at 524.

⁴⁵ *Id.* at 531.

⁴⁶ *Id.* at 536.

⁴⁷ *Solheim Lutheran Home v. Los Angeles County* (1957) 152 Cal.App.2d 775, 778.

purpose of establishing and maintaining a home for aged men and women of a particular faith. The articles of incorporation included a provision that authorized the corporation to engage in other businesses unrelated to its primary business of conducting a home for the aged. The Court of Appeal held that a court must look both to the stated purpose and the irrevocable dedication clauses in a corporation's articles of incorporation to understand the scope of the charitable trust.⁴⁸

2. The Trial Court did not properly evaluate the charitable purposes for which the trusts of ESC and SRW exist, and thus failed to find that the original Articles of Incorporation of ESC and SRW impressed a religious trust upon their assets that must be honored.

The Trial Court improperly overlooked the religious purpose of ESC and SRW as set forth in these organizations' respective purposes and irrevocable dedication clauses. The Trial Court should have properly determined the charitable purposes of ESC and SRW, and the nature of the charitable trusts to which all of their assets were subject, before addressing whether a breach of charitable trust had occurred.

ESC and SRW's assets were both impressed with a religious and charitable trust upon incorporation because a religious purpose or affiliation with the Church Entities was expressly stated in the original articles of incorporation and bylaws of each entity.

ESC's original Articles of Incorporation, stated that its purpose was to "provide housing, related facilities, and services for elderly persons on a non-profit, religious, and charitable basis; and to receive donations, gifts, and other funds for use in the advancement of the religious and charitable

⁴⁸ If the corporation were to depart from its stated religious purposes, the attorney general would be authorized to protect the trust status of the corporation's property. *Solheim*, 152 Cal.App.2d at 779.

work done on a non-profit basis by the Protestant Episcopal Church in the Diocese of California, its Diocesan Institutions, and the parishes and missions affiliated with it.⁴⁹ Further, its Articles stated that “the property of this corporation is irrevocably dedicated to religious and charitable purposes,” and upon liquidation or dissolution, “all properties and assets of this corporation remaining after paying or providing for all debts and obligations shall be distributed and paid over to a fund, foundation or corporation organized and operated exclusively for charitable purposes by the Diocese of California of the Protestant Episcopal Church.”⁵⁰ SRW’s original articles of incorporation⁵¹ stated that its purpose was to “provide housing, related facilities and services for elderly persons on a nonprofit basis” and declared that “the property is irrevocably dedicated to religious and charitable purposes.”⁵² SRW’s original bylaws elaborated on this purpose: “The primary purpose of this corporation shall be to supply for elderly persons shelter, care, protection, understanding, companionship, and those essentials of a full and devoted life believed to be desirable and essential by those believing in and accepting the principles and doctrines of The Protestant Episcopal Church...”⁵³

Here, ESC and SRW were formed as California nonprofit public benefit corporations with a religious purpose as expressly stated in their respective Articles of Incorporation. The Trial Court’s finding that “ESC incorporated as a nonprofit corporation...to provide services to seniors” is incorrect, and not based on any evidence at all, given a plain reading of

⁴⁹ AA0116, art. Second, para. (a)(emphasis added).

⁵⁰ AA0116-117, art. Second, para. (d)(emphasis added).

⁵¹ AA0098, art. First. SRW was incorporated in 1965 under the name John Tennant Memorial Homes, Inc.

⁵² AA0100, art. Ninth.

⁵³ AA0102-0103, art. IV.

ESC’s original Articles of Incorporation. The Trial Court’s statements that “ESC elected to incorporate as a secular nonprofit public benefit corporation”⁵⁴ is not supported by the evidence, and “ESC has never incorporated as a religious corporation”⁵⁵ while true, misconstrues the real issue, which is whether ESC had a religious purpose to which its assets were held in trust. A California nonprofit public benefit corporation can be organized for one or more charitable purposes,⁵⁶ and it is not uncommon for an organization to be formed for both charitable and religious purposes.⁵⁷

California case law, developed in *Holt, Queen of Angels, Brown* and *Solheim* does not allow the Trial Court to overlook the religious purpose of ESC and SRW as set forth in these organizations’ respective purposes and irrevocable dedication clauses. Precedent requires that the Trial Court evaluate the nature and scope of the charitable trust at issue prior to determining whether a breach of such trust has occurred.

The Trial Court improperly held that Plaintiffs-Appellants “waived all rights to seek the imposition of a trust on any assets of ESC” under the terms of the Sponsorship Agreement.⁵⁸ Applying the Charitable Trust Doctrine, the Trial Court should have determined that ESC’s assets were impressed with a charitable trust before the Sponsorship Agreement was

⁵⁴ AA2537:4-9 (Statement of Decision).

⁵⁵ *Id.*

⁵⁶ Rest.3d Trusts § 28.

⁵⁷ As of February 27, 2019, the GuideStar Director of Charities “Browse by Category” function reveals that there are over 140,000 organizations across the country that identify with the category of “religion”. These include many organizations that were organized as nonprofit corporations for state law purposes that may have been formed for both charitable and religious purposes pursuant to their Articles of Incorporation. <https://www.guidestar.org/nonprofit-directory/religion.aspx>. (last visited Feb. 27, 2019).

⁵⁸ AA2791:3-11.

executed and regardless of its existence or terms. Even assuming that Plaintiffs-Appellants had contracted to modify or waive ESC's charitable trust, such action would violate the Charitable Trust Doctrine; modification can only be achieved by the Cy Pres Doctrine, as discussed in more detail below.

The Trial Court should have properly determined the charitable purposes of ESC and SRW, and the nature of the charitable trusts to which all of their assets were subject, before addressing whether a breach of charitable trust had occurred.

3. The Trial Court's finding that a breach of charitable trust requires a diversion of assets is incorrect under California law.

The Trial Court misapplied the holding of *Brown*⁵⁹ and ignored well developed relevant case law. The question in this case is whether it is lawful for ESC and SRW to cease to perform the purposes for which each was organized, and whether the ESC and SRW directors' actions breached the duty owed under the Charitable Trust Doctrine. The Trial Court failed to address whether the Board's actions were contrary to the charitable trust and hostile to the charitable beneficiaries.

Brown involved a conflict between two entities for the control of the assets of charitable trusts created for certain beneficiaries. The lower court there held that the Trustee had abused and abandoned the charitable trust and should be removed,⁶⁰ and the Second District Court of Appeals affirmed.⁶¹ *Brown* does not stand for the proposition that a breach of charitable trust requires a diversion of assets, as stated by the Trial Court.⁶²

⁵⁹ AA2516:23-AA2517:7.

⁶⁰ *Brown*, 162 Cal.App.2d at 518.

⁶¹ *Id.* at 531.

⁶² AA2791:6-11 (Amended Judgment).

Rather, *Brown* demonstrates the established grounds for removal of a charitable trustee for breach of charitable trust, which includes the diversion of trust funds to unauthorized uses, and also includes inefficiency and mismanagement, assumption of an adverse trust, and hostility to the trust's beneficiaries.⁶³

Brown did not hold that only the diversion of charitable assets to improper use is conduct that constitutes a breach of charitable trust, nor did it require diversion to establish a breach of charitable trust.⁶⁴

a. Conduct that is hostile to the trust's purposes or beneficiaries constitutes a breach of charitable trust.

Hostility towards the corporation's purpose or its beneficiaries can constitute a breach of charitable trust. The Second District Court of Appeal in *Brown* illuminated the concept of hostility, where the subordinate organization attempted to nullify its relationship with its parent organization by changing its corporate articles to eliminate the parent's name from its own name, without informing the parent organization or obtaining its own consent. The Appellate Court held that the attempt to change the scope of a charitable trust by mere amendment of the trustees' charter breached a charitable trust.⁶⁵ *Brown* addressed hostility to the

⁶³ *Brown*, 162 Cal.App.2d at 534.

⁶⁴ Amongst other reasons, a California court may find a charitable corporation has abused and abandoned its trust and remove a trustee for committing that breach of trust, and in situations where the trustee fails to properly execute the duties of the office, or for other good cause. Cal. Prob. Code § 15642(b). Constant hostility with respect to the trust administration between a consultant named in a trust instrument and the trustee required removal of the trustee. *In re Gilmaker's Estate* (1962) 57 Cal.2d 627, 632.

⁶⁵ *Brown*, 162 Cal.App.2d at 524, quoting *In re Los Angeles County Pioneer Society*, 40 Cal.2d at 862, in which the California Supreme Court

charitable trust's beneficiaries (the Members of the American Gold Star Mothers) as grounds for removal. The Court noted that hostility, strife and antagonism had existed between the President of the Board and the Members of American Gold Star Mothers and that, in addition to facts involving financial mismanagement of the trust, the record was full of illustrations of hostile reactions on the President's part to any questioning or criticism of her regime.⁶⁶

b. Conduct that changes the required use of assets or the intended beneficiaries of a charitable trust constitutes a breach of charitable trust.

Conduct that attempts to benefit those other than the intended beneficiaries of a charitable trust or attempts to use assets in a manner contrary to the stated charitable trust can constitute a breach of charitable trust. In *Holt*, the California Supreme Court held it was a breach of trust for a school to abandon osteopathic medicine in order to teach allopathic medicine. The Court reasoned that if the charitable purpose of the school is to train osteopathic physicians and surgeons, the change of curriculum and training of other beneficiaries, allopathic physicians, are not within the purpose of the school.⁶⁷ In *Queen of Angels*, the Second District Court of Appeal held that the corporation could not operate clinics when it was formed to operate a hospital.⁶⁸ The Court of Appeal reasoned that the issue

held that deviations from the purposes stated in the organization's articles was also a breach of charitable trust.

⁶⁶ *Brown*, 162 Cal.App.2d at 532. Although *Brown* did not involve a religious purpose, the Court explained that a trustee of a religious trust can be removed where his views are hostile to the purposes of the trust, including where he ceases to hold religious views which it is the purpose of the trust to promote. *Id.* at 534.

⁶⁷ *Holt* at 759-760.

⁶⁸ *Queen of Angels* at 369.

is “not the desirability of the new use to which Queen wishes to put the trust assets,” rather, the issue is “whether that purpose is authorized by the articles.”⁶⁹ In other words, the corporation’s charitable trust was limited to the primary operation of a hospital and thus, the corporation’s assets could not be redirected to operate clinics and undermine the corporation’s operation of a hospital.

c. Conduct that improperly expands a limited charitable trust constitutes a breach of charitable trust.

Assets held in charitable trust cannot be put to a broader use that is inconsistent with that trust. In a case involving both a proposed expansion of use and change which threatened the intended beneficiaries, *San Diego County Council, Boy Scouts of America v. City of Escondido*, the Fourth District Court of Appeal analyzed real property that had been deeded to the City of Escondido for “the use, benefit and enjoyment of the Boy Scouts of Palomar District in San Diego County, and the Girl Scouts of Escondido...for the use, benefit and enjoyment of [them]”.⁷⁰ The Court of Appeal in *Boy Scouts* rejected the city’s claim that it could satisfy the trust’s charitable purpose by using the property more broadly for “youth parks and recreational development” without regard to the Boy or Girl Scouts. The Court of Appeal held that the broader use repudiated the stated charitable purpose of serving the Scouts.⁷¹

⁶⁹ *Id.*

⁷⁰ *San Diego County Council, Boy Scouts of America v. City of Escondido*, (1971) 14 Cal.App.3d 189, 192-193.

⁷¹ *Id.* at 196.

d. Conduct that threatens to breach a charitable trust is sufficient for judicial review.

In re Veterans' Industries, Inc. supports the proposition that a threatened breach is sufficient for review under the Charitable Trust Doctrine without a prerequisite of actual diversion of assets. In that case, a dissolving corporation, Veterans' Industries, proposed distribution of its assets upon dissolution to another corporation, Community Rehabilitation. Community Rehabilitation's purposes were, amongst other purposes, to provide rehabilitation service "to all groups of mentally and physically handicapped persons." The Court of Appeals determined the purposes of the proposed distributee were substantially different and more extensive in scope, and were not consistent with Veterans' Industries' purpose of holding, administering or distributing funds and property "for the benefit of war veterans".⁷² The Second District Court of Appeals considered whether a breach of trust was imminent, and held that there was more than "plausible cause to believe a breach of trust was imminent" because Community Rehabilitation's purposes made no mention of war veterans as a specifically designated class of beneficiaries.⁷³

Based on the foregoing, the Trial Court should have reviewed the actions taken by the ESC and SRW Directors in light of a proper application of the Charitable Trust Doctrine under *Brown, Holt, Boy Scouts*, and *In re Veterans'* as discussed above. The Trial Court instead looked only to see whether there had been a diversion of assets. By failing to apply the Charitable Trust Doctrine, the Trial Court failed to correctly evaluate the conduct of the ESC and SRW Boards. Specifically, the Trial Court should have assessed whether the Boards' actions to remove the

⁷² *In re Veterans'*, 8 Cal.App.3d at 911-913.

⁷³ *Id.* at 917.

religious purpose from the charitable trust, remove the Bishop's governance prerogatives, and abrogate the Sponsorship Agreement were hostile to the trusts and beneficiaries under the relevant case law.

4. ESC and SRW's actions to amend their respective articles of incorporation and remove the religious purpose evidence a breach of charitable trust.

The Trial Court failed to recognize or even consider that actions to amend the ESC and SRW Articles of Incorporation effectively and intentionally assumed an adverse trust and evidenced hostility and a breach of charitable trust.⁷⁴

In 2007, ESC restated its Articles of Incorporation reaffirming ESC's stated religious purpose, but it changed the liquidation and dissolution clause so that all properties and assets of the corporation would be distributed to an unspecified nonprofit.⁷⁵ Later, in 2015, the ESC Board approved restated Articles of Incorporation which fundamentally altered the purpose clause: all references to "religious" and the Episcopal Church were removed from its purpose clause, but the reversionary interest to the Episcopal Church was restored to the dissolution clause.⁷⁶ SRW restated its Articles of Incorporation to remove the Episcopal Church from the irrevocable dedication clause,⁷⁷ and pursuant to post-trial testimony, did so specifically contemplating that future affiliates may be nondenominational.⁷⁸

Under the principles enunciated in *Brown*, ESC and SRW's actions to amend the ESC and SRW Articles of Incorporation were a clear and

⁷⁴ AA2533:20-AA2534:24 (Statement of Decision); AA2791:3-11 (Amended Judgment).

⁷⁵ AA0189-AA0190, art. Third, paras. (b)-(c), art. Fourth, para. (e).

⁷⁶ AA0252, art. II, para. (B), art. IV, para. (B).

⁷⁷ AA0163, art. 3(e).

⁷⁸ AA2975, Deposition of William Tobin.

impermissible attempt to change the scope of a religious and charitable trust to remove any religious affiliation. In *Brown*, continuous acts of denial by the trustees of any obligation to the members of Gold Star, including the improper amendment of the corporation's articles, constituted a repudiation of the organization's charitable trust.⁷⁹ California law does not permit these actions because such amendment triggers the assumption of an adverse trust and is hostile to the charitable beneficiaries.

Applying the reasoning of *Boy Scouts*,⁸⁰ ESC cannot claim that it could satisfy the trust's religious and charitable purposes by using the property more broadly "to provide services to seniors" without regard to the religious affiliation with the Church Entities which was an explicit limitation on the charitable trust that applied to its assets.

The record is replete with facts to support that ESC was organized and operated as a Diocesan Institution. For example, ESC's Articles of Incorporation⁸¹ expressly state the relationship to the Church Entities, the residents' contracts historically stated ESC was an institution of the Episcopal Diocese,⁸² and the Sponsorship Agreement reiterated the Bishop's governance prerogatives and ESC's relationship with the Church Entities.⁸³ This religious affiliation, which promotes a spiritual community, was an essential element of the charitable trust that applied to ESC's assets.

The actions of the ESC and SRW Boards to remove the religious component of ESC's charitable purposes and to distance ESC and SRW

⁷⁹ *Brown*, 162 Cal.App.2d at 531-534.

⁸⁰ *Boy Scouts*, 14 Cal.App.3d at 196.

⁸¹ AA0116, art. Second, para. (a)

⁸² See *Life Care Contract* attached to the ACA as Exhibit A. ACA005-024. See also *Residence and Care Agreement*, attached to the ACA as Exhibit B. ACA026-093.

⁸³ AA0150-AA0161.

from the Church Entities evidence hostility to the charitable purposes and charitable beneficiaries of the corporations, and those hostile actions should have been considered by the Trial Court as evidence of a breach of the charitable trust for which their assets were held.

5. Elimination of the Bishop’s board appointment power and governance prerogatives and abrogation of the Sponsorship Agreement evidence a breach of charitable trust.

The Trial Court improperly refused to address whether ESC’s actions to remove the Bishop’s authority and governance prerogatives and repudiate the Sponsorship Agreement were evidence of the assumption of an adverse trust and hostile to the charitable beneficiaries, thereby constituting a breach of charitable trust.⁸⁴

The Trial Court determined that the votes by ESC’s governing board for SRW to become the sole member of ESC in 2007 and to abrogate the Church’s governance rights and prerogatives were “antithetical to the purposes of the Sponsorship Agreement”⁸⁵ and that the Sponsorship Agreement defines the exclusive rights that the Church Entities have with respect to ESC’s governance.⁸⁶ The Trial Court evaluated the ESC’s governance prerogatives and relationship to the Church Entities based on contract principles and only through the lens of the Sponsorship Agreement.⁸⁷

⁸⁴ AA2533:20-AA2534:24 (Statement of Decision); AA2791:3-11 (Amended Judgment).

⁸⁵ AA2590.

⁸⁶ AA2791.

⁸⁷ Amicus focus their brief on the Charitable Trust Doctrine; Appellants’ brief advances the misinterpretation, and breach, of contract claims. See Appellant’s Reply Brief of The Episcopal Church in the Diocese of California, et al. (“Appellant’s Reply Brief”), at 49-59 (February 11, 2019). Amicus raise this issue to point out that, notwithstanding the breach

Instead of evaluating whether the Board actions to remove the Bishop's governance provisions and abrogate the Sponsorship Agreement were improper under breach of contract principles, the Trial Court should have analyzed whether these actions constituted a breach of charitable trust under *Brown* and other case law as hostile to ESC's charitable trust and charitable beneficiaries. The Trial Court should have evaluated these acts in the context of ESC and SRW's original governance structure, which was designed so that the Bishop could protect ESC's charitable trust.

The California Nonprofit Corporations Code provides that the right to enforce and protect charitable purposes is held by the attorney general, the directors and officers of the corporation, and, in rare cases, private parties with a special interest.⁸⁸ In California, the attorney general must be notified of and given the opportunity to join as a party in these actions.⁸⁹ It is the Attorney General's duty to protect interests of the beneficiaries of a charitable trust.⁹⁰ A suit in equity can be maintained by the Attorney General to compel the trustees of a charitable trust to perform their duties as trustees, or to enjoin them from committing a breach of trust, or to compel them to redress a breach of trust, or to appoint a receiver to take possession of the trust property; or to remove the trustees and appoint other trustees.⁹¹

of contract claim, the Trial Court simply failed to apply and properly interpret the Charitable Trust Doctrine.

⁸⁸ See Cal. Corp. § 5142.

⁸⁹ Principles of the Law of Nonprofit Organizations § 6.03 TD (2017). Cal. Gov. Code § 12591. Under California law, the California Attorney General has the primary responsibility to supervise and enforce charitable trusts. Cal. Gov. Code, § 12598.

⁹⁰ Cal. Gov. Code §§ 12584, 12591; *Estate of Schloss* (1961) 56 Cal.2d 248, 257; *Estate of Ventura* (1963) 217 Cal.App.2d 50, 57.

⁹¹ Rest. 2d Trusts § 392. See also *In re Los Angeles County Pioneer Society*, 40 Cal.2d at 873–74.

The Attorney General may bring suit any time within ten years after the cause of action accrued.⁹²

The responsibility and opportunity to seek to protect a charitable trust is not exclusive to the Attorney General. Despite having the authority to protect a charitable trust, the Attorney General is not compelled to and may not always take action.⁹³ An officer or director of a California nonprofit public benefit corporation, a person with a reversionary, contractual, or property interest in the assets subject to a charitable trust, or a person granted relator status by the Attorney General may also bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust.⁹⁴

In this case, the governance structures of ESC and SRW, as originally devised, designated the Bishop as a protector of the religious and charitable trust for each organization, and the voice to protect the interests of the charitable class of beneficiaries.⁹⁵ Acting in his capacity as a director, the Bishop or the Bishop's appointee would possess the right

⁹² Cal. Gov. Code § 12596. The statute imposes no limitation on an enforcement action brought by a private party.

⁹³ The Attorney General's inaction in a case does not signify approval of conduct that is alleged to be a breach of charitable trust or a misuse of charitable assets. The Attorney General's various responsibilities can make it burdensome to institute legal actions except in situations of serious public detriment. See *L.B. Research & Education Foundation*, 130 Cal.App.4th at 181.

⁹⁴ Cal. Corp. Code, § 5142(a)(1)-(4). See *Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 161.

⁹⁵ When the ESC and SRW Directors voted to approve new corporate articles abrogating the Church's governance role, one Bishop Representative believed that abolishing the governance rights and prerogatives left the Episcopal Bishop no means to monitor or enforce existing religious aspects of ESC like the beneficiaries' ability to worship in their homes, and to provide for the continued employment of chaplains. See 7RT1993:10-1997:8, EX 223.

under California law as a director to bring an action to enjoin or to otherwise remedy a breach of a charitable trust by ESC or SRW.⁹⁶

As discussed above, the ESC and SRW governing documents intended a high level of involvement of the Bishop and the continual operation of both organizations as Diocesan institutions.⁹⁷ Further, the Sponsorship Agreement's provisions reinforced ESC's historical governance structure and relationship with the Church Entities;⁹⁸ it essentially preserved the charitable trust for which ESC's assets were already held.⁹⁹ The Trial Court failed to evaluate how the Board actions to eliminate the Bishop's board appointment power and governance prerogatives and abrogate the Sponsorship Agreement were hostile to ESC's charitable trust and beneficiaries.

The Trial Court also failed to consider other evidence in the record as hostility between ESC and the charitable beneficiaries. The ESC Board ignored any questioning or criticism of their actions just as the hostile President did in *Brown*. For example, concerned about the direction of the outcome of the litigation between the parties in this case, 131 ESC residents signed a petition on June 9, 2016 reiterating that most of them have turned

⁹⁶ Cal. Corp. Code, § 5142(a)(1)-(4). See *Hardman*, 195 Cal.App.3d at 161.

⁹⁷ ESC's original Bylaws gave the Bishop governance rights. AA0119 By-Laws, art I, sect. 2. ESC's Bylaws stated it would operate as a Diocesan Institution, or some variation of how it would do so as long as the corporation is "accepted and certified" as a Diocesan Institution. AA0119-0123 (By-laws, Nov. 4, 1965, art. VI, sec. 2); AA0131- 0136 (By-Laws, May 10, 1971, art. VI), AA0167-0188 (By-Laws, April 30, 2007, art. XII). SRW's Bylaws stated it would operate as a Diocesan Institution. AA0102-111 (By-Laws, May 25, 1965, art. I), AA0401-0411 (By-Laws, June 25, 1980, art I), AA0412- 0421 (By-laws, June 25, 2003, art. X).

⁹⁸ AA0150-AA0161.

⁹⁹ AA0116, art. Second, para. (a); AA0116-117, art. Second, para. (d)

over a major portion of their net worth to ESC in return for a contractual promise¹⁰⁰ of lifetime care under the moral protection of an Institution of the Episcopal Church.¹⁰¹ This petition was addressed to ESC's then-Board Chair and expressed the residents' concern about the proposed affiliation with NCPHS. The ESC Board did not respond.

The Trial Court should have addressed whether the ESC Board actions described in the record frustrated and impaired the protection and furtherance of the religious purpose of the trust. The ESC and SRW Board left the charitable beneficiaries of ESC and SRW without the religious oversight and protection built in to the Articles of Incorporation and Bylaws of ESC and SRW. The Trial Court is required by California law to consider whether this resulted in a breach of charitable trust.

B. The Cy Pres Doctrine Is The Only Method To Change A Charitable Trust And Is Inapplicable In This Case.

Once assets are impressed with a charitable trust and are irrevocably dedicated to that purpose in California, such assets cannot then be put to use for a different purpose except in very narrow circumstances and with

¹⁰⁰ As is typical for residential care facilities of its kind, the Towers advertises itself as follows: "A Life Plan Community offers you the ability to enjoy your current active lifestyle while putting in place a plan for your future needs. The comprehensive continuum of services and care options offer you and your family complete peace of mind. Should your health ever change, you'll have a supportive team of professionals who work with you to meet your needs today and tomorrow." San Francisco Towers, A Covia Life Plan Community, <https://covia.org/san-francisco-towers/> (last visited Feb. 6, 2019). Many residents chose the Towers as their retirement community for complete peace of mind, and specifically because of the promise that they would enjoy the Church's moral protection and with knowledge of the organization's charitable and religious purposes, governance structure, and relationship with the Episcopal Bishop.

¹⁰¹ See Plaintiffs-Appellants' First Amended Exhibit List, Exhibit 63 (June 9, 2016 Letter from James W. Guthrie and San Francisco Towers Resident's Petition, DioCal 010993-11009) (Sept. 20, 2016).

the approval of the California Attorney General.¹⁰² Under California law, the only remedy available to modify the purpose of an existing charitable trust is the Cy Pres doctrine. Because the Cy Pres doctrine cannot be used to repudiate a purpose that is possible to accomplish, it is inapplicable in this case. This doctrine was not discussed by the Trial Court, but is relevant to the Charitable Trust Doctrine in that it supports the proposition that neither ESC nor SRW may modify each respective organization's charitable trust if those trusts are possible to accomplish.

Under common law, charitable trusts were granted the privileges of perpetual life and exemption from the Rule Against Perpetuities. These privileges offered some assurance to donors that charities would abide by their wishes for a very long time, if not in perpetuity. However, it is impossible to anticipate all changing circumstances, and restrictions that seem appropriate at one time may turn out to have unintended consequences.¹⁰³

The Cy Pres Doctrine developed to address changed circumstances. It provides that if property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a

¹⁰² *Pacific Home v. County of Los Angeles* (1953) 41 Cal.2d 844, 852. Property acquired *after* an organization changes its charitable purpose may, in certain circumstances, be dedicated to additional or different charitable purposes. In *Pacific Home*, the Defendants argued that the plaintiff may amend its articles to include nonexempt as well as exempt purposes. The Court explained that if it were to do so, such action would not affect the trust status of property acquired before the amendment. Such property, which was acquired when plaintiff's articles were limited to charitable purposes, was thereby impressed with a trust for such purposes, and if such property subsequently should be diverted to newly-declared purposes, the attorney general would have the duty to bring appropriate proceedings to enforce the trust.

¹⁰³ Rest. Law of Charitable Nonprofit Org. § 3.02.

more general intention to devote the property to charitable purposes, the Cy Pres Doctrine allows a court to direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.¹⁰⁴

However, the Cy Pres Doctrine cannot be used to nullify a possible purpose. For example, it does not authorize changing the charitable purpose to one that the board or a court believes is better or more deserving of support than the donor's charitable purpose.¹⁰⁵

ESC has not sought relief under the Cy Pres Doctrine in this case, nor is it applicable under the circumstances, because the ESC Board cannot simply decide it would prefer to have a nonreligious purpose in order to streamline its services through an affiliation or merger, so as to have better access to capital to make investments going forward.

Defendants/Appellants did not obtain the consent of the California Attorney General to the change to the charitable trust under which they wish to hold their assets.¹⁰⁶ Indeed, ESC apparently has not yet advised the

¹⁰⁴ Rest.2d Trusts § 399 (emphasis added). The expression indicates the idea that where the exact intention of the settlor is not carried out, his intention is carried out “as nearly as” may be.

¹⁰⁵ Restatement of the Law of Charitable Nonprofit Org. § 3.02 TD No 1 (2016). In *In re Veterans’ Industries, Inc.*, Veterans’ Industries was being wound up and dissolved and its assets were to be transferred to another corporation. The Second District Court of Appeal held it would not suffice to make a distribution to a charity whose purposes are generally similar if there is another charity whose purposes are identical, absent other factors which would frustrate the original charitable purpose. The court reiterated that ‘charitable contributions must be used only for the purposes for which they were received in trust.’ *In re Veterans’*, 8 Cal.App.3d at 919.

¹⁰⁶ Cal. Corp. Code. § 5820 provides that the Attorney General may, at the corporation’s request, give rulings as to whether a proposed amendment is inconsistent with the corporation’s charitable trust.

California Attorney General that it has again amended its Articles of Incorporation to remove the religious purposes of the corporation.¹⁰⁷

C. If the Trial Court is Permitted to Misapply the Charitable Trust Doctrine, the Implications will be Far-Reaching.

California law expresses a strong public policy that assets held in charitable trust by a nonprofit religious or charitable corporation may not be diverted from their declared purpose.¹⁰⁸ Holding otherwise could have far-reaching and detrimental impacts, not only for the Residents and ESC's other charitable beneficiaries, but also more broadly, for other charitable beneficiaries, charitable donors, and nonprofit organizations throughout California.

The Defendants-Respondents expressed in the record that nonprofit senior living communities face intense competitive pressure from for-profit providers of the same services, and that to counteract such pressure, nonprofits do best to collaborate through affiliations and mergers to combine resources.¹⁰⁹ As the Trial Court noted, "broadening operations would allow non-profits to have greater access to capital to make investments going forward".¹¹⁰ However lawful, well intended and appropriate this may be under certain circumstances, the broadening of nonprofit operations in a manner that undermines the Charitable Trust

¹⁰⁷ As of February 14, 2019, the most recent version of ESC's Articles of Incorporation available on the website for the California Attorney General's Registry of Charitable Trusts is the Amended and Restated Articles dated August 14, 2007; The Registry does not appear to have received a copy of any later amendments by ESC.

¹⁰⁸ *In re Veterans'*, 8 Cal.App.3d at 917. See also *In re Metro. Baptist Church of Richmond, Inc.* (1975) 48 Cal. App. 3d 850, 857.

¹⁰⁹ Respondent's Brief of Episcopal Senior Communities ("ESC Respondent's Brief"), at 10 (Nov. 21, 2018).

¹¹⁰ AA2545:19-20 (Statement of Decision) (emphasis added).

Doctrine is not consistent with California's strong public policy that assets held in charitable trust may not be diverted from the trust's declared purpose. California law does not provide for broadening the use of assets owned by a nonprofit corporation that are impressed with a more limited charitable trust in its articles of incorporation.¹¹¹

In this case, if the Trial Court's misapplication of the Charitable Trust Doctrine stands, the Residents and other ESC charitable beneficiaries risk not only the loss of the intangible religious nature of the promised services, but also higher financial burdens. More broadly, the Trial Court's decision is inconsistent with existing case law, and affirming that decision will set new precedent and wrongly signal that Courts will allow directors of California nonprofit public benefit corporations to divert charitable assets to their personal visions of what should be charitable.

IV. CONCLUSION

Amicus urges this Court to reverse the Trial Court's ruling that a breach of charitable trust did not occur in this case, and to remand with instructions or guidance for the Trial Court to properly apply the Charitable Trust Doctrine. Specifically, for all of the reasons outlined above, the Amicus respectfully request that this Court hold:

- The Trial Court erred in finding for ESC and against Plaintiffs on the Plaintiffs' claim of breach of contract. Elimination of the governance prerogatives is a breach of the charitable trust, because doing so was hostile to the charitable purposes of the corporation; the terms of the Sponsorship Agreement could not, and did not, modify the terms under which ESC held its charitable assets. The Trial Court erred in holding that diversion of trust assets is necessary for a finding of breach of charitable trust.

¹¹¹ *Boy Scouts*, 14 Cal.App.3d at 196.

- The Trial Court misapplied the Charitable Trust Doctrine by focusing on the contract provisions of the Sponsorship Agreement and the governance provisions of the Bylaws, instead of properly applying the Charitable Trust Doctrine. In its finding for ESC and against Plaintiffs on the Plaintiffs' claim of breach of contract, the Trial Court failed to recognize that the ESC actions to abrogate the Sponsorship Agreement and modify the governance prerogatives of the Bishop were acts taken to assume an adverse trust, and were hostile to the charitable purposes of ESC.
- The Trial Court was correct in finding that, as a California nonprofit public benefit corporation, California law controls the rights and obligations of the ESC board. However, the Trial Court erred in its misapplication of California corporate and charitable trust law. California law does not allow the Directors of ESC to assume an adverse trust and act in a manner hostile to the stated charitable purposes of the corporation and its charitable beneficiaries.

Dated: March 5, 2019

FARELLA BRAUN + MARTEL LLP

By: /s/ Cynthia R. Rowland
Cynthia R. Rowland

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CERTIFICATE OF WORD COUNT

The text of this petition consists of 11,476 words as counted by the MS Word word-processing program used to generate the petition.

Dated: March 5, 2019

/s/ Cynthia R. Rowland
Cynthia R. Rowland

PROOF OF SERVICE

The Episcopal church in the Diocese of California, et al. v. Episcopal Senior Communities, et al.

Case Nos. A152934 and A153165

(San Francisco Superior Court No. CGC-15-547681)

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery Street, 17th Floor, San Francisco, CA 94104.

On March 5, 2019, I served true copies of the following document(s) described as

**APPLICATION TO FILE BRIEF OF AMICUS CURIAE
FRIENDS OF THE EPISCOPAL DIOCESE
IN SUPPORT OF PLAINTIFFS-APPELLANTS;
AMICUS CURIAE BRIEF**

on the interested parties in this action as follows:

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed below:

Hon. A. James Robertson II
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San Francisco, CA 94102-4514

and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Farella Braun + Martel LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

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

Executed on March 5, 2019, at San Francisco, California.



Deborah Lynch

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