THE STATE OF NEW HAMPSHIRE
SUPREME COURT

IN RE: TRUSTS UNDER THE WILL OF MARY BAKER EDDY

CASE NO. 2018-0309

BRIEF OF THE TRUSTEES OF THE TRUSTS UNDER THE WILL OF MARY BAKER EDDY, CLAUSES 6 AND 8

ON APPEAL FROM DECISIONS OF THE CIRCUIT COURT
DOVER PROBATE DIVISION (COMPLEX TRUST DOCKET)

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TABLE OF CONTENTS

Page

Table of Contents 2

Table of Authorities 4

Questions Presented for Review 8

Statement of the Case and Facts 9

A. The Will of Mary Baker Eddy 9

B. The Mother Church and its Board of Directors 10

C. Early judicial decisions established that the Clause 6 and 8 Trusts are fundamentally religious trusts intertwined with The Mother Church's mission of promoting and extending Mrs. Eddy's teachings 12

D. The recent administration of the Clause 8 Trust 16

1. The 1993 Probate Court Order 16

2. The Trustees' motion to amend the 1993 Order and restore the Clause 8 Trust priorities 17

3. Second Church's attempts to intervene in the administration of the Trusts 18

Summary of the Argument 20

Argument 21

I. Standard of Review 21

II. The Probate Court correctly ruled that Second Church lacked standing to object to past accountings, object to

the Trustees' motion to amend the 1993 order, petition for the appointment of an independent trustee, and seek additional affirmative relief 21

A. The Probate Court correctly found that Second Church failed to meet any of the five factors for special interest standing known as the Blasko test, and should not be granted standing 21

1. The State Attorney General's availability or effectiveness 24

2. The nature of the benefitted class 25

3. The presence of fraud or misconduct on the part of the charity or its directors 29

4. The extraordinary nature of the acts complained and the remedy sought 32

5. Subjective factor and social desirability 33

B. The Probate Court properly denied Second Church's Request for Discovery 34

C. The Probate Court properly denied Second Church's motion to appoint an independent Trustee 35

Conclusion 40

Request for Oral Argument 40

Certificate of Compliance 40

Certificate of Service 41

TABLE OF AUTHORITIES

Page

Alco Gravure, Inc. v. Knapp Foundation,
479 N.E.2d 752 (N.Y. App. 1985) 27, 28, 32

Baumgartner v. First Church of Christ Scientist,
490 N.E.2d 1319, 1323 (Ill. App. 1986) 36

Berthiaume v. McCormack, 153 N.H. 239, 245 (2006) 37

Chase v. Dickey, 99 N.E. 410, 416 (Mass. 1912) 13, 14, 15

Clipper Affiliates v. Checovich, 138 N.H. 271, 277 (1994) 22

Fernald v. The First Church of Christ Scientist,
77 N.H. 108, 109 (1913) ..... *passim*

Glover v. Baker, 76 N.H. 393, 404 (1912) ..... *passim*

Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) 37

Heard v. Johnson, 810 A.2d 871, 878 (D.C. 2002) 37

Hooker v. Edes Home, 579 A.2d 608, 615-16 (D.C. 1990) 32

Horse Pond Fish & Game Club v. Cormer, 133 N.H. 648
(1990) 24

In re Certain Scholarship Funds, 133 N.H. 227 (1990) 24

In re Estate of Locke, 148 N.H. 754, 755 (2002) 21

In re Jewish Secondary School Movement,
174 N.Y.S.2d 560 (N.Y. App. Div. 1958) 27

In re Trust of Mary Baker Eddy, Case No. 2018-0309 (Hicks, J.)(September 20, 2018) 29

In re Trust of Mary Baker Eddy, Case No. 2018-0309 (Hicks, J.)(November 30, 2018) 29

Johnson v. Town of Wolfeboro Planning Bd., 157 N.H. 94, 96 (2008) 21

Kania v. Chatham, 254 S.E.2d 528, 530 (N.C. 1979) 26

Lamprey v. Britton Constr., 163 N.H. 252, 256 (2012) 30

Lemon v. Kurtzman, 403 U.S. 602 (1971) 37

N.L.R.B. v. Catholic Bishop, 440 U.S. 490, at 502 (1979) 37

Petition of Lath, 169 N.H. 616, 621 (2017) 22

Pfeifer v. Christian Science Committee on Publications, 334 N.E.2d 876, 880 (Ill. App. Ct. 1975) 36

Portsmouth Hospital v. Attorney General, 104 N.H. 51, (1962) .. 24

Rhone v. Adams, 986 So. 2d 374, 378 (Ala. 2007) 26

Robert Schalkenbach Foundation v. Lincoln Foundation, 91 P.3d 1019, 1025-26 (Ariz. Ct. App. 2004) 26, 27

Souhegan National Bank v. Kenison, 92 N.H. 117 (1942) 24

Warren v. Board of Regents, 544 S.E.2d 190, 194 (Ct.App.Ga. 2001) 26

YMCA of the City of Washington v. Covington, 484 A.2d 589, 592 (D.C. 1984) 27

Statutes

RSA 7:19-a 38

RSA 7:19-a, I 38

RSA 7:28 ..... 10, 31

RSA 7:32 24

RSA 564-B:1-103(2) 21

RSA 564-B:1-103(12) 21

RSA 564-B:7-704(d)(1) 20, 35

RSA 564-B:8-802(b) 39

RSA 567-A:4 21

Other

The First Amendment to the Constitution of the United States of America ..... *passim*

Mary Grace Blasko, et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F.L. REV. 37 (1993) ..... *passim*

Massachusetts Acts of 1913, Chapter 155 14

Massachusetts Revised Laws, c. 37 section 9 12

New Hampshire Public Statutes, c. 152, s. 10 12

Restatement of the Law Charitable Nonprofit Institutions
§ 6.05 23

Restatement (Second) of Trusts §391 34

Scott and Fratcher, The Law of Trusts (4th ed., 1989), § 364, ... 24

Text of Statutes and other Authorities

The text of statutes and other authorities may be found verbatim in the Trustees' Appendix. Supreme Court Rule 16(3)(c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Probate Court properly found that Second Church of Christ Scientist, Melbourne (Australia) ("Second Church") lacked special interest standing to request relief in proceedings concerning the testamentary trusts established under Clause 6 and Clause 8 of the Will of Mary Baker Eddy? *Second Church's Appendix ("App.")* at 494-529, 566-70, 591-97, 605-12.

2. Whether the Probate Court properly denied Second Church's motion to appoint an independent Trustee of the Clause 8 Trust, where it lacked standing, there is no vacancy in the existing Trustee positions, and the Court's appointment of an independent Trustee would infringe on First Amendment rights? *Second Church's App.* at 440, 461-93, 572-86 and 591-97.

STATEMENT OF THE CASE AND FACTS

A. The Will of Mary Baker Eddy

Mary Baker Eddy was born in Bow and grew up in New Hampshire. At the time of her death in 1910, her religious activities had shifted to Boston, but she retained her residence in Concord, known as "Pleasant View," now the site of the Pleasant View Center. Accordingly, following her death in 1910, her will was admitted to probate in the Merrimack County Probate Court.

Her will, originally written in 1901, with several codicils, (the "Will") created two trusts, in clauses six and eight (referred to as the Clause 6 Trust and the Clause 8 Trust, and together, the "Trusts"). The Trusts were religious, intended to support the activities of The First Church of Christ, Scientist (also known as "The Mother Church"), established by her in Boston. Clause 6 bequeathed certain funds in trust to The Christian Science Board of Directors (the "Board of Directors") "for the purpose of providing free instruction for indigent, well educated, worthy Christian Scientists." Clause 8 left the residue to The Mother Church in trust:

> I give, bequeath, and devise all the rest, residue and remainder of my estate, of every kind and description, to The Mother Church—The First Church of Christ, Scientist, in Boston, Massachusetts, in trust for the following general purposes; I desire that such portion of the income of my residuary estate as may be necessary shall be used for the purpose of keeping in repair the church building and my former house at #385 Commonwealth Avenue, in said Boston, which has been transferred to said Mother Church, and any building or buildings which may be, by necessity or convenience, substituted therefor; and, so far as may be necessary, to maintain my said homestead and grounds ("Pleasant View" in Concord, New Hampshire) in a perpetual state of repair and cultivation for the uses and purposes heretofore in this will

> expressed; and I desire that the balance of said income, and such portion of the principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me.

By a 1903 codicil, Mrs. Eddy directed that Pleasant View be sold and the proceeds given to the Board of Directors, leaving two purposes for the Clause 8 Trust, maintenance of the Boston buildings and promoting and extending the religion "as taught by me."

The Will was admitted to probate on December 14, 1910, and Henry Baker was appointed as executor, serving until his death in 1912. Josiah E. Fernald was then appointed as administrator w.w.a. On his petition, the Probate Court appointed the initial trustees of the Trusts in 1913, consisting of the then Board of Directors and Mr. Fernald (the initial and later trustees are referred to as the "Trustees").

Since Mrs. Eddy's death, the Trusts have grown in size. The Trustees file annual accounts with the Probate Court, together with financial statements, which are also sent to the Director of Charitable Trusts (the "Director"), as required by RSA 7:28. As shown on the probate accounts for the 2018 fiscal year, the net value of the Clause 6 Trust is now $778,814.65; the Clause 8 Trust assets total $27,517,526.97.

B. The Mother Church and its Board of Directors.

Mrs. Eddy left extensive writings establishing both the religious beliefs and practices and the governance of The Mother Church. The central writing on the religion of Christian Science was her book, *Science and Health with Key to the Scriptures* ("Science and Health"), first

published in 1875, which Mrs. Eddy continued to revise until her death in 1910.

Unlike the Congregational churches Mrs. Eddy attended during her early years in New Hampshire, with a self-governing tradition, Mrs. Eddy created The Mother Church with a central governance authority, a position initially held by her, and then passing on her death to the Board of Directors. She created the Board of Directors in a deed in 1892 (the "1892 Trust Deed"). The deed conveyed land to named trustees, directed them to construct a church edifice on the land and maintain public worship under the name "The First Church of Christ, Scientist," and appointed the trustees to act as the Christian Science Board of Directors as a body corporate, with the power to "make any and all necessary rules and regulations for the Church." The Directors were authorized to fill vacancies in the Board of Directors as long as the successors, in the opinion of the remaining Directors, are "firm and consistent believers in the doctrines of Christian Science as taught in … Science and Health." *Second Church App.* at 336.

Mrs. Eddy's rules for the governance of The Mother Church, including the Church Bylaws, are contained in the *Manual of The Mother Church, The First Church of Christ, Scientist, in Boston, Massachusetts,* referred to as the "Church Manual" or simply, the "Manual." Under the Manual, the Board of Directors is solely responsible for making decisions on both religious and administrative matters. *Trustees' App.* at 38, 39-40.

Included in the denominational structure of the Christian Science Church are approximately 1,400 branch churches and societies in the United States and approximately sixty other countries. For many aspects of their own affairs, branch churches and societies are self-governing, but The

Mother Church and the Board of Directors retain authority over their religious teachings and other areas specified in the Manual. *Trustees' App.* at 38, 39-40. Second Church is a branch church located in Australia.

C. Early judicial decisions established that the Clause 6 and 8 Trusts are fundamentally religious trusts intertwined with The Mother Church's mission of promoting and extending Mrs. Eddy's teachings.

The Will and the Clauses 6 and 8 Trusts were the subject of several court cases in their early years. The first two resulted from efforts by Mrs. Eddy's heirs, including her son George Glover, to have the Trusts declared void, with the challenges resting in part on statutes in Massachusetts and New Hampshire, remnants of the English mortmain statute, that limited bequests to churches. In Massachusetts, Massachusetts Revised Laws, c 37, section 9, specified: "the [i]ncome of the gifts, grants, bequests and devises made to or for the use of any one church shall not exceed two thousand dollars a year ...." In New Hampshire, Public Statues, c. 152, s. 10, as cited in *Glover v. Baker*, 76 N.H. 393, 404 (1912), was similar: "The income of any grant or donation made to or for the use of a church shall not exceed five thousand dollars a year."

Glover was brought in New Hampshire by George Glover and others. The defendants included the executor of Mrs. Eddy's estate, Henry Baker, and the five members of the Board of Directors. The Court held that the Clause 8 Trust remained valid as a gift in trust even if The Mother Church lacked capacity to take directly under the Massachusetts statute. *Id*. at 404. Moreover, the Court recognized that the Clause 8 Trust is "on its face a gift for religious purposes," *id.* at 403; how the trust funds will be

used to accomplish those religious purposes is to be left to the discretion of the Trustees, *id.* at 417; and the Probate Court is required to appoint trustees who held to Mrs. Eddy's religious beliefs. As the Court noted:

> The testatrix intended the trust to be administered by persons professing the belief she desired to promote. Such persons it would be the duty of the court to appoint should occasion arise, or at least none in hostility thereto should be permitted to undertake the execution of the trust.

Id. at 404. Further, well before today's developed First Amendment jurisprudence, *Glover* recognized Mrs. Eddy's right to worship, practice, and spread the Christian Science religion: "Mrs. Eddy had the constitutional right to entertain such opinions as she chose, and to make a religion of them, and to teach them to all others; and their rights of belief are as extensive as hers. Her legal right to teach was not ended with her death." *Id*. at 420.

Chase v. Dickey, 99 N.E. 410, 416 (Mass. 1912), the Massachusetts case, began as a bill in equity brought by the Board of Directors. The original respondents included the executor of Mrs. Eddy's estate and trustees under other of Mrs. Eddy's trusts (including Josiah Fernald). Not giving up after his loss in the New Hampshire action, George Glover and another heir intervened to challenge the validity of the Clause 8 Trust. The executor and the Board of Directors were represented by the same New Hampshire law firm as they were in *Glover*. As noted in the Court's opinion, the trustees and the executor admitted the allegations in the bill. *Id.* at 557-558. Contrary to the suggestion of Second Church, there was no adversity among the executor of the estate, the Board of Directors, and the trustees of Mrs. Eddy's other trusts.

The Massachusetts Supreme Judicial Court held that the gift of the residuary estate under Clause 8 was valid as a public charity and would not lapse for failure to name the trustees, but the bequest remained subject to the Massachusetts statute, *id*. at 415-416. By Massachusetts Acts of 1913, Chapter 155, however, the Commonwealth then waived its rights of escheat in Mrs. Eddy's testamentary trust property, and expressly authorized "The First Church of Christ, Scientist, in Boston,… to take and hold the real and personal estate devised and bequeathed to it by the will ... of its founder, Mary Baker G. Eddy …to be *held and administered by its board of directors*" (emphasis added). As a result, The Mother Church, acting through the Board of Directors, could accept the bequests.

Finally, with the benefit of *Chase* and *Glover*, Josiah Fernald, as administrator, petitioned the superior court for instructions on the remaining questions of whether The Mother Church was to hold the funds as part of its corporate assets or in trust and whether the Trusts would be administered in Massachusetts or New Hampshire, which the superior court transferred to this Court. *Fernald v. The First Church of Christ, Scientist*, 77 N.H. 108, 109 (1913). The Court held that Mrs. Eddy intended to create a "public trust to be administered by the church under the direct supervision of the court," and that, as the gift was not solely for the benefit of residents of Massachusetts, the trust was to be administered in New Hampshire, as "the jurisdiction of its origin." *Id.* at 109-110. Second Church suggests that the *Fernald* case was a "raid" on the trust property by the Board of Directors. The responses of the Trustees and Directors indicate, to the contrary, that the case was brought in the nature of a "friendly suit" to

obtain the Court's direction on how the estate should be distributed, questions not answered by *Glover* or *Chase*. *Id*. at 415-416.

Mr. Fernald then petitioned the probate court for the appointment of the five members of the Board of Directors and him to become the initial Trustees, which the probate court approved by order dated November 18, 1913. *Trustees' App.* at 217, *1949 Court Order*. Mr. Fernald was not appointed as an "independent" trustee to watch over the other Trustees, as Second Church contends. Mr. Fernald was Mrs. Eddy's long-time financial advisor and banker in New Hampshire, and was co-trustee with Archibald McLellan, a member of the Board of Directors and one of the initial Trustees, and Henry M. Baker, her original executor, of another trust created by Mrs. Eddy in 1907. He was also the only member of the original Trustees who resided in New Hampshire, so he could serve as the resident trustee and agent required for a New Hampshire trust. That Mr. Fernald petitioned for appointment of the members of the Board of Directors to serve with him as the initial Trustees should dispel any theory that they had a hostile or adverse relationship.

Following Mr. Fernald's death, by order dated August 10, 1949, the Probate Court ruled that it was "not necessary to fill the vacancy" of Josiah Fernald and "the five members of the Christian Science Board of Directors who are the surviving trustees under said Clause 8 shall constitute the sole trustees," on condition that the Trustees retain a registered agent in New Hampshire, the role previously served by Mr. Fernald. *See Trustees' App.* at 217. Since then, the Probate Court, on petition by the Trustees, and without objection by the Director of Charitable Trusts, has routinely filled

vacancies in Trustee positions by appointing successor Trustees who are also members of the Board of Directors.

D. The recent administration of the Clause 8 Trust.

(1) The 1993 Probate Court Order.

The recipients of funds from the Clause 8 Trust have varied over time as the Trustees have identified different needs for the Trust's funds. In the early years, when the religion was expanding, distributions were made to provide Church publications to, for example, college libraries. *Trustees' Appendix* at 90, 97. During the era of expansion of Christian Science, especially in the 1920s and 1930s, disbursements were made to branch churches, partly to support construction of church buildings. Since then, particularly as many branch churches declined in size, the Trustees have looked to other ways to fulfill Mrs. Eddy's instructions.

In the 1980s, the Church sought to expand the religion, nationally and internationally, by creating a television network. The probate account filed for the fiscal year ending March 31, 1992, listed a large loan to The Mother Church for the television network expenses, which the Trustees considered consistent with the "promotion and extension" purpose of the Clause 8 Trust. The then Director of Charitable Trusts, William Cullimore, however, filed a "Specification for Cause for Appearance" that questioned the size of the loan and the Church's plans for repayment. To resolve the Director's concerns about the loan, the Trustees agreed to a "Stipulation for Order," dated August 23, 1993, which the Probate Court approved on September 14, 1993. *Trustees' App.* at 34.

Recognizing without objection the dual roles of the Trustees and Directors, the Stipulation required the Church to repay the loan within five

years, with interest, which the Church did, ahead of schedule, and restricted withdrawals of principal. The Stipulation reversed the historical priority given to the two Clause 8 Trust purposes, promotion and extension of the religion and maintenance of Church buildings, by specifying that Trust income be used exclusively for maintenance, and only after paying all costs of repair could the Trustees apply unexpended income to promotion and extension. As noted in section 8 of the Stipulation, the parties agreed that the Stipulation was not to be considered as an admission of any impropriety in the administration of the Clause 8 Trust. *Trustees' App.* at 34.

Since 1993, the Trustees have followed the disbursement limitations in the Stipulation. The Clause 8 Trust income has been used for expenses of maintaining the Church buildings, and the Church has used its own funds to direct to Mrs. Eddy's goals of promoting and extending the religion. *Trustees' App.* at 24.

(2) The Trustees' motion to amend the 1993 Order and restore the Clause 8 Trust priorities.

In 2017, with the assent of the Director, the Trustees moved to amend the 1993 Order to permit, again, use of Clause 8 Trust income for promotion and extension of Christian Science. *See Trustees' App.* at 24-30. The Probate Court approved the amendment, by order dated March 19, 2018, (the "March Order"), noting that under the terms of the Clause 8 Trust, promotion and extension were important trust purposes that the amendment restored, but imposing three conditions on distributions:

> (1) any distributions for repairs need to be disclosed to, and approved by, the DCT [the Director of Charitable Trusts]; and (2) the Mother Church may not receive distributions intended to

> "promote and extend" directly or for its programs, rather, they will be distributed to third parties; and (3) the availability of those funds/potential distributions will be published prominently in The Christian Science Monitor [later amended to *The Christian Science Journal*].

Second Church's App. at 376, March Order at 28-29. The Court also directed the Trustees to file annually with the Director a sworn statement that distributees are third party recipients. *Id*.

In a memorandum filed in an earlier proceeding in support of his objection to Second Church's standing, the Director had raised a concern about an "embedded conflict of interest" resulting from the Trustees' capacities as both Trustees of these Trusts and as the Christian Science Board of Directors. *See Second Church's App.* at 349. The Trustees did not agree with the Director that their dual roles created a conflict, but to address the Director's concerns, they and the Director agreed to the limitations on recipients of distributions from the Clause 8 Trust approved in the March Order.

(3) Second Church's attempts to intervene in the administration of the Trusts.

Since 2015, Second Church has sought to intervene in the review of the Trustees' annual probate accounts and other proceedings. Its goals are broad, and include "institutional changes, personnel changes, independent investigations and reconciliations." *See Second Church*'s *App.* at 405. Those goals reflect its own interpretation of Mrs. Eddy's writings and the authority of the Board of Directors, as expressed in the over thirty pleadings it has filed over the past three years, including its views that the

authority of the Board of Directors in the governance of the Church should be transferred to the trustees of these Trusts and her other trusts. *See Second Church's Brief* at 12-13.

Its filings have accordingly challenged decisions and actions by the Trustees dating back decades, many taken with the approval of the Probate Court, and have attempted to portray the Trustees as acting for some improper purpose, to the detriment of the religious purposes of these Trusts. The Trustees have denied those accusations. The over one hundred years of administration of these Trusts in the Probate Court demonstrates that the Trustees have, in fact, sought to faithfully interpret the intent of Mrs. Eddy.

SUMMARY OF THE ARGUMENT

When Mary Baker Eddy, the founder and discoverer of the religion of Christian Science, died in 1910, she left a will, admitted to probate in Merrimack County, that created two testamentary charitable trusts for the support of the religion. Since their initial appointment in 1913, the Trustees of the Clause 6 and Clause 8 Trusts have filed annual probate accounts, and been subject to the review of the Probate Court. This appeal involves an attempt by Second Church to intervene in the administration of the trusts. Both the Director of Charitable Trusts and the Trustees have objected to Second Church's standing.

Second Church contends that it has a "special interest" that gives it standing. Weighing this contention, the Probate Court relied on the five-part "Blasko" test that has been used in other jurisdictions to assess special interest standing in actions involving charitable trusts. The Probate Court determined that Second Church satisfied none of those five factors, and does not have a special interest or standing.

Second Church also moved the Probate Court to appoint an independent trustee over these trusts. Lacking standing, Second Church was not entitled to make that request. Moreover, as there was no current vacancy in a trustee position, the request did not comport with RSA 564-B:7-704(d)(1). More importantly, although not discussed at length by the Probate Court, the imposition of an independent trustee would encroach on the First Amendment rights surrounding these religious trusts. Therefore, the Probate Court properly denied the motion.

Accordingly, the Court should affirm the Probate Court's Orders.

ARGUMENT

I. Standard of Review.

RSA 567-A:4 provides: "The findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made." In determining standing, the probate court must "look beyond the plaintiffs' unsubstantiated allegations and determine, based on the facts, whether the plaintiffs have sufficiently demonstrated their right to claim relief." *Johnson v. Town of Wolfeboro Planning Bd*., 157 N.H. 94, 96 (2008) (quotation marks omitted). This Court "will not disturb the probate court's decree unless it is unsupported by the evidence or plainly erroneous as a matter of law." *In re Estate of Locke*, 148 N.H. 754, 755 (2002).

II. The Probate Court correctly ruled that Second Church lacked standing to object to past accountings, object to the Trustees' motion to amend the 1993 order, petition for the appointment of an independent trustee, and seek additional affirmative relief.

A. The Probate Court correctly found that Second Church failed to meet any of the five factors for special interest standing known as the Blasko test, and should not be granted standing.

Second Church is not named as a beneficiary in the Will, does not qualify as a beneficiary or a qualified beneficiary under the New Hampshire Trust Code, *see* RSA 564-B:1-103(2) and RSA 564-B:1-103(12), and does not have standing under any other New Hampshire statute. Instead it claims to have a common law "special interest" that nevertheless gives it standing. Restatement Second of Trusts § 391 recognizes common law special

interest standing in certain limited circumstances, but this Court has not. Other jurisdictions, though, have generally found that a charitable trust's potential recipients, such as Second Church, do not have special interest standing.

Many courts have analyzed special interest standing by weighing, on a case-by-case basis, five factors developed in a widely cited law review article, Mary Grace Blasko, et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F.L.Rev. 37, 61 (1993) ("*Blasko*"). The "Blasko test" was developed through a review of cases involving charitable trusts. The five factor test considers: (1) the state attorney general's availability or effectiveness; (2) the nature of the benefited class; (3) the presence of fraud or misconduct on the part of the charity or its directors; (4) the extraordinary nature of the acts complained of and the remedy sought by the plaintiff; and (5) the subjective and case-specific factual circumstances. *Blasko* at 61.

The Probate Court applied the Blasko test to evaluate Second Church's standing claim, explaining that it allows courts "to address the myriad of factual situations that may present themselves in the realm of charitable trusts." *Second Church's App.* at 376, *Court Order* 17-18. The Probate Court also explained that the Blasko test "comports with New Hampshire common law directing that a 'mere general interest' is insufficient to confer standing." *Second Church's App.* at 376, Court Order at 18 (quoting *Petition of Lath*, 169 N.H. 616, 621 (2017); *Clipper Affiliates v. Checovich*, 138 N.H. 271, 277 (1994)). The Probate Court determined that Second Church met none of the Blasko factors and therefore did not have standing.

The American Law Institute ("ALI") has recently adopted a similar, but updated, standard in the Restatement of the Law Charitable Nonprofit Institutions at §6.05 (Approved May 22, 2017).[1] Based on the evolution of cases since the 1993 Blasko article, the ALI test requires compliance with all five factors. *See Second Church's App.* at 376, *Court Order* at 17, n. 9. If the Court were to recognize special interest standing, the ALI test would provide a sounder standard. The Probate Court noted that by failing to satisfy the Blasko test, Second Church would also fail to meet standing under the more rigorous ALI test. *Id*. Accordingly, the Trustees will address the Probate Court's findings under *Blasko*.

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[1] §6.05. Definition of a Private Party with a Special Interest for the Purposes of Standing

A private party has a special interest for purposes of commencing a derivative suit on behalf of a charity (as provided by § 6.02), enforcing the purposes to which charitable assets are devoted or the administrative terms governing the charitable assets (as provided by §6.03), or commencing or intervening in a cy pres or deviation proceeding (as provided by §6.04) only upon demonstrating all of the following conditions:

(a) the attorney general is not exercising the office's authority to protect the public's interest in the charitable assets at issue, as provided in § 5.01;

(b) the charitable assets in question will not otherwise be protected without the grant of special interest standing;

(c) the alleged misconduct is egregious or the circumstance are serious and exigent;

(d) the relief sought is appropriate to enforce the purposes of the charity or the purposes to which particular charitable assets are devoted; and

(e) the private party bears a substantial connection to:

(1) the matter at issue and the charity, for an action under §6.02, or

(2) the assets in question, for an action under §§ 6.03 or 6.04.

(1) The State Attorney General's availability or effectiveness.

The most important Blasko factor is the first: whether the Attorney General is able to enforce the law with respect to a charity. *Blasko* explained the importance of an active and effective Attorney General when determining special interest standing:

> In jurisdictions that maintain vigilant, active and effective official enforcement systems through their attorneys general, courts understandably give great weight to the attorney general's evaluation of a private party's claim. When the attorney general in such a jurisdiction declines to comment or act on the merits of a particular case, courts are reluctant to allow a private party to proceed, even if the attorney general does not take a position on the standing of the private plaintiff involved.

Blasko at 68.

New Hampshire was one of the first states to create a separate position within the Attorney General's office, the Director of Charitable Trusts, for the enforcement of charitable trusts. *See* Scott and Fratcher, *The Law of Trusts* (4th ed., 1989) § 391 at 363 (citing RSA 17:19; RSA 7:32; *Souhegan National Bank v. Kenison*, 92 N.H. 117 (1942); *Portsmouth Hospital v. Attorney General*, 104 N.H. 51, 178 A.2d 516 (1962)). Prior cases before this Court show that the Director has historically played an active role in supervising charitable trusts in New Hampshire. *See, e.g.*, *In re Certain Scholarship Funds*, 133 N.H. 227 (1990); *Horse Pond Fish & Game Club v. Cormier*, 133 N.H. 648 (1990).

Moreover, the recent probate history of these Trusts demonstrates that the Director is capable of supervising their administration, as

evidenced by the Director's objection to the Trustees' 1992 probate account that resulted in the 1993 Stipulation. *Trustees' App.* at 24, 28. More recently, the Director objected to the Trustees' 2016 probate accounts, reviewed numerous issues raised by Second Church and the Probate Court, and engaged in discussions with the Trustees resulting in the terms of the Motion to Amend the 1993 Order. *Trustees' App*. at 24-30. The Probate Court's March Order ensures the Director's continued involvement by requiring the Trustees to submit to the Director "a schedule of recipients of Clause VIII distributions and provide affidavit(s), under oath, that these distributees are in fact 'third party recipients' and not affiliated with the Mother Church," and to disclose for the Director's approval any potential distributions for repairs to the Mother Church. *Second Church's App.* at 376, *Court Order* at 36.

The Probate Court properly determined that the Director is available and effective in enforcing the Trusts, and that this factor weighed heavily against granting standing to Second Church.

(2) The nature of the benefitted class.

The second factor of special interest standing requires that "[a] potential plaintiff… show that she is a member of a small and identifiable class that the charity is designed to benefit." *Blasko* at 70. The Restatement Second of Trusts explains that "the mere fact that a person is a possible beneficiary is not sufficient to entitle him to maintain a suit for the enforcement of a charitable trust." *Restatement, Second, Trusts*, § 391, comment c.

Accordingly, when a plaintiff is not specifically designated and is merely a potential beneficiary, it lacks standing. *See Rhone v. Adams*, 986 So. 2d 374, 378 (Ala. 2007) (where a church and a school were not named as beneficiaries of a charitable trust, but were merely potential beneficiaries, they did not have a sufficient special interest in the enforcement of the trust to entitle them to bring a suit against the trustees for alleged misdeeds and mismanagement). The court in *Robert Schalkenbach Foundation* explained the policy for this limitation:

> The policy behind limiting enforcement of charitable trusts to public officers and persons with a special interest stems from the inherent impossibility of establishing a distinct justiciable interest on the part of a member of a large and constantly shifting benefitted class, and the recurring burdens on the trust *res* and trustee of vexatious litigation that would result from recognition of a cause of action by any and all of a large number of individuals who might benefit incidentally from the trust.

Robert Schalkenbach Foundation v. Lincoln Foundation, 91 P.3d 1019, 1025-26 (Ariz. Ct. App. 2004).

Therefore, courts deny special interest standing when there is no sharply defined class of beneficiaries. For example, the North Carolina Supreme Court refused to grant standing to one out of 930 unsuccessful nominees for a scholarship funded by a charitable trust because granting standing "would only open the door to similar actions by [hundreds] of other unsuccessful nominees now and in the future." *Kania v. Chatham*, 254 S.E.2d 528, 530 (N.C. 1979); *see also Warren v. Board of Regents*, 544 S.E.2d 190, 194 (Ct.App.Ga. 2001) (faculty members who objected to university's selection of person to assume endowed chair lacked standing

by virtue of their positions as faculty members eligible to be selected for the chair).

Before the Probate Court, Second Church argued that all branch churches, reading rooms, and others that historically received disbursements from the Clause 8 Trust should have standing in all matters concerning the Clause 8 Trust. *Second Church App.* at 406. That branch churches and others received distributions in the past from the Trustees does not, though, allow Second Church standing here. *See In re Jewish Secondary School Movement,* 174 N.Y.S.2d 560 (N.Y. App. Div. 1958) (where money had been allotted to a particular beneficiary and subsequently no action taken on the allotment, the organization had no standing to enforce payment as it was not specifically named in the trust); *Robert Schalkenbach Foundation,* 91 P.3d at 1027 (Plaintiff was once listed in the Foundation's Articles as a beneficiary; that "special interest" ended, however, over ten years ago).

Second Church's reliance on *YMCA of the City of Washington. v. Covington*, 484 A.2d 589, 592 (D.C. 1984), is misplaced, as that case involved the District of Columbia Court of Appeals affirming a trial court's ruling that area residents who were members of a local YMCA branch had standing to sue for breach of a trust duty to maintain or keep open the branch building. *Id*. at 592. Here, in contrast, the class to which Second Church belongs is worldwide and is not limited in size. Second Church's reliance on *Alco Gravure, Inc. v. Knapp Foundation*, 479 N.E.2d 752 (N.Y. App. 1985), is similarly inappropriate. *Alco Gravure* concerned the proposed amendment and quasi-*cy pres* to a not-for-profit corporation's certificate of incorporation. *Id*. at 753. There, the class with an interest in

the corporation was limited to employees and their families of the corporate founder. *Id*. at 756. Borrowing from special interest standing in the trust context, the court ruled that individuals and a corporation had standing to maintain an action, in part, because the class was sharply defined and entitled to a preference in the distribution of the corporation's funds. *Id*. at 755.

Unlike in *Alco Gravure*, Second Church is neither part of a class of beneficiaries that is well defined nor entitled to a preference in the distribution of the Clause 8 Trust funds. Clause 8 does not limit distributions to branch churches, or even list them as potential recipients. Although at times in the over one-hundred year history of these trusts, branch churches received assistance, at other times funds have been disbursed to other recipients. *Trustees' App.* at 90, 97. No court order requires distributions to branch churches, and they have no special entitlement under the Trusts to distributions. Even among branch churches, Second Church is only one of approximately 1,400 branch churches. If a branch church were entitled to special interest standing, so would be the many other potential recipients of Clause 8 funds, an unlimited number.

Accordingly, giving special interest standing to Second Church would open the Trusts up to recurring litigation and intervention by an unmanageable class. Second Church argues to this Court that because no branch church has sought standing to intervene in the past, the likelihood of a branch church doing so in the future is minimal. *Second Church's Brief* at 35. But granting standing to Second Church would be an invitation to those many other branch churches, as well as other potential or historical recipients of Trust distributions, to similarly seek to intervene. As a

foretaste, even within the relatively short period of time in which this case has been on this Court's docket, others have sought to intervene in these proceedings. *See In re Trust of Mary Baker Eddy*, Case No. 2018-0309, (Hicks, J.) (September 20, 2018) (ruling that the mailing of five copies of the book, *Mary Baker Eddy Betrayed*, by David E. Robinson, constitutes an improper "attempt to communicate with the justices about the case *ex parte."*); *see also In re Trust of Mary Baker Eddy*, Case No. 2018-0309, (Hicks, J.) (November 30, 2018) (striking the amicus brief filed by David E. Robinson).

As a result, the Probate Court properly found that "[i]t is undisputed that the Second Church is one of over 1,400 worldwide branch churches that although 'identifiable,' is not small by any measure, and, as such, the potential for vexatious litigation is heightened, and this factor weighs against standing." *Second Church's App.* at 376, *Court Order* at 21.

(3) The presence of fraud or misconduct on the part of the charity or its directors.

The third factor considers the presence of fraud or misconduct. "Courts are particularly sensitive to abuses of fiduciary responsibility or fraud and will more readily allow a private actor to protect the public interest in situations where such abuses are apparent." *Blasko* at 63. Second Church makes a number of allegations about the Trustees for events stretching back to the early years of these Trusts. As the Probate Court properly found, however, these allegations lacked "sufficient factual underpinnings on which to support a finding of fraud or bad faith pursuant to New Hampshire Law." *Second Church's App.* at 376, *Court Order* at 20.

The Probate Court is not required to "accept allegations…that are merely conclusions of law [because] the threshold inquiry involves testing the facts alleged in the pleadings against the applicable law." *Lamprey v. Britton Constr*., 163 N.H. 252, 256 (2012). These allegations should be given minimum weight because "misconduct may be relatively easy to allege." *See Restatement of the Law, Charitable Nonprofit Organizations* §6.05, comment d.

The Trustees deny Second Church's accusations. For example, contrary to Second Church's charge, the Trustees did not engage in self-dealing by causing The Mother Church to become the sole beneficiary of the Clause 8 Trust. As explained, the restriction on use of Clause 8 funds in the 1993 Order, limiting distributions of income to maintenance of Church buildings, was imposed by the Director of Charitable Trusts after he reviewed the loan to The Mother Church disclosed in the annual account. The Trustees considered that loan, made to cover expenses of the Church's television network, a proper disbursement to promote and extend the religion, and the Stipulation for Order expressly stated that there was no admission of wrongdoing.

Second Church alleges that the Trustees acted in bad faith by violating a court order that required them to file annual audited accounts. *Second Church's Brief* at 29 -30. The 2001 motion and court order referenced by Second Church requested the court's consent to allow the Trustees to pool investments with investments held by The Mother Church. *Trustees' App.* at 177, Court Order dated August 23, 2001. The Trustees stated in the text of that motion their intent to continue to file audited financial statements, although not required by any prior court order or by

RSA 7:28. They disclosed in later accounts that the financial statements were no longer audited, without objection until 2016. No question has been raised about the accuracy of the accounts. In his review of the 2016 annual accounts, the current Director concluded that the Trustees should have filed for express consent to file unaudited financial statements, rather than disclosing their unaudited status in the annual accounts, but the accounts with unaudited financial statements were accepted and approved for several years by the then Directors and the Court. That omission hardly rises to bad faith.

Second Church also claims that the Trustees improperly sold copyrights of Mrs. Eddy's works to The Mother Church. *Second Church's Brief* at 22. That transaction occurred in 1972. The Church's records show that the Probate Court approved the transfer and that the Church paid an amount to the Trustees as consideration determined by an independent appraiser, as ordered by the court. The transfer was properly conducted. *See Trustees' App.* at 90, 97. Following Probate Court orders, and relying on the Probate Court's approval of probate accounts, is not misconduct. Accordingly, the Probate Court properly determined that this factor also weighs against Second Church.

(4) The extraordinary nature of the acts complained and the remedy sought.

Under the fourth factor, courts are more apt to give standing where a party seeks limited remedies or complains of extraordinary violations of or change in the charity's express philanthropic purpose. *Blasko*, at 61-62. For example, *Hooker v. Edes Home*, 579 A.2d 608, 615-16 (D.C. 1990), concerned a charitable bequest to create a free home for elderly indigent widows in a community. The trustees proposed to close the home and move the residents to a facility offering a different level of care, which, as the court noted, was a "fundamental change," and the trustees and the residents of Edes Home "stand at a crossroads they are unlikely to face again." *Hooker* at 31; *see also Alco Gravure, Inc.*, 479 N.E.2d at 755 (dissolution of nonprofit corporation).

Here, in contrast, as explained in the Motion to Amend the 1993 Order, the Trustees' proposal, requesting the court's consent to allow Clause 8 income to again be used for promotion and extension, was not extraordinary, but rather restored the traditional priorities of the Clause 8 Trust. As the Probate Court properly observed, Second Church, in comparison, does not seek limited remedies, but instead requests "a number of fairly extraordinary remedies," including the reopening of twenty years of accountings, the order of forensic accounting and the appointment of an "independent trustee and in so-doing, implicit reconsideration of a 1949 Order of the Probate Court." *Second Church's App.* at 376, *Court Order* at 18.

The extraordinary scope of relief Second Church seeks is best illustrated in its stated goals: "institutional changes, personnel changes,

independent investigations and reconciliations." *See Second Church's App.* at 405. To accomplish those goals, Second Church requests to be allowed discovery to challenge long settled interpretations of Mrs. Eddy's writings, including her other trusts. It is not the Trustees who request an extraordinary change in the Trusts' charitable purposes. Rather, it is Second Church that seeks a new interpretation of the purposes of the Trusts, their relationship to The Mother Church, and the governance of The Mother Church. The Probate Court properly determined that Second Church seeks remedies that the Director of Charitable Trusts has not chosen to adopt and that Second Church's disagreement with the Director "is not sufficient to justify standing." *Second Church's App.* at 376, *Court Order* at 19. The Probate Court's findings on this factor should be upheld.

(5) Subjective factor and social desirability.

The last factor, while not specifically addressed at common law, looks to "those cases where there seem[s] to have been an egregious wrong which otherwise would go uncorrected," with an inquiry on whether these suits are "socially desirable and fulfill praiseworthy goals." *Blasko* at 75. The Probate Court found that because the Director was actively involved in the administration of the Clause 8 Trust, the risk that an improper action would not be challenged was outweighed by the "general policy concern that charities not be harassed by suits brought by a near infinite number of potential beneficiaries. *Second Church's App.* at 376, *Court Order* at 22 (quoting *Blasko* at 75). Therefore, the Probate Court properly ruled that this factor weighs against standing.

In summary, the Probate Court and the Director of Charitable Trusts have effectively supervised these charitable trusts for decades. Second Church's interests in the Trusts are no different than that of other potential distributees, notwithstanding its different views on the teachings of Mary Baker Eddy. Accordingly, the Probate Court properly determined that Second Church did not satisfy any of the Blasko factors and that Second Church does not have standing. Those findings and rulings were not clearly erroneous, and this Court accordingly should uphold the Probate Court's orders.

B. The Probate Court properly denied Second Church's Request for Discovery.

Second Church contends that the Probate Court should not have denied it standing without allowing it discovery. One of the purposes of restricting standing, as recognized by the *Restatement (Second) of Trusts* §391 and Blasko, is to limit vexatious litigation. Here, as its stated goals make clear, Second Church's scope of inquiry falls far beyond the accounts filed by these Trustees, including the decisions and governance by the Board of Directors. Allowing discovery by an entity without standing to inquire into the broad areas and time frame, stretching back to the early years of these Trusts, encompassed by Second Church's allegations, is opening the door to exactly the vexatious litigation that the Restatement and Blasko discourage. Moreover, any discovery would only relate to certain of the Blasko factors, and would not necessarily lead to its obtaining standing, but instead would give Second Church further opportunity to harass the Director, the Board of Directors, and the Trustees, for its own

religious agenda. Second Church is not entitled to discovery to establish standing.

C. The Probate Court properly denied Second Church's motion to appoint an independent Trustee.

As explained, with the sole exception of Josiah Fernald, all of the Trustees of these Trusts have also been the members of the Board of Directors of The Mother Church. Notwithstanding this long history, Second Church contends that the Probate Court should exercise the extraordinary remedy of appointing an independent Trustee. Second Church's lack of standing, by itself, was a sufficient basis to deny Second Church's request. Even if Second Church were entitled to special interest standing, however, the Probate Court correctly denied Second Church's request to appoint an independent Trustee.

The Trust Code specifies that a vacancy in a trusteeship of a charitable trust that is required to be filled is filled in the first instance "by a person designated in the terms of the trust to act as successor trustee." RSA 564-B:7-704(d)(1). As the Probate Court noted, there was no vacant Trustee position. *Second Church's App.* at 376, *Court Order* at 4. Therefore, as a statutory matter, Second Church's request was properly denied.

More compellingly, the request by a third party, without standing, to request the Court to appoint an independent trustee over these fundamentally religious trusts risks violating First Amendment rights. The Clause 8 Trust expressly designated The Mother Church to hold the trust property: "I give, bequeath, and devise all the rest, residue and remainder of my estate, of every kind and description, to The Mother Church—The First

Church of Christ, Scientist, in Boston, Massachusetts, in trust." Underlying the Clause 8 Trust is the question of what Mrs. Eddy intended when she wrote in her Will that the funds were to be used by the "said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me." By its own terms, that is a fundamentally religious question, which, to answer, requires analyzing her writings and teachings, not limited to her Will, but extending over her various deeds of trusts, the Church Manual, and her other writings.

How does a court, either directly or by overseeing an independent Trustee appointed by the court, make that determination? The answer is that it cannot, but instead it should leave those interpretations to properly authorized church officials. The Mother Church is represented by its Board of Directors, whose members, as required by the 1892 Trust Deed, are chosen for their belief in the doctrines of the religion. Consistent with *Glover's* instruction that "the trust to be administered by persons professing the belief she desired to promote," the members of the Board of Directors are therefore the persons qualified to determine how to best effectuate Mrs. Eddy's intent in promoting and extending the religion of Christian Science. *See Baumgartner v. First Church of Christ, Scientist*, 490 N.E.2d 1319, 1323 (Ill. App. 1986) ("The United States Constitution dictates that the only entity with the authority and power to determine whether there has been a deviation from 'true' Christian Science practice is the Christian Science Church itself."); *see also Pfeifer v. Christian Science Committee on Publications*, 334 N.E.2d 876, 880 (Ill. App. Ct. 1975) ("This case depends on the resolution of the factual question of whether Cessna's teachings deviated from the principles of Mary Baker Eddy. For these reasons we

judge that the trial court correctly dismissed the complaint on the ground it lacked jurisdiction.").

Not all matters involving these Trusts are insulated by the First Amendment. The Trustees have followed probate procedures for filing and obtaining the Probate Court's oversight of annual accounts and their actions as Trustees in accordance with New Hampshire trust law, and as directed in *Fernald*. They do not, however, waive any First Amendment rights that they are entitled to assert in their roles as Trustees and as the Board of Directors. *See, e.g.*, *Heard v. Johnson*, 810 A.2d 871, 878 (D.C. 2002) (ruling that "Trustees of the Church," a non-profit religious corporation, was entitled to claim First Amendment immunity from judicial interference, "just as bishops and other officials in hierarchical churches")(citing *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1 (1929)). This Court has warned that a court should not entangle itself in matters of "doctrine, discipline, faith, or internal organization." *Berthiaume v. McCormack*, 153 N.H. 239, 245 (2006).

Second Church seeks to impose its view of the proper interpretation of Mrs. Eddy's religious teachings onto these Trusts. The Court's appointment of an independent Trustee, on Second Church's request, accordingly raises a significant risk of infringing on religious interests, in violation of the Free Exercise Clause. *See N.L.R.B. v. Catholic Bishop*, 440 U.S. 490, 502 (1979). Further, this appointment would create excessive entanglement in the religion of Christian Science, in violation of the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). As a result, the relief requested by Second Church would require this Court to intrude into areas of religious autonomy protected by the First Amendment.

In support of its request for an independent Trustee, Second Church raises accusations about the conflict of interest of the current Trustees. Contrary to Second Church's charges, the Trustees have not "strip[ped] the economic benefit and intrinsic value of the Clause 8 Trust." *Second Church's Brief* at 39. Instead, by their prudent management, they have grown the value of the trust assets to several million dollars. They have not been "ineffectually supervised by the New Hampshire Attorney General's Office." *Second Church's Brief* at 39. Instead, as illustrated by Director Cullimore's 1993 Stipulation for Order and more recent filings by the current Director, the Directors have actively supervised these Trusts.

Second Church relies in part on the comments of Attorney General Tuttle in his brief for *Fernald*. The Court in *Fernald*, however, did not adopt Mr. Tuttle's position, but instead noted Mrs. Eddy's intent "to create a public trust to be administered by the church under the direct supervision of the court." *Fernald*, 77 N.H. at 109. Had the Court wanted to require that an independent trustee be appointed, it could have said so, but it did not. Later attorneys general, acting through the Director of Charitable Trusts, have not adopted Attorney General Tuttle's views and have not objected to the appointment of members of the Board of Directors as successor Trustees.

Second Church's statutory citations similarly miss the mark. The Trustees are not prevented from also serving as members of the Board of Directors by either RSA 7:19-a or the Trust Code. Distributions of Clause 8 funds to or for the benefit of The Mother Church to carry out its religious purposes, in accordance with the express instructions by Mrs. Eddy in her Will, are not pecuniary benefit transactions as defined in RSA 7:19-a, I.

The fiduciary duties of the Trustees to these Trusts and of the Directors to The Mother Church do not violate their duty of impartiality or loyalty under the Trust Code, particularly where the Will specifies the purposes of the Clause 8 distributions, with no limitation on recipients, and the distributions are subject to review and approval of the Probate Court. *See* RSA 564-B:8-802(b).

In summary, Second Church does not have standing to request an appointment of an independent Trustee. There was no vacancy in the Trustee positions. The Court's appointment of an independent Trustee would infringe on First Amendment rights. Therefore, the Probate Court properly denied Second Church's request for appointment of an independent Trustee.

CONCLUSION

For the reasons stated above, the Court should affirm the Probate Court's Orders.

REQUEST FOR ORAL ARGUMENT

The Trustees request 15 minutes for oral argument, to be presented by Russell F. Hilliard.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 8,458 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix.

Respectfully submitted,

Trustees of the Trusts under the Will
of Mary Baker Eddy, Clauses 6 and 8

By their Attorneys,
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Date: December 20, 2018

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CERTIFICATE OF SERVICE

The undersigned counsel certify that a copy of this Brief and the Appendix are being filed on this date through the Supreme Court's electronic filing service, which "satisfies the requirement in Supreme Court Rule 26(2) that a filer provide to all other parties a copy at or before the time of filing." Sup.Ct. 2018 Supp. R. 18(a). Counsel of record for Second Church and the Director of Charitable Trusts are receiving a copy of this filing through the Court's electronic filing system on this date.

/s/ Russell F. Hilliard
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