No. __-____

In the Supreme Court of the United States

THE FALLS CHURCH, PETITIONER

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the First Amendment permits civil courts to retroactively impose a "trust" on church property based on church canons that were never embodied in any secular instrument of property ownership and did not comply with state law at the time of their adoption.

II. Whether the Contracts Clause permits civil courts resolving church property disputes to apply changes to state statutory law retroactively.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is The Falls Church (also known as The Church at the Falls–The Falls Church), a Virginia nonstock corporation with no parent corporation.

Respondents are The Protestant Episcopal Church in the United States of America (also known as The Episcopal Church), an unincorporated New York voluntary association with no parent corporation or stock; The Protestant Episcopal Church in the Diocese of Virginia, an unincorporated Virginia voluntary association with no parent corporation or stock; and William W. Goodrich and Steven Skancke, in their capacity as trustees for The Falls Church.

Amici curiae below included the Commonwealth of Virginia; The Becket Fund for Religious Liberty; 516 Donors to The Falls Church; A.E. Dick Howard; General Council on Finance and Administration of the United Methodist Church; Episcopal Diocese of Southern Virginia; Episcopal Diocese of Southwestern Virginia; the Rt. Rev. Yung Chin Cho (Bishop, Virginia Annual Conference of The United Methodist Church); Steven D. Brown, Richmond (Chancellor, Virginia Annual Conference of The United Methodist Church); Gradye Parsons, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A) ("PCUSA"); Abingdon Presbytery of the PCUSA; Elder Donald F. Bickhart (Stated Clerk, Presbytery of Eastern Virginia, PCUSA); the Rev. Dr. G. Wilson Gunn, Jr. (General Presbyter, National Captial Presbytery, PCUSA); Virginia Synod of the Evangelical Lutheran Church of America; Metropolitan Washington, D.C. Synod of the Evangelical Lutheran Church of America.

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GLOSSARY

A____	Virginia Supreme Court joint appendix citation
Church	The Falls Church
Dennis Canon	TEC Canon I.7.4 and Diocese Canon 15.1
denomination	The Protestant Episcopal Church in the United States of America and the Protestant Episcopal Church in the Diocese of Virginia
Diocese	The Protestant Episcopal Church in the Diocese of Virginia
TEC	The Protestant Episcopal Church in the United States of America, also known as The Episcopal Church
TFC	The Falls Church
7/13/07 Br.	Brief in Opposition to Demurrers and Pleas in Bar of TEC and the Diocese (July 13, 2007)

INTRODUCTION

This case presents an opportunity both to decide a critical free-exercise question expressly reserved in this Court's last church property decision, *Jones* v. *Wolf*, 443 U.S. 595 (1979), and to resolve a mature split among more than a dozen state supreme courts on a closely related First Amendment question.

The questions presented arise out of a dispute between a historic Virginia church, The Falls Church ("the Church"), and its former denomination—The Episcopal Church ("TEC") and Episcopal Diocese of Virginia ("Diocese"). The Virginia Supreme Court's decision in respondents' favor squarely presents the issue left open in *Jones*: Under what circumstances does "retroactive application of a neutral-principles approach infringe[] free-exercise rights"? *Id.* at 606 n.4. In addition, the decision deepens an entrenched split—involving eight state supreme courts on one side, and five on the other—over whether the First Amendment requires civil courts to enforce church rules that "recite an express trust in favor of the denominational church." *Id.* at 606.

The Church here obtained its principal property in 1746, long before the denomination even existed. All eleven parcels at issue are titled solely in the name of the Church's trustees, and all funds used to purchase and improve those parcels were provided by the Church's donors. Yet, based on church canon law, the Virginia Supreme Court held that a *retroactive* "constructive trust [must] be imposed on [the Church's] property for the benefit of TEC and the Diocese," thereby divesting the Church of title. Pet. 22a.

The court acknowledged that, "when the [relevant] Canon was enacted" in 1979, it was "ineffective" un-

der "the law in effect" in Virginia. Pet. 15a-16a. Nevertheless, purporting to apply the "neutral principles" approach of *Jones*—a "completely secular" and "objective" analysis designed to effectuate "the intentions of the parties" (443 U.S. at 603)—the court held that it "need look no further than [the same] Canon" to justify imposing a retroactive trust. Pet. 8a-10a, 18a.

The court recognized that it was imposing a trust "independently of the intention of the parties" and that the Church could not agree to a church canon that violated state law. Pet. 16a (citation omitted). Nevertheless, noting that the canon was "enacted through a process resembling a representative form of government," the court held that, "even if implementation of the [relevant] Canon was unilateral, this Court would be powerless to address any issues of inequity wrought thereby, as to do so would invite judicial interference with religion and clearly violate the First Amendment." Pet. 21a.

The decision below thus deepens an acknowledged split over whether the "neutral principles" approach permits courts to impose a trust on church property by applying denominational rules that conflict with secular indicia of intent and governing state law. As the Oregon Supreme Court recently observed, *Jones* "provides a general framework for the neutral principles approach," but "[c]ourts have disagreed * * * over the legal implications of an express trust provision in the denominational church's constitution"; "even those applying 'neutral principles,' have not adopted a uniform approach." *Hope Presbyterian Church* v. *Presbyterian Church (U.S.A.)*, 352 Ore. 668, 685, 686 (2012) (citing New York, California, South Carolina, and Indiana decisions).

Similarly, the Indiana Supreme Court recently noted: "Some state courts have apparently read *Jones* as an affirmative rule requiring the imposition of a trust whenever the denominational church organization enshrines such language in its constitution," while others "do not understand *Jones* as creating such a rule," which "result[s] in de facto compulsory deference" to "the denomination[]"—"regardless of any contrary evidence or state law." *Presbytery of Ohio Valley* v. *OPC, Inc.*, 973 N.E.2d 1099, 1106 n.7 (Ind. 2012) (citing Georgia and Connecticut rulings); see also *Masterson* v. *Diocese of Northwest Texas*, 2013 WL 4608632, *15 (Tex. Aug. 30, 2013) (rejecting views of five "other state courts" that, under *Jones*, "an express trust canon" "precludes * * * a local congregation from retaining local parish property").

The conflict on this important question is now fully ripe. Since last year, four more States have joined the split, and the positions of both sides in the split are fully developed. Moreover, the issues are vital to thousands of churches across numerous denominations, and to third parties—lenders, buyers, title searchers, and tort claimants—who cannot determine ownership of church property without deciphering arcane, widely varying church rules not filed in the land records.

This case presents an ideal opportunity to clarify the law. Because the court below not only imposed a trust on the Church's property, but did so retroactively, this Court may conclude that enforcing denominational "trust" rules that do not satisfy then-governing civil law is (1) constitutionally required, (2) constitutionally prohibited, (3) constitutionally permitted but not constitutionally required, or (4) constitutional prospectively, but not retroactively.

Certiorari should be granted.

OPINIONS BELOW

The decision below (Pet. 1a-36a) is reported at 740 S.E.2d 530 (Va. 2013). The order denying rehearing (Pet. 37a) is unpublished. The trial court's order on remand correcting an error in the judgment (Pet. 38a-44a) is unpublished. The trial court's merits opinion (Pet. 45a-233a) is reported at 84 Va. Cir. 105 (2012), and its final order (Pet. 234a-264a) is unpublished. An earlier Virginia Supreme Court opinion in this case (Pet. 265a-292a) is reported at 694 S.E.2d 555 (Va. 2010). Two earlier trial court orders (Pet. 293a-323a, 324a-340a) are reported at 76 Va. Cir. 976 (2008), and 76 Va. Cir. 884 (2008), respectively.

JURISDICTION

The court below entered judgment on April 18, 2013, and denied a timely rehearing petition on June 14, 2013. On September 4, 2013, the Chief Justice extended the time for seeking certiorari to October 9, 2013.

This Court has jurisdiction under 28 U.S.C. §1257(a). The court below finally resolved all issues in the case but one, involving the date of the Church's disaffiliation from respondents. The court reversed the trial court's holding that the "demarcation point" for purposes of determining which funds were held in trust for respondents was when they sued, rather than the date when the Church "voted to disaffiliate" from the denomination. Pet. 29a. The court thus remanded for the ministerial act of transferring funds based on this discrepancy. Pet. 30a.

The remanded issue is distinct from the questions presented, and has been resolved by an agreed order.

Pet. 38a-40a. But even before this order, "the federal issue[s]" had been "finally decided by [Virginia's] highest Court," and "survive[d] and require[d] decision regardless of the outcome of [the remand]." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Contracts Clause (art. I, §10, cl. 1) provides in relevant part: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts."

STATEMENT

A. The Falls Church and its real property

The Falls Church was founded in 1732, "prior to the creation of TEC" or "the Diocese." Pet. 144a. The Church was initially part of the established Church of England, and its vestry during colonial times included both George Washington and George Mason, who "played major roles in the early history of The Falls Church." A2515. The Church broke its ties to the established church during the American Revolution.

The Church and a few other congregations formed the Diocese in 1785, and the Diocese affiliated with TEC upon its formation in 1789. Pet. 144a. The Church remained affiliated with respondents from then until 1798, when it "no longer function[ed] as an Episcopal congregation," but reaffiliated in 1836. Pet. 145a, 2a.

At the time of reaffiliation, both Virginia law and respondents' canons provided that Episcopal property was held in trust for "the congregation," not the denomination. As the 1836 property canon stated: "The

Vestries respectively, with the Minister, when there is one, shall hold all glebes, lands, parsonage houses, churches, books, plate, or other property now belonging or hereafter accruing to the Protestant Episcopal churches of the Diocese as trustees *for the benefit of the congregation*." A5912a (emphasis added). Another canon secured the Church's right to "manag[e] [its] affairs and temporal concerns, * * * as [it] shall think most conducive to its interest." *Ibid*.

All authority over secular matters thus remained with the Church, which has been governed by a locally elected lay vestry for 280 years. A5048-51. And as both sides' historical experts testified, the Church never ceded authority over its property to respondents. A7497, A8276-77, A8285-86, A8295-96.

Rather, title to the Church's property has always been held by its vestry or trustees. The Church's original building sits on land conveyed in 1746 to "[the] Vestry of Truro parish." Pet. 4a-5a. As the trial court held in an unappealed ruling, "the vestry of the TFC is the legal successor of the vestry of Truro parish." Pet. 311a.

As the Church grew, it acquired more properties. But unlike other Episcopal churches' property deeds, none of petitioner's deeds refers to TEC, the Diocese, or their canons, let alone conveys the denomination an interest.[1] Four deeds—the 1746 deed and three that grant land to "Trustees of The Falls Church"—do not include the word "Episcopal." Pet. 5a. Five grant

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[1] Cf. Pet. 150a (subjecting use of Truro Church's property "to [TEC's] Constitution, canons & regulations"); Pet. 155a, A391, A395 (same).

land to “trustees of The Falls Church (Episcopal),” one to “Trustees for the Falls Church Episcopal Church,” and one to “Trustees of the Episcopal Church, known and designated as the ‘Falls Church.’” *Ibid.* Respondents admit that they are not “named as a grantee as such in any [deed].” A7033.

The Church remained solely responsible for maintaining and improving its property after joining the denomination. From 1950 to 2003, the Church spent $15.9 million ($26.6 million in today’s dollars) on improvements, and $8.1 million ($12.9 million in today’s dollars) on upkeep, whereas neither respondent contributed a dime. A2521-22, A2524, A2443-56, A2633-35, A3023-24. As the trial court held in an unappealed ruling, “TFC’s vestry * * * for more than 150 years has governed the property in question, raised funds to upgrade the property, repaired the property, financed additions to the property and decided how the property was to be used.” Pet. 313a n.10.

At no time before this lawsuit did respondents file any document in the land records asserting rights in the Church’s property. A7879-81, A2499-2502. Nor did respondents assert an interest in the Church’s property in public UCC filings. A2351-52. A *lis pendens* filed *after* respondents sued was the first public notice of their claim. A238-45.

B. The Falls Church’s autonomy in governance and financial independence

TEC’s hierarchy is distinct from the Roman Catholic model. For example, petitioner’s vestry, clergy, and staff are selected by the Church, not the bishop or the denomination. A6962, A7633-34.

The Church’s vestry also determined whether to incorporate, and on what terms. A5047-51. Unlike

other denominations and other Episcopal dioceses, neither TEC nor the Diocese requires denominational approval of congregations' corporate articles or unincorporated congregations' bylaws.[2] And unlike the governing documents of other churches below (Pet. 210a), The Falls Church's corporate articles do not subject it to respondents' authority (A5048-51).

The Church also had full control over its bank accounts. And although it made generous voluntary contributions to respondents, it "was clearly within The Falls Church's discretion" to "withhold donations and contributions to the Diocese and TEC." Pet. 28a.[3]

C. TEC, the Diocese, and their canons

TEC is a national denomination and the Diocese is one of its 111 geographical dioceses. Both are unincorporated voluntary associations.

Respondents' claims rest principally on internal rules adopted at church conventions. First, respondents cite canons that direct affiliated congregations to obtain Diocesan consent when encumbering or alienating "consecrated" property—*i.e.*, realty formally dedicated to divine worship. A5693, A7285-86. These "consent canons" post-date the Church's affiliation with respondents, do not purport to create a "trust," and are not referenced in the deeds. Indeed, outside of this lawsuit, the Diocese did not ascribe legal significance to these canons. As one Diocesan official

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[2] Cf. A652 (Los Angeles); A578 (Arizona); A514-15 (Michigan); A733 (Colorado); A755 (Ohio); A474 (Texas); A476 (W. Missouri).

[3] From 1950 to 2003 alone, the Church gave respondents $4.36 million ($8.82 million in today's dollars). A3025.

explained: "We are not affiliated to each other by contractual commitments that have a beginning and an end, escape and penalty clauses and the like. * * * The requirements of various consents * * * are means by which we affirm that the Church is one body, sharing one baptism, proclaiming one faith." A6218. Petitioner had a similar understanding. A8041-43, A8119, A8153.

Second, respondents invoke TEC's 1979 "trust" canon (Canon I.7.4) and its Diocesan counterpart (Canon 15.1) (together, the "Dennis Canon"), which assert that congregational property is held "in trust for [TEC] and the Diocese." Pet. 15a n.7. The Dennis Canon post-dates the purchase of most of the properties, and is not referenced in the deeds. A246-319. Further, respondents have never suggested that the Dennis Canon satisfies Virginia's requirement that, to create an express trust, the settlor must convey an interest in the property. *Leonard* v. *Counts*, 221 Va. 582, 588 (1980). Rather, as TEC's officially published canons acknowledge, canon law "is only of moral value, and has no legal effect." A2194; accord A2347.

The Falls Church honored respondents' canons in ecclesiastical matters, but never acceded to the Dennis Canon. A8047-48, A8109-10. The one time the Diocese suggested it had a "trust" interest in the Church's property—250 years after its founding—the Church took issue. Citing "the eighteenth century conveyances to which [its] Trustees trace their title" and noting that the canon was "subsequently-adopted," the Church stated that ownership was a matter of "Virginia real property law." A4716 (1990 letter).

D. Virginia's longstanding prohibition on denominational trusts

Respondents' trust claim rests on the theory that, upon joining the denomination, The Falls Church accepted all future canons, regardless of their validity under civil law. Yet the canons then required that the Church's property—even property "hereafter" acquired—be held "for the benefit of the congregation." A5912a. And when respondents' canons were adopted, denominational trusts were unlawful. Virginia Supreme Court decisions repeatedly so held.[4]

Virginia's bar on denominational trusts derived in part from Jeffersonian anti-establishment concerns and in part from Virginia's "general rule" that, unless authorized by statute, trusts for "indefinite" beneficiaries were "void." *Gallego's Ex'rs* v. *Attorney Gen.*, 30 Va. 450, 461 (1832). From the beginning, Virginia's legislature had "grave doubt" about its "constitutional power to create corporations" for "any religious sect" without violating "[Virginia's] act establishing religious freedom." *Selden* v. *Overseers of the Poor*, 38 Va. 127, 133-134 (1840). This understanding was enshrined in Virginia's 1850 constitution. Va. Const., art. IV, §32 (1850) ("The General Assembly shall not grant a charter of incorporation to any church or religious denomination"). Thus, all Virginia churches were unincorporated voluntary associations that could hold property only as permitted by statute. Virginia law provided that church trustees could hold property only "for the use or benefit of any religious congregation." Va. Stat. 1841-2, ch. 102, §8.

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[4] *E.g.*, *Norfolk Presbytery* v. *Bollinger*, 214 Va. 500, 505-507 (1974) (citing six cases dating from 1832).

Although grantors could not place church property in trust for denominations, they could draft deeds restricting such property to "the sole and exclusive use" of members remaining affiliated with particular denominations (*Finley* v. *Brent*, 87 Va. 103, 104 (1890)) or worshipping "according to [their] rules" (*Brooke* v. *Shacklett*, 54 Va. 301, 302-303 (1856)). And over time, unincorporated associations were given legal status[5] and churches were permitted to incorporate.[6]

E. Proceedings below

This case arose in 2006, when the Church and fourteen others disaffiliated from TEC and the Diocese as part of a wider denominational split involving theological differences. Pet. 61a, 272a. By more than a 90% majority, the Church voted to affiliate with the Convocation of Anglicans in North America—a denomination created by the split and affiliated with the worldwide Anglican Communion, under the Archbishop of Canterbury, via the Anglican Church of Nigeria. Pet. 272a-273a; A235-37.

1. Proceedings under Va. Code §57-9

In this lawsuit's first stage, The Falls Church and eight other churches won recognition of the ownership of their property under Va. Code §57-9(A), which allows churches, after a "division" in a denomination, to vote on which "branch" of the denomination to join. Finding the statute only partially satisfied, however, the Virginia Supreme Court reversed and remanded

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[5] Va. Code §8.01-15.

[6] Va. Code §57-16.1; see also Va. Code §57-16 (denominational officers may hold title).

the case for resolution "under principles of real property and contract law." Pet. 291a. In so doing, the court left undisturbed the trial court's rejection of respondents' express trust claim, which rested on the argument that Va. Code §57-7.1, adopted in 1993, reversed Virginia's longstanding bar on denominational trusts. Pet. 337a-338a.[7]

2. Proceedings under Va. Code §§ 57-15 and 57-7.1

On remand, the trial court ruled for respondents. The court reaffirmed its earlier determination that Va. Code §57-7.1 did not reverse Virginia's prohibition on denominational trusts. Pet. 124a-125a. As the court recognized, prior law barred such trusts and §57-7.1 stated that it was "'declaratory of existing law.'" Pet. 125a.

The trial court nevertheless held that respondents had rights in the seven remaining churches' properties under Va. Code §57-15, which authorizes transferring church property as permitted by church "authorities." In prior cases, the Virginia Supreme Court had held that, to have "standing to object to [a local church's] property transfer" under §57-15, a denomination must first "establish a proprietary interest in the property" under "'neutral principles of law, developed for use in all property disputes.'" *Bollinger*, 214 Va. at 503, 504. Yet the trial court's ruling rested principally on church canons and assumptions about

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[7] Va. Code §57-7.1 states in relevant part: "Every conveyance or transfer of real or personal property * * * made to or for the benefit of any church, church diocese, religious congregation or religious society * * * shall be valid."

the implications of denominational affiliation, citing respondents' "hierarchical" polity *35 times* and their canons over *150 times*. Pet. 45a-233a. Although no deed here mentions respondents, the court read *every* deed to condition ownership on maintaining an "Episcopal" affiliation. Pet. 173a.

The Church appealed, and respondents cross-appealed the trial court's interpretation of §57-7.1. The Virginia Supreme Court affirmed in part, but did not adopt the trial court's analysis.

The court ruled that §57-7.1 overruled "Virginia's long history of invalidating [denominational] trusts," while rejecting respondents' contention that the Dennis Canon "created an express trust" under the new statute. Pet. 14a. "[A]ny express trusts purportedly created by the Dennis Canon were ineffective," as trusts are "construed according to the law in effect *at the time the trust is executed*," and "[t]he Dennis Canon was enacted * * * in 1979"—before "passage of Code §57-7.1." Pet. 16a, 15a (citation omitted).

Respondents did not assert any other trust theory. Nevertheless, after holding that the record did not "support the existence of a resulting trust," the court held, sua sponte, that a "constructive trust [must] be imposed on the property." Pet. 16a, 22a.[8] The court acknowledged that constructive trusts are those "which *the law* creates, *independently of the intention*

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[8] In six-plus years, respondents had not pled or pressed a "constructive trust" theory. Neither complaint alleges that the Church was a "trustee" or owed respondents a "fiduciary duty." Thus, as a concurring justice observed, no constructive trust theory was "before the Court." Pet. 31a n.1.

of the parties." Pet. 16a (citation omitted; emphasis added). And it imposed a constructive trust on the theory that the Church had breached a "fiduciary obligation" to respondents. Pet. 22a.

What was the source of this "fiduciary" duty? The court held that it "need look no further than the Dennis Canon"—the same canon that was legally void when passed—coupled with "implicit" aspects of the Church's relationship with the denomination predating §57-7.1's adoption, such as attendance at Diocesan council and bishop visits. Pet. 18a, 21a-22a. According to the court, this "course of dealing" showed that the Church expected its property would be held in trust for respondents, even though denominational trusts violated Virginia law. Pet. 22a. Based on this premise, the court reasoned that the Church's retention of its property after disaffiliation violated its "fiduciary obligation to [respondents]." *Ibid.*

The court did not say, however, how the Church could have known of its alleged fiduciary duty to hold its property for respondents' benefit. Section 57-7.1 requires a "conveyance" or "transfer" of a trust interest—which all agree never occurred. 7/13/07 Br. 23 (respondents "do not allege a 'conveyance' (or a contract to convey)"). Moreover, §57-7.1 gives no indication that it operates retroactively. Pet. 125a. And in the first appeal, the Virginia Supreme Court left undisturbed the trial court's holding that §57.7-1 did not change Virginia law.

The court faced similar difficulties in finding that the Church consented to hold its property in trust for respondents. The court noted that, "[u]pon joining TEC and the Diocese in 1836," the Church acceded to future canons "for the government of this church in

ecclesiastical concerns" (Pet. 20a)—ignoring that the canons then assured the Church that it would "hold all * * * property now belonging or hereafter accruing to" the Church "for the benefit of the congregation." A5912a. The court also cited a "course of dealing" involving bishop visits and vestry declarations (Pet. 21a-22a), but did not explain how pre-1993 canons or conduct could give rise to a fiduciary duty to the denomination when state law prohibited denominational trusts. Nor did the court identify any specific act of consent after 1993—only a continuation of practices predating §57-7.1. Pet. 21a-22a.

Absent a legal validation of denominational trusts or subsequent consent by the Church to create such a trust, there could not have been any "fiduciary obligation" to breach—and thus any basis to impose a constructive trust. Indeed, to support its assertion that the Dennis Canon made "explicit" a trust that had previously been "implicit" in the parties' relationship, the court cited only cases from *other States*, where denominational trusts were legal. Pet. 18a-19a.

In short, the court held that the Church violated a "fiduciary obligation" that did not have legal validity at the time—retroactively enforcing §57-7.1 against every parcel at issue, whenever conveyed. Pet. 22a. The court did not even analyze the Church's deeds. And it brushed off arguments that the Dennis Canon was unenforceable under civil law, reasoning that the canon was "enacted through a process resembling a representative form of government," and that "address[ing] any issues of inequity wrought thereby * * * would invite judicial interference with religion and clearly violate the First Amendment." Pet. 21a.

"In light of [its] ruling" that "this case is governed by Code §57-7.1, not Code §57-15," the court held that it "no longer need[ed] to consider" whether applying *§57-15* "retroactively" was unconstitutional. Pet. 24a. But the Church had contended that, whatever statute applied—§57-7.1 *or* §57-15—it could not be applied retroactively. The court ignored the Church's argument that the Constitution barred retroactively enforcing *§57-7.1*.

The Church sought rehearing, noting that it could not have had a "duty" to recognize a denominational trust when such trusts were illegal, and reiterating that retroactively applying §57-7.1 was unconstitutional. Rehearing was denied.

REASONS FOR GRANTING THE PETITION

I.A-B. In the 34 years since *Jones* was decided, "neutral principles" has become the dominant approach to resolving church property disputes.[9] But *Jones* expressly left unanswered the question: Under what circumstances does "retroactive application of a neutral-principles approach infringe[] free-exercise rights"? 443 U.S. at 606 n.4. Moreover, the lower courts are openly divided over whether the neutral-principles approach permits enforcing denominational rules that violate governing state law. *Jones* itself sows confusion on this point. And the split is fully ripe, with four state supreme courts reaching different conclusions since July 2012.

I.C. The prevailing legal uncertainty affects multiple denominations, thousands of churches, and mil-

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[9] *Masterson*, 2013 WL 4608632, *11 n.6 (30 States "have adopted neutral principles").

lions of their members. It also has several pernicious effects in addition to causing substantial litigation. It discourages churches from expanding. It skews their decisions whether to join or leave denominations. And even when title is clear, it keeps third parties, such as lenders and insurers, from ascertaining ownership without examining arcane denominational rules that could change without notice. Such uncertainty is fundamentally inconsistent with the idea of "neutral principles," which are supposed to facilitate straightforward ownership determinations under "objective," "secular," and "familiar" concepts of civil law. *Jones*, 443 U.S. at 603.

I.D. The decision below cannot be reconciled with *Jones*, or with this Court's free exercise and establishment jurisprudence generally. The notion that denominations have a right to retroactively transfer ownership of thousands of properties in every State—simply by passing rules, and regardless of the deeds—is breathtaking. No other Virginia institution has the power to establish a trust in properties titled in others' names. Thus, the decision below "impose[s] special disabilities on the basis of * * * religious status"—in violation of free exercise. *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (quotation omitted). Moreover, the court below ignored not only the free exercise rights of The Falls Church, but those of its grantors—who likewise *could not*, under governing law, have intended to create a denominational trust.

I.E. This case provides an ideal opportunity to clarify the law. The court below squarely held that no denominational trust was created "when the Dennis Canon was enacted," but invoked the same canon in imposing a retroactive trust "independently of the

intention of the parties." Pet. 15a, 16a. Thus, the case presents *both* the question of whether, and under what circumstances, "retroactive application of a neutral principles approach infringes free exercise rights," *and* the question of the legal effect of denominational "trust" provisions that are not based on "the result indicated by the parties" and conflict with governing civil law. *Jones*, 443 U.S. at 606 & n.4.

II. The Court should also review a closely related question—whether the Contracts Clause permits applying state law retroactively to impose a denominational trust on a church's property. That question too is cleanly presented, and it makes sense to consider it together with the First Amendment question. Moreover, this Court's precedents foreclose the notion that a change in state law could strip a church of ownership by retroactively validating a canon that was legally void upon adoption. "[A] law that takes property from A. and gives it to B * * * cannot be considered a rightful exercise of legislative authority." *Calder* v. *Bull*, 3 U.S. 386, 388 (1798) (Chase, J.).

I. Review is needed to determine the legal effect, under the First Amendment, of denominational "trust" provisions that conflict with secular indicia of intent and ordinary state trust law.

As the Court in *Jones* emphasized, courts resolving church property disputes may not "frustrate[] the free-exercise rights of the members of [the] religious association" before the court and must "ensure that [the] dispute" is "resolved in accord with the desires of the members." 443 U.S. at 604, 606. The lower courts, however, are intractably divided over how to reconcile these instructions with "trust" provisions in

denominational rules. This conflict is mature, acknowledged, and deepening—with four state supreme courts weighing in since July 2012. Eight state supreme courts and one federal circuit now fall on one side of the split; five state supreme courts fall on the other. Review is urgently needed.

A. Eight state supreme courts and one federal circuit hold that neutral-principles analysis requires determining whether the asserted "trust" is consistent with ordinary evidence of intent and embodied in valid secular legal form.

Following this Court's direction, eight state high courts—Indiana, South Carolina, Arkansas, Texas, Oregon, Pennsylvania, New Hampshire, and Alaska —and the Eighth Circuit hold that neutrally determining whether the parties have created a "legally cognizable" trust under *Jones* (443 U.S. at 606) cannot be answered simply by analyzing whether the denomination's rules include a "trust" provision. Some of these courts have ruled for local churches, others for denominations. But all recognize that, to "give effect to the result indicated by the parties" (*ibid.*)— including grantors—courts must consider secular indicia of ownership under ordinary civil law.

1. For example, Indiana's high court recently rejected the view of "[s]ome state courts" that the Constitution "*requir*[*es*] the imposition of a trust whenever the denominational church organization enshrines such language in its constitution." *OPC*, 973 N.E.2d at 1106 n.7. "[S]uch a rule would result in *de facto* compulsory deference" to denominations—"regardless of any contrary evidence" and in violation of *Jones*' teaching that neutral principles apply "without re-

gard to the [denomination's] organizational structure." *Id.* at 1106 n.7, 1108. The court thus analyzed whether "the intention of the parties" was "'embodied in some legally cognizable form'"—*i.e.*, whether there was secular evidence of "the intent of the owner (settlor) to create a trust." *Id.* at 1106 & n.7.

Likewise, in *All Saints Parish Waccamaw* v. *Protestant Episcopal Church*, 385 S.C. 428 (2009), the South Carolina Supreme Court set aside the Dennis Canon based on the "axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another." *Id.* at 449. The court acknowledged that the canon "was enacted in reaction to [*Jones*]," but held that "the First Amendment d[oes] not require a civil court to defer" to such canons—let alone where "[n]o such property canons existed" when title was conveyed. *Id.* at 437 n.4, 448. Thus, "the Dennis Canon[] had no legal effect." *Id.* at 444, 449.

Arkansas' highest court took a similar approach in *Arkansas Presbytery of Cumberland Presbyterian Church* v. *Hudson*, 344 Ark. 332 (2001). The denomination there claimed properties conveyed before it amended its constitution to "impose[] a trust in favor of the National Church." *Id.* at 343. But "nothing in the language of the deeds reflect[ed] that the [local church's property] was held in trust for the [denomination]." *Id.* at 341. Further, the denomination could not "impose a trust upon property previously conveyed," as *Jones* did not upset the "long held" rule "that parties to a conveyance have a right to rely upon the law as it was at that time." *Id.* at 343-344.

The Texas Supreme Court adopted similar reasoning in two recent cases. *Masterson*, 2013 WL 4608632,

*15; *Episcopal Diocese of Fort Worth* v. *The Episcopal Church*, 2013 WL 4608728, *5 (Tex. Aug. 30, 2013). The court rejected the holdings of "other state courts" that "an express trust canon" adopted "in accordance with the *Jones* decision" precludes "a local congregation from retaining local parish property after voting to disaffiliate." *Masterson*, 2013 WL 4608632, *15 (citing five state supreme court decisions). "[*Jones*'] statement that 'the civil courts will be bound to give effect to' the parties' intentions," the court explained, "was explicitly conditioned on those intentions being 'embodied in some legally cognizable form.'" *Ibid*. (quoting *Heartland Presbytery* v. *Gashland Presbyterian Church*, 364 S.W.3d 575, 589 (Mo. Ct. App. 2012)). Finding "no trust language in either the deeds" or the congregation's "articles of incorporation or bylaws," the court simply inquired whether the congregation intended to create a trust and, if so, whether it was revoked. *Id*. at *17; see *Episcopal Diocese of Fort Worth*, 2013 WL 4608728, *5 (similar approach to TEC's dispute with disaffiliating diocese).

The Eighth Circuit has likewise rejected arguments that "failure to defer to [denominational trust provisions]" would "violat[e] the First Amendment." *Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522, 525-526 (8th Cir. 1995).

2. Recognizing denominational trusts only where they reflect the parties' intent and satisfy governing civil law does not mean the local church will necessarily prevail. Several state high courts applying this approach have ruled for denominations, while recognizing that the Constitution does not require enforcing denominational "trust" provisions.

Last year, for example, Oregon followed Indiana in holding that "looking to only the church constitution" would constitute "a *de facto* application of hierarchical deference." *Hope Presbyterian*, 352 Ore. at 686, 687. "Courts have disagreed," the court noted, "over the legal implications of an express trust provision in the denominational church's constitution"; "[s]ome courts" treat such provisions as "dispositive," "even in the absence of other supporting documents." *Id*. at 685 (collecting decisions). And "even those [courts] applying 'neutral principles,' have not adopted a uniform approach." *Id*. at 686.

Because a neutral-principles approach requires denominational trusts to be "'embodied in some legally cognizable form,'" Oregon's high court joined others holding that "express trust provision[s] in [a denomination's] constitution cannot be dispositive." *Id*. at 686. Nonetheless, the court held that the congregation had declared a trust by amending its governing documents to state that it "'holds all property as trustee for the [denomination].'" *Id*. at 688, 691.

Likewise, in *Berthiaume* v. *McCormack*, 153 N.H. 239 (2006), the New Hampshire Supreme Court sided with the Roman Catholic Church based solely on a review of state statutes and the relevant deed, which (as is typical in Catholic churches) placed title in the bishop. Citing *Jones*' admonition that courts should avoid all doctrine, the court "consider[ed] *only* secular documents such as trusts, deeds, and statutes." *Id*. at 248. "Only if these documents leave [ownership] unclear," the court continued, "will we consider religious documents, such as church constitutions and by-laws, *even when such documents contain provisions governing the use or disposal of church property*." *Ibid.* (emphasis added).

Similarly, in *St. Paul Church, Inc.* v. *Bd. of Trustees of Alaska Missionary Conference*, 145 P.3d 541, 553 (Alaska 2006), the Alaska Supreme Court ruled for the Methodist denomination—but only after finding that the local church had an "[u]nequivocal intent to create a trust," and only after applying an existing rule that trusts were presumed irrevocable unless the trust instrument said otherwise. The court explained that the congregation was "fully cognizant"—having been warned in writing "[a]t the time of affiliation"—that "[a]ll property of United Methodist Churches is owned in trust on behalf of The United Methodist Church." *Id.* at 553, 546. But "under different facts," the court stated, "[it might] determine that in accordance with [a later-enacted, non-retroactive, trust law] a trust created by a local church in favor of a parent church is revocable." 145 P.3d at 557.

Finally, in *In re Church of St. James the Less*, 585 Pa. 428 (2005), the Pennsylvania Supreme Court addressed whether the Dennis Canon created an enforceable denominational trust. Noting that "civil courts could violate the constitution if they improperly applied the [neutral-principles] approach," the court emphasized the need for secular evidence of "the parties' intentions." *Id*. at 444. Member churches are "bound by amendments to the association's rules," the court explained, only if the amendments "do not deprive the member of vested property rights without the member's explicit consent." *Id.* at 444, 448. But the court found consent in the church's charter, which "agreed to hold its property in trust for the Diocese." *Id*. at 449-450.

B. Five state supreme courts hold that neutral-principles analysis requires enforcing denominational "trust" provisions regardless of contrary secular evidence of intent or compliance with governing law.

The high courts of Connecticut, California, Georgia, New York, and Virginia, by contrast, understand the neutral-principles doctrine to require enforcing "trust" provisions in denominational rules despite contrary evidence of the parties' intent and even if the provisions are not embodied in "legally cognizable form" under civil law. *Jones*, 443 U.S. at 606.

In *Episcopal Church in Diocese of Connecticut* v. *Gauss*, for example, Connecticut's high court relied on *Jones* and "the Dennis Canon" in dismissing evidence that imposing a denominational "trust" would contravene the "intent of the parties." 302 Conn. 408, 433, 436-437 (2011). "[*Jones*] stated that civil courts would be *bound* by [a denominational trust] provision, as long as the provision was enacted *before* the dispute occurred." *Id.* at 446. "[T]he subjective intent and personal beliefs of the parties, including those of the donors are, according to *Jones*, irrelevant." *Id.* at 442-443.

The California Supreme Court's decision in *Episcopal Church Cases*, 45 Cal. 4th 467 (2009), is to the same effect. Citing *Jones*' "reference to what the 'parties' can do" to arrange ownership, the parish there presented evidence that it joined TEC before the Dennis Canon's adoption and that imposing a trust would be "contrary to the intent of its members." *Id.* at 492. Yet the court held that civil courts *must* enforce that canon, because making parishes "ratify the change"—even if required by civil law—"*would* in-

fringe on the [denomination's] free exercise rights." *Ibid*. Evidence of grantor intent was thus irrelevant, and the parish's original accession to denominational oversight was "[t]he only intent a secular court can effectively discern." *Ibid*.; see also *id*. at 495 (Kennard, J., concurring) (relying on a separate statute and stating that "[n]o principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner").

Georgia's Supreme Court took a similar approach in two recent cases. In *Rector, Wardens & Vestrymen of Christ Church* v. *Bishop of Episcopal Diocese*, the court ruled for TEC based on canon law, holding that requiring the parties to "modify their deeds, amend their charters, or draft separate legally recognized documents to establish an express trust" would "be inconsistent with the teaching of *Jones*." 290 Ga. 95, 102 (2011). To require more than "an express trust" in "the general church's governing law" would impose an "immense" burden on the denomination's "free exercise," in conflict with "how [*Jones*] envisioned that the neutral principles doctrine would be applied." *Ibid*. Accord *Presbytery of Greater Atlanta, Inc.* v. *Timberridge Presbyterian Church*, 290 Ga. 272, 288 (2011).

The dissent disagreed, observing that, "per *Jones*," a trust requires a "joint intention," not simply "the unilateral intention of one party who has no interest in the property." 290 Ga. at 164. Moreover, because modifying deeds is only "a $200 burden," granting denominations "preferential treatment" over "other legal entities" does not relieve a "substantial burden" on religious exercise and erects "an establishment of religion." *Id*. at 139, 141.

New York's high court joined this side of the split in *Episcopal Diocese of Rochester* v. *Harnish*, 11 N.Y.3d 340 (2008). The court found "nothing in the deeds" or "the Religious Corporations Law" that "establishe[d] an express trust in favor of the [denomination]." *Id.* at 351. Yet the Dennis Canon, adopted "nearly 30 years after" the parish joined TEC, was "dispositive," because the "neutral principles" approach "*requires* that we look to the constitution of the general church concerning the ownership and control of church property." *Id.* at 351-352 (emphasis added; citation, internal quotations omitted).

Finally, the Virginia Supreme Court here imposed a *constructive* trust on The Falls Church's property. The court did not even analyze the deeds, much less find evidence of the Church's intent to create a trust in an ordinary instrument of ownership. Indeed, the court recognized that neither party could have intended to create a trust before 1993, when "denominational trusts, whether express or implied," were "'invalid.'" Pet. 10a-11a.

Instead, to impose a trust, the court stated: "[W]e need look no further than the Dennis Canon." Pet. 18a. And in response to contentions that the Dennis Canon was invalid under civil law, the court stated only that it was "enacted through a process resembling a representative form of government," and that "address[ing] any issues of inequity wrought thereby * * * would invite judicial interference with religion and clearly violate the First Amendment." Pet. 20a, 21a; see also Pet. 15a (the Dennis Canon "was reportedly passed in direct response to the Supreme Court's recognition that 'the constitution of the general church can be made to recite an express trust in favor of the denominational church'" (quoting *Jones*, 443

U.S. at 606)); Pet. 21a ("even if implementation of the canons were unilateral, religious freedom encompasses the power [of religious bodies] to decide for themselves, free from state interference, matters of church government" (quoting *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721-722 (1976) (internal quotations omitted)). In short, the court imposed a trust based on the mistaken view that the First Amendment required enforcing the Dennis Canon, even if adopted unilaterally.

This acknowledged lower-court split stems directly from an internal contradiction in this Court's precedent—one that this Court alone can rectify. On the one hand, *Jones* stated that neutral-principles analysis "is completely secular," "relies exclusively on objective, well-established concepts of trust and property law," and facilitates "ordering private rights and obligations to reflect the intentions of the parties" as embodied in "legally cognizable form." 443 U.S. at 603, 606. On the other hand, *Jones* stated that "the constitution of the general church can be made to recite an express trust in favor of the denominational church." *Id*. at 606.

The problem is that "objective, well-established" trust law does not permit parties to "recite an express trust" in favor of themselves unless they hold title. A church (as settlor) might *agree* to "modify the deeds or the corporate charter" to create a denominational trust. *Ibid*. But unless it does so, the existence of a canon—*church law*—is not a "legally cognizable form" in any jurisdiction.

Courts that enforce denominational "trust" rules therefore do so on the theory that the First Amendment compels States to make an exception to other-

wise universal rules of civil law. The court below, for example, retroactively imposed a *constructive* trust based on the very same canon that failed to satisfy "the law in effect *at the time the trust is executed*." Pet. 15a (citation omitted). And it did so believing that, because the canon was "enacted through a process resembling a representative form of government," the court was "powerless to address any issues of inequity wrought thereby"—that "would invite judicial interference with religion and clearly violate the First Amendment." Pet. 21a.

The First Amendment cannot reasonably be read to require an exception to neutral trust law in this respect, much less retroactively. This Court should make that clear, before more churches and denominations waste precious resources on litigation.

C. The lower-court division generates uncertainty in private property rights and creates practical difficulties for churches, denominations, and third parties.

As the foregoing precedents show, the issues here are recurring and of national concern. The legal uncertainty affects ownership in numerous denominations. And the courts' "nonuniform" understandings of neutral principles lead to "unpredictable" results, "divergences on these questions much greater than one might imagine from reading Supreme Court opinions," and much more litigation. Greenawalt, *Hands Off! Civil Court Involvement In Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1883 (1998).[10]

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[10] Accord Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*,

Yet many churches and denominations cannot afford to litigate. And both sides would prefer that limited resources now spent on litigation be spent on mission.

The prevailing legal uncertainty also affects third parties. If denominations need not publicly record their alleged property interests, then lenders, buyers, title examiners, and tort claimants cannot determine who owns church property without examining church law—a difficult and indeterminate task.

Uncertainty is fundamentally inconsistent with the idea of neutral principles, which is supposed to be predictable, "completely secular," and free from "examination of ecclesiastical polity." *Jones*, 443 U.S. at 603, 605. The "promise of nonentanglement and neutrality inherent in the neutral-principles approach" (*id.* at 604) is betrayed when courts treat church rules as superseding ordinary indicia of ownership. Churches seeing that neutral principles are "secular," "objective," and "familiar" would have no inkling that *canon law* might determine who owns their property.

Jones predicted that "problems in application" of the neutral-principles approach would be "gradually

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35 Pepp. L. Rev. 399, 416-426, 431 (2008) (noting "massive inconsistency" in "neutral-principles" decisions); Massey, *Church Schisms, Church Property, and Civil Authority*, 84 St. John's L. Rev. 23, 32 (2010) ("courts are divided on their answers to [how neutral principles are applied]"); Note, *Where's the Wall? Church Property Disputes Within the Civil Courts and the Need for Consistent Application of the Law*, 39 Ga. L. Rev. 1027, 1028 (2005) ("Because of [*Jones*'] ambiguous instructions, state court decisions have become more and more disparate").

eliminated." 443 U.S. at 605. That will not happen unless this Court intervenes.

D. The decision below also conflicts with the Court's free exercise and establishment decisions.

Review is also warranted because the decision below conflicts with this Court's precedents. By holding that *church law* superseded secular indicia of intent and created a retroactive trust, the court below violated not only the constitutional principles that undergird *Jones*, but the Court's religion jurisprudence generally.

Civil courts may not apply "neutral principles" in a manner that "frustrate[s] the free-exercise rights of the members of [the] religious association." *Jones*, 443 U.S. at 606. Protecting religious liberty thus requires courts to "give effect to the result indicated by the parties." *Ibid.* Even under the deference analysis of *Watson* v. *Jones*, 80 U.S. 679, 722-723 (1872), denominational rules cannot trump grantor intent: "regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed." *Jones*, 443 U.S. at 603 n.3. Yet the decision below violates this principle.

For starters, the court below imposed a trust "independently of the intention of the parties." Pet. 16a. The court did not even *consider* the deeds, let alone the grantors' intent. But those grantors, like the Church itself, have religious interests, and their intent must be interpreted in light of civil law, which prohibited denominational trusts.

The grantors here conveyed title without language restricting the properties' use to members of the denomination—restrictions that Virginia has long en-

forced. *Supra* at 11. Much as courts may not decide ownership under the "English approach"—by presuming that church property was donated based on "doctrine" (*Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 443 (1969))—courts may not presume that such property is donated based on denominational loyalty. But that is what the court below did.

Ignoring the deeds and giving legal effect to trusts declared in denominational documents is not leveling the playing field. It is not even mere deference. It is giving denominations power to rewrite civil property law. By stripping churches of their property via means available to no one but denominations, such an approach "impose[s] special disabilities on the basis of * * * religious status"—in violation of free exercise. *Lukumi*, 508 U.S. at 533 (quotation omitted).

Requiring that denominational trusts be embodied in "legally cognizable form" (*Jones*, 443 U.S. at 606) is also necessary to avoiding establishment violations. As *Jones* confirmed, free exercise is not implicated by "neutral provisions of state law governing the manner in which churches own property"; the "burden" of complying with such provisions is "minimal." *Ibid*. Thus, allowing denominations to secure ownership of congregations' properties without complying with civil law cannot be defended as a religious "accommodation," which must alleviate "a significant burden" on religious exercise. *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987).

That is especially clear where a purported "accommodation" burdens *other parties*—here, by stripping them of their property. Even where the burdens on third parties are far less severe, States may not grant "unilateral and absolute power" to "a church"

on "issues with significant economic and political implications" for others' property rights. *Larkin* v. *Grendel's Den*, 459 U.S. 116, 117, 127 (1982).

The Virginia Supreme Court's brand of "neutral principles" is particularly onerous: It not only gave effect to canon law; it did so *retroactively*—divesting The Falls Church of property conveyed 250 years before the law changed, and decades before the denomination existed. If that conception of "neutral principles" is correct, then no church can join a denomination without jeopardizing its property. The denomination can always pass rules transferring ownership, and States can always pass laws making those rules effective retroactively. Such a legal regime deters churches from both joining and leaving denominations, to the detriment of religious choice.

Review is needed to make that clear.

E. The retroactive effect of the ruling below makes this case an ideal vehicle both to resolve the split and to address the question expressly left open in *Jones.*

This case presents an excellent opportunity to resolve the ambiguity in this Court's precedents, and to elaborate a clear rule concerning the constitutional significance of denominational "trust" provisions.

The court below acknowledged that no denominational trust was created under "the law in effect * * * when the Dennis Canon was enacted." Pet. 15a. Citing a 1993 statutory change, however, the court held that the same canon created a retroactive trust.

To be sure, the court found that the fiduciary duty allegedly created by the Dennis Canon was *breached* after 1993—that §57-7.1 was "the applicable law at

all times the property" was "wrongfully held." Pet. 17a. But the *basis* for the duty was the 1979 Dennis Canon and pre-1993 conduct that could not create a trust under then-governing law.

The court pointed to no evidence that the Church consented to a trust after §57-7.1—it relied on the Church's continued participation in the denomination on the same terms as before. Pet. 21a-22a. The 1993 statutory change was the basis for retroactively altering ownership. Thus, the case squarely presents both the question whether, and under what circumstances, "retroactive application of a neutral-principles approach infringes free-exercise rights," and the question of the legal effect of denominational "trust" provisions that are imposed independently of "the result indicated by the parties" and conflict with governing civil law. *Jones*, 443 U.S. at 606 & n.4.

The relationship between these issues, moreover, makes this case an ideal vehicle to clarify the law. The Court may resolve the issues by holding, as five state high courts have held, that the First Amendment requires enforcing church rules that "recite an express trust in favor of the denominational church," regardless of whether they satisfy governing civil law. *Id*. at 606. Alternatively, the Court may reject that view, as eight state high courts have done, and hold that such rules need be enforced only where they reflect the parties' intent as embodied in "legally cognizable form." *Ibid*. Or the Court may hold that enforcing denominational rules under these circumstances is constitutional prospectively, but not retroactively—an issue that also implicates the Contracts Clause.

II. This Court should decide whether the Contracts Clause permits applying state statutory changes retroactively to impose a denominational trust on local church property.

Review is also warranted to address whether the Contracts Clause permits applying state statutes retroactively to impose a denominational trust on local church property. This question is related to the first question presented, and the decision below directly conflicts with this Court's precedents.

When the Dennis Canon passed, "denominational trusts" were "'invalid under Virginia law.'" Pet. 11a (citation omitted). But upon concluding that §57-7.1 changed that rule, the court below applied §57-7.1 retroactively to transfer beneficial ownership of the Church's property. And since the case was "governed by Code §57-7.1," the court reasoned that it "no longer need[ed] to consider" whether "retroactively" applying *§57-15* was constitutional—thus neglecting the Church's objection to applying *§57-7.1* retroactively. Pet. 24a.

Under this Court's precedents, §57-7.1 could not divest the Church of ownership by retroactively validating a canon that was legally void upon adoption. "Retroactivity is not favored in the law" (*Bowen* v. *Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988)), and the Contracts Clause "forbid[s] the application of the repealing law to past contracts" (*Ogden* v. *Saunders*, 25 U.S. 213, 261 (1827)). "'[T]he laws which subsist at the time and place of the making of a contract * * * form a part of it.'" *United States Trust Co. of New York* v. *New Jersey*, 431 U.S. 1, 19 n.17 (1977) (citations omitted). Accordingly, neither the Church

nor its grantors could have intended to create a denominational trust before 1993.

The ruling below unquestionably effected "a substantial impairment of a contractual relationship." *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 244 (1978). As respondents earlier acknowledged, "it would be unconstitutional to interpret or apply [Virginia statutes] to alter existing rights and obligations or trusts established in governing deeds." 7/13/07 Br. 29. In support, they cited Contracts Clause precedent holding that a church's deed is a "binding contract," and that it is "beyond the legislative power" to read state statutes to retroactively "deprive[] the *cestuis que trusts* named therein * * * of their property." *Finley*, 87 Va. at 108-109.

Indeed, as the Court held in another Virginia case, legislatures may not "divest [an] Episcopal church" of "property already acquired under the faith of previous laws" without violating "the spirit and the letter of the constitution." *Terrett* v. *Taylor*, 13 U.S. 43, 52 (1815) (Story, J.). Yet that is what the court below did. Without even analyzing the deeds, the court read §57-7.1 to retroactively transfer ownership of the Church's properties to TEC and the Diocese.

This "disruption of contractual expectations" was not "necessary to meet an important general social problem." *Spannaus*, 438 U.S. at 247. It serves "no legitimate purpose" at all (*Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 245 (1984)), as "a law that takes property from A. and gives it to B" is "against all reason" and "cannot be considered a rightful exercise of legislative authority." *Calder*, 3 U.S. at 388. This has "long been accepted." *Kelo* v. *City of New London*, 545 U.S. 469, 477 (2005). And it is why oth-

er courts deciding church property disputes recognize "that parties to a conveyance have a right to rely upon the law as it was at that time." *Hudson*, 344 Ark. at 344; cf. *Diocese of Fort Worth*, 2013 WL 4608728, *7 ("neutral principles may pose constitutional problems if they are retroactively applied").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

PRESENT: Kinser, C.J., Goodwyn, Millette, McClanahan and Powell, JJ., and Koontz and Lacy, S.JJ.

OPINION BY JUSTICE CLEO E. POWELL

April 18, 2013

THE FALLS CHURCH, a/k/a THE CHURCH AT THE FALLS - THE FALLS CHURCH

v. Record No. 120919

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

Randy I. Bellows, Judge

This appeal has its origin in a protracted and complex dispute between the plaintiffs, the Protestant Episcopal Church in the Diocese of Virginia (the "Diocese") and the Protestant Episcopal Church in the United States of America ("TEC"), and the defendants, seven local congregations including The Falls Church, the appellant in the present case. In this appeal, we are asked to consider whether the trial court properly applied neutral principles of law in deciding the ownership of certain disputed church property, whether that application was constitutional, and whether the trial court, after applying neutral principles of law, granted the proper relief. In their assignment of cross-error, TEC and the Diocese ask us to consider whether the trial court erred in its application of Code § 57-7.1.

I. BACKGROUND

Many of the facts in this case were related in exacting detail in prior proceedings before this Court. See Protestant Episcopal Church v. Truro Church, 280 Va. 6, 694 S.E.2d 555 (2010). Therefore, due to the extensive nature of the proceedings below, we will recite only the facts necessary for our resolution of the dispositive issues in this case.

The Falls Church was founded in 1732 as one of two congregations in Truro Parish. Construction of a church on the property conveyed to the parish was completed in 1769. TEC is a hierarchical denomination founded in 1789. Id. at 13, 694 S.E.2d at 558. The Diocese is one of the geographical dioceses within TEC. Id. at 15, 694 S.E.2d at 559. Although it existed prior to the founding of TEC or the Diocese, The Falls Church petitioned to be a part of the Diocese and TEC in 1836. At the 1836 Annual Convention, the Diocese accepted The Falls Church's petition.

Following a long-standing conflict within TEC that arose in 2003, the congregation of The Falls Church overwhelmingly voted to disaffiliate from TEC and the Diocese on December 17, 2006. The Falls Church and six other congregations in the Diocese (collectively the "CANA congregations") subsequently filed petitions pursuant to Code § 57-9(A), which was the subject of this Court's opinion in Truro Church.

Shortly after the CANA congregations filed their petitions, TEC and the Diocese filed complaints asserting that all personal and real property held by the CANA congregations was actually held in trust for TEC and the Diocese. In their complaint, TEC and the Diocese asserted that they directed the trus-

tees of the CANA congregations to transfer the property to the Diocesan Bishop, but the CANA congregations had refused to do so. Both complaints requested that the CANA congregations be ordered to submit an accounting, be enjoined from further use, occupancy or alienation of the disputed property, and convey and transfer control of the property to the Diocesan Bishop. The complaint filed by the Diocese further requested that the trial court enter judgment declaring an improper trespass, conversion and alienation of real and personal property. The CANA congregations filed a counterclaim seeking a declaration that TEC and the Diocese had no interest in the disputed property occupied by the CANA congregations, and asserting claims for unjust enrichment and for imposition of a constructive trust.

After a trial on the congregations' Code § 57-9(A) petitions, the trial court granted the petitions and dismissed the complaints filed by TEC and the Diocese as legally moot. This Court reversed, and remanded the case with direction that the trial court reinstate TEC's and the Diocese's declaratory judgment actions and the CANA congregations' related counterclaims. Id. at 29, 694 S.E.2d at 567. In so doing, we stated the trial court was to "resolve this dispute under principles of real property and contract law." Id.

On remand, the trial court considered the complaints filed by TEC and the Diocese as well as the counterclaims filed by the CANA congregations. Following a 22-day trial, the trial court ruled that TEC and the Diocese had contractual and proprietary interests in the property at issue, and enjoined the CANA congregations from further use of the proper-

ty. The trial court denied the entirety of the CANA congregations' counterclaims.

In a 113-page letter opinion, the trial court articulated its analysis of the dispute. The trial court explained that it applied neutral principles of law by considering our statutes, the language of the deeds conveying the disputed property, the constitution and canons of TEC and the Diocese, and the dealings between the parties. See Green v. Lewis, 221 Va. 547, 555, 272 S.E.2d 181, 185-86 (1980) ("we look to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties"); Norfolk Presbytery v. Bollinger, 214 Va. 500, 505, 201 S.E.2d 752, 756-57 (1974) ("it is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church").

In considering the applicable statutes, the trial court found that the adoption of Code § 57-7.1 did not change the long-standing rule in Virginia that church property may not be held by a trustee for the general church, and only trusts for local congregations are recognized. Thus, the trial court found it unnecessary to address the applicability of Code § 57-7.1. The trial court further determined that Code § 57-15 allowed it to order the transfer of property only if the transfer was the wish of the constituted church authorities of a hierarchical church.

Turning to its examination of the relevant deeds, the trial court considered the eleven deeds connected with The Falls Church. In 1746, the first deed conveyed two acres to "the said Vestry of Truro par-

ish." The second deed is to the "trustees of the Episcopal Church, known and designated as the 'Falls Church.'" The third deed is to "Trustees for the Falls Church Episcopal Church," and the fourth is to "Trustees of the Falls Church." The fifth and sixth deeds are both to "Trustees of The Falls Church, Falls Church, Virginia." The seventh through eleventh deeds are all to "Trustees of the Falls Church (Episcopal)." The trial court found that the fact that most of the deeds refer to the church as Episcopal was an indication that the designated cestui que trust was a unit or component of TEC. Relying on the circumstances of the times during which the deeds were executed, the trial court found that a reasonable grantor would have understood that property conveyed to a local Episcopal church would not be removed from the denomination without TEC's or the Diocese's consent.

In looking at the constitution and canons of the church, the trial court cited provisions stating that each congregation was bound by the constitution and canons of the general church and must acknowledge the jurisdiction of the Bishop; all clergy must affirm they "conform to the Doctrine, Discipline, and Worship of the Episcopal Church" to be ordained; all congregations use the Book of Common Prayer; Bishops must regularly visit parishes to examine the state of the churches; and congregations must participate in the Diocesan health care plan, contribute to the Church Pension Fund, and purchase fire, casualty and workers' compensation insurance. The trial court also noted property canons which prohibited the congregations from alienating consecrated property without the consent of the Diocese and allowed the Diocese to declare property

abandoned if it ceased to be used by a congregation of TEC and the Diocese. The trial court concluded that TEC and the Diocese exercised pervasive dominion, management, control, supervision and authority over local church property, in a manner traditionally associated with ownership and possession.

Finally, in considering the course of dealings between the parties, the trial court cited the fact that the churches became members of TEC and the Diocese in accordance with the rules of the Diocese, were known in the community as Episcopal churches, sought consent from the Diocese to encumber property, were served by ordained Episcopal priests, used the Book of Common Prayer, contributed financially to the Diocese and the Church Pension Fund and were visited every year between 1934 and 2005 by the Bishops of the Diocese.

Based on its consideration of neutral principles of law and examination of our statutes, the deeds, the constitutions and canons, and the course of dealings between the parties, the trial court found that TEC and the Diocese carried their burden of proving they had contractual and proprietary interests in the church property at issue. The trial court acknowledged that the congregations paid for, improved and managed the property on a daily basis, but found those actions were consistent with a hierarchical polity and were not dispositive of whether the CANA congregations or TEC and the Diocese were entitled to the property. The trial court also found that, under Code § 57-10, the personal property held by the CANA congregations followed the disposition of the real property and must also be turned over to the Bishop.

The trial court further stated that there was a point in time after which it was clear that donations by members of the CANA congregations were not contributions to Episcopal congregations. Therefore, the trial court adopted the date TEC and the Diocese filed the declaratory judgment actions, January 31, 2007, as the proper "point of demarcation," and ordered that all personal property acquired before that date be conveyed to the Diocese and all intangible personal property acquired after that date remain with the CANA congregations. Tangible personal property acquired after that date would be conveyed to the Diocese unless the CANA congregations could demonstrate that it was purchased with funds acquired after the date.

The Falls Church appeals.[1] TEC and the Diocese cross-appeal the trial court's ruling with regard to Code § 57-7.1.

II. COURT REVIEW OF CHURCH PROPERTY DISPUTES

The primary issue in this case is whether TEC and the Diocese have a proprietary interest in the real and personal property that was held by The Falls Church. See Code § 57-15; Norfolk Presbytery, 214 Va. at 503, 201 S.E.2d at 755. In its first assignment of error, The Falls Church claims that:

> The trial court erred in enforcing canon law, rather than "principles of real property and contract law" used in all cases, to award [TEC and the Diocese] a proprietary interest in [The Falls Church's] property and to extinguish [The Falls

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[1] None of the other six CANA congregations appealed the decision of the trial court.

> Church's] interest in such property, even though [The Falls Church's] own trustees held title and [The Falls Church] paid for, improved, and maintained the property.

Although it has been recognized that "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes," Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969), it is well established that "there is no constitutional prohibition against the resolution of church property disputes by civil courts, provided that the decision does not depend on inquiry into questions of faith or doctrine." Norfolk Presbytery, 214 Va. at 503, 201 S.E.2d at 755.

> "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." Neither the State Constitution nor the First Amendment deprives church members of their right to resort to the courts for the protection of their property rights or their civil rights. The question is simply whether the court can decide the case by reference to neutral principles of law, without reference to issues of faith and doctrine.

Reid v. Gholson, 229 Va. 179, 187-88, 327 S.E.2d 107, 112 (1985) (citations omitted).

In Jones v. Wolf, 443 U.S. 595, 602 (1979), the United States Supreme Court held that "'a State may

adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith'" (quoting Maryland & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (emphasis omitted)). Referring to such secular approaches as "neutral principles of law," the Supreme Court explained:

> The primary advantages of the neutral principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general - flexibility in ordering private rights and obligations to reflect the intentions of the parties.

Id. at 603.

As part of its explanation of the neutral principles of law, the Supreme Court noted that:

> Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the gen-

> eral church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Id. at 606.

Virginia has long applied neutral principles of law when there is a dispute between a hierarchical church and a local congregation over the ownership of church property. See Reid, 229 Va. at 188, 327 S.E.2d at 112; Green, 221 Va. at 555, 272 S.E.2d at 185; Norfolk Presbytery, 214 Va. at 507, 201 S.E.2d at 758. We have held that the hierarchical church bears the burden of proving a proprietary interest[2] in the property at issue by demonstrating that the local congregation violated either "the express language of the deeds or a contractual obligation to the general church." Norfolk Presbytery, 214 Va. at 507, 201 S.E.2d at 758. In resolving church property disputes, we have heretofore specifically limited our consideration to certain aspects of property and contract law. This limitation was necessitated only by the fact that, in Virginia, hierarchical churches were prohibited from relying on denominational trusts, whether express or implied. See Green, 221 Va. at

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[2] A proprietary right or interest "is a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls." Green, 221 Va. at 555, 272 S.E.2d at 186.

555, 272 S.E.2d at 185; Norfolk Presbytery, 214 Va. at 507, 201 S.E.2d at 758.

However, in their assignment of cross-error, TEC and the Diocese argue that the plain language of Code § 57-7.1 demonstrates that the General Assembly has repudiated Virginia's historical disdain for denominational trusts.[3] We will first address whether the trial court erred by holding that "[Code § 57-7.1 did not change the policy in Virginia, which is that church property may be held by trustees for the local congregation, not for the general church."

A. CODE § 57-7.1

We have long recognized that, for the most part, express and implied trusts for hierarchical churches "are invalid under Virginia law." Norfolk Presbytery, 214 Va. at 507, 201 S.E.2d at 754. However, this limitation on denominational trusts is a creature of statutory law and, therefore, it is within the power of the General Assembly to narrow or even eliminate the limitation, should it so choose. See Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc., 249 Va. 144, 152, 452 S.E.2d 847, 851 (1995) ("acquisition and ownership of property by churches are matters governed by stat-

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[3] We recognize that, due to the posture of Truro Church, we were not required to consider TEC's and the Diocese's arguments regarding Code § 57-7.1. On remand, we specifically instructed the trial court to "resolve this dispute under principles of real property and contract law," Truro Church, 280 Va. at 29, 694 S.E.2d at 567, which it properly did. However, now the issue of the applicability of the Code § 57-7.1 is squarely before us and therefore we will address it.

ute.") (citing Article IV, § 14 of the Constitution of Virginia).[4]

In reviewing Code § 57-7.1, we are guided by well-established principles of statutory construction. "When the language of a statute is clear and unambiguous, we are bound by the plain meaning of that language." Industrial Dev. Auth. v. Board of Supervisors, 263 Va. 349, 353, 559 S.E.2d 621, 623 (2002). Furthermore, "[i]n interpreting a statute, we presume that the General Assembly acted with full knowledge of the law in the area in which it dealt." Philip Morris USA Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 576, 643 S.E.2d 219, 225 (2007). Finally, "statutory construction is a question of law which we review de novo." Smit v. Shippers' Choice of Va., Inc., 277 Va. 593, 597, 674 S.E.2d 842, 844 (2009).

Former Code § 57-7[5] specifically validated conveyances, devises and dedications of land "for the use or

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[4] In 1995, the last paragraph of Article IV, § 14 of the Constitution of Virginia stated: "The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law." (Emphasis added.) This paragraph was removed by an amendment proposed and agreed to by the General Assembly at the 2005 Regular Session (2005 Acts ch. 950) and the 2006 Regular Session (2006 Acts chs. 68, 945), and ratified by the people at the general election held November 7, 2006. Code §§ 57-7.1 through -17 demonstrate that, although the language referring to the method of securing church property has been removed, the General Assembly still intended for matters involving the acquisition and ownership of church property to be governed by statute.

[5] Former Code § 57-7 stated, in relevant part:

> Every conveyance, devise, or dedication shall be valid which . . . has been made, and every conveyance shall be

benefit of any religious congregation." (Emphasis added.) In this context, this Court has previously explained that the phrase "religious congregation" was limited, meaning "the local congregation rather than a larger hierarchical body." Norfolk Presbytery, 214 Va. at 506, 201 S.E.2d at 757.

However, in 1993, the General Assembly repealed Code § 57-7 and enacted Code § 57-7.1.[6] See 1993 Acts ch. 370. Unlike Code § 57-7, Code § 57-7.1 validates conveyances and transfers of both real and personal property "which [are] made to or for the bene-

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> valid which hereafter shall be made of land for the use or benefit of any religious congregation as a place for public worship, or as a burial place, or a residence for a minister, or for the use or benefit of any church diocese, church, or religious society, as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church diocese, church or religious society, and employed under its authority and about its business; and every conveyance shall be valid which may hereafter be made, or has heretofore been made, of land as a location for a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church or of land as a place of residence for the sexton of a church, provided such land lies adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant; or for use in furtherance of the affairs of any church diocese, and the land shall be held for such uses or benefit and for such purposes, and not otherwise.

[6] Code § 57-7.1 states, in relevant part:

> Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift, shall be valid.

fit of any church, church diocese, religious congregation or religious society." (Emphasis added.) The General Assembly's inclusion of the phrase "church diocese" in Code § 57-7.1 clearly demonstrates its intention to broaden the scope of denominational trusts to include all real and personal property that is conveyed or transferred to or for the benefit of a hierarchical church. Indeed, we previously recognized that similar language in another portion of former Code § 57-7 "broadened the scope of [denominational] trusts to include property conveyed or devised for the use or benefit of a church diocese for certain residential purposes." Norfolk Presbytery, 214 Va. at 506, 201 S.E.2d at 757-58. Thus, notwithstanding Virginia's long history of invalidating trusts for hierarchical churches, the General Assembly has expressly allowed such trusts with the passage of Code § 57-7.1. Accordingly, we agree with TEC and the Diocese and hold that the trial court erred in its application of Code § 57-7.1.

B. EXISTENCE OF A TRUST

Having determined that the property could be subject to a denominational trust, we now examine what effect, if any, Code § 57-7.1 has on the present case. TEC and the Diocese contend that canon 1.7.4 of TEC's canons (the "Dennis Canon")[7] created an express trust in "[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation." The Dennis Canon was enacted by TEC's General Convention in 1979. It was reportedly passed in direct response to the Supreme Court's recognition that "the constitution of the general church can be made to recite an express trust in favor of the denominational church". Jones, 443 U.S. at 606.

We have previously explained that, "unless the language shows a contrary intent, the language of an inter vivos trust should be construed according to the law in effect at the time the trust is executed." McGehee v. Edwards, 268 Va. 15, 20, 597 S.E.2d 99, 102 (2004) (emphasis added); see also Yancey v. Scales, 244 Va. 300, 303, 421 S.E.2d 195, 196 (1992); Wildberger v. Cheek, 94 Va. 517, 520, 27 SE. 441, 442 (1897). In 1979, when the Dennis Canon was enacted, former Code § 57-7 was the law in effect.

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[7] The Dennis Canon states:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Thus, any express trusts purportedly created by the Dennis Canon were ineffective in Virginia.

Our analysis does not end here, however. Our holding in McGehee was clearly limited to express trusts. Therefore, we next examine whether the property was subject to an implied trust. Virginia has recognized two forms of implied trusts: resulting and constructive. See Leonard v. Counts, 221 Va. 582, 588, 272 S.E.2d 190, 194 (1980) ("Resulting and constructive trusts comprise two categories of trusts by operation of law arising without any express declaration of trust."). A resulting trust "arises when prior to the purchase one person binds himself to pay purchase money and stands behind his commitment, but title is conveyed to another." Id. at 588, 272 S.E.2d at 195. It is readily apparent that the record in the present case does not support the existence of a resulting trust.

Constructive trusts, on the other hand, are trusts "which the law creates, independently of the intention of the parties, to prevent fraud or injustice." Id.

> Certain species of constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud.

Porter v. Shaffer, 147 Va. 921, 929, 133 S.E. 614, 616 (1926) (citation and internal quotation marks omitted) (emphasis in original); see also Leonard, 221 Va. at 590, 272 S.E.2d at 196 ("'[N]ot . . . all constructive trusts are based on "fraud", unless that word is used in its broadest sense to include all conduct which eq-

uity treats as unfair, unconscionable and unjust'") (quoting George G. Bogert, The Law of Trusts and Trustees § 471, at 22-23 (2d ed. rev. 1978)).

Moreover,

> [i]t is well settled that where one person sustains a fiduciary relation to another he cannot acquire an interest in the subject matter of the relationship adverse to such other party. If he does so equity will regard him as a constructive trustee and compel him to convey to his associate a proper interest in the property or to account to him for the profits derived therefrom.

Horne v. Holley, 167 Va. 234, 240, 188 S.E. 169, 172 (1936).

Notably, constructive trusts "will not arise until explicitly created by a court." David A. Thomas, 3 Thompson on Real Property § 27.04(g)(1)(i) (David A. Thomas, ed., 2d ed. 2001 & Supp. 2012). A "court's action creating a constructive trust will relate back to the time when the property began to be wrongfully held." Id. As previously discussed, Code § 57-7.1 has been in effect since 1993, therefore it was the applicable law at all times the property in the present case is alleged to have been wrongfully held.

Thus, the existence of a constructive trust in the present case turns on the nature of the relationship between the parties. To determine the nature of the relationship between a local congregation and a hierarchical church, we look to the articles of religious governance[8] of the hierarchical church as well as the

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[8] We recognize that, in previous church property disputes, we have only referenced the "constitution of the general church."

course of dealing between the local congregation and the hierarchical church.

1. ARTICLES OF RELIGIOUS GOVERNANCE

In the present case, we need look no further than the Dennis Canon to find sufficient evidence of the necessary fiduciary relationship. As a number of courts in other states have noted, the Dennis Canon "merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [TEC] in 1789." Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church, 620 A.2d 1280, 1292 (Conn. 1993); see also Episcopal Diocese of Mass. v. DeVine, 797 N.E.2d 916, 924 n. 21 (Mass. App. Ct. 2003) ("the Dennis Canon merely confirmed the preexisting relationship between [TEC], its subordinate dioceses, and the parishes thereunder."); Trustees of the Diocese of Albany v. Trinity Episcopal Church, 684 N.Y.S.2d 76, 81 (N.Y. App. Div. 1999) ("the 'Dennis Canon' amendment expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal Church."); Bishop & Diocese of Colorado

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See Green, 221 Va. at 555, 272 S.E.2d at 185-86; Norfolk Presbytery, 214 Va. at 507, 201 S.E.2d at 758. We note that limiting our examination to only the constitution of the general church is demonstrably unmanageable, given that each religion differs in its chosen form of religious governance. Therefore, we interpret our previous references broadly to include any articles of religious governance employed by the general church. Cf., Jones, 443 U.S. at 604 ("The neutral-principles method . . . requires a civil court to examine certain religious documents, such as a church constitution") (emphasis added).

v. Mote, 716 P.2d 85, 105 n. 15 (Colo. 1986) ("the [Dennis Canon] did nothing but confirm the relationships existing among [TEC], the diocese and theparish"); Protestant Episcopal Church in the Diocese of New Jersey v. Graves, 417 A.2d 19, 24 (N.J. 1980) ("[The Dennis Canon] reflects established customs, practices and usages of The Protestant Episcopal Church.").

The Falls Church has argued in this case that it was not bound by the canons, including the Dennis Canon, as there is no evidence of mutual assent by The Falls Church with regard to TEC and the Diocese having any rights to the property. As this argument relates to the nature of the relationship between the parties, we will address it here.

We begin by observing that the relationship created by a local church's decision to join a hierarchical church is analogous to a contractual relationship. See, e.g., Norfolk Presbytery, 214 Va. at 507, 201 S.E.2d at 758 (recognizing that courts are not "powerless to prevent a hierarchical church from being deprived of contractual rights in church property held by trustees of a local congregation").[9] Therefore, to determine the issue of mutual assent, we look exclusively to the "expressions of [the par-

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[9] We note that, although the relationship between a hierarchical church and a local church is analogous to a contractual relationship, we have never held, nor do we now hold, that all of the traditional concepts of contract law apply in the context of church property cases. By virtue of their relationship, the local church is clearly not an entirely independent entity. Indeed, the local church derives its identity from its relationship with the hierarchical church. Clearly, then, the parties are not negotiating at arm's length. As such, while some concepts of contract law apply to church property cases, others do not.

ties'] intentions which are communicated between them." Lucy v. Zehmer, 196 Va. 493, 503, 84 S.E.2d 516, 522 (1954) (internal quotation marks omitted). Here, the record clearly establishes that The Falls Church has affirmatively assented to the constitution and canons. Upon joining TEC and the Diocese in 1836, The Falls Church agreed to "be benefited and bound . . . by every rule and canon which shall be framed, by any Convention acting under this constitution, for the government of this church in ecclesiastical concerns." Moreover, The Falls Church's Vestry Manual states "The Falls Church is subject to the constitution and canons of the national church ([TEC]) and of the Diocese." (Emphasis added.) Thus, contrary to its argument, it is clear that The Falls Church agreed to be bound by the constitutions and canons of both TEC and the Diocese.

Similarly, The Falls Church's argument that TEC and the Diocese acted in a unilateral manner in passing certain canons is without merit. The record demonstrates that the adoption of the canons is hardly "unilateral." The triennial General Convention, the highest governing body of TEC, adopts TEC's constitution and canons. The General Convention is composed of representatives from each diocese. The legislative body of each diocese (referred to in Virginia as the "Annual Council") selects the representatives that are sent to the General Convention. The Annual Council is composed of representatives from each of the churches and other congregations within the Diocese. Thus, it is clear that each canon, including the Dennis Canon, is enacted through a process resembling a representative form of government.

Moreover, even if the implementation of the canons were unilateral, "religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-22 (1976) (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)). Thus, even if implementation of the Dennis Canon was unilateral, this Court would be powerless to address any issues of inequity wrought thereby, as to do so would involve judicial interference with religion and clearly violate the First Amendment.[10]

2. COURSE OF DEALING

Turning to the course of dealing between the parties, the record clearly demonstrates that The Falls Church allowed the Diocese to play an active role in its overall operations. Indeed, the trial court found that on at least two occasions, the Diocese vetoed the employment of clergy at The Falls Church and The Falls Church complied with the decision; Bishops of the Diocese and other Bishops within TEC have visited The Falls Church every year between 1934 and

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[10] The Falls Church's assertion that Virginia law bars voluntary associations from enacting rules that encumber or forfeit member's property is inapposite to the present case. Notably, as previously stated, there was no "unilateral" encumbrance or forfeiture of the property in the present case analogous to the cases cited by The Falls Church. Furthermore, the cases that The Falls Church relies upon deal with the limited remedies available under the Condominium Act, Code 9 55- 79.39, et seq., (Unit Owners Ass'n. v. Gillman, 223 Va. 752, 292 S.E.2d 378 (1982)) and the creation of private judicial tribunals that purport to have the power of the sovereign (Davis v. Mayo, 82 Va. 97 (1886)).

2005; and the vestry members of The Falls Church have regularly "subscribed to the oath or declaration prescribed by Diocesan Canons." It is worth noting that The Falls Church actively participated in the Diocese, having sent representatives to the Annual Convention every year for at least 100 years (1909-2010).

In conclusion, neither TEC nor the Diocese can claim a proprietary interest in the property by way of an express denominational trust. However, when one considers the constitution and canons, specifically the adoption of the Dennis Canon, and the course of dealing between the parties, The Falls Church, TEC and the Diocese intended, agreed and expected that the property at issue would be held in trust by The Falls Church as trustee for the benefit of TEC and the Diocese. As such, we find that the fiduciary relationship required to impose a constructive trust has been shown to exist. The fact that The Falls Church attempted to withdraw from TEC and the Diocese and yet still maintain the property represents a violation of its fiduciary obligation to TEC and the Diocese. Therefore, equity dictates that a constructive trust be imposed on the property for the benefit of TEC and the Diocese.

III. PROPERTY AWARDS

In its remaining assignments of error, The Falls Church asserts that, notwithstanding the method of determining the ownership of the property, the trial court's property award was in error. These arguments are independent of the trial court's application of the neutral-principles analysis and our constructive trust determination; therefore, we will address them.

A. CONSTITUTIONALITY

In its second assignment or error, The Falls Church argues that "[t]he trial court's award of [The Falls Church's] property to [TEC and the Diocese] violates the Religion Clauses of the U.S. and Virginia Constitutions by enabling denominations to secure others' property by means available to no other Virginia entity." The essence of The Falls Church's argument is that the method of resolving a property ownership dispute between a hierarchical church and a local church is unconstitutional. In light of the fact that the trial court's analysis and the existence of denominational trusts rely on the application of neutral principles of law, which has been specifically upheld by the United States Supreme Court in Jones, 443 U.S. at 602-03, we must disagree with The Falls Church. So long as the dispute was resolved in a wholly secular manner through the use of neutral principles of law, as it was in the present case, we cannot say that the trial court committed constitutional error.

B. PROPERTY ACQUIRED BEFORE 1904

The Falls Church next takes issue with the trial court's finding that the Diocese and TEC "had proprietary interests in [The Falls Church's] real property acquired before 1904, when the legislature first referenced denominational approval of church property transfers." Specifically, The Falls Church argues that the trial court erred by "retroactively applying laws and canons not in force when [The Falls Church] acquired its initial property or when it joined the denomination." The Falls Church claims that the trial court ruled that the 1904 amendment to Code § 57-15 retroactively validated

the consent canons, which were enacted in 1870 when TEC and the Diocese were incapable of holding any property. Thus, according to The Falls Church, it is only bound by the laws and canons in effect at the time it joined TEC and the Diocese.

In light of our above ruling, we no longer need to consider this issue, as this case is governed by Code § 57-7.1, not Code § 57-15 Assuming Code § 57-15 were applicable, however, we note that contrary to The Falls Church's argument, the trial court did not hold that Code § 57-15 retroactively validated the consent canons. Rather, the trial court merely restated our holding in Norfolk Presbytery as to what must be determined before Code § 57-15 applies. Thus, nothing in the trial court's application of Code § 57-15 was retroactive.

Furthermore, The Falls Church's interpretation of Code 57-15 ignores the plain language of The Diocesan Constitution in effect when The Falls Church joined the Diocese, which provided that The Falls Church agreed to be "benefited and bound . . . by every rule and canon which shall be framed." (Emphasis added.) Under The Falls Church's interpretation, it would only be bound by those rules and canons which "have been framed."[11] (Emphasis added.) Accordingly, we find no error in the trial court's application of Code § 57-15.

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[11] We further note that The Falls Church's application of Code § 57-15 would result in an unmanageable patchwork of laws and canons that would be different for each congregation and, potentially, each property.

C. UNCONSECRATED PROPERTY

The Falls Church next argues that the trial court erred in deciding to award the Diocese and TEC the unconsecrated property held by The Falls Church. According to The Falls Church, it was incorrect for the trial court to rely upon TEC's canons to determine ownership of unconsecrated real property. The Falls Church contends that the canons only apply to consecrated property, therefore, it was improper for the trial court to apply them to any unconsecrated property. However, The Falls Church never raised this argument before the trial court and therefore we will not consider it here. See Rule 5:25 ("No ruling of the trial court will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling").

D. PERSONAL PROPERTY

In its fifth assignment of error, The Falls Church argues that

> [t]he trial court erred in awarding [The Falls Church's] personal property to [TEC and the Diocese] - even though [TEC and the Diocese] never had any control over [The Falls Church's] funds or their use, and [The Falls Church's] donors, for religious reasons, gave on the express condition that their gifts not be forwarded to [TEC and the Diocese]- in violation of Va. Code § 57-1 and the Religion Clauses of the U.S. and Virginia Constitutions.

The Falls Church asserts that the trial court failed to require TEC to prove an interest in the personal property of The Falls Church. The Falls Church contends that the trial court ignored the evidence that its use of its funds was discretionary, as demonstrat-

ed by the fact that TEC had no enforcement system. Thus, according to The Falls Church, TEC had no dominion over the personal property of The Falls Church.

In making its ruling, the trial court relied exclusively on Code § 57-10, which states, in relevant part:

> When personal property shall be given or acquired for the benefit of an unincorporated church or religious body, to be used for its religious purposes, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts . . . .

(Emphasis added.)

In light of our above ruling recognizing the existence of a constructive denominational trust, it is clear that any contributions or donations or payments of membership dues made to The Falls Church would also be held in trust for the benefit of TEC and the Diocese. Indeed, the existence of such a trust is further demonstrated when Code § 57-10 is considered in conjunction with Code § 57-7.1, because Code § 57-7.1 explicitly applies to "[e]very conveyance or transfer of real or personal property." (Emphasis added.) The fact that TEC and the Diocese grant each congregation discretion as to how it distributes any contributions or donations it receives does not change the fact that such contributions and donations are held in trust for the benefit of TEC and the Diocese.

The Falls Church further argues that the trial court failed to properly consider the donative intent of the congregants. The Falls Church relies on the fact that, starting in 2003, The Falls Church's vestry decided it would no longer give money to TEC or the

Diocese. The congregants were informed that they could contribute directly to TEC and the Diocese if they wished. According to The Falls Church, any contributions or donations made to The Falls Church after 2003 must be viewed as demonstrating the congregants' donative intent to support only The Falls Church and not TEC or the Diocese. The Diocese counters that The Falls Church can only prove donative intent by tracing the source of the donations and contributions to specific donors/contributors.

Based on the record before us, we cannot determine the donative intent of any individual member of the congregation, much less the congregation as a whole. The Falls Church offered no evidence, beyond the decision of the vestry, that provides any support for a finding about the donative intent of the congregants. It is further worth noting that, contrary to its stated decision, the vestry continued to give money to the Diocese, albeit for designated purposes as opposed to the Diocese's general operating budget. While we make no decision as to what level of evidence would sufficiently demonstrate the donative intent of the congregation as a whole, we hold that evidence merely documenting the policy of the vestry is insufficient. Indeed, the decision of the vestry only establishes that it was exercising the discretion granted to it by TEC and the Diocese.

E. RELIEF SOUGHT

In its final assignment of error, The Falls Church asserts that "[t]he trial court erred in awarding [TEC and the Diocese] more relief than sought, including funds given after [The Falls Church] disaffiliated and funds spent on maintenance, which [TEC and the Diocese] stipulated [The Falls Church] should keep."

According to The Falls Church, the Diocese and TEC only sought the real and personal property The Falls Church acquired prior to disaffiliation. The trial court, however, ordered The Falls Church to turn over funds it acquired after it had disaffiliated from TEC and the Diocese.

In its letter opinion, the trial court identified four points in time which it considered as the potential demarcation point at which The Falls Church became an entirely separate entity from the Diocese and TEC: (1) when The Falls Church began withholding contributions to the Diocese; (2) when The Falls Church voted to disaffiliate; (3) when the Diocese declared that the property was abandoned; or (4) when the Diocese filed its declaratory judgment action. Ultimately, the trial court determined that the date that the Diocese filed its declaratory judgment action against The Falls Church was the proper demarcation point, explaining that "[a]fter this date, no contribution made, no donation made, no dues paid by a congregant, could reasonably have been made with the understanding that the money was going to [an] Episcopal congregation[]." This was error on the part of the trial court.

As we have previously indicated, The Falls Church's decision to withhold donations and contributions to the Diocese and TEC was clearly within The Falls Church's discretion and, ultimately, had no bearing on The Falls Church's standing as an Episcopal Church. Similarly, the filing of the declaratory judgment action had no bearing on The Falls Church's standing as an Episcopal Church, as both parties had already taken affirmative steps that clearly indicated that The Falls Church was not an Episcopal Church: The Falls Church had voted to

disaffiliate and the Diocese had declared that the CANA congregations had "severed ties with the Episcopal Church and the Diocese of Virginia."

Thus, the proper demarcation point is either when The Falls Church voted to disaffiliate or when the Diocese declared that the property was abandoned. The trial court, in its letter opinion, correctly explained that once a congregation votes to disaffiliate from a hierarchical church, that congregation no longer has any rights or interest in any property owned by the general church.[12] A necessary corollary is that once a congregation votes to disaffiliate from a hierarchical church, the hierarchical church no longer has any rights or interest in any property subsequently acquired by the congregation.[13]

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[12] However, in its decision to eliminate this as the demarcation point, the trial court explained that:

> it is not the act of taking a vote, or even the filing of a petition, that renders a decision to affiliate with a different denomination final and conclusive - rather it is the Court's approval of the petition.That did not come until January 8, 2009, and in any event was reversed by the Virginia Supreme Court.

(Emphasis in original.)

This ruling expressly contradicts the trial court's earlier statement that the act of disaffiliation eliminated The Falls Church's interest in the property. Additionally, nothing in our jurisprudence supports the notion that a congregation must receive court approval to disaffiliate. Indeed, such a requirement would clearly amount to unconstitutional judicial interference.

[13] During the trial on the CANA Congregations' Code § 57-9 petitions and after both the Diocese and TEC had filed their declaratory judgment actions, counsel for TEC conceded that "the money that [the CANA Congregations have] received due to contributions since the time that they disaffiliated, and whatever

Furthermore, as the trial court noted, the vote to disaffiliate necessarily renders the Diocese's abandonment declaration a nullity, as the declaration:

> did not "extinguish" the CANA Congregations' "interest" in the seven church properties, for the CANA Congregations are not in authorized possession of Episcopal church property and, therefore, have no "interest" in the properties capable of being extinguished.

(Emphasis in original.)

Therefore, we agree that the trial court awarded more relief than TEC and the Diocese sought. Accordingly, we will remand this issue to the trial court to reconsider its award using the date The Falls Church voted to disaffiliate as the proper demarcation point.

IV. CONCLUSION

For the foregoing reasons we will reverse the judgment of the trial court with regard to its analysis of Code § 57-7.1 and find that TEC and the Diocese have proven that they have a proprietary interest and impose a constructive denominational trust in the properties. However, as the imposition of a constructive denominational trust still requires the conveyance of the property, we will affirm the trial court's order requiring that The Falls Church convey the property to TEC and the Diocese. With regard to the disposition of personal property acquired by The Falls Church after the vote to disaffiliate, we will reverse the judgment of the trial court and remand for further proceedings consistent with

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purchases that they have made with that, the Episcopal Church and the Diocese haven't made a claim on that property."

this opinion. We will affirm the remainder of the trial court's judgment.

Affirmed in part, reversed in part, and remanded

JUSTICE McCLANAHAN, concurring.

I agree with the majority as to its disposition of the property awards in section III. I write separately as to the majority's neutral-principles analysis in section II, however, because I believe TEC and the Diocese acquired their interest in the disputed church property, not merely by a constructive trust, but rather by an express trust pursuant to the Dennis Canon, as TEC and the Diocese have consistently argued throughout this case.[1]

After holding that Virginia now allows trusts for hierarchical churches under Code § 57-7.1 (the successor to Code § 57-7), the majority states that "[i]n 1979, when the Dennis Canon was enacted, former Code § 57-7 was the law in effect. Thus, any express trusts purportedly created by the Dennis Canon were ineffective in Virginia." That statement necessarily assumes that former Code § 57-7 was constitutional as applied to the Dennis Canon. In my opinion, that assumption is incorrect. Under First Amendment law, the prohibition of the enforcement of an express trust under former Code § 57-7, such as that

[1] Indeed, given the position of TEC and the Diocese on this issue both below and on appeal, I do not believe the question of whether the property is held by The Falls Church for TEC's and the Diocese's benefit through a constructive trust is before this Court. See Rule 5:17(c); Commonwealth v. Brown, 279 Va. 235, 239-42, 687 S.E.2d 742, 743-45 (2010); Clifford v. Commonwealth, 274 Va. 23, 25-26, 645 S.E.2d 295, 297 (2007); Richardson v. Moore, 217 Va. 422, 423 n*, 229 S.E.2d 864, 865 n.* (1976).

created by the Dennis Canon between TEC, the Diocese, and The Falls Church, was unconstitutional. Legislative recognition of the same no doubt resulted in the passage of Code § 57-7.1. As Professor A. E. Dick Howard aptly states in his amicus brief in reference to the repeal of former Code § 57-7: "[t]he General Assembly has acted to sweep away that anachronistic and unconstitutional provision. In enacting Section 57-7.1, the legislature has done what needed to be done."

Just because former Code § 57-7 was repealed in 1993 (and replaced with a constitutional provision) does not mean that the former statute was thereby rendered immune from future constitutional scrutiny, or that its constitutionality is moot. Given the potential dispositive impact of former Code § 57-7 on the issue of whether the disputed church property is being held in an express trust for the benefit of TEC and the Diocese pursuant to the Dennis Canon, as these parties assert, the statute's validity and effect is very much a live issue now before this Court. See Wessely Energy Corp. v. Jennings, 736 S.W.2d 624, 625-28 (Tex. 1987) (In an action instituted in 1981, the Texas Supreme Court held that a coverture statute on title to real property repealed in 1963 was unconstitutional in 1954 when the subject deeds were executed, as the statute violated both the United States and Texas Constitutions); Dunn v. Pate, 431 S.E.2d 178, 179-83 (N.C. 1993) (In an action instituted in 1989, the North Carolina Supreme Court held that private examination statutes repealed in 1977 were unconstitutional in 1962 when the subject deed was executed, as the statutes violated both the United States and North Carolina Constitutions).

The manifest problem with former Code § 57-7,[2] as construed and applied to hierarchical churches, was that it treated those churches differently than local congregational churches[3] by allowing only the latter to hold property in trust in Virginia.[4] This was accomplished by use of Virginia's long-accepted but ultimately unconstitutional construction of the term "religious congregation" in former Code § 57-7 to mean only a local congregational church. Virginia's historic animus toward the accumulation of wealth by churches generally, and hierarchical churches in particular, was the origin of that disparate statutory treatment. See Norfolk Presbytery v. Bollinger, 214 Va. 500, 505-07, 201 S.E.2d 752, 757-58 (1974);

[2] Former Code § 57-7 provided, in relevant part, that "[e]very conveyance, devise, or dedication [of land] shall be valid [when done] for the use or benefit of any religious congregation."

[3] In this context, the term "local congregational church" is used in reference to an "autonomous congregation" at the local level not affiliated with a hierarchical church such as Episcopal and Presbyterian churches, which are "subject to control by super-congregational bodies." Protestant Episcopal Church v. Truro Church, 280 Va. 6, 13-14 n.4, 694 S.E.2d 555, 558 n.4 (2010) (citation and internal quotation marks omitted); see Norfolk Presbytery v. Bollinger, 214 Va. 500, 506-07, 201 S.E.2d 752, 757-58 (1974); Brooke v. Shacklett, 54 Va. (13 Gratt.) 301, 313 (1856).

[4] The only exception to this statutory exclusion on hierarchical churches was implemented by the 1962 amendment to former Code § 57-7, 1962 Acts ch. 516, which "broadened the scope of religious trusts to include property conveyed or devised for the use or benefit of a church diocese for certain residential purposes. The General Assembly [did] not go[] beyond this, however, to validate trusts for a general hierarchical church . . . ." Norfolk Presbytery, 214 Va. at 506-507, 201 S.E.2d at 757-58 (citing Hoskinson v. Pusey, 73 Va. (32 Gratt.) 428, 431 (1879); Brooke, 54 Va. (13 Gratt) at 312-13)).

Gallego v. Attorney General, 30 Va. (3 Leigh) 450, 477 (1832).

Such application of former Code § 57-7 violated the Establishment Clause of the First Amendment in conferring a religious preference to local congregational churches. As a fundamental limitation of the Establishment Clause, neither a state nor the Federal Government "can pass laws which . . prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947). Since Everson, the United States Supreme Court "has adhered to th[is] principle, clearly manifested in the history and logic of the Establishment Clause." Larson v. Valente, 456 U.S. 228, 246-55 (1982); see, e.g., id. cL 246 (a state statute imposing registration and reporting requirements only on those religious organizations that solicited more than fifty percent of their funds from nonmembers worked a "denominational preference" in violation of the First Amendment); Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) (holding that a municipal ordinance violated the First Amendment when applied to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service). The Supreme Court. has called this constitutionally mandated neutral treatment of religions "[t]he clearest command of the Establishment Clause." Larson, 456 U.S, at 244.

This command for government neutrality among religious groups or denominations was thus well established in the law when the United States Supreme Court decided Jones v. Wolf, 443 U.S. 595 (1979). In Jones, the Court addressed the question of how, consistent with the First Amendment, a state court may resolve a dispute between a hierarchical church

and one of its local church affiliates over the ownership of church. property. Id. at 597. In doing so, the Court directed that "[a]t any time before the dispute erupts" the parties could "ensure" a resolution of the matter by, inter alia, making the denomination's governing documents "recite an express trust in favor of the denominational church." Id. at 606. "[C]ivil courts will [then] be bound to give effect" to such provisions. Id.

Relying on Jones, TEC enacted the Dennis Canon at its 1979 General Convention (just months after Jones was decided). With this canon, TEC created an express trust for the benefit of it and its Dioceses as to all the property then being held by or for the benefit of its local parishes, missions and congregations, specifically providing, in relevant part: "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for [TEC] and the Diocese thereof in which such Parish, Mission or Congregation is located."

Based on TEC's enactment of the Dennis Canon pursuant to the directive in Jones along with the neutrality rule dictated under the First Amendment, the express t 1st created by the Dennis Canon could not be invalidated under Virginia law by former Code § 57-7. Moreover, this Court is "bound to give effect" to this express trust under Jones. Id. at 606.

I would therefore hold that former Code § 57-7 was unconstitutional in its application to the Dennis Canon trust. That is to say the statute, as I read it, was not unconstitutional on its face. Rather, it was unconstitutional because of the historically restrictive construction and application given to the statutory term "religious congregation" so as to favor lo-

cal "congregational churches" and disfavor "super congregational churches" like TEC and the Diocese. See Volkswagen of Am., Inc. v. Smit, 279 Va. 327, 336, 689 S.E.2d 679, 684 (2010) ("Because our jurisprudence favors upholding the constitutionality of properly enacted laws, we have recognized that it is possible for a statute . . . to be facially valid, and yet unconstitutional as applied in a particular case."). Accordingly, the statute's prior application to other circumstances would remain unaffected by holding it unconstitutional as applied to trusts benefiting hierarchical churches. See Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 193 (6th Cir. 1997) (explaining that "[i]f a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional").

Having reached these conclusions, I would join the other courts that have determined that the Dennis Canon established an express trust for the benefit of TEC and its Dioceses in their respective states in the context of the nationwide church property dispute between TEC, its Dioceses and local Episcopal congregations. See Protestant Episcopal Church in the Diocese of Tennessee v. St. Andrew's Parish, 2012 Tenn. App. LEXIS 274, at *35-41 (Tenn. Ct. App. 2012); Episcopal Church in the Diocese of Conn. v. Gauss, 28 A.3d 302, 318-28 (Conn. 2011); Episcopal Church Cases, 198 P.3d 66, 82 (Cal. 2009); Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 922-25 (N.Y. 2008); In re Church of St. James the Less, 888 A.2d 795, 807-10 (Pa. 2005); Episcopal Diocese v DeVine, 797 N.E.2d 916, 923-24 (Mass. 2003).

For these reasons, I concur.

APPENDIX B

IN THE SUPREME COURT OF VIRGINIA

Richmond Friday the 14th day of June, 2013

The Falls Church, a/k/a The Church at the Falls -

The Falls Church, Appellant,

Against Record No. 120919

Circuit Court Nos. CL2007-248724, CL2007-1235, CL2007-1236, CL2007-1238, CL2007-1625, CL2007-5250, CL2007-5682, CL2007-5683 and CL2007-5902

The Protestant Episcopal Church in the United States of America, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 18th day of April, 2013 and grant a rehearing thereof, the prayer of the said petition is denied.

Justices Lemons and Mims took no part in the consideration of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

Deputy Clerk

APPENDIX C

VIRGINIA;

IN THE CIRCUIT COURT FOR
FAIRFAX COUNTY

In re:	**) Civil Case Numbers**;
Multi-Circuit Episcopal	**)** CL 2007-248724,
Church	**)** CL 2007-5250
Litigation	**)** CL 2007-1625

ORDER ON REMAND TO CORRECT ERROR IN JUDGMENT

The Final Order in this matter was entered on March 1, 2012, and corrected, on March 16, 2012, *Nunc Pro Tunc* to March 1, 2012,

On July 16, 2013, the Supreme Court of Virginia, having affirmed the judgment in part and reversed the judgment in part, issued its Mandate to this Court stating that the Supreme Court of Virginia "is of the opinion that there is error in part in the judgment" and remanded the case to this Court "consistent with the views expressed in the written opinion of this Court."

The Episcopal Church, The Episcopal Church in the Diocese of Virginia (the "Diocese") and The Church at the Falls — The Falls Church while preserving all evidence, objections, exceptions, positions and arguments previously stated and/or written in the Court and on appeal, have agreed that this Order On Remand To Correct Error In Judgment complies with and satisfies the Mandate that this Court con-

duct proceedings consistent with the views expressed in the written opinion of the Supreme Court of Virginia. The signature of counsel on this Order is not a waiver of any evidence, objections, exceptions, positions or arguments. Rather, signature of counsel only indicates their agreement that this Order complies with the Mandate from the Supreme Court of Virginia,

The Church at the Falls — The Falls Church has announced its intention to seek a writ of certiorari from the Supreme Court,

THEREFORE, it is hereby ADJUDGED, ORDERED and DECREED that the "Ownership Determination Date" defined in Paragraph D of the Final Order and referenced in Paragraph E of the Final Order is hereby changed to December 16, 2006 in the case of The Church at the Falls — The Falls Church; and

It is further hereby ADJUDGED, ORDERED and DECREED, that the money judgment entered against The Church at the Falls — The Falls Church in Paragraph E of the Final Order is hereby reduced to $2,398,923,72; and

It is further hereby ADJUDGED, ORDERED and DECREED, that Exhibit G to the Final Order is hereby corrected to exclude the tangible personal property listed on Exhibit 1 hereto and the Diocese shall promptly convey ownership and possession of such property to The Church at the Falls — The Falls Church; and

It is further hereby ADJUDGED, ORDERED and DECREED, that the Clerk of this Court is directed to

and shall promptly issue, from the funds deposited in the Registry of the Court by The Church at the Falls — The Falls Church, a check in the amount of Three Hundred and Fifty Thousand, Nine Hundred and Twenty-Six Dollars and Twenty-Four Cents ($350,926,24) payable to "The Church at the Falls — The Falls Church" and mail the check to:

The Church at the Falls — The Falls Church
ATTN: William Deiss, Parish Administrator
3190 Fairview Park Drive, Suite 500
Falls Church VA, 22042; and

It is further hereby ADJUDGED, ORDERED and DECREED, that the Clerk shall retain the funds remaining in the Registry of the Court without prejudice to any rights which any party may or may not have to move for or object to the payment of the funds due to the Diocese under the Final Order as herein corrected; and

It is further hereby ADJUDGED, ORDERED and DEGREED, that this Order On Remand To Correct Error In Judgment is hereby incorporated into and made a part of the Final Order, as previously corrected, and that the provisions of the Final Order, with the corrections ordered previously and herein, shall remain in full force and effect.

Entered this 17th day of September, 2013,

Circuit Court Judge Randy I. Bellows

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EXHIBIT ONE
TFCA
TANGIBLE PERSONAL PROPERTY TO BE RETURNED TO TFCA AS A RESULT OF MANDATE FROM SUPREME COURT OF VIRGINIA

I. Audio Visual Items

a) **Monster Power Pro 2500 power conditioner** (S/N 05060101578), purchased 1/31/2007, WMC invoice 853192
b) **Shure UR14D wireless microphone system** (system consists of 2 transmitters plus 1 dual receiver, transmitter S/Ns 0111071147 and 0111071152, receiver S/N 0102071232), purchased 1/31/2007, WMC invoice 853192
c) **Shure UR4D wireless microphone dual receiver** (2nd receiver, S/N 0102071235), purchased 1/31/2007, WMC invoice 853192
d) **Shure UA845 RF distribution unit** (S/N U0065056076), purchased 2/7/2007, WMC invoice 855512
e) **Shure UA830WB wideband antenna and cable** (qty 2), purchased 2/6/2007, B&H invoice 189491970/1006051307
f) **Shure UR1 wireless microphone transmitter** (3rd transmitter, S/N 11C1195541-05), purchased 4/9/2009, WMC invoice on tile with the finance office
g) FCC licensing for security radios and security radios.

II. IT Equipment

a) **<u>Dell OptiPlex 740 desktop computer</u>** purchased 12/18/2006 for the Washington Institute.
b) **<u>Dell E773MM Monitor</u>** purchased 12/18/2006 for the Washington Institute.
c) **<u>HP OfficeJet 5610</u>** that was purchased for the Archive Room over in Southgate for the use of Finance.

III. Furniture

a) <u>1 desk</u>
b) <u>1 small table</u>
c) <u>1 loveseat/sofas</u>

APPENDIX D

IN RE MULTI-CIRCUIT CHURCH PROPERTY LITIGATION	CIVIL CASE NUMBERS: CL 2007-248724, CL 2006-15793, CL 2006-15792, CL 2007-556, CL 2007-1625, CL 2007-1235, CL 2007-1236, CL 2007-1237, CL 2007-1238, CL 2007-5249, CL 2007-5250, CL 2007-5364, CL 2007-5686, CL 2007-5685, CL 2007-5683, CL 2007-5682, CL 2007-5684, CL 2007-5902, and CL 2007-5903.

LETTER OPINION OF THE COURT
REGARDING THE COMPLAINTS FILED BY THE
PROTESTANT EPISCOPAL CHURCH IN THE
UNITED STATES OF AMERICA AND THE
PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA AND
THE AMENDED COUNTERCLAIMS
FILED BY THE CANA CONGREGATIONS

Judge Randy I. Bellows
Circuit Court of Fairfax County
Date: January 10, 2012

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January 10, 2012

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Dear Counsel[1]:

I. INTRODUCTION

On June 10, 2010, the Virginia Supreme Court remanded *Protestant* Episcopal *Church in the Diocese of Virginia v. Truro Church,* 280 Va. 6 (2010), to the Circuit Court, as follows:

> Accordingly, we hold that the circuit court erred in ruling that the CANA Congregations' petitions were properly before the court under Code §57- 9(A).
>
> By granting the CANA Congregations' Code §57-9(A) petitions, the circuit court ruled that this "obviate[d] the need to address the merits of the Declaratory Judgment Actions filed by the Episcopal Church and the Diocese and thus render[s] them legally moot." In light of our holding that the circuit court erred in granting the Code §57-9(A) petitions, the control and ownership of the property held in trust and used by the CANA Congregations remains unresolved. Accordingly, the declaratory judgment actions filed by TEC and the Diocese, and the counterclaims of the CANA Congregations in response to those suits, must be revived in order to resolve this dispute under principles of real property and contract law.
>
> For these reasons, we will reverse the judgment of the circuit court and remand with directions to dismiss the CANA Congregations' Code

---

[1] On November 1, 2011, the Court granted the Motion to Withdraw as Counsel filed by Robert C. Dunn, Esq. Mr. Dunn represented a Trustee of the Church of Epiphany, Marjorie Bell, but advised the Court that she passed away on August 21, 2011.

> §57- 9(A) petitions. We will further direct the circuit court to reinstate the declaratory judgment actions filed by TEC and the Diocese and the counterclaims of the CANA Congregations to those actions, and conduct further proceedings thereon consistent with the views expressed in this opinion.

Id. at 29-30 (footnotes and citations omitted).

Pursuant to this remand, the Court conducted the trial of the declaratory judgment actions over the course of 22 days during April, May and June 2011, and took testimony from over 60 witnesses. On June 2, 2011, the Court set a post-trial briefing schedule, permitting each side to file up to 600 pages of argument in three rounds of briefings. Both sides filed comprehensive and thorough post-trial briefings, with each side using up approximately 500 of its allotted 600 pages.[2] The Court, having thoroughly reviewed

---

[2] A total of nine principal post-trial briefs have been filed by the parties. For clarity and simplicity sake, the briefs will be referred to in this opinion as follows:

- CANA CONGREGATIONS' CORRECTED OPENING POST-TRIAL BRIEF (CANA BRIEF #1A)
- CANA CONGREGATIONS' (CORRECTED) PROPOSED FINDINGS OF FACT FOR THEIR OPENING POST-TRIAL BRIEF (CANA BRIEF #1B)
- CANA CONGREGATIONS' POST-TRIAL OPPOSITION BRIEF (CANA BRIEF #2)
- CANA CONGREGATIONS' CORRECTED POST-TRIAL REPLY BRIEF (CANA BRIEF #3)
- THE EPISCOPAL CHURCH'S FIRST POST-TRIAL BRIEF (TEC BRIEF #1)
- POST-TRIAL OPENING BRIEF FOR THE EPISCOPAL DIOCESE OF VIRGINIA (DIOCESE BRIEF

the thousand pages of post-trial briefings and the record of this matter and the applicable case law, is now prepared to rule. This Letter Opinion sets out the Court's rulings and the basis for these rulings. As further described below, the parties are to prepare a Final Order in accordance with this Letter Opinion.

II. BACKGROUND OF LITIGATION AND PROCEDURAL HISTORY

A. BACKGROUND OF LITIGATION

The genesis of this litigation has already been set out in detail in the Court's Letter Opinion on the Applicability of Virginia Code §57-9(A), dated April 3, 2008, *see In re Multi-Circuit Episcopal Church Prop. Litig.,* 76 Va. Cir. 785 (2008), as well as in the Virginia Supreme Court's opinion in this case. The Virginia Supreme Court, in its opinion on the applicability of §57-9(A), described the background of the litigation as follows:

> At the 2003 General Convention of TEC, three major points of controversy arose: the Convention's confirmation of the election of Gene Robinson, a homosexual priest, as a bishop of one of the dioceses of TEC; the adoption of a resolution permitting the blessing of same-sex unions; and

---

#1)

- POST-TRIAL RESPONSE BRIEF FOR THE EPISCOPAL CHURCH AND THE EPISCOPAL DIOCESE OF VIRGINIA (TEC/DOV BRIEF #2)
- THE EPISCOPAL CHURCH'S THIRD POST-TRIAL BRIEF (TEC BRIEF #3)
- POST-TRIAL REPLY BRIEF FOR THE EPISCOPAL DIOCESE OF VIRGINIA (DIOCESE BRIEF #3)

the rejection of a resolution concerning the "historic formularies of the Christian faith." Following the 2003 General Convention, Peter James Lee, the bishop of the Diocese, who had supported the confirmation of Robinson as a bishop, received "hundreds of letters" opposing these actions taken by the General Convention. Additionally, several congregations opposed to the actions of the General Convention stopped paying pledges owed to the Diocese and TEC, placing the funds in escrow. As a result, Bishop Lee became concerned that the dissident congregations would "attempt to create a parallel province."

In response to the discord within the Diocese, in 2004 a "Reconciliation Commission" was formed "to find ways to bring about some peaceful conflict resolution." Despite this effort, dissent concerning the actions of the 2003 General Convention continued, and in 2005 Bishop Lee created a new commission "to give attention to this rising threat of division in the Diocese." The following year, the commission promulgated a "Protocol for Departing Congregations." Under this protocol, the Diocese initiated procedures for congregations to conduct votes "regarding possible departure from the Diocese," and several congregations initiated procedures under the protocol to separate from the Diocese. However, Bishop Lee subsequently advised leaders of the dissident congregations that due to a change in leadership in TEC, separation of congregations had become a matter of concern to the national church, and that a vote to separate would not be binding on the Diocese or TEC.

Nonetheless, between December 2006 and November 2007, 15 congregations voted to separate from the Diocese. As a result, 22 members of the clergy associated with these congregations were deposed, or removed, from their pastoral duties in the Diocese by Bishop Lee. Congregations in other dioceses of TEC also took similar action to separate from their dioceses over the controversies arising from the 2003 General Convention. These congregations, as well as newly formed congregations of former members of TEC, began seeking to affiliate with other polities within the Anglican Communion in order "to be a part of the worldwide church."

The Church of Nigeria is a province of the Anglican Communion and governs the Anglican churches in the Federal Republic of Nigeria, a former British colony. In 2005, the Convocation of Anglican Nigerians in America was established as a mission of the Church of Nigeria to provide oversight for expatriate Nigerian congregations in the United States. In 2006, the Church of Nigeria changed the name of this mission to the Convocation of Anglicans in North America ("CANA") and began accepting former TEC congregations. In 2006, the Anglican District of Virginia (·ADV") was formed as a district of CANA. By 2007, CANA included 60 congregations in eighteen states and 12,000 members, of which 10,000 were in congregations previously affiliated with dioceses of TEC.

280 Va. at 15-16 (footnotes and citations omitted).

To the above, the Court would add the following facts:

• On January 18, 2007, the Standing Committee of the Diocese advised Bishop Lee of the names of the Clergy associated with the CANA Congregations who the Diocese stated "have abandoned the communion of the Episcopal Church." PX-COM-0253-001

• On January 22, 2007, Bishop Lee, in a document entitled "NOTICE OF INHIBITION" notified The Presiding Bishop of The Episcopal Church, Rev. Katharine Jefferts Schori, and others, that "[u]nder the provisions of Title IV, Canon 10 of the Constitution and Canons of the Episcopal Church, the Standing Committee of the Diocese of Virginia has determined that [21 named] priests canonically resident in the Diocese of Virginia, have abandoned the communion of the Protestant Episcopal Church in the United States of America [and that Bishop Lee had] affirmed such determination." Bishop Lee then stated the following:

> Acting in accordance with the provisions of Title IV, Canon 10, Section 1, have inhibited the clergy listed above from exercising their priestly ministry, including officiating in the Diocese of Virginia for six (6) months from this date, and from participating in the councils of this Church and Diocese. Unless, within six (6) months they shall fulfill the canonical requirements and transmit a retraction of their actions, they will be removed from the ordained ministry of the Church, under the provisions of Title IV, Canon 10.2

PX-COM-0254-001.

• Also on January 22, 2007, Bishop Lee as President of the Executive Board of the Diocese signed a resolution declaring the property of each of the seven churches to have been abandoned. *See* PX-TRU-0510 (Truro), PX-FALLS-0788 (The Falls Church), PX-APOST-0477 (Church of the Apostles), PX-EPIPH-0283 (Church of the Epiphany), PX-STMARG (St. Margaret's), PX-STPAUL-0764 (St. Paul's), and PX-SSH-0485 (St. Stephens). Each of the resolutions stated, in part, the following:

> (1) The Executive Board regards the real and/or personal property heretofore and formerly owned or used by the Congregation of [the named church], a Church of The Episcopal Church in the Diocese of Virginia for purposes for which religious congregations are authorized to hold property under the provisions of the Code of Virginia, as abandoned property because such real and personal property has ceased to be so occupied or used by such Congregation.
>
> (2) The Executive Board accordingly declares the real and/or personal property of [the named church] abandoned.
>
> (3) The Executive Board hereby resolves to take charge and custody of such real and/or personal property.
>
> (4) The Executive Board hereby directs the Trustees of [the named church] to transfer all such real and/or personal property to the Bishop forthwith.

Id.

• On August 1, 2007, Bishop Lee, in a document entitled "**NOTICE OF REMOVAL**" notified The Presiding Bishop of The Episcopal Church, Rev. Katharine Jefferts Schori, and others, that in accordance with the provisions of Canon IV, 10.2 of the Constitution and Canons of the Episcopal Church, that with the "advice and consent" of the Standing Committee of the Diocese, certain named clergy, each of whom had been named in the January 22, 2007 Notice of Inhibition were "released from the obligations of ordained ministry and, for causes which do not affect their moral character, are deprived of the rights to exercise the gifts and spiritual authority conferred in Ordination." PX-COM0275-001.

B. PROCEDURAL HISTORY

The instant litigation began with the filing of the §57-9(A) petitions between December 2006 and July 2007 by nine congregations in the five circuit courts which had jurisdiction over the property.[3] TEC and the Diocese intervened in the cases and also filed declaratory judgment actions against the CANA Congregations.[4]

[3] The nine congregations were as follows: Truro Church (Fairfax), The Church at the Falls — The Falls Church (Arlington), Church of the Apostles (Fairfax), Church of the Epiphany (Fairfax), St. Margaret's Church (Woodbridge), St. Paul's Church (Haymarket), St. Stephen's Church (Northumberland County), Church of the Word (Prince William County), and Church of Our Saviour (Loudon County).

[4] Individuals associated with the congregations, including former Episcopal Church rectors and vicars, vestry members and property trustees, were also sued.

On or about January 31, 2007, the Diocese filed a complaint in the Circuit Court of Arlington County against The Church at the Falls — The Falls Church, and three separate complaints in the Circuit Court of Fairfax County against Truro Church, Church of the Apostles, and Church of The Epiphany, respectively. On or about the same date, the Diocese also filed a complaint in the Circuit Court of Northumberland County against St. Stephen's Church. On or about February 1, 2007, additional complaints were filed in the Circuit Court of Prince William County against St. Margaret's Church and St. Paul's Church.[5]

The Diocese's complaint against each of the congregations sought six forms of relief: (1) entry of a judgment that there has been an improper trespass, conversion, alienation and use of the real and personal property of the church; (2) affirm the trust, proprietary and contract rights of the Diocese; (3) restrain and enjoin individual defendants from further use and occupancy of the property; (4) direct and require the trustees of the property to convey and transfer the legal title to such property to the Diocesean Bishop; (5) direct and require individual defendants to convey and transfer control of such property to the Diocesean Bishop; and (6) order an accounting of the use of the real and personal property.[6]

---

[5] Complaints against other churches were filed as well, but they are no longer a part of this litigation and not further described.

[6] A three-judge panel appointed by the Virginia Supreme Court under the Multiple Claimant Litigation Act, Virginia Code §§ 8.01-267.1, et seq., consolidated all these cases in the Circuit Court of Fairfax County.

On or about February 9, 2007, TEC filed a single complaint in the Circuit Court of Fairfax County against Truro Church, Church of the Apostles, Church of the Epiphany, The Church at The Falls — The Falls Church, St. Margaret's Church, St. Paul's Church, St. Stephen's Church, Christ the Redeemer Church, Church of the Word, Church of Our Saviour at Oatlands, and Potomac Falls Church.[7]

TEC' s complaint sought five specific forms of relief: (1) a declaration that each parish's real and personal property is held for the benefit of an Episcopal congregation or entity and must be used for the Church's ministry and mission; (2) a declaration that the defendants may not divert, alienate or use the parishes real or personal property except in accordance with the constitution and canons of TEC and the Diocese; (3) issuance of a preliminary and permanent injunction ordering defendants to stop diverting, alienating or using the parishes real or personal property, except as provided by the Constitution and Canons of TEC and the Diocese; (4) order an accounting of all real and personal property held by each parish; and (5) order the relinquishment of control of the real and personal property to the diocesean bishop.

Counterclaims and amended counterclaims were subsequently filed by the CANA Congregations.[8] Specifically, the amended counterclaims,

---

[7] Four of the congregations initially sued by TEC — Christ the Redeemer Church, Church of the Word, Church of Our Saviour at Oatlands, and Potomac Falls Church — are no longer a part of this litigation.

[8] On February 8, 2011, this Court granted the CANA Congregations' motion for leave to amend, and the amended pleadings were deemed filed.

which were filed individually against TEC and the Diocese in January 2011, each sought the same relief: (1) a declaration that each of the properties at issue were in the sole and exclusive ownership of their respective congregation, free and clear of any claim of right or interest by TEC or the Diocese; (2) a claim for unjust enrichment/quantum meruit, if the Court should determine that TEC or the Diocese had rights to the individual church's real or personal property that were "superior or otherwise" to the rights of the CANA Congregation; and (3) a request for imposition of a constructive trust on TEC or the Diocese, if the Court should determine that TEC or the Diocese had rights to the individual church's real or personal property that were "superior or otherwise" to the rights of the CANA Congregation.

Also before the Court is a single question regarding The Falls Church Endowment Fund. All parties agree that the sole question before the Court is "which Vestry is the Vestry of The Falls Church, Episcopal Church, which has the authority to elect the Directors of the Endowment Fund." *(See* DIOCESE Brief #1 at 80; *see also* Falls Church's Post-Trial Reply Brief Regarding the Endowment Fund.) Previously, this Court rejected the CANA Congregations' assertion that the Endowment Fund was subject to The Falls Church's §57-9 petition, and stated that the matter would be resolved in this declaratory judgment action. *See In re Multi-Circuit Episcopal Church Prop. Litig.,* 76 Va. Cir. 976, 986 (2008).

In this Letter Opinion, the Court resolves the Declaratory Judgment actions filed by TEC and the Diocese against the seven CANA Congregations, the CANA Congregations amended counterclaims, and

the question described above regarding The Falls Church Endowment Fund.

III. SUMMARY OF RULINGS

In this Letter Opinion, the Court makes three principle rulings:

1. TEC and the Diocese have a contractual and proprietary interest in each of the seven Episcopal churches that are the subjects of this litigation. Specifically, the Court finds for TEC and the Diocese in their Declaratory Judgment actions and, among other relief, orders that all real property conveyed by the 41 deeds, as well as all personal property acquired by the churches up to the filing date of the Declaratory Judgment actions (on or about January 31, 2007 or February 1, 2007) are to be promptly conveyed to the Diocese. (Additional instructions are provided at the conclusion of this Letter Opinion.)

2. The CANA Congregations' Amended Counterclaims are denied in their entirety. Specifically, the Court finds that the CANA Congregations, in that they are not *Episcopal* Congregations, do not possess either contractual or proprietary interests in the property of the seven Episcopal Churches at issue. They are, therefore, enjoined from further use or control of these properties and must promptly relinquish them to the Diocese. Moreover, the Court finds no merit in the CANA Congregations' claims for unjust enrichment, quantum meruit, and constructive trust and grants TEC's and the Diocese's motions to strike these claims.

3. The vestry empowered to elect directors to the Falls Church Endowment Fund is the vestry recognized by the Diocese as the Episcopal vestry of The

Falls Church, that is to say, the Continuing Congregation.

IV. DESCRIPTION OF THE PARTIES

A. PLAINTIFFS AND COUNTER-DEFENDANTS

1. THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA ("TEC")[9]

The Protestant Episcopal Church in the United States of America ("TEC") is "a constituent member of the Anglican Communion."[10] It considers itself to

[9] The following brief description of the Protestant Episcopal Church in the United States of America is taken from the Court's prior letter opinion of April 3, 2008, except that, to avoid confusion, the Court has replaced the short-hand reference used in the opinion to refer to the denomination ("ECUSA") with the short-hand reference used in this opinion to refer to the denomination ("TEC"). 76 Va. Cir. 785, 789-90 (citations omitted).

[10] The Anglican Communion is described in the same opinion as follows: ". . . . a 'family of churches . . . shar[ing] a kind of historical relationship, one with another. . . . understanding and seeing [their] common ancestry in the Church of England through the See of Canterbury.' It is 'a family of . . . 38 . . . regional and national churches that share a common history of their understanding of the Church catholic through the See of Canterbury,' and 'a way by which . . . Anglicans say [they] are related to, [they] have a historic relationship with the Archbishop of Canterbury.' The Anglican Communion has also been described as 'a widely diverse international society of churches.' In the Lambeth Commission on Communion's 2004 Windsor Report, it formally referred to itself as that part of the Body of Christ which shares an inheritance through the Anglican tradition, that is, from the Church of England, whose history encompasses the ancient Celtic and Saxon churches of the British Isles, and which was given fresh theological expression during the period of the Reformation in the sixteenth and seventeenth centuries. . . . The core structures of the Anglican Communion include the

be "a Fellowship within the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Book of Common Prayer." TEC's governing body is the General Convention, which consists of the House of Bishops and the House of Deputies. Essentially, the General Convention is a bicameral legislature, in that "[e]ither House may originate and propose legislation, and all acts of the Convention shall be adopted and be authenticated by both Houses." Each TEC bishop has a "seat and a vote in the House of Bishops," while the House of Deputies is composed of a mix of "ordained persons," Presbyters, Deacons, and laypeople. The House of Bishops elects TEC's Presiding Bishop, which is TEC's "Chief Pastor and Primate," by majority vote. TEC is further subdivided into either Dioceses, or Missions. Each Diocese chooses its Bishop or Bishop Coadjutor according to "rules prescribed by the Convention of that Diocese," while Bishops of Missionary Dioceses are "chosen in accordance with the Canons of the General Convention." Dioceses are grouped into geographical Provinces, except that, pursuant to TEC's Constitution, "no Diocese shall be included in a Province without its own consent." Each Province has a Synod, which has its own House of Bishops and House of Deputies.

Archbishop of Canterbury, who is known as the Anglican Communion's 'focus of unity,' along with three 'Instruments of Communion,' that are also known as 'Instruments of Unity.' These are: 1.) the Lambeth Conference; 2.) Anglican Consultative Council [hereinafter "ACC"); and 3.) the Primates' Meeting." Id. at 792-93.

The Virginia Supreme Court, in *Protestant Episcopal Church in Diocese of Virginia v. Truro Church,* 280 Va. at 14-15 (footnote omitted), provided the following additional description of TEC:

> TEC consists of 111 geographic dioceses with over 7000 congregations and over 2 million members. The highest governing body of TEC is the triennial General Convention, which adopts TEC's constitution and canons to which the dioceses must give an "unqualified accession." Each diocese in turn is governed by a Bishop and Annual Council that adopts the constitution and canons for the diocese. Each congregation within a diocese in turn is bound by the national and diocesan constitutions and canons. The Protestant Episcopal Church in the Diocese of Virginia ('the Diocese') is one of the diocese within TEC.

There is no dispute in this litigation that TEC is a hierarchical church.[11] *Id.* at 12-14.

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[11] A "hierarchical church" is a church "such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies." 280 Va. at 13 (footnote omitted); *see also Baber v. Caldwell*, 207 Va. 694, 698 (1967). The term "hierarchical" includes -super congregational" and "connectional" churches. *Reid v. Gholson*, 229 Va. 179, 188 (1985). *Reid* provides the following description of a "hierarchical" church:

> Hierarchical churches may, and customarily do, establish their own rules for discipline and internal government. They may, and frequently do, establish internal tribunals to decide internal disputes arising in matters of discipline and internal government. These tribunals may be guided by a body of internally-developed canon or ecclesiastical law, sometimes developed over a period of centuries. The decisions of such tribunals may be promulgated as matters of faith and are entirely independent of civil authority. One who becomes

2. THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA ("THE DIOCESE")[12]

The Diocese is an unincorporated religious body or association in Virginia and a constituent part of TEC. The Diocese's Constitution states that "[t]he order, government, and discipline of the Protestant Episcopal Church in the Diocese of Virginia shall be vested in the Bishop, and in the Council of the Diocese . . ." The Council is comprised of the "Clerical order" and the "Lay order." The Clerical order is composed of "the Bishop or Bishops and all other ministers canonically resident in the Diocese of Virginia," while the "Lay order consist[s] of both the "Lay Delegates," and the "Lay members ex officio." The Lay Delegates consist of delegates from each church, as chosen by its Vestry. The Lay members ex

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> a member of such a church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals. For that reason, the civil courts will treat a decision by a governing body or internal tribunal of a hierarchical church as an ecclesiastical determination constitutionally immune from judicial review. To do otherwise would precipitate the civil court into the 'religious thicket' of reviewing questions of faith and doctrine even when the issue is merely one of internal governance, because in such churches the resolution of internal government disputes depends upon matters of faith and doctrine.

Id. at 188-189 (citation omitted). As a part of the hierarchy, there are three dioceses affiliated with TEC in Virginia, of which the "Diocese of Virginia" is one. The "Diocese of Virginia" consists of 38 counties in the northern and central parts of the Commonwealth. 280 Va. at 15.

[12] All but the first sentence of the following description is taken from this Court's April 3, 2008 opinion. *See* 76 Va. Cir. 785, 790-91 (citations omitted).

officio include "the Lay members of the Standing Committee, the Lay members of the Executive Board, the Chancellor, the Presidents of the Regions, the President of the Episcopal Church Women of the Diocese, and five lay persons, not over 21 years of age at the time of election, to be elected on or before May 1 as Youth Delegates by five of the Regional Councils designated on an annual rotating basis by the Standing Committee." The Council conducts annual meetings.

In addition to the Bishop, officers of the Diocese include a Secretary, Treasurer, Chancellor, and a Registrar. The Diocese's Constitution also mandates that a Standing Committee and an Executive Board "conduct . . . the affairs of the Diocese." The Standing Committee "consist[s] of twelve members, six of the Clerical order, and six of the Lay order," while the Executive Board consists of "[o]ne member elected by each Regional Council," and "Itlhe Bishop, the Bishop Coadjutor if there be one, and the Suffragan Bishops if there be such." The Diocese of Virginia is divided into Regions, of which every Church in the Diocese is a member. Each Region has its own Regional Council. At the local level, each Church within the Diocese has a Vestry, which consists of three (3) to twelve (12) members who are elected by the Church's adult communicants. The Church's head pastor, known as the Rector, presides at Vestry meetings, and is in fact elected by the Church's Vestry, with "the advice of the Bishop and in compliance with General Convention Canon III. 17."

B. DEFENDANTS AND COUNTER-PLAINTIFFS

1. The Falls Church

The Falls Church, located in Falls Church, Virginia, was founded in or around 1732 and, therefore, is the only church before the Court that existed before TEC and the Diocese came into existence. In 1746, John Trammole conveyed a two-acre parcel to the Vestry of Truro Parish for a churchyard, upon which the original sanctuary was built. By 1798, The Falls Church was no longer functioning as an Episcopal congregation but, by 1819, there is evidence of a functioning congregation at The Falls Church that sought to participate in activities of the Diocese. In 1836, The Falls Church was admitted to the Diocese as a separate and distinct church. From 1837 to 1861, The Falls Church had an organized congregation. With the coming of the Civil War, the church suffered substantial disruption and building damage, which was repaired by the United States Army following the war. The church was formally reorganized and a vestry was elected on November 27, 1873. The church has been continually in existence since then.

2. St. Paul's Church

St. Paul's, which is located in Haymarket, Virginia, began in or around 1832. In 1834, the historic church, which was previously a district courthouse, was consecrated. Except for a period of disruption during the Civil War, the church has been continually in existence to the present.

3. Truro Church

Truro Church, which is located in Fairfax, Virginia, was founded in 1843 by Rev. Richard Temple-

ton Brown, who was then the Rector of The Falls Church. Until 1934, it was known as Zion Protestant Episcopal Church but the name was changed to Truro by the congregation and vestry in that year. The congregation disbanded during the Civil War but partially re-formed as early as November 1866, when initial trustees were appointed. The Congregation of Zion Church erected a frame building around 1872 and the congregation has been in continued existence since then.

4. St. Stephen's Church

St. Stephen's, which is located in Heathsville, Virginia, came into existence in 1874, with the deeding of property for the purpose of erecting a "house for divine worship." Initially, the church was called Emmanuel P.E. Church, but the church was consecrated in 1881 as St. Stephen's Church. Since then, the original church building has been continuously used as a church.

5. Church of the Apostles

Church of the Apostles, which is located in Fairfax, Virginia, was formed as a mission of the Diocese in 1968. In June 1969, the congregation purchased a parcel of land on Pickett Road in Fairfax, Virginia from the Diocese. Because the congregation had not achieved parish status, legal title remained in the Diocesan Missionary Society until Apostles was granted parish status at the 1970 Annual Council of the Diocese. A worship space was built on the property in 1980. Church of the Apostles has been in continual existence since it was formed as a mission in 1968.

6. St. Margaret's Church

St. Margaret's, which is located in Woodbridge, Virginia, grew out of the Diocese's program for church planting in the early 1960's. On October 6, 1963, St. Margaret's held its first worship service in a middle school classroom. On January 28, 1965, St. Margaret's was admitted to the Diocese as a Mission and, on January 24, 1971, St. Margaret's was admitted to the Diocese as a church. St. Margaret's has been in continual existence since it was formed as a mission in 1965.

7. Church of the Epiphany

Church of the Epiphany, which is located in Herndon, Virginia, was founded in 1986 as a mission of Truro Church and that same year was admitted by the Diocese of Virginia as a mission. It held its first worship service on February 1, 1986 at a local public school. On January 30, 1987, the Diocese of Virginia admitted the Church of the Epiphany as a church. In August 1987, the Church of the Epiphany acquired the property upon which its church would be built. Ground-breaking took place in March 1988 and the church was consecrated on April 23, 1989. Church of the Epiphany has been in continual existence since it was formed as a mission in 1986.

V. NEUTRAL PRINCIPLES OF LAW LEGAL STANDARD

A. KEY U.S. AND VIRGINIA SUPREME COURT CASES

1. PRESBYTERIAN *CHURCH IN- UNITED STATES V. MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH,* 393 U.S. 440 (1969)

Hull involved a church property dispute which arose when two local churches in Savannah, Georgia, withdrew from a hierarchical general church organization, specifically the Presbyterian Church in the United States. As the Supreme Court described the situation confronting Georgia courts:

> In 1966, the membership of the local churches, in the belief that certain actions and pronouncements of the general church were violations of that organization's constitution and departures from the doctrine and practice in force at the time of affiliation, voted to withdraw from the general church and to reconstitute the local churches as an autonomous Presbyterian organization. The ministers of the two churches renounced the general church's jurisdiction and authority over them, as did all but two of the ruling elders. In response, the general church, through the Presbytery of Savannah, established an Administrative Commission to seek conciliation. The dissident local churchmen remained steadfast; consequently. the Commission acknowledged the withdrawal of the local leadership and proceeded to take over the local churches' property on behalf of the general

church until new local leadership could be appointed.

The local churchmen made no effort to appeal the Commission's action to higher church tribunals — the Synod of Georgia or the General Assembly. Instead, the churches filed separate suits in the Superior Court of Chatham County to enjoin the general church from trespassing on the disputed property, title to which was in the local churches. The cases were consolidated for trial. The general church moved to dismiss the actions and cross-claimed for injunctive relief in its own behalf on the ground that civil courts were without power to determine whether the general church had departed from its tenets of faith and practice. The motion to dismiss was denied, and the case was submitted to the jury on the theory that Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adheres to its tenets of faith and practice existing at the time of affiliation by the local churches. Thus, the jury was instructed to determine whether the actions of the general church 'amount to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church], so that the new tenets and doctrines are utterly variant from the purposes for which the [general church] was founded.' The jury returned a verdict for the local churches, and the trial judge thereupon declared that the implied trust had terminated and enjoined the general church from interfering with the use of the property in question. The Supreme Court of Georgia affirmed. [The Su-

> preme Court of the United States] granted certiorari to consider the First Amendment questions raised.

Id. at 442-444. In determining that the First Amendment would not permit a civil court to adjudicate ecclesiastical issues, the Supreme Court set out some of the guiding principles for resolution of a church property dispute in a civil court:

- "It is of course true that the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution. Special problems arise, however, when these disputes implicate controversies over church doctrine and practice." *Id.* at 445.
- "[T]he civil courts [have] *no* role in determining ecclesiastical questions in the process of resolving property disputes." *Id.* at 447 (emphasis in original).
- "Thus, the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. *And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded.* But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies

over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes, *Abington School District v. Schempp,* 374 U.S. 203 (1963); the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. *Id.* at 449 (Emphasis Added).

- "The Georgia courts have violated the command of the First Amendment. The departure-from-doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a 'substantial departure' from the tenets of faith and practice existing at the time of the local churches affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place

of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion — the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." *Id.* at 449-50.

2. *MARYLAND AND VIRGINIA ELDERSHIP OF CHURCHES OF GOD V. CHURCH OF GOD AT SHARPSBURG, INC.,* 396 U.S 367 (1970)

This case began in the Circuit Court of Washington County, Maryland, after a religious denomination called the General Eldership of the Churches of God in North America, filed suit against two congregations to prevent them from withdrawing from the Maryland & Virginia Eldership (which was one of the Elderships in the General Eldership) and to determine which of the two factions involved in the litigation should control the respective churches, their property, and their corporations. Ultimately, the Maryland Circuit and appellate courts held for the local congregations, based on the determination that "so far as the use and control of property of the local congregation is concerned," the Church of God had a congregational (as opposed to a hierarchical) polity. *Maryland and Virginia Eldership of the Churches of God. v. Church of God at Sharpsburg, Inc.,* 241 A.2d 691, 699 (1968). After Hull came down in 1969, the

Supreme Court of the United States remanded the case back to the Maryland Court of Appeals to reconsider its decision in light of Hull. The Maryland Court determined that it had anticipated Hull in its decision and that its handling of the case properly applied "neutral principles of law" and did not involve resolution of doctrinal issues as in Hull. When the case returned to the Supreme Court of the United States, they dismissed the appeal for want of a substantial federal question. In its entirety, the *per curiarn* opinion reads as follows:

> In resolving a church property dispute between appellants, representing the General Eldership, and appellees, two secessionist congregations, the Maryland Court of Appeals relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property. Appellants argue primarily that the statute, as applied, deprived the General Eldership of property in violation of the First Amendment. Since, however, the Maryland court's resolution of the dispute involved no inquiry into religious doctrine, appellees' motion to dismiss is granted, and the appeal is dismissed for want of a substantial federal question.

396 U.S. at 367-68 (footnotes and citations omitted). Justice Brennan, in his concurrence, explained that a State could comply with the prescripts of *Hull* in a variety of ways and that a State "may adopt *any* one of

various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* at 368 (Emphasis in Original). Justice Brennan then went on to list three methodologies a State might adopt:

First, Justice Brennan referenced the approach of *Watson v. Jones,* 80 U.S. 679 (1872), enforcing the property decisions made within a church of congregational polity by a majority of its members or by such other "local organism as it may have instituted for the purpose of ecclesiastical government," and within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue, unless "express terms" in the "instrument by which the property is held" condition the property's use or control in a specific manner. 396 U.S. at 368-69. Justice Brennan warned, however, that "the use of the Watson approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity." *Id.* at 370.

Second, Justice Brennan references the approach called "neutral principles of law, developed for use in all property disputes," citing *Hull. Id.* "Under the 'formal title' doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws. Again, however, general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues." *Id.* He cites as an example a provision in a deed or a denomination's constitution for reversion of local church property to the general church upon a finding of departure from doctrine. *Id.*

Third, Justice Brennan references the possibility of "passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine." *Id.* He warns, however, that "[s]uch statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies." *Id.* (citation and footnote omitted).

3. *NORFOLK PRESBYTERY v. BOLLINGER,* 214 Va. 500 (1974)

In July 1972, a congregation in Hampton, Virginia, called Grace Covenant Presbyterian Church, which was a member of the Norfolk Presbytery and The Presbyterian Church in the United States, voted to sever its connection with the denomination and become an independent and autonomous church. In September of the same year, the Trustees of Grace Covenant filed a petition with the circuit court seeking permission to convey the real estate they held for Grace Covenant (which was used for a church, an elementary school and a parsonage) to The Mary Atkins Christian Day School. The proceeding was ex parte and the trial court, after noting that "the transfer of property was 'the wish of the congregation' and that the congregation was 'the governing body of said church', directed the Trustees to effectuate the property transfer." Id. at 501.

Norfolk Presbytery filed a timely motion to set aside the order or, alternatively, to intervene. According to the subsequent Virginia Supreme Court opinion:

> [t]he motion for leave to intervene alleged that Grace Covenant was a duly constituted church of and subject to the jurisdiction, government

> and discipline of The Presbyterian Church in the United States, a supercongregational body. The motion further alleged that the action of the congregation in undertaking unilaterally to withdraw, with its property, from the parent church was contrary to ecclesiastical law; that Norfolk Presbytery was the first ecclesiastical court having direct jurisdiction over Grace Covenant; that the Presbytery had a proprietary interest, as well as a jurisdictional and pastoral interest, in Grace Covenant and its property, which would be denied without due process of law if the order of September 22, 1972, became final. . ." *Id.*

The trial court denied Norfolk Presbytery's motion, and the case was appealed to the Virginia Supreme Court.

The Virginia Supreme Court, in a decision that construed *Hull* and *Maryland & Virginia Eldership Churches of God* and set out the elements of a "neutral principles of law" analysis, reversed, and held that the Norfolk Presbytery's motion to intervene should have been granted so that the Presbytery could present "whatever evidence it had tending to establish its interest in the Grace Covenant property." *Id.* at 503. This case warrants extended discussion because it, along with *Green v. Lewis,* 221 Va. 547 (1980), are the two principle Virginia Supreme Court decisions on this subject.

First, the Court construed Virginia Code §57-15 "to require that a church property transfer may be ordered only upon a showing that this is the wish of the duly constituted church authorities having jurisdiction in the premises." 214 Va. at 502. Where a

"supercongregational church" was involved, "we hold that Code §57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church."[13] *Id.* at 503.

Second, the Court addressed the consequence of a finding that the general church had a "proprietary interest" in the local church's property. In that event, "the [trial] court's approval of the conveyance sought by the Trustees would unlawfully deprive the Presbytery of this property interest," and the Presbytery would be entitled to a permanent injunction against the conveyance by the Trustees to the Day School." *Id.* If, on the other hand, "the Presbytery is unable to establish a proprietary interest in the property, it will have no standing to object to the property transfer." *Id.* (citation omitted).

Third, the Court addressed each party's contention that, regardless of statutory provisions, the constitutional principle of separation of church and state compelled a ruling in its favor. The Trustees of the local church argued that judicial review of the congregation's decision to become autonomous "would abridge the congregation's right to free exercise of religion and would establish the Presbytery as a state supported church." *Id.* The Presbytery argued the reverse: a ruling in the local congregation's favor would be an impermissible establishment of the local church and a prohibited interference in the ecclesiastical law of the general church." *Id.* The Virginia Supreme Court "reject[ed] both of these contentions, for there is no constitutional prohibition against the resolution of church property disputes by civil courts,

[13] §57-15 is discussed in greater detail in the "Statutes" section, below.

provided that the decision does not depend on inquiry into questions of faith or doctrine." *Id.* (citations omitted).

Fourth, the Court observed that it was not bound by the holding of *Watson v. Jones,* where "it was held that those who unite themselves with a hierarchical church do so with an implied consent to its government and take title to local church property subject to an implied trust for the general church." *Id.* at 504. The Court noted that *Watson* was based on federal law and, in any event, "did not hold that the implied trust doctrine was the only constitutional rule for resolving church property disputes." *Id.*

Fifth, the Court reviewed the holding of the Supreme Court in *Hull,* and noted that, "in *Hull,* the Supreme Court acknowledged that civil courts may properly adjudicate disputes over church property. The First Amendment requires only that such disputes be adjudicated according to 'neutral principles of law, developed for use in all property disputes', and which do not involve inquiry into religious faith or doctrine." *Id.* (citation omitted). Significantly, the Court stated that "[w]e do not construe Hull as requiring that courts apply neutral principles of law by considering only the record title to church property." *Id.* at 505. The Court then turned to the Supreme Court's decision in the *Maryland & Virginia Eldership of Churches of God* case, where it dismissed the appeal of the Maryland decision upholding a multifaceted approach to the "neutral principles of law" analysis. The Court then held "that it is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church." *Id.*

Sixth, the Virginia Supreme Court noted that "[a]s express trusts for supercongregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld." *Id.* at 507. This did not mean, however, "that our civil courts are powerless to prevent a hierarchical church from being deprived of contractual rights in church property held by trustees of a local congregation." *Id.* It then concluded:

> Norfolk Presbytery made sufficient allegations to be entitled to file its petition as an intervenor in order to have a determination made whether it had a proprietary interest in the property of Grace Covenant which could not be eliminated by unilateral action of the congregation. To this end the language of the deeds and the constitution of the general church should be considered by the trial court in the application of neutral principles of law. As Norfolk Presbytery cannot rely on the implied trust theory, because of our statutes, it has the burden of proving that the Trustees of Grace Covenant have violated either the express language of the deeds or a contractual obligation to the general church.

Id.

4. *JONES V. WOLF,* 443 U.S. 595 (1979)

Once again, the Supreme Court of the United States addressed a Georgia case involving a dispute over the ownership of local church property following a "schism" in a local church affiliated with a hierarchical organization, specifically the Presbyterian Church in the United States.

First, the Supreme Court noted that Georgia's approach to church property litigation has "evolved"

since *Hull* was handed down in 1969. *Id.* at 599. Prior to *Hull,* noted the Court, the "Georgia Supreme Court resolved [a church property] controversy by applying a theory of implied trust, whereby the property of a local church affiliated with a hierarchical church organization was deemed to be held in trust for the general church, provided the general church had not 'substantially abandoned' the tenets of faith and practice as they existed at the time of affiliation." *Id.* Because the Supreme Court in *Hull* reversed and found that Georgia "would have to find some other way of resolving church property disputes that did not draw the state courts into religious controversies," Georgia subsequently abandoned its implied trust theory "in its entirety," after concluding that it could not survive without the "departure-from-doctrine" element. *Id.* at 599-600. In its place, the Georgia Supreme Court adopted the "neutral principles of law" method for resolving church property disputes. In Georgia, that meant that "[t]he court examined the deeds to the properties, the state statutes dealing with implied trusts, and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church." *Id.* at 600. (citation omitted).

Second, the Supreme Court reviewed prior case law establishing the limitations placed on a civil court by the First Amendment in resolving a church property issue: "Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710 (1976) (other citations omitted). As a corollary to this commandment, the Amendment requires that civil courts defer to the

resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." 443 U.S. at 602 (citations omitted). "Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Id.* The Court then cited Justice Brennan's concurrence in *Maryland & Virginia Churches, 396 U.S. at 368,* for the proposition that "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." 443 U.S. at 602.

Third, the Supreme Court noted that the "'neutral principles of law' approach is consistent with [these] constitutional principles" and that the "primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." Id. at 602-03. In particular, said the Court:

> The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglements in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general — flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will deter-

> mine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Id. at 603-04.

Fourth, the Court warned that even the "neutral principles of law" approach was not "wholly free of difficulty." *Id.* at 604. For example, in Georgia, the approach requires a civil court to examine religious documents, such as a church constitution, for language of trust in favor of the denomination. "In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms." *Id.* And "where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property," and the interpretation of the document would require the civil court to resolve a religious controversy, "then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.* (citation omitted).

Fifth, the Court noted that the problems of religious entanglement should be gradually eliminated as religious organizations come to recognize their obligation to structure their relationships so as not to require civil courts to resolve religious issues.

Sixth, the Supreme Court held that a State is "constitutionally entitled" to adopt neutral principles of law as a means of adjudicating a church property dispute. In addition, the Supreme Court rejected the notion that "the First Amendment requires the

States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved." *Id.* at 605.

Seventh, the Supreme Court noted that under the neutral principles approach, "the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form." *Id.* at 606 (footnote omitted)

Eighth, the Supreme Court addressed the circumstances of the controversy before it, which had as a factor distinguishing it from prior cases a division between a majority of local congregation members who wished to withdraw from the denomination and a minority of local congregation members who wished to maintain the affiliation. The Court stated that "Win fact Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, we think this would be consistent with both the neutral-principles analysis and the First Amendment." *Id.* at 607. "Most importantly," added the Court, "any rule of majority representation can always be overcome, under the

neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it. Indeed, the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* at 607-08 (footnote omitted).

Finally, the case was remanded to the Supreme Court of Georgia for it to determine what the law of Georgia was regarding majority rule. The Court noted that there was some "indications" in the record that under Georgia law the process of identifying the faction that represents the local church involves considerations of religious doctrine and polity and that Georgia law requires "that 'church property be held according to the terms of the church government,' and provides that a local church affiliated with a hierarchical religious association 'is part of the whole body of the general church and is subject to the higher authority of the organization and its laws and regulations.' *Id.* at 608 (citations omitted). This suggested to the Supreme Court the possibility that the "identity" of the local church named in the deeds "must be determined according to the terms of the Book of Church Order, which sets out the laws and regulations of churches affiliated with [the denomination]." *Id.* at 609. The Court concluded:

> Such a determination, however, would appear to require a civil court to pass on questions of religious doctrine, and to usurp the function of the commission appointed by the Presbytery, which

> already has determined that petitioners represent the "true congregation" of the [local] church. Therefore, if Georgia law provides that the identity of the [local] church is to be determined according to the "laws and regulations" of the [denomination], then the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination of that church's identity.

Id. (footnotes omitted).

After the Supreme Court issued *Jones,* TEC decided to avail itself of the Supreme Court's suggestion that a denomination might amend its governing documents to recite an express trust in favor of the denomination. The General Convention adopted a canon (now Canon 1.7(4)), called either the "Dennis Canon" or the "1979 Trust Canon," which provides:

> Sec. 4. All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitutions and Canons.
>
> Sec. 5. The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action but no such action shall be necessary for the existence and validity of the trust.

TEC-18-2, Tr. 1214. The Annual Council of the Diocese of Virginia adopted a parallel canon, current Diocesan Canon 15.1, in 1983. PX-COM-222.[14] *See also* TEC Brief #1 at 13.

5. GREEN V. LEWIS, 221 Va. 547 (1980)

On October 11, 1977, the congregation of a Chesterfield County church called -Lee Chapel, African Methodist Episcopal Zion Church" decided to separate itself from its parent organization, the American Methodist Episcopal [A.M.E.] Zion Church. At a meeting held on November 20, 1977, the congregation adopted a resolution to become an independent Methodist Episcopal Church free of its former affiliation with the A.M.E. Zion Church in Virginia and the A.M.E. Zion Church in America. The resolution also stated that -all decisions concerning the Lee Chapel Methodist Episcopal Church and its property and all of its affairs shall be lawfully made by its local membership and congregation, through their duly elected officers or trustees." *Id.* at 550. Thereafter, Wesley J. Green, pastor of Lee Chapel, sought an injunction against certain members of the church to prevent them from entering or using the premises of Lee Chapel in a manner contrary to the wishes of the proper officials of the A.M.E. Zion Church. The trial judge granted a temporary injunction but subsequently dissolved it on motion of members of the congregation who petitioned to intervene. Ultimately, the trial found that the general church "had failed to

[14] For the reasons stated in the Statutes section of this opinion, the Court concludes that neither the Dennis Canon nor Diocesan Canon 15.1 had their intended effect in the Commonwealth, given the fact that the Commonwealth did not validate denominational trusts.

establish that it had a proprietary interest in the property of Lee Chapel and decreed that the trustees of the local congregation and the congregation should enjoy the ownership, control, and use of the real and personal property in controversy to the exclusion of the general church. *Id.* at 548-549.

The issue before the Virginia Supreme Court in *Green* was essentially the same one before the Virginia Supreme Court in *Norfolk Presbytery,* i.e., whether the general church had a contractual or proprietary interest in the local church property. *Green* is particularly significant for two reasons.

The first reason is that *Green* gives a trial court guidance on the types of evidence that a trial court might rely upon in performing the "neutral principles of law" analysis. In the course of the opinion, the Virginia Supreme Court noted the following pertinent facts:

(1) The A.M.E. Zion Church "is a hierarchical church composed of local pastors, deacons, elders, presiding elders, and bishops, whose duties are specified in the Discipline."[15] *Id.* at 549.

(2) "The structure of the A.M.E. Zion Church and its general plan of operation are not unlike that of other supercongregational or hierarchical churches." *Id.* Specifically, the Court took note of the following eight aspects of the Church: (a) It has a "home mission" department, which makes grants and loans

[15] The Court noted that the "rules, regulations, and doctrines, governing and controlling the operation of the church are found in 'The Doctrines and Discipline of the African Methodist Episcopal Zion Church,' revised in May 1972, and hereinafter referred to as 'the Discipline." 221 Va. at 549.

to local churches; (b) it has a publishing house in Charlotte, North Carolina, which provides literature for local churches and Sunday Schools and publishes the Discipline and hymnals; (c) the Church operates as college and two junior colleges and makes scholarships available for students to attend these colleges; (d) the church also runs a seminary which trains its pastors; (e) the church does missionary work in foreign countries; (f) the church is financed by assessments paid by members of local churches to the general church; (g) pastors are appointed by the bishops and a local congregation could not refuse to accept a pastor; and (h) guidelines for worship are set forth in the Discipline and are followed by local pastors. *Id.*

(3) The local church property consisted of a one acre lot conveyed by deed in 1875 to the "Trustees of the A.M.E. Church of Zion for the purpose of erecting an A.M.E. Church of Zion to be known as Lee Chapel." *Id.* at 549.[16]

(4) Lee Chapel was constructed on the deeded property and operated continuously as an A.M.E. Zion Church until October 1977, when the controversy arose. The original church building burned down in 1939 and was replaced by the present building,

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[16] CANA argues that if the denomination had not been the grantee in the deed, the denomination "would not have gotten to first base in establishing a proprietary interest." CANA Brief #1A at 23. The Court disagrees. First, given the fact that denominational trusts are not recognized in Virginia, the deed must necessarily be read as a deed by which the trustees hold the property on behalf of the local church itself. Thus, naming the denomination as grantee gave the denomination no greater or lesser rights. Second, *Norfolk Presbytery* makes it clear that a Court applying "neutral principles of law" does not look just at the record title holder.

which was a church that had been used and abandoned by another church. The Virginia Supreme Court noted: "All labor incident to the removal of the building to the Lee Chapel site was performed by the local membership. No funds of the AM.E. Zion Church, state or national, were used incident to the reconstruction of the church or to pay for any improvements subsequently made thereon." *Id.* at 550.

(5) Until the controversy erupted, all pastors of Lee Chapel were installed by the Annual Conference and their appointment accepted by the congregation of Lee Chapel. *Id.*

(6) The local church owes no funds, assessments or other monies to the denomination or its Annual Conference. *Id.*

(7) It was unknown whether the original church had ever been formally dedicated. As to the present church, evidence was presented that it was never dedicated. A witness testified that in the A.M.E. Zion Church, "dedication of property was not required because it regarded a dedication as a ceremonial matter, more spiritual in nature than legal." *Id.* at 551. The Court rejected the claim made by Lee Chapel members that the fact that there was never a formal dedicatory ceremony meant that the church never became a member of the denomination: "[W]e conclude that 100 years of continuous service in the church by the pastors supplied Lee Chapel by the A.M.E. Zion Church constitutes an adequate dedication of the property for its intended spiritual and ecclesiastical purposes." *Id.* at 554.

(8) At the meeting in October 1977, when Lee Chapel voted to withdraw from the general church, 64 of 70 active members were present. *Id.* at 551.

(9) As to the reasons why Lee Chapel moved to disaffiliate from A.M.E. Zion Church, various members of the congregation noted that they had become "thoroughly disenchanted with the hierarchy" and "with those who operated the church above the level of the congregation." *Id.* Specifically, they complained that the general church had failed to lend any financial assistance during a $12,000 remodeling project; they objected to the levied assessments that the local congregation was required to meet; and they claimed that "the assessments were out of line, excessive, and beyond the financial ability of the congregation." *Id.* One quoted witness, who said it was his understanding that the church and its property belonged to the people in the community, complained that the benefits the general church now claimed it provided to Lee Chapel "all fade away when it comes down to getting any results from the affiliation." *Id.* at 552.

(10) The trial court also heard from the Presiding Elder, who testified that he did receive complaints from Lee Chapel about the assessments but stated that both the clergy and laity had the opportunity to "speak pro or con, to ask that it be changed, or whatever they want to ask about it." *Id.* at 552. He also indicated that a representative of the Lee Chapel had approached him about funds to make improvements and he advised him that the local church could make an application for assistance, that the local church could even direct the application directly to the Presiding Elder and that he would "see that they got it," but that Lee Chapel had never applied for assistance. *Id.*

(11) The Virginia Supreme Court stated that, until October 1977, Lee Chapel operated in a manner not unlike any other small church in a rural area

with a limited congregation that is part of a super-congregational denomination. Their "frustrations" were "not uncommon." *Id.*

(12) The Virginia Supreme Court summarized the hierarchical nature of the church as follows:

> Concerning the status of Lee Chapel, a reference to the original deed discloses that Lee Chapel has been an A.M.E. Zion Church for more than 100 years. The grantors conveyed the property to "Trustees of the A.M.E. Church of Zion." The conveyance was for the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination, or an independent church. And that is what occurred. The church was organized, the building was constructed, and it functioned as an A.M.E. Zion Church until October 1977. It became and was an integral part of the super-congregational or hierarchical structure of the A.M.E. Zion Church. The general church supplied the ministers and provided the organization and structure which is necessary if a church is to function and to fulfill its mission. A Sunday School was organized, and its materials were furnished by the general church. Hymnals and other literature were provided. Baptisms, marriages, and funerals were conducted from the church's Discipline. Revival services were held. The central church, of which Lee Chapel was a part, conducted world missions and sent missionaries abroad. Colleges were founded, scholarships provided, and loans and grants made available when, in the discretion of the general church, they were needed. And the members of Lee Chapel, by payment of their assessments

> and in numerous other supportive ways, contributed to this state, national and international ecclesiastical organization, and they presumably benefitted from the association, spiritually and otherwise.

Id. at 553-54.

The second reason why *Green* is particularly significant is because of a number of general statements in the opinion that provide a trial court guidance as to the "neutral principles of law" method of resolving church property disputes. Specifically, the Virginia Supreme Court noted the following:

(1) "In determining whether the AME Zion Church has a proprietary interest in the Lee Chapel property, we look to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties." *Id.* at 555.

(2) The Court also defined what constituted a proprietary right: "A proprietary right is a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls." *Id.*

(3) The Court made it clear that it was not within the scope of a "neutral principles of law" analysis to determine whether or not the grievances of the membership of a local church were valid. The issue now before the Court "is legal, not ecclesiastical, and involves an order of the court below, vesting title and ownership of the property in controversy in the trustees of the local congregation of Lee Chapel, upon the premise that the A.M.E. Zion Church has no proprietary interest therein." *Id.* at 552.

(4) The Court reviewed §57-9 and §57-15, with regard to the distinction between independent churches and those that are part of a supercongregational hierarchy. It quoted the language in *Norfolk Presbytery* that construes §57-15 to require that a church property transfer may be ordered only upon a showing that this is the wish of the duly constituted church authorities having jurisdiction in the premises.... [The statute] now contemplates that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve such a property transfer." *Id.* at 553 (citation omitted). It also noted that in both *Norfolk Presbytery* and *Baber v. Caldwell,* 207 Va. 694 (1967), the Court "pointed out the distinctions, enunciated in Code §57-9, between an autonomous congregation and one which is part of a supercongregational or hierarchical denomination where a determination of property rights is involved." 221 Va. at 553. It noted that, in *Norfolk Presbytery,* the Court had held "that in the case of a supercongregational church Code §57-15 'requires a showing that the property conveyance is the wish of the constituted authorities of the general church.'" *Id.* (citation omitted).

(5) As to the fact that the deed at issue did not include a provision that the property was held in trust for the national church, the Court stated that [t]he addition of a trust clause to the deed would have provided the A.M.E. Zion Church with no additional or further interest in the Lee Chapel property." *Id.* at 554. The Court noted that the property was "already held by the trustees for that church and no other," and, as stated in *Norfolk Presbytery,* "express trusts for supercongregational churches are in-

valid under Virginia law," as are implied trusts. *Id.* at 554-55.[17]

Given the foregoing, the Virginia Supreme Court concluded that A.M.E. Zion Church did have a proprietary interest in the property of Lee Chapel, concluding its opinion as follows:

> Here the A.M.E. Zion Church is the grantee in the deed, the property having been conveyed to trustees of that church to establish an A.M.E. Zion Church thereon. The provisions of this deed have remained unchanged since 1875, and since that time we find that the name, customs, and policies of the A.M.E. Zion Church have been used in such a way that Lee Chapel is known, recognized, and accepted to be an A.M.E. Zion Church. All religious services and ceremonies conducted by the pastors of that church have followed its Discipline. The literature used by the

[17] The Discipline of the A.M.E. Zion Church required that a trust clause be incorporated in all conveyances of churches and parsonages to the A.M.E. Zion Church, providing that the property is held in trust for the national church. The requirement is waived, however, for deeds, like the 1875 deed at issue in this case, that predated the adoption of the current Discipline. As to the deeds previously executed, the Discipline also stated that the absence of a trust clause did not relieve a local church of its responsibilities to the denomination, "provided that the intent and desire of the founders and/or the later congregations and boards of Trustees is shown by any or all of the following indications: (a) the conveyance of the property to the trustees of the local African Methodist Episcopal Zion Church or any of its predecessors: (b) the use of the name, customs, and policy of the African Methodist Episcopal Zion Church in such a way as to be thus known to the community as a part of this denomination: (c) the acceptance of the pastorate of ministers appointed by a bishop of the African Methodist Episcopal Zion Church, or employed by the presiding elder of the district in which it is located." 221 Va. at 554.

church and by the Sunday School came from the publishing house of the A.M.E. Zion Church. The various conferences to which the membership of Lee Chapel's congregation sent delegates were all organized and held under the direction of the A.M.E. Zion Church.

It is reasonable to assume that those who constituted the original membership of Lee Chapel, and who established the church in the manner directed by the grantors in the deed, and those members who followed thereafter, united themselves to a hierarchical church, the A.M.E. Zion Church, with the understanding and implied consent that they and their church would be governed by and would adhere to the Discipline of the general church. And para. 437(1) of the Discipline requires that all property transfers be approved by the bishop.

The fact that the general church has made no loans or grants for the benefit of Lee Chapel and that, in fact, it may have refused to contribute to the remodeling program of the local church, is not dispositive. A proprietary interest or a contractual obligation does not necessarily depend upon a monetary investment. The contractual obligation which the A.M.E. Zion Church assumed has its genesis in the 1875 deed. From that time until October 1977, when the congregation sought to disassociate itself from the general church, the A.M.E. Zion Church had assumed its responsibility, fulfilled its obligation, and exercised dominion, control, and supervision over Lee Chapel, albeit not always in accordance with the wishes of all the members of the local church.

> We find from the language of the deed involved, the Discipline of the A.M.E. Zion Church, and the relationship which has existed between the central church and the congregation over a long period of years, that the A.M.E. Zion Church does have a proprietary interest in the property of Lee Chapel, and that its interest in the church property cannot be eliminated by the unilateral action of the congregation. The Discipline of the A.M.E. Zion Church requires that all property transfers be approved by the bishop of the district of the Annual Conference, and such approval has not been given.

Id. at 555-56 (footnote omitted).

6. *THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA v. TRURO CHURCH,* 280 Va. 6 (2010)

The instant case was appealed upon this Court's decision holding that the disaffiliating congregations had properly invoked §57-9(A). The Virginia Supreme reversed, ruling that the disaffiliating congregations had proven the existence of a division within TEC and the Diocese, but had failed to prove that by affiliating with CANA or the Anglican District of Virginia ("ADV") that it had joined a "branch" of TEC or the Diocese.[18] While the bulk of the opinion relates

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[18] The Court found that "while CANA is an 'alternative polity' to which the congregations could and did attach themselves, we hold that, within the meaning of Code §57-9(A), CANA is not a 'branch' of either TEC or the Diocese to which the congregations could vote to join following the 'division' in TEC and the Diocese as contemplated by Code §57-9(A)." 280 Va. at 28. The Court explained the "branch" requirement as follows: "While the branch joined may operate as a separate polity from the branch to which the congregation formerly was attached, the

specifically to the §57-9(A) litigation, there are a number of statements made by the Court that are directly germane to this declaratory judgment action:

(1) The Court noted at the outset that "[t]hese appeals arise from a dispute concerning church property between a hierarchical church and one of its diocese in Virginia and a number of the diocese's constituent congregations." 280 Va. at 12.

(2) The Court reviewed the structure of TEC: "The highest governing body of TEC is the triennial General Convention, which adopts TEC's constitution and canons to which the dioceses must give an 'unqualified accession.' Each diocese in turn is governed by a Bishop and Annual Council that adopts the constitution and canons for the diocese. Each congregation within a diocese in turn is bound by the national and diocesan constitutions and canons. The Protestant Episcopal Church in the Diocese of Virginia ('the Diocese') is one of the dioceses within TEC." *Id.* at 15 (footnote omitted).

(3) The Court reviewed the denomination's and dioceses' control over its priests: "Priests of TEC are 'canonically resident' within a specific diocese and may not function as priests in any other diocese of TEC without the permission of the local bishop. Similarly, a priest ordained by a diocese of TEC may not function as a priest for one of the other regional or national churches that participate in the Anglican

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statute requires that each branch proceed from the same polity, and not merely a shared tradition of faith." *Id.* at 28-9. The Court also found that this Court "erred in its holding that there was a division in the Anglican Communion for purposes of the application of Code §57-9(A) in these cases." *Id.* at 22.

Communion without permission from the local authority of that church." *Id.*

(4) The Court found that the evidence presented by the CANA Congregations "clearly establishes that a split or rupture has occurred within the Diocese and, given the evidence of similar events in other dioceses of TEC, the split or rupture has occurred at the national level as well." *Id.* at 27. And, significantly, the Court found that "[t]here was not, nor could there be, any serious dispute that, until the discord resulting from the 2003 General Convention, the CANA Congregations were *attached' both to TEC and the Diocese because they were required to conform to the constitution and canons of TEC and the Diocese."[19] *Id.*

(5) Finally, the Court ordered reinstatement of the declaratory judgment actions and counterclaims, to be resolved "under principles of real property and contract law." *Id.* at 29.

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[19] The parties disagree as to what significance this Court should attach to the Virginia Supreme Court's statements that: (1) "Each congregation within a diocese in turn is bound by the national and diocesan constitutions and canons;" and (2) "The CANA Congregations were 'attached' both to TEC and the Diocese because they were required to conform to the constitution and canons of TEC and the Diocese." The Diocese argues that they are the governing "law of the case." Diocese Brief 41 at 40. The CANA Congregations argue that they were just a "passing reference." CANA Brief #3 at 59. This Court does not agree that these were merely "passing reference[s]." Nevertheless, the Court does not need to reach the "law of the case" question because the evidence before the Court clearly supports the conclusion, and the Court so finds, that the Congregations were, indeed, "bound" by the national and diocesan constitutions and canons, and were, indeed, required to "conform" to them.

B. OTHER CIRCUIT COURT DECISIONS

There are two Circuit Court decisions, one in 1977 and one in 1979, which this Court has found helpful in deciding the instant case, and which warrant extended discussion. Both cases involve TEC and one of its Virginia diocese and both cases involve factual circumstances similar to the instant case. Because both cases were decided after the Supreme Court of the United States handed down *Hull* and *Maryland & Virginia Eldership of the Churches of God*[20] and after the Virginia Supreme Court handed down *Norfolk Presbytery,* both cases apply the "neutral principles of law" method to resolve a church property dispute between the denomination and a local congregation.

1. DIOCESE OF SOUTHWESTERN VIRGINIA OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA v. KATHRYN BUHRMAN, 5 Va. Cir. 497 (1977) (Stephenson, *J.)*

Buhrman involved a suit "brought by the Diocese of Southwestern Virginia of the Protestant Episcopal Church in the United States of America, a trustee of St. Andrew's Episcopal Church of Clifton Forge, Virginia, and by twelve members of St. Andrew's against the remaining four trustees of the church and the Parish Rector to obtain a judicial determination of the status of St. Andrew's Parish real and personal property." *Id.* at 497. The property at issue were two parcels of real property in the City of Clifton Forge. On one parcel was the church and par-

[20] The 1979 case also had the benefit of the Jones decision, issued four months earlier.

ish house and on the other was the rectory. *Id.* There were two deeds involved in the litigation. The first deed, dated November 6, 1893, was to the church and parish house parcel. It stated that it was "for the erection of a church building to be used as a place of worship by the Episcopal congregation of Clifton Forge Parish." *Id.* at 497-98. The second deed, dated January 16, 1905, was to the rectory parcel and it had no stated purpose but it was to "certain named persons as Trustees of St. Andrew's Episcopal Church of Clifton Forge, Virginia." *Id.* at 498.

St. Andrew's was a unit of the Diocese of Southwestern Virginia, which in turn is a constituent part of TEC. According to then-Judge Roscoe B. Stephenson, Jr., St. Andrew's "[t]hroughout its history" has always been a part of TEC, although it was connected to different TEC dioceses within the Commonwealth at various points in its history. *Id.* Prior to 1974, St. Andrew's was a mission of TEC and the Diocese and gained parish status in January 1974.[21]

The controversy giving rise to the litigation arose out of resolutions passed by a "substantial" number of the members of St. Andrew's in October

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[21] In connection with its formal petition to the Diocese to be be advanced to parish status, the members of St. Andrew's promised and declared that the "[p]arish shall be forever held under the Ecclesiastical Authority of the Diocese of Southwestern Virginia, and in conformity with the Constitution and Canons of the Diocese of Southwestern Virginia, the authority of which we do hereby recognize." 5 Va. Cir. at 499. In the same writing, the members did "solemnly engage and stipulate that all real estate consecrated as a church or chapel, of which the said Parish is or may become possessed, shall be secured against alienation from the Protestant Episcopal Church in the Diocese of Southwestern Virginia, unless such alienation is in conformation with its Canons." *Id.* at 499.

1976 formally withdrawing itself from TEC, effective in December 1976, and a letter from the Rector of the Parish dated December 12, 1976, in which he resigned from the TEC ministry. Since the end of December 1976, the members who withdrew from St. Andrew's and the resigned rector (until his death) "have continued to use, control and possess the real and personal property of St. Andrew's." *Id.* at 500. Further, "[c]hurch officials and lay members of The Episcopal Church, including the complainants, have been precluded from using these properties for the furtherance of The Episcopal Church and its activities." *Id.*

On December 16, 1976, the Standing Committee of the Diocese requested the Bishop "to advise the rector, wardens and trustees of St. Andrew's" that unless the October 1976 resolutions adopted by the local congregation were rescinded, the use of the parish's property by the local congregation and its minister "would constitute use of said property for purposes unrelated to the purposes of the Episcopal Church or Diocese," and would thereby constitute "abandonment of said property" or "alienation" of the property without court approval and the written consent of the Bishop and Standing Committee in violation of the Church's and Diocese's canons. *Id.* On January 15, 1977, the Diocese's Executive Board adopted a resolution declaring the property abandoned or illegally alienated, and called upon the Trustees of St. Andrew's to transfer the title and possession of the property to the Diocese. On May 5, 1977, a committee of the Diocese wrote the Trustees, Rector and Wardens of St. Andrew's requesting that the parish property be vacated and that its trustees convey the property to the Diocese. The defendants

failed to comply with this request and the litigation ensued.

After determining that under *Norfolk Presbytery* it was proper to resolve the dispute by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church, the Court noted the following:

First, the Court observed that from its beginning St. Andrew's was a "component" of TEC, and that it has been part of a hierarchical or supercongregational church organization. "Because of this it is, and always has been, subject to the ecclesiastical authority and to the Constitutions and Canons of both The Episcopal Church and the Diocese." *Id.* at 502-03.

Second, the Court considered two statutes of the Virginia Code, as follows: "By statute, Code §§57-8 and 57-13, the legal title (as opposed to the beneficial ownership) to all property of a local church (whether the church be independent or a unit of a supercongregational organization) is held by local church trustees who are appointed by the circuit court. Section 57-13 provides that 'any one or more members of any church diocese or religious congregation may, in his or their names, on behalf of such church diocese or congregation, commence and prosecute a suit in equity against any such trustee to compel him to apply such real or personal estate for the use or benefit of the church diocese or congregation, as his duty shall require." 5 Va. Cir. at 503.

Third, the Court examined the deeds at issue — in particular, noting that one deed stated that the conveyance was "for the erection of a church building to be used as a place of worship by the Episcopal

Congregation of Clifton Forge Parish" and that the other deed was made to named "Trustees of St. Andrew's Episcopal Church of Clifton Forge, Virginia" — and stated that "[i]t is evident that the designated *cestui que trust*[22] in each deed was a unit or component of The Protestant Episcopal Church in the United States of America within the then existing diocese. It cannot be successfully questioned that the abbreviated and commonly accepted name for that church is and always has been 'The Episcopal Church.' Therefore, a reasonable interpretation of these deeds leads inescapably to the conclusion that the trustees cannot hold title to the subject property for persons or groups who are withdrawn from and not under the authority of The Episcopal Church." *Id.* (footnote omitted).

Fourth, the Court considered the evidence related to the provisions of the "constitution of the general church," after first noting that the Virginia Supreme Court in *Norfolk Presbytery* gave that phrase "a rather broad meaning which included contractual rights of the various levels and units within a *super-congregational* church." *Id.* at 504. On this issue, the Court noted that at the time the congregation sought parish status, it expressly promised the Diocese that the parish would always be held under the ecclesiastical authority of the Diocese and in conformity with its constitution and canons and that all consecrated property would be secured against alienation from the Diocese, unless in conformity with the Diocese's

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[22] According to Black's Law Dictionary (Ninth Edition), the definition of "*cestui que trust*" is "[o]ne who possesses equitable rights in property" and "beneficiary."

Canons.[23] Significantly, the Court stated that even without these "express promises, however, the contractual rights of the Diocese in the subject property are implicit in the Constitution and Canons of The Episcopal Church and in the Constitution and Canons of the Diocese." *Id.* at 505. These provisions, noted the Court, are "binding" on all units of TEC, including the parish. The Court then proceeded to cite various provisions of the canons and constitution, such as the provision preventing alienation of property without permission of the Diocese and the provision declaring that every congregation within the Diocese was "bound equally by every rule and Canon which shall be framed by any Council, acting under this Constitution." *Id.* at 506. The Court stated that such constitutional and canonical provisions "are what gives The Episcopal Church its hierarchical character, and this supercongregational characteristic is the reason that the Diocese has a proprietary interest in the subject property." *Id.*

Fifth, the Court cited the Diocesan Canon regarding the Executive Board's power to declare prop-

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[23] One of the ways in which the CANA Congregations seek to distinguish the instant case from that of *Buhrman* is to argue that the CANA Congregations, "by contrast, made no such agreements, pledges, or representations." CANA Brief #3 at 51. The Court disagrees. There is a wealth of evidence before the Court — see the "course of dealings" section of this opinion, below — which demonstrates the congregations' "agreements, pledges, or representations," as manifested by vestry oaths, vestry minutes, vestry handbooks, local church constitutions, innumerable acknowledgements of fidelity to TEC's and the Diocese's Constitutions and Canons, and other documents. Moreover, Judge Stephenson makes it clear in his opinion that such "express promises" were not necessary to his finding that the Diocese had contractual rights in the local church's property.

erty to be "abandoned' and to direct the trustees holding legal title to the property to transfer it to the Diocese's trustees. It then noted that, in fact, the Executive Board had declared St. Andrew's property to have "been abandoned within the context of church law, and it is most doubtful if that determination is subject to review by this court." *Id.* at 507 (citations omitted). Even if the property was not deemed abandoned, noted the Court, it was being used by "those who no longer claim allegiance" to TEC, contrary to the express promise made by the Congregation that the property would be "secured against alienation" from the Diocese. *Id.* The Court added that such use also violated the Diocesan Canon that prevented alienation without the consent of the Bishop. *Id.*

Judge Stephenson concluded his opinion as follows:

> By whatever term the defendants' actions are called (be it abandonment, alienation or something else), it is undisputed that the local church trustees who have withdrawn from The Episcopal Church claim to hold title to the subject property for those persons who have likewise withdrawn from The Episcopal Church. Moreover, they have expressly renounced the control and authority of The Episcopal Church. Their appointment as trustees was for the purposes of a church which they have since renounced, and they have placed the St. Andrew's property beyond the reach, use and control of those parishioners who have remained loyal to The Episcopal Church as well as the Diocese to which St. Andrew's belongs.

> The Court holds, therefore, that the withdrawn trustees, having violated the express language of the deeds and their contractual obligations to the general church, have no further right or interest in the subject property, that neither they nor the others who have renounced The Episcopal Church have any proprietary or possessory rights in said property. Until such time as other trustees, loyal to The Episcopal Church, can be appointed, the lone remaining trustee, being one of the complainants, shall hold title to said property for the sole benefit of St. Andrew's as a unit of The Protestant Episcopal Church in the United States of America as contemplated by and in accordance with the deeds and the constitution of that church.

Id. at 508 (citation omitted).

2. DIOCESE OF SOUTHWESTERN VIRGINIA OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA v. WYCKOFF, unpublished opinion (Amherst County, Nov. 16, 1979) (Koontz, J.)

Wyckoff, like *Buhrman,* also involved TEC, as well as a Virginia diocese of TEC, and a local congregation which had decided to leave TEC. In this case, the departing congregation, called Ascension Episcopal Church, in Amherst, Virginia, voted to renounce their allegiance to the Diocese and affiliate with the Anglican Catholic Church. Then-Judge Lawrence L. Koontz, Jr. reached a similar result to that of Judge Stephenson in *Buhrman.*

There were two properties at issue in *Wyckoff* one conveyed by deed in 1847 and one conveyed by deed in 1860. The 1847 deed stated, in pertinent

part, that on the property conveyed "preparations are now being made to erect a new brick church for the use and benefit of the Protestant Episcopal Church," the conveyance being "upon this special trust and this special confidence, however, that they the said (grantees) and the survivor of them and the heirs and assigns of them and the survivor of them shall and will forever have and hold the said piece or parcel of land with all the improvements and appurtenances thereunto belonging for the use and benefit of the Protestant Episcopal Church as they the said (grantees) and the survivor of them and the heirs and assigns of them and the survivor of them shall deem most likely to promote the interest of said church...." *Wyckoff* at 2. The 1860 deed said that the property conveyed was for "the same use and for the same purposes and upon the same conditions and upon the same trusts" as in the 1847 deed described above. *Id* at 2-3.

In ruling for the Diocese, Judge Koontz applied the same "neutral principles of law" method used in *Norfolk Presbytery,* and noted that the recent United States Supreme Court decision in *Jones* "does not change but rather affirms this [neutral principles of law] approach as one valid means of resolving church property disputes." *Id.* at 5. In the course of his decision, Judge Koontz noted the following:

First, he observed that the church had been used continuously for Protestant Episcopal Church services for over one hundred years. Moreover, the Ascension Episcopal Church had "remained loyal" to the Ecclesiastical Authority and its constitution.

Second, the Court noted that it is "well settled under the law of this Commonwealth that trusts cre-

ated by language in deeds purporting to convey property to named individual trustees for indefinite beneficiaries are invalid. Furthermore, such trusts expressed or implied for general hierarchical churches are invalid." *Id.* at 4 (citations omitted). The type of language in the deeds cited above, Judge Koontz held, "create a conveyance of the property for the use of the local congregation." Id. (citation omitted).

Third, Judge Koontz turned to the significance of the congregational vote to leave the Episcopal Diocese and join the Anglican Catholic Church. "It is obvious and uncontested that members of the congregation had the right to withdraw from the Episcopal Church and to transfer their allegiance to any other church. It is also obvious that in so doing even a majority could not thereby require the minority to transfer their allegiance or be put out of existence as a church entity. . . . The result, nevertheless, is that the protestant congregation of Ascension Episcopal Church, Amherst while perhaps reduced in number still existed as it had prior to the vote." *Id.* at 4-5.

Fourth, Judge Koontz found that using the neutral principles of law approach, "this Court has found no provision of the constitution or canons of the general church or the diocese which permit a vote of even the majority of the local congregation to alienate the real property of the church without the written consent of the Bishop acting with the advice and consent of the Standing Committee of the Diocese. In fact, Canon 21 expressly prohibits such alienation." *Id.* at 6.

Fifth, Judge Koontz noted that while §57-9 did provide for a method to address a division within a hierarchical church, the vote of the congregation was

not taken in accordance with the requirements of the statute. (He also noted that, in any event, §57-9 might not be applicable to these deeds, both of which predated the passage of the statute; nor was he satisfied that a division had occurred as contemplated by the statute.) "The net result, therefore, based on the constitution and canons of the church and the state statutes is that the effect of the congregational vote in May, 1978 on the title to the real property in question was that title remained exactly where it was prior to the vote, that is, in the trustees for the benefit of the local protestant episcopal congregation." *Id.* at 7.

Finally, Justice Koontz concluded as follows:

> The result of the May, 1978 congregational vote did not and could not extinguish that part of the Protestant Episcopal congregation known as Ascension Episcopal Church, Amherst remaining loyal to the Diocese of Southwestern Virginia and the National Episcopal Church. The vote may well have indicated that fifty-nine members of that congregation transferred their allegiance to the Anglican Catholic Church which is unquestionably a separate entity. Nothing, however, has occurred under neutral principles of law to transfer the title and control of the property in question from the beneficial use of the remaining congregation of the Ascension Episcopal Church, Amherst as represented by the complainants herein.
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> For these reasons, the primary prayer of the complainants will be granted and the present trustees will be directed and required to hold the property in question for the sole use and

> benefit of the congregation of Ascension Episcopal Church, Amherst as a unit of the Episcopal Church subject to the canonical authority of the Diocese of Southwestern Virginia. [Respondents] will be enjoined from further use and occupancy of the property.

Id. at 7-8.

C. GENERAL DISCUSSION REGARDING NEUTRAL PRINCIPLES OF LAW

The parties are in sharp disagreement on a number of issues related to the ·neutral principles of law" approach. Each is discussed in turn:

1. In a "neutral principles of law" analysis, should a court consider the "course of dealings" between the local church and the general church?

The CANA Congregations argue that the "course of dealings" between the parties is not a proper consideration in a "neutral principles of law" analysis, largely because it was not stated as one of the factors under consideration in *Norfolk Presbytery*. The Court finds, however, that under the Virginia Supreme Court's subsequent holding in *Green,* a trial court must (and, at a minimum, may) consider the "course of dealings" between the parties. While it could be argued that *Green* established "course of dealings" evidence as an *additional* factor in the "neutral principle of law" analysis, it makes more sense to simply view "course of dealings" evidence as instructive to understanding the hierarchical nature of the polity in practice as well as in theory, and each parties' awareness of, and agreement to. the rules governing a supercongregational church.

CANA argues, however, that the only reason the Court in *Green* considered "course of dealing" evidence was to determine if the congregation in *Green* had manifested its intent to be legally bound by a denominational proprietary interest by engaging in specific conduct indicating their connection to the denomination. (CANA Brief #1A at 83.) The problem with this argument is that the Virginia Supreme Court never said this; nor did it even imply this; and its review of the evidence does not suggest it is the case.

2. *In examining the general church's governing documents, is the Court limited in its consideration to the constitution of the denomination and diocese, or should the Court also consider the canons and any other governing documents that may exist?*

CANA argues that this Court may only consider the Constitution of TEC and the Constitution of the Diocese because *Norfolk Presbytery* used the word "constitution,"[24] rather than "constitution and canons." The Court disagrees. As Judge Stephenson said in *Buhrman,* the Virginia Supreme Court in *Norfolk Presbytery* gave the reference to "constitution" a "rather broad meaning." 5 Va. Cir. at 504. This Court views the reference to ·constitution" to require an examination of the governing laws of the church, which most certainly includes both the Constitution of TEC and the Diocese, as well as their Canons.

CANA argues, however, that canons are different than constitutions, because canons are enacted

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[24] The word "constitution" appears in Norfolk Presbytery with a lower-case "c".

"without the standstill periods or two-reading requirements that apply to constitutional changes." (CANA Brief #1A at 2, 39-45.) Even if true, there is no basis upon which this Court could or should conclude that canons are entitled to less weight than constitutions. CANA asks this Court to parse the manner in which the denomination amends its constitution versus amending its canons, and conclude that -[o]nly constitutional provisions may create a trust interest." TEC and the Diocese state that for the Court to do this would infringe on their First Amendment rights. The Court does not need to resolve that question, because the Court concludes that there is no basis in the "neutral principles of law" analysis for a Court to ignore canonical provisions because the Court believes it would have been fairer or more equitable to accomplish a canonical objective by constitutional amendment.

3. *In a "neutral principles of law" analysis, are the deeds 'first among equals" when considering the other factors?*

CANA argues that "[d]eeds are generally the predominant consideration in real property disputes and according them such weight here is consistent with both the Virginia Supreme Court's mandate that this Court apply normal principles of 'real property' law and the fact that 'neutral principles' are principles 'developed for use in *all* property disputes.' (CANA Brief #3 (emphasis in original) (citations omitted). The Court does not agree. There is no suggestion in *Norfolk Presbytery* or *Green* that in the resolution of a church property dispute that this Court should accord the deeds "predominant" weight over, for example, the constitution of the general church. Rather, at the core of the "neutral principles

of law" methodology is the requirement that the Court give full consideration to *each* of the factors and determine whether the plaintiffs have proven that they have a "proprietary" interest in the property at issue.

4. *In a case where the trial court finds that the general church has a contractual or proprietary interest over local church property, does that mean that control and ownership of the local church property necessarily transfers from the trustees of the local church to the diocese? In other words, does the local congregation retain a proprietary interest to prevent a transfer to the diocese? Does that question turn on whether the local congregation has disaffiliated from the denomination and/or on whether the diocese, under its canons, has declared the property abandoned?*

Whether or not it is possible to hypothesize a scenario under which both a hierarchical denomination and a local disaffiliated congregation would have competing "proprietary interests" in local church property, that is not the case now before the Court. The CANA Congregations are not *Episcopal* Congregations. Their rectors are not *Episcopal* rectors. Their vestries are not *Episcopal* vestries.[25] Therefore, they have no contractual or proprietary interest in these *Episcopal* Churches.[26] As Judge Stephenson

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[25] The Rector of an *Episcopal* church must be an Episcopal priest, TEC Canon III.9(3)(a)(3), and the Vestry of an *Episcopal* church must be composed of *Episcopalians*. Diocesan Canon 11.4.

[26] Thus, this Court rejects the premise of the CANA Congregations' claim, at Page 77 of CANA Brief #2, that it is entitled to compensation for improvements it made to the church proper-

said in *Buhrman,* 5 Va. Cir. at 508: "The Court holds, therefore, that the withdrawn trustees, having violated the express language of the deeds and their contractual obligations to the general church, have no further right or interest in the subject property, that neither they nor the others who have renounced The Episcopal Church have any proprietary or possessory rights in said property."

As to the "abandonment" resolution by the Diocese, it must first be stated that the resolution did not "extinguish"[27] the CANA Congregations' "interest" in the seven church properties, for the CANA Congregations are not in authorized possession of Episcopal church property and, therefore, have no "interest" in the properties capable of being extinguished. And while it is true that the Executive Board's January 22, 2007 resolution declaring the seven church properties to have been abandoned was

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ties. In support of that argument, CANA asserts that the Virginia Supreme Court in Green "did not state that the denomination's [proprietary] interest extinguished the [proprietary] interest of the congregation," nor did the Court in Green state that "the congregation's interest could be extinguished without compensating it for the improvements it had made to the property." Id. While it is undoubtedly true that the Court in Green did not make these statements, it is equally true that CANA' s assertions depend on a finding that the CANA Congregations hold a "proprietary" interest in Episcopal church properties, which this Court has found they do not.

[27] See this statement from CANA Brief #2 at 78: -[TEC and the Diocese] may not be required to pay to acquire a proprietary interest, [but] nothing in Green absolves them of the duty to compensate the Congregations, should they wish to extinguish the Congregations' interest in the property." The fallacy in this statement is the presumption, which this Court rejects, that the CANA Congregations possess an "interest" in Episcopal church property.

the canonical predicate for the Executive Board's instruction to the trustees to transfer the property to the Bishop, that obviously did not happen At this point, any conveyances that take place will occur pursuant to the instant declaratory judgment actions, and the orders that will ultimately issue. More to the point, this Court's determination that TEC and the Diocese have a proprietary interest in the seven church properties does not depend on the Executive Board's "abandonment" resolution, nor is that a condition precedent to the Court's determination.

5. *In determining whether a denomination or diocese has a "contractual" or "proprietary" interest in a constituent member's local church property, must the court apply traditional concepts of contract law, such as the requirement of consideration, mutuality of remedies in the event of breach, and so on?*

CANA argues that TEC and the Diocese cannot have a contractual interest in the properties because they did not provide "consideration" for them. (CANA Brief #1A at 55.) CANA also argues that there cannot be an enforceable contract where the plaintiff fails to establish the requirements of mutual obligation and mutual remedy. *(Id.* at 58.) CANA also makes a related argument that its claim that TEC and the Diocese breached their spiritual obligations to the CANA Congregations is unenforceable in a civil court under First Amendment precepts and, hence, where there is no remedy for breach there can be no enforceable contract. *(Id.* at 63.)

TEC and the Diocese argue that these concepts were not considered by the Virginia Supreme Court in *Norfolk Presbytery* or *Green* and, therefore, are

not part of the "neutral principle of law" analysis. The CANA Congregations argue, correctly, that the fact that a party in unrelated litigation may not have made a particular argument does not prevent a party in the instant litigation from making the same argument in this case. The Court agrees with that proposition. Nevertheless, the Court does not find the claims to be meritorious.

VI. NEUTRAL PRINCIPLES OF LAW ANALYSIS

A. STATUTES

The starting point in a "neutral principles of law" approach to a church property dispute is a fair consideration of the applicable and pertinent statutes. *See, generally, Norfolk Presbytery,* 214 Va. at 505 (" We hold that it is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church."); and *Green,* 221 Va. at 555 ("In determining whether the A.M.E. Zion Church has a proprietary interest in the Lee Chapel property, we look to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties."). Obviously, it is not necessary that a statute be dispositive to be pertinent and, in this case, the Court finds that there are four statutes warranting discussion, Virginia Code §§57-7.1, 57-9, 57-15, and 57-16.1.

1. Virginia Code §57-7.1 [28]

Not surprisingly, both sides have focused considerable attention on whether the Virginia Code now permits trusts for denominations and the dioceses of those denominations. TEC and the Diocese acknowledge that historically Virginia statutes did not validate trusts for general churches. *(See* Diocese Brief #1 at 39.) They assert, however, that this changed in 1993, when the General Assembly repealed §57-7 and enacted §57-7.1. They argue that §57-7.1 "should be construed as validating trusts for denominational churches," and that "[s]uch a trust is stated by TEC's Dennis Canon and Diocesan Canon 15.1." *(See Id.* at 41.) The CANA Congregations, in contrast, argue that neither §57-7.1, nor its predecessors, legalize denominational trusts and point to 14

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[28] Virginia Code §57-7.1(2011) reads as follows:

§ 57-7.1. What transfers for religious purposes valid

Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift, shall be valid.

Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof.

No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57-8, is incorporated, has created a corporation pursuant to § 57-16.1, or has ecclesiastical officers pursuant to the provisions of § 57-16.

Virginia Supreme Court decisions in support of their position. *(See* CANA Brief 1A at 14-16.)

This Court has previously had occasion to rule on this matter. In its Letter Opinion of June 27, 2008, 76 Va. Cir. 884, 894, the Court held that "57-7.1 did not change the policy in Virginia, which is that church property may be held by trustees for the local congregation, not for the general church."[29] While the issue arose in a different context,[30] the matter was fully briefed and decided. Among other matters, the Court noted that the Virginia Supreme Court in *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.,* 249 Va. 144, 152, (1995) held that "Code §57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations." The Court also noted that Clause 3 of the 1993 Act

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[29] This policy has a long pedigree in Virginia. *See, generally, Hoskinson v. Pusey,* 73 Va. 428, 431 (1879)("The deed is the same in substance as the deed in *Brooke v. Shacklett,* 54 Va. 301, and the construction must be the same. According to that construction, the conveyance is not for the use of the Methodist Episcopal Church in a general sense. Such a conveyance in this state would be void."); *Norfolk Presbytery,* 214 Va. at 507 ("As express trusts for super-congregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld."); *and Reid* 229 Va. at 187 ("Because of this strong tradition, we have, for instance, refused to adopt the 'implied trust' theory in favor of hierarchical churches.").

[30] TEC and the Diocese had argued that the Court had to make a preliminary determination of church property ownership before embarking on a §57-9 analysis. The Court found that position to be without merit "because §57-7.1 did not change long-established precedent in Virginia regarding trusts for general hierarchical churches." *See* 76 Va. Cir. at 893.

which enacted §57- 7.1 states that it is "declaratory of existing law."

While TEC and the Diocese invite the Court to revisit this matter and, more particularly, to hold that the Virginia Code does recognize trusts for denominations and their *dioceses*, the Court declines to do so. Put simply, the Court believes its prior decision on this issue was correct.[31] Nevertheless, several additional points should be noted with regard to § 57-7.1.

First, TEC and the Diocese argue that "[i]f §57-7.1 does not allow church property to be held in trust for the Diocese, . . . it is unconstitutional." *(See* Diocese Brief #1 at 41.) While it is true that the Court might need to reach and address the constitutional issue if its construction of §57-71 was in any sense determinative of the matters before it, that is not the case. As stated above, the Court finds on the record before it that the evidence and law clearly favor TEC and the Diocese. Thus, whether or not a construction of §57-7.1 in favor of denominational trusts or a holding regarding the constitutionality of §57-7.1 might provide an alternative or additional basis to grant TEC and the Diocese the relief they seek, that does not warrant addressing these issues.

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[31] In particular, the Court is not persuaded by the argument put forward by TEC and the Diocese that the Commonwealth must recognize denominational trusts because §57-7.1 and §57-14 both refer to property held by trustees for church dioceses. As the CANA congregations note in their response brief: "'Slow property, such as ecclesiastical residences, can be held in trust for a diocese, and that has been true since 1962.... Accordingly, plaintiffs are wrong to suggest that the Court's reading of §57-7.1 'render[s] meaningless' the law's reference to 'diocese." (See CANA Brief #2 at page 11.)

Second, the CANA congregations argue that if this Court were to find that the Dennis Canon or Diocesan Canon 15.1 did give TEC and the Diocese a trust interest in the church properties, plaintiffs' claims would be barred by the United States and Virginia Constitutions. CANA states: "Granting their canons legally dispositive weight would violate not only principles of free exercise and disestablishment, but also the Contracts Clause (as applied to pre-1993 conveyances), basic notions of due process, and the Equal Protection Clause." (CANA Brief 41A at 123.) To the extent that CANA's Constitutionality argument is based solely on concerns regarding the Dennis Canon and Diocesan Canon 15.1, the Court obviously does not need to reach the issue because the Court has not found that these Canons establish valid trust interests in the Commonwealth. To the extent that CANA's argument is broader than this, in other words, to the extent that CANA is arguing that this Court cannot base a finding of a contractual or proprietary interest by considering and giving weight to *any* portion of the Constitution and Canons of TEC and the Diocese, this Court rejects CANA's claim of unconstitutionality. In this Letter Opinion, this Court applies *Norfolk Presbytery* and *Green,* which in turn are based on United States Supreme Court precedent that permits the resolution of church property disputes through the application of "neutral principles of law." Those "neutral principles of law" are not limited to "the neutral default rules of state property law," as CANA appears to argue they should be *(Id.* at 135.) They also include consideration of the constitution and canons of the denomination *(Norfolk Presbytery* and *Green),* and the "course of dealings" between the parties. When applied in accordance with governing

precedent, this Court does not find any constitutional infirmity.

Third, the CANA Congregations argue that even if §57-7.1 legalizes denominational trusts, such trusts cannot be found to exist with regard to deeds that predate the 1993 effective date of the statute. The CANA Congregations also argue that the manner in which TEC and the Diocese purported to establish their trust interest, i.e., through the Dennis Canon and Diocese Canon 15.1, was flawed and ultimately ineffective. The Court, having concluded that trusts for denominational churches remain invalid in Virginia, sees no reason to further address these issues.

Fourth, the Diocese argues that even if this Court concludes that denominational trusts remain invalid even after 1993, this Court should nevertheless rely on the Dennis Canon and Diocesan Canon 15.1 as a "partial expression of the contractual relationships among the parties." (*See* Diocese Brief #3 at 14.) To the extent the Diocese is suggesting that this Court should consider the Dennis Canon and Diocesan Canon 15.1 in the context of that portion of the "neutral principle of law" analysis related to the constitution of the church, the Court is not persuaded it should do so given its finding that neither canon actually accomplished the objective of establishing denominational trusts in the Commonwealth. However, to the extent the Diocese is suggesting that the interaction of the parties regarding these canons could be considered in the context of that portion of the "neutral principle of law" analysis related to "course of dealings" between the parties, the Court agrees that

this interaction can be considered and given such weight as the Court deems warranted.[32]

Fifth, the Diocese argues that the Virginia Supreme Court in its remand of this matter, implicitly: (1) recognized that §57-7.1 changed the law of the Commonwealth by validating denominational trusts; (2) rejected the CANA Congregations assertions that §57-7.1, even if it validated denominational trusts, could not be applied retroactively to property acquired prior to 1993; and (3) rejected the CANA Congregations assertions that, even if denominational trusts were now valid in principle, TEC and the Diocese had not gone about acquiring their trusts in a proper manner. *(See* Diocese Brief #3 at 15.) All this is based on the following paragraph at the conclusion of the remand:

> In light of our holding that the circuit court erred in granting the Code § 57-9(A) petitions, the control and ownership of the property held in trust and used by the CANA Congregations remains unresolved. Accordingly, the declaratory judgment actions filed by TEC and the Diocese, and the counterclaims of the CANA Congregations in response to those suits, must be revived in order to resolve this dispute under principles of real property and contract law. *See,* e.g., *Code § 57-7.1;* Trustees of Asbury United

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[32] For example, in notes to a financial statement, Church of Epiphany stated that the church "is a constituent part of the Episcopal Church, U.S.A., and the Episcopal Diocese of Virginia. The canons of the Episcopal Church U.S.A. and the Diocese of Virginia require the real property of all Episcopal parishes to be held in trust for the national church and the Diocese even though the individual churches hold legal title for all other purposes." PX-EPIPH-048-040.

> Methodist Church v. Taylor & Parrish, Inc., 249 Va. 144, 452 S.E.2d 847 (1995); Green v. Lewis, 221 Va. 547, 272 S.E.2d 181 (1980); Norfolk Presbytery v. Bollinger, 214 Va. 500, 201 S.E.2d 752 (1974).

280 Va. at 29 (emphasis added). This Court cannot assume or infer from this reference to §57-7.1 that the Virginia Supreme Court implied that they had reached any of the judgments attributed to them by the Diocese. The Court does assume and infer from this reference to §57-7.1 that the Virginia Supreme Court intended this Court to consider the applicability of §57-7.1 in its "neutral principles of law" analysis, which it has done.

2. Virginia Code §57-9 [33]

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[33] Virginia Code §57-9 (2011) reads as follows:

> § 57-9. How property rights determined on division of church or society
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> A. If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth.
>
> B. If a division has heretofore occurred or shall hereafter occur in a congregation whose property is held by trustees which, in its organization and government, is a church or society entirely independent of any other church or general so-

The fact that the CANA Congregations did not meet the statutory requirements of §57-9(A) in the instant case does not render the statute irrelevant. As the Diocese notes in its reply brief: "Code §57-9 is no longer directly at issue, but its careful distinction between hierarchical and congregational churches remains relevant." *(See* Diocese Brief #3 at 18.) Indeed, it is precisely because of the CANA Congregations inability to meet the additional branch-attachment requirement applicable only to churches that are part of a hierarchical denomination that the Virginia Supreme Court in *Protestant Episcopal Church in Diocese of Virginia v. Truro Church,* 280 Va. 6 (2010) ordered that the congregations §57-9(A) petitions be dismissed upon remand.[34]

TEC argues that the criteria for considering a Virginia statute as part of the "neutral principles of law" analysis is not whether the statute *by its own application alone* establishes the hierarchical church's proprietary or contractual interest in local church property. *(See* TEC Brief #3 at 17) Rather, ar-

ciety, a majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom, may decide the right, title, and control of all property held in trust for such congregation. Their decision shall be reported to such court, and if approved by it, shall be so entered as aforesaid, and shall be final as to such right of property so held.

[34] Similarly, the construction given the word "branch" by the Virginia Supreme Court in that decision — that "the [§57-9(A)] statute requires that each branch proceed from the same polity, and not merely a shared tradition of faith,"— is also significant, because it excludes from the reach of the statute any situation where a local church departs from one polity and affiliates with a wholly unrelated polity. 280 Va. at 28-9.

gues TEC, "the inquiry under *Green* is whether the general statutory climate supports finding a proprietary interest" and whether "Virginia statutes are hospitable to the proposition that a hierarchical church may have an interest in local church property." *(Id.* at 17-8). While TEC does not cite §57-9 as evidence in support of this proposition (which is certainly not surprising given their previous constitutional challenge to §57-9), it must nevertheless be noted that §57-9(A), especially when viewed in comparison to the division requirements applicable to a congregational church, *see* §57-9(B), reflects a recognition that hierarchical churches in their organization and structure are different than congregational churches and that a Virginia statute designed to address divisions within a church may properly reflect that recognition.

3. Virginia Code §57-15 [35]

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[35] Virginia Code §57-15 (2011) reads as follows:

> § 57-15. Proceedings by trustees or members for similar purposes, exception for certain transfers
>
> A. The trustees of such a church diocese, congregation, or church or religious denomination, or society or branch or division thereof, in whom is vested the legal title to such land held for any of the purposes mentioned in § 57-7.1, may file their petition in the circuit court of the county or the city wherein the land, or the greater part thereof held by them as trustees, lies, or before the judge of such court in vacation, asking leave to sell, encumber, extend encumbrances, improve, make a gift of, or exchange the land, or a part thereof, or to settle boundaries between adjoining property by agreement. Upon evidence being produced before the court that it is the wish of the congregation, or church or religious denomination or society, or branch or division thereof, or the constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese, to sell, exchange, encumber, extend encumbrances,

make a gift of, or improve the property or settle boundaries by agreement, the court shall make such order as may be proper, providing for the sale of such land, or a part thereof, or that the same may be exchanged, encumbered, improved, or given as a gift, or that encumbrances thereon be extended, and in case of sale for the proper investment of the proceeds or for the settlement of such boundaries by agreement.

When any such religious congregation has become extinct or has ceased to occupy such property as a place of worship, so that it may be regarded as abandoned property, the petition may be filed either by the surviving trustee or trustees, should there be any, or by any one or more members of such congregation, should there be any, or by the religious body which by the laws of the church or denomination to which the congregation belongs has the charge or custody of the property, or in which it may be vested by the laws of such church or denomination. The court shall either (i) make a decree for the sale of the property or the settlement of boundaries between adjoining properties by agreement, and the disposition of the proceeds in accordance with the laws of the denomination and the printed acts of the church or denomination issued by its authority, embodied in book or pamphlet form, shall be taken and regarded as the law and acts of such denomination or religious body or (ii) at the request of the surviving trustees and after notice in accordance with law to all necessary parties, make such order as may be proper providing for the gift of such property to any willing local, state or federal entity or to a willing private, nonprofit organization exempt from taxation under § 501 (c) (3) of the Internal Revenue Code, provided the court finds that (a) the property includes a historic building or landmark so designated by the Commonwealth and (b) the purpose of such gift is historical preservation of the property.

The court may make such order as to the costs in all these proceedings as may seem proper.

B. As an alternative to proceeding under subsection A, (i) the trustees of a church or religious body that incorporate may transfer the title to the real and personal property of the church or religious body held by them to the incorporated church or religious body; and (ii) the trustees of a

The significance of §57-15 to the instant litigation lies in the following excerpt from the statute: "Upon evidence being produced before the court that *it is the wish of the congregation, or church or religious denomination or* society*, or branch or division thereof or the constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese,* to sell, exchange, encumber, extend encumbrances, make a gift of, or improve the

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church or religious body that do not incorporate under subdivision (i) hereof may transfer title to the real and personal property of the church or religious body held by them to a corporation created pursuant to § 57-16.1 without, in either instance, obtaining court permission if the transfer is authorized in accordance with the church's or religious body's polity. If no petition seeking to set such a transfer aside is filed within one year of the recordation of the trustees' deed transferring title to the real estate, or the date of the transfer of any personal property, it shall be conclusively presumed that the transfer was made in accordance with the church's or religious body's polity insofar as a good faith purchaser or lender is concerned.

C. No transfer made pursuant to subsection A or B shall operate as a transfer for purposes of a provision contained in any note or deed of trust that purports to accelerate an indebtedness upon a transfer of title. Any such transfers of real estate shall be entitled to the exemptions set forth in § 58.1-811.

D. Any transfer of real or personal property made pursuant to subsection B, and any similar transfer made pursuant to subsection A after April 23, 2002, shall be deemed to assign to the incorporated church or religious body, or the corporation created pursuant to § 57-16.1, as the case may be, the beneficial interest in every policy of insurance of every kind, type, and description, relating to the property transferred, contemporaneously with the transfer, and the transferee shall have all of the rights and obligations of the transferor relating thereto.

property or settle boundaries by agreement, the court shall may such order as may be proper." (emphasis added).

To underscore the importance of this passage, this Court need do no more than quote the following language from *Norfolk Presbytery:*

> We construe Code §57-15 to require that a church property transfer may be ordered only upon a showing that this is the wish of the duly constituted church authorities having jurisdiction in. the premises. Under predecessor statutes only the congregation's wishes were to be considered in a proceeding to authorize a church property conveyance, but Code §57- 15 now contemplates that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve such a property transfer. In determining the proper party to approve the property transfer, the trial court must look to the organizational structure of the church. *See* Code §57-9, which recognizes a distinction between an autonomous congregation and one which is part of a supercongregational or hierarchical denomination in providing for the determination of property rights upon a division of a church or congregation. *In the case of a super-congregational church, we hold that Code §57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church.*

214 Va. at 502-03 (footnote and citation omitted) (emphasis added).[36] This holding could not be clear-

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[36] The evolution of the statute is, itself, significant. As the Virginia Supreme Court details at footnote 2 of the *Norfolk Presby-*

er, nor its implications.[37] As the Diocese states in its reply brief "Needless to say, the Congregations have not carried their burden of proving that it is the wish of TEC and Diocese that the properties be transferred to the CANA Congregations, which is precisely the relief that they seek in the first prayer for relief in their Amended Counterclaims." *(See* Diocese Brief #3 at 12-3.)

The parties disagree on the proper interpretation of both §57-15 and *Norfolk Presbytery.* CANA argues that §57-15 is only relevant where the denomination has already established its proprietary interest in the property at issue; absent such proof, argues CANA, *Norfolk Presbytery* stands for the propo-

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tery opinion, the statute initially required only congregational approval as a basis for a court order authorizing a property conveyance. In 1904, the statute was amended to require proof that the proposed conveyance was "the wish of said congregation, or church or religious denomination or society, or branch or division thereof" 214 Va. at 503. In 1924, the statute was further amended to add the phrase "or the constituted authorities thereof having jurisdiction in the premises." *Id.* Finally, in 1962, language relating to a church diocese was added.

[37] *See also Green*, 221 Va. at 552-53, which reaffirmed this holding: “It is well settled in Virginia that it is the right of a majority of the members of a divided congregation to control the use of the church property if the church, in its organization and government, is a church or society entirely independent of any other church or general society. Code §57-9. *Baber v. Caldwell*, 207 Va. at 695. ...In both [*Baber* and *Norfolk Presbytery*] we pointed out the distinctions, enunciated in Code §57-9, between an autonomous congregation and one which is part of a supercongregational or hierarchical denomination where a determination of property rights is involved. We held that in the case of a supercongregational church Code §57-15 'requires a showing that the property conveyance is the wish of the constituted authorities of the general church.'”

sition that the denomination has no standing to object to the conveyance of the property. The Diocese argues that CANA is confusing the jurisdictional issue of standing with the substantive requirement in §57- 15 that, where a supercongregational church is involved, a church cannot obtain circuit court approval for a conveyance of church property without proof that it is the wish of the constituted authorities of the general church.[38]

The Court does not agree entirely with either parties' interpretation of *Norfolk Presbytery's* reference to §57-15. Under *Norfolk Presbytery,* the significance of §57-15 is that it establishes a statutory framework for consideration of property transfers when churches (either autonomous or hierarchical) are involved. If it is determined: (1) that a local church is part of a hierarchy; and (2) that the general church has a contractual or proprietary interest in the property at issue based upon the deeds before the Court and the constitution governing the relationship between that local church and that general church,[39] then §57-15 recognizes that a church prop-

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[38] TEC makes a slightly different (but related) point in its reply brief: In *Norfolk Presbytery's* discussion regarding standing, it was referring only to standing to object to a transfer under §57-15; it was not addressing "under what circumstances a hierarchical church might have standing to pursue a declaratory judgment action to enforce its interest in local church property, much less about whether and when a hierarchical church would have standing to assert the identity of its own leaders." *See* TEC Brief #3 at 40.)

[39] *Norfolk Presbytery* did not address the relevance of "course of dealing" evidence to the proprietary interest analysis. The parties disagree whether "course of dealing" evidence is a proper consideration in every "neutral principles of law" analysis or only under the circumstances of *Green.* As stated above, the

erty conveyance cannot occur without proof that the general church has approved the conveyance.[40]

One more point must be emphasized. TEC and the Diocese appear to be arguing that if a church is deemed "hierarchical" or "supercongregational," it is *a fortiori* a church with a contractual or proprietary interest in local church property. In support of that proposition, TEC and the Diocese rely on the language in *Norfolk* Presbytery that states: "In the case of a supercongregational church, we hold that Code §57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church." 214 Va. at 503. But if it were true that *hierarchy = proprietary interest,* without more, why would the Virginia Supreme Court have held that a trial court must examine the constitution of

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Court does consider "course of dealing" evidence a proper consideration in a "neutral principle of law" analysis. Moreover, as described below, the Court has fully evaluated the "course of dealing" evidence presented in this litigation and concludes that it supports its finding that the denomination and diocese have proprietary interests in the properties at issue. It should be emphasized, however, that even if the Court did not consider the "course of dealing" evidence in the instant case, it would not change the Court's ultimate conclusion.

[40] The Diocese notes that during the §57-9 litigation, the CANA congregations expressed a similar understanding of §57-15, quoting from CANA Congregations' Reply Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Va. Code §57-9 (filed August 31, 2007) at 8: "Section 57-15's requirement of denominational approval ... applies in cases such as *Norfolk Presbytery* and *Green,* where one or more congregations break away from a supercongregational church ... without joining any branch." *(See* Diocese Brief #3 at 11-2.) In other words, in a case involving a supercongregational church (as here), where §57-9 has been determined to be inapplicable (as here), the requirement of denominational approval applies.

the general church (as in *Norfolk Presbytery)* or the constitution of the general church and "course of dealing" evidence (as in *Green).* One possibility, of course, is that such an examination is necessary to determine if a church is truly hierarchical. But in *Green* that issue was conceded,[41] and yet the Virginia Supreme Court undertook the entire neutral principles of law analysis. The better answer, to this Court, is that a local church might, at least in theory, be part of a hierarchy, yet be empowered with complete authority and autonomy over local church property. That is the reason why, in this Court's opinion, the Virginia Supreme Court in *Norfolk Presbytery* found *both* that *Norfolk Presbytery* had a right to intervene in the proposed property conveyance at issue and that Norfolk Presbytery might ultimately fail to establish its proprietary interest in the property at issue. Similarly, in *Green,* the Virginia Supreme Court defined a "proprietary right" in terms that, to this Court, mean more than proof that a local church was part of a hierarchy.[42]

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[41] *See, e.g.,* this language from *Green:* "There is little conflict in the evidence. Appellees do not deny that Lee Chapel has been an A.M.E. Zion Church and through the years has been a part of that hierarchical organization." 221 Va. at 551.

[42] In *Green,* the Supreme Court stated the following:

> In determining whether the A.M.E. Zion Church has a proprietary interest in the Lee Chapel property, we look to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties. A proprietary right is a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls.

Id. at 555.

Therefore, this Court concludes that hierarchy does not automatically equate with a proprietary interest.[43] However, where a hierarchical church has established its proprietary interest in local church property, §57-15 will afford it relief, including the possibility contemplated in *Norfolk Presbytery* of a permanent injunction against a proposed conveyance.

4. Virginia Code §57-16.1

In the wake of *Falwell v. Miller,* 203 F. Supp. 2d 624 (W.D. Va. 2002), the General Assembly enacted §57-16.1, permitting Virginia churches to incorporate. The parties disagree as to the significance of §57-16.1 in the neutral principles of law analysis. To understand their disagreement, it is necessary to begin with the words of the statute:

> Whenever the laws, rules, or ecclesiastic polity of an unincorporated church or religious body provide for it to create a corporation to hold, administer, and manage its real and personal property, such corporation shall have the power to (i) acquire by deed, devise, gift, purchase, or otherwise, any real or personal property for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body, and not prohibited by the law of the Common-

[43] There are circumstances where the resolution of this issue could be outcome determinative. However, the present case does not present such a circumstance, because this Court concludes that TEC and the Diocese have carried their burden of proof under *either* theory, i.e., if all they are required to do is prove that they and the local churches are part of a hierarchical church, they have certainly done so; and if they must also prove that there is substantial added indicia to prove their contractual or proprietary interest, they have done that as well.

> wealth and (ii) hold, improve, mortgage, sell, and convey the same in accordance with such law, rules, and ecclesiastic polity, and in accordance with the law of the Commonwealth.

Va. Code §57-16.1 (2011).

The CANA Congregations argue that the reference in the statute to a "church or religious body" is intended to be a reference to a local church only, not to a denomination or diocese. CANA notes that other provisions of Title 57 specifically reference "denominations" or "dioceses" and, therefore, the fact that §57-16.1 does not do so must mean that it was intentionally excluded by the legislature. *See* CANA Brief #2 at 6-7.) Thus, argues CANA, §57-16.1 "does not grant the denomination a proprietary interest." *Id.* at 10.

TEC and the Diocese do not suggest that §57-16.1 *by itself* grants the denomination a proprietary interest, but they do argue that it supports the assertion that "[m]odern Virginia statutes embody ... a policy of respect for the autonomy of churches, and for the governance and property arrangements made by churches, whatever they may be." *(See* TEC/DOV Brief #3 at 12.) Specifically, TEC and the Diocese assert the following:

> Section 57-16.1 does not refer only to "rules" of a "church or body." It refers, twice, to "the laws, rules, or ecclesiastic polity" of an unincorporated church or religious body. The Episcopal Church and the Diocese are unincorporated churches or religious bodies. The "ecclesiastic polity" of the Episcopal Church is undeniably hierarchical. And the "laws" and "rules" of a member of any hierarchical institution include the laws and

> rules — here the Constitutions and Canons — of each higher level of the hierarchy, here the Diocese and TEC. In the context of a hierarchical church, the "laws" and "rules" of each subordinate institution *necessarily* include the laws and rules of superior levels in the hierarchy, and indeed each of the *local* churches in these cases expressly incorporated those rules in their own governing documents.

(*See* Diocese Brief #3 at 13-14 (citations and footnotes omitted)) This Court agrees that the phrase "church or religious body" includes a denomination or diocese. But even if that were not the case, there is no question that when that local church is part of a hierarchical denomination, the "laws, rules, or ecclesiastic polity of the church or body" necessarily include and incorporate the rules, laws, and polity of the denomination of which they are a constituent member.[44]

But CANA argues the following: §57-16.1 also states that the church must act "in accordance with the law of the Commonwealth" and since the law of the Commonwealth does not validate denominational trusts, any argument that the corporate articles for the CANA Congregations were invalid because they do not specify that the Congregations' property is held in trust for plaintiffs "would be unavailing." *See* CANA Brief #2 at 9.)

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[44] The use of the term "polity" in the statute is significant. As the Virginia Supreme Court noted in *Protestant Episcopal Church in Diocese of Virginia v. Truro Church,* 280 Va. at 12, (citation omitted), "When used in reference to religious entities, the term 'polity' refers to the internal structural governance of the denomination."

This Court agrees that the Commonwealth does not validate denominational trusts. But, in this Court's view, that is not the significance of §57-16.1. Rather, it is this: when a local church that incorporates is a constituent member of a supercongregational church, §57-16.1 in effect provides that it cannot acquire, encumber, or dispose of its real or personal property except in accordance with the laws, rules, and polity of the denomination and diocese to which the local church belongs. To hold otherwise would be to hold that the General Assembly, by enacting §57-16.1, essentially created a mechanism by which a hierarchical church could become a congregational church by the simple act of incorporation. To put it another way: while the statute does not provide a denomination or a diocese *more* control over a constituent member that incorporates, it ensures that the act of incorporation will not result in a denomination or diocese having *less* control over a constituent member,

This is far from an academic discussion. Each of the seven CANA Congregations incorporated in either 2006 or early 2007,[45] at a time of profound discord between the local churches and the Diocese and TEC. Regardless of what may have been the other consequences of incorporation — and what is cited in CANA Brief #1A includes the following: (1) "to gain the advantages of the corporate form" *(see* ¶98); and (2) "as a matter of sound business practice" *(see* 11266) — one consequence that the congregations could not realize given the language of §57-16.1 is to

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[45] *See* CANA Brief #1B at 20, ¶98 (The Falls Church), at 45, ¶266 (St. Paul's), at 85, ¶537 (Truro), at 90, ¶574 (St. Stephen's), at 108, ¶686 (St. Margaret's), at 126, 11803 (Church of the Apostles), and at 134, ¶867 (Church of the Epiphany).

separate themselves from the obligations and responsibilities of being members of a hierarchical church.

Thus, §57-16.1, although not explicitly referencing denominations and dioceses, ensures that when a local church which is a member of a hierarchy acts to incorporate, its new form as an incorporated entity does not relieve it of its obligation to continue to comply with the laws, rules, and ecclesiastical polity of its hierarchy with regard to the acquisition, encumbrance, and disposition of church property.

B. DEEDS

1. The Specific Deeds at Issue[46]

a. The Falls Church

The Falls Church was founded in or around 1732 when the vestry of Truro Parish made plans to establish a church, engaged a minister to preach, and entered into a contract to construct the church building. (DX-FALLS-0060; 2008-TECEDV-066.) The Falls Church was one of two congregations in Truro Parish, according to the testimony of the Diocese's expert witness, Professor Edward Bond. (Tr. 925) In 1746, John Trammole conveyed a two-acre parcel to the Vestry of Truro Parish for a churchyard, upon which the original sanctuary was built. (DX-FALLS-0002; DX-FALLS-0060.) In 1765, the colonial legislature divided Truro Parish into Fairfax Parish and Truro Parish, and the two-acre Trammole property became part of the new Fairfax Parish. *See* 76 Va.

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[46] The Court counts 41 deeds at issue, as does TEC and the Diocese. CANA, however, counts 42 deeds at issue.

Cir. at 987.[47] Construction of a brick church on the two-acre parcel was completed in 1769. (DX-FALLS-0060) Thus, The Falls Church came into existence prior to the creation of TEC in 1789. Similarly, The Falls Church came into existence prior to the creation of the Diocese; indeed, The Falls Church was one of the congregations that founded the Diocese. (Tr. 1109.)[48]

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[47] On December 19, 2008, this Court issued a letter opinion resolving a number of remaining issues in the §57-9 litigation. One of those issues was TEC's and the Diocese's claim that the true legal successor in connection with the Trammole two-acre parcel was not The Falls Church but, rather, Christ Church, Alexandria. The Court rejected this claim, holding that the vestry of The Falls Church was the legal successor of the vestry of Truro Parish as to the two-acre parcel, and holding, therefore, that the two-acre parcel was subject to The Falls Church's §57-9(A) petition. At '1139 of the CANA Brief #1B, CANA notes: "This Court has already concluded [in its December 19, 2008 Letter Opinion] that plaintiffs, the Diocese of Virginia, and The Episcopal Church have acknowledged and admitted that defendant The Falls Church, and no other entity, is the owner of this two-acre parcel." The purpose of this note is to make it clear that, in citing these admissions in connection with the §57-9(A) litigation, the Court was neither judging their relevance in connection with the instant litigation or suggesting that either the Diocese or TEC had conceded the ultimate issue now before the Court as to whether they hold a proprietary interest in the property in question. Simply put, the Court referenced the Diocese's and TEC' s admissions as evidence rebutting their claim that the two-acre parcel should not be subject to The Falls Church's §57-9(A) petition because the property was actually owned by Christ Church, Alexandria.

[48] According to a grant application prepared by TFC in December 1983, the Rev. David Griffith, who was chosen as rector of Fairfax Parish (Christ Church, Alexandria and The Falls Church) in 1779, "was, by 1783, one of the leaders in the effort to transform the Anglican parishes in Virginia into a new diocese and to initiate a Protestant Episcopal Church in the United

By 1798, The Falls Church was no longer functioning as an Episcopal congregation. (Tr. 929). *(See also* CANA Brief #1B at 12-13, 58-63.) From 1819 forward, there is evidence of a functioning congregation at The Falls Church that sought to participate in activities of the Diocese. *Id.* at ¶¶64, 68. In 1836, The Falls Church petitioned the Diocesan convention, which admitted The Falls Church "as a separate and distinct church," pursuant to Diocesan Canon XII, enacted in 1815. 76 Va. Cir. at 988. (footnote and citation omitted.) The Falls Church's first parochial report was printed in the Journal of the Annual Council of the Diocese in 1837. (PX-COM-073-014.) From 1837 to 1861, The Falls Church had an organized congregation. With the coming of the Civil War, the church suffered substantial disruption and building damage. (DX-FALLS0060.) According to a history written by Senior Warden Charles A. Stewart that was completed in 1941, *see* PX-FALLS-053, "[t]he old building ... was restored [by the Federal government] within twelve months after the war closed and turned over to the Bishop in February, 1866." (PX-FALLS-053-195, -205.) The church was formally reorganized and a vestry was elected on November 27, 1873. (DX-FALLS-060-064; DX-FALLS-201-002; PX-FALLS-044-045.)

States of America as the successor to the Church of England in the new nation, independent of governmental establishment. On Easter Monday, 1785, the Fairfax parish vestry, meeting at The Falls Church, declared itself conformants to the 'Doctrine, Discipline and Worship of the Protestant Episcopal Church.' Since then The Falls Church has been a church of the Protestant Episcopal Church in the United States of America, the Diocese of Virginia." *See* Restoration of the Falls Church (DX-FALLS-068-015-016.)

There are eleven deeds in connection with The Falls Church:

The first deed is dated March 20, 1746, and it concerns the two-acre Trammole parcel that was conveyed to "the vestry of the said parish of Truro in Fairfax county." (DX-FALLS-002.) This was in exchange for 50 shillings paid by the Vestry. *Id.* This was the parcel upon which the original church building and vestry house of The Falls Church was built in the 18th Century.

The second deed is dated December 16, 1852 and is to "Trustees of the Episcopal Church, known and designated as the 'Falls Church' in Fairfax County, of the County of Fairfax in the State of Virginia." (DX-Falls-003, 003A.)

The third deed is dated October 1, 1918 is to "Trustees for the Falls Church Episcopal Church." (DX-FALLS-004.)

The fourth deed is dated October 29, 1953 and is to "Trustees of The Falls Church." (DX-FALLS-005.) This deed concerns the rectory property at 1008 Broadmont Terrace in Falls Church. (Tr. 2441.)

The fifth deed is dated February 27, 1956 and is to "Trustees of The Falls Church, Falls Church, Virginia." (DX-FALLS-006.)

The sixth deed is dated September 15, 1956 and is to "Trustees of THE FALLS CHURCH, Falls Church, Virginia." (DX-FALLS-007.)

The seventh deed is dated August 30, 1963 and is to "Trustees of THE FALLS CHURCH (Episcopal)." (DX-FALLS-008.)

The eighth deed is dated December 15, 1986 and is to "THE TRUSTEES OF THE FALLS CHURCH (EPISCOPAL)." (DX-FALLS-009.)

The ninth deed is dated October 31, 1996 and is to "THE TRUSTEES OF THE FALLS CHURCH (EPISCOPAL)." (DX-FALLS-010.)

The tenth deed is dated January 3, 2000 and is to "TRUSTEES, of The Falls Church (Episcopal)." The Congregation paid $1.65 million for this property. (DXFALLS-011.)

The eleventh deed is dated December 1, 2005 and is to "TRUSTEES OF THE FALLS CHURCH (EPISCOPAL), a Parish Church of the Protestant Episcopal Church in the Diocese of Virginia." (DX-FALLS-012.)

b. St. Paul's Church

There are five deeds at issue in connection with St. Paul's, not including a lost deed from 1830, which led to the appointment of a special commissioner in 1993 to convey the 1830 property to the trustees of the church, which is further described below.

The first deed is dated January 18, 1900, and it is to certain named "trustees, to be held as a Rectory for the use and benefit of St. Paul's P.E. Church, Haymarket, Virginia" (DSTP-297-04320, DSTP-297A-04321A.) Later in the same deed, the church is referred to as "St. Paul's Protestant E. Church of Haymarket, Va." By this deed, St. Paul's purchased for $525 a parcel on which a frame house originally used as a Rectory was built. (DSTP Exs. 297, 297A.) In 1926, the vestry of St. Paul's adopted a resolution authorizing it to borrow $2,000 to fund repairs to the Rectory. (DSTP Ex. 9-00671.) And in 1975, the Ves-

try replaced the Rectory roof. (DSTP Ex. 12-01406.) The building is now used for offices and meetings. (Tr. 1807.)

The second deed is dated April 21, 1904, and it is to certain named ·trustees of St. Paul's Episcopal Church at Haymarket, Va." (DSTP-293, 293A.) In consideration of support given the grantors by the St. Paul's women's auxiliaries for "a number of years" and $5, the grantors conveyed to the church certain property with a frame house. *Id.* The property is used as the Parish Hall and also houses the St. Paul's School. (Tr. 1808-1809.)

The third deed is dated July 28, 1993, and it is to "Trustees of St. Paul's Episcopal Church of Haymarket, Virginia." (DSTP 294.) This deed concerns the historic church, which was built originally in 1801 as a district courthouse. (PXSTPAUL 596.) According to St. Paul's 1996 parish profile, the church building "was deeded to the Episcopal church in 1830 and became St. Paul's three years later." (PX-STPAUL 108.) (The deed itself is lost, according to a petition filed by "trustees of the religious congregation of St. Paul's Episcopal Church" under Virginia Code §57-17, which allows conveyances where there is "no deed of record," reciting possession since 1830.) Diocesan Bishop William Meade consecrated the building in 1834 as St. Paul's Episcopal Church. (PX-COM 071.) Except for a period during the Civil War, it has been used ever since as an Episcopal Church. (PX-STPAUL-005, 596; Tr. 984-85.) Over the years, the Congregation of St. Paul's expended various sums of money on remodeling and repairs. *See* CANA Brief #1B at 42-3, ¶¶242-47.) Much of the construction work was performed by members of the congregation. *Id.* In July, 1993, St. Paul's trustees sought

the appointment of a special commissioner authorized to convey to them the historic church parcel on the grounds that St. Paul's had been in continuous and undisputed possession of the parcel since the 1830's. *Id.* That conveyance was accomplished by the deed dated July 28, 1993.

The fourth deed is dated February 19, 1998, and it is to certain named "Trustees of St. Paul's Episcopal Church of Haymarket, Virginia." The deed concerns a vacant parcel of land behind the original Rectory, for which St. Paul's paid $50,000. (DSTP Ex. 295.)

The fifth deed is dated September 22, 1999, and it is to certain named "Trustees of St. Paul's Episcopal Church of Haymarket, Virginia." (DSTP-296.) St. Paul's paid $209,900 for an improved parcel containing a frame house named the Meade House after one of the 19th century residents of the house. *(Id.;* Tr. 1810.) Meade House is now rented to a third party not associated with St. Paul's. (Tr. 1810.)

c. Truro Church

Truro Church was founded in 1843 by Rev. Richard Templeton Brown, who was then the Rector of The Falls Church. (CANA Brief #1B at 55, 11318.) It was previously known as Zion Protestant Episcopal Church but the name was changed by the congregation and vestry to Truro Church in 1934. *Id.* at fn. 15. According to CANA, the congregation disbanded during the Civil War but partially re-formed as early as November 1866, when initial trustees were appointed. (CANA Brief #2 at 56, 11325.) The Congregation of Zion Church erected a frame building around 1872, and the congregation has been in continued existence since then. *Id.* at 1111327-28.

The 1872 structure was used by the congregation of Zion Church up through early 1934, (PX-TRU-0187-001.) when the "historic chapel" was completed. (DX-TRU-146.0050.)

There are eleven deeds in connection with Truro:[49]

First, there is a deed (called the "Rumsey Deed") dated December 3, 1874,[50] to "Trustees for Zion Protestant Episcopal Church ... To have & to hold ... forever but upon the following purposes, uses, trusts & conditions & none other — that is to say, for the use of the members & congregation of the Protestant Episcopal Church of the Diocese of Va. worshipping & to worship in the building on said lot known as & called 'Zion Church,' subject to the Constitution, canons & regulations of the Protestant Episcopal Church

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[49] The Court does not discuss here the two Instruments of Donation that Truro executed in 1934 and 1974. (PX-TRU-003-001; PX-TRU-004-001.) These instruments are associated with the consecration of Truro's "Historic Chapel" (1934) and the consecration of Truro's Main Sanctuary (1974). *(Id.; see also* PX-TRU-369.) TEC and the Diocese argue that they are valid and enforceable but, even if not, "they show that Truro accepted that its property must be used for the mission and ministry of the Episcopal Church and the Diocese" and "strongly support the Diocese's claims of proprietary and contractual rights." (Diocese Brief #1 at 110-12.) The CANA Congregations argue that "such documents are literally part of TEC's liturgy and have only symbolic significance" and that they are not "legally cognizable." (CANA Brief #2 at 56-61.) Because neither TEC nor the Diocese assert that they were recorded as deeds, they are not further discussed in this section; however, they are discussed below in the "Course of Dealings" section of this opinion.

[50] No recorded deed was introduced into evidence for any parcel of property held by the Trustees of Zion Church prior to 1874. (CANA Brief #1B at 55, ¶321.)

of the Diocese of Va." (DXTRU001.)[51] The property conveyed by the 1874 deed is a one-half acre parcel where the "historic chapel" now sits. (Tr. 1637.) With the exception of a small grant from a Diocesan fund toward the construction of the 1872 structure, nearly all costs of improvements to the real property of Truro were funded by the congregation. (CANA Brief #1B at 66,- ¶¶406-08.)

Second, there is a deed (called the "Simpson Deed") dated December 1, 1882 to "trustees of Zion Protestant Episcopal Church ... In trust nevertheless to be held by [the trustees] for the sole use and benefit of the said Zion Protestant Episcopal Church, with power in said trustees, with consent of the vestry of said church, to charge, encumber, sell and convey said property." (DX-TRU002, TRU002a.) This deed concerns a seven acre parcel known as the "Simpson Property." The structures that currently sit on this parcel are the Main Sanctuary[52] and the Gunnell House. (CANA Brief #2 at 59, ¶338.) According to CANA, the Main Sanctuary was not completed until

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[51] This deed purports to be a replacement deed from William T. Rumsey, but no prior deed is recorded. *Id.* at ¶333.

[52] The Main Sanctuary was completed in 1959. In order to finance construction of the Main Sanctuary, the Trustees filed a petition in Circuit Court in November 1957 seeking to encumber property in the amount of $250,000. Then-Circuit Court Judge Harry L. Carrico entered an order approving the petition upon finding that it was "the desire of the members of the congregation" to encumber the property. In December 1957, Truro Church requested permission of the Board of the Department of Christian Stewardship to borrow the funds necessary to build the new church building. The Board approved the request, noting that it was approving the request to incur the debut "for the specific purpose of erecting a church on property now owned by that church." (CANA Brief #1B at 69-70, ¶¶431-42.)

1959, but the Gunnell House was built in 1835. *Id.* at ¶339.[53]

Third, there is a deed (called the "Kirkpatrick Deed") dated May 19, 1952 to "Trustees of Truro Episcopal Church." (DX-TRU006.) The Parish Hall, constructed in 1952 with congregational funds and a loan, is partially on this property and partially on the Rumsey deed property conveyed in 1874. (CANA Brief #1B at 68-9, ¶¶424-30.)

Fourth, there is a deed dated July 3, 1956 to "Trustees for Truro Episcopal Church." (DX-TRU007.) According to CANA, this is where the education building currently sits. (CANA Brief #2 at 62, ¶364.) CANA acknowledges that there is evidence that Truro Church sought permission from the Diocese to encumber property for the 1965 loan, but notes that no evidence was submitted regarding any approval by the Diocese. (CANA Brief #1B at 71, fn. 27.)

Fifth, there is a deed dated January 4, 1982 to "TRUSTEES for TRURO EPISCOPAL CHURCH." (DX-TRU008.) This property currently serves as a parking lot. (Tr. 1657.)

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[53] In 1908, 1913 and 1921, portions of the original seven acre parcel were sold to John W. Rust, pursuant to petitions filed in the Circuit Court. (CANA Brief #2 at ¶¶341- 42.) CANA notes in its argument that neither the Diocese nor TEC joined in the petition, and no evidence was introduced that either was consulted about the sale, nor about a sale of property in 1939, and another sale of property in 1960. *Id.* at ¶¶343-56. In 1960 and 2002, there were other sales of property, again pursuant to petition, and CANA notes that neither the Diocese nor TEC joined in the petition. *Id.* at ¶¶365-68, 396-99.

Sixth, there is a deed dated March 15, 1987 to "Trustees of Truro Episcopal Church." (DX-TRU011.) This deed concerned the International Christian Ministry Building, which Truro purchased for $1.4 million. CANA notes that neither the Diocese nor TEC were parties to the contract to purchase the building. (CANA Brief #1B at page 63, ¶380.) The property is located across the street from Truro's main campus and is used as an office building. *Id.* at ¶381.

Seventh, there is a deed dated April 26, 1991 to "Trustees for TRURO EPISCOPAL CHURCH, FAIRFAX VA." The deed provided "[Ole principal dwelling house on the Property shall be used and occupied as a rectory or dwelling for members of the clergy of Truro Episcopal Church." This deed retained a life estate for the grantor, which life estate was conveyed in the deed dated July 30, 1992. (DX-TRU012.) The deed also states that: "In the event that within 35 years from the date of this deed Truro Church shall cause or allow the dwelling house to be demolished or shall cease to use the principal dwelling house as a rectory or residence for the benefit of clergy of Truro Church, title to the property shall revert to the estate of the Grantor and shall be distributed in accordance with her last will and testament." *Id.*

Eighth, there is a deed dated March 2, 1992 to "TRUSTEES for Truro Episcopal Church." (DX-TRU009.) CANA notes that the deed was based on a contract of sale to sell a parcel of property to Truro Church that was executed by Truro's senior warden and that neither the Diocese nor TEC was a party to the contract. CANA Brief #1B at 64, ¶¶387-90.)

Ninth, there is a deed dated July 30, 1992, to "Trustees for TRURO EPISCOPAL CHURCH, FAIRFAX, VA., conveying the life estate retained in the April 26, 1991 deed. (DX-TRU013.)

Tenth, there is a deed dated May 31, 2001 to "TRUSTEES FOR TRURO EPISCOPAL CHURCH." (DX-TRU010.) The purchase price for the property was $1.25 million, financed by a promissory note executed by Truro's Rector and Senior Warden. CANA notes that neither the Diocese nor TEC was an obligor under the promissory note and did not contribute money toward the purchase. CANA Brief #1B at 65, ¶¶392-95.

Eleventh, there is a deed dated December 13, 2006 consisting of a Quitclaim Deed of Gift from Trustees of Christ the Redeemer Episcopal Church to "Truro Church" (PX-TRU-001-040), replaced by a December 21, 2006 deed of correction to "TRURO CHURCH by its trustees." (DX-TRU015.)[54]

d. St. Stephen's Church

There are eight deeds in connection with St. Stephen's:

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[54] This property was the subject of footnote 12 of the Virginia Supreme Court's decision in *Protestant Episcopal Church in Diocese of Virginia v. Truro Church,* 280 Va. 6, which reads in part as follows: "The Diocese has also assigned error to the circuit courts' determination that it lacked jurisdiction to reconsider an order entered in a prior proceeding approving the transfer of property from Christ Redeemer Church to Truro Church. While we agree with the circuit court that the Diocese was attempting to bring an improper collateral attack on a final judgment, it is nonetheless evident that as the property is held for the benefit of Truro Church, the ultimate determination of ownership and control of that property will be resolved in the proceedings on the declaratory judgment actions."

The first deed is dated November 20, 1874, and followed the appointment in October 1874 of nine individuals to serve as trustees of the Protestant Episcopal Church in Northumberland County. The deed is to certain named individuals as "trustees duly legalized and appointed by the Circuit Court," such property to be held:

> In trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal Church for the purpose of erecting a house for divine worship and such other houses as said congregation may need, And said church or house for divine worship when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church not inconsistent with the laws and constitution of Virginia....

(DSTS-005-031, 015-098-099.) St. Stephen's Church dates from this point in time, when "[a] renewed interest in an Episcopal Church for Northumberland prompted the purchase of land in 1874 for the purpose of 'erecting a house of divine worship," which initially was known as Emmanuel P.E. Church. (PXS SH-149-005; National Register of Historic Places nomination, DSTS Ex. 15.) The "house for divine worship" was built over a period of several years at a cost of about $1,100, funded largely by the congregation. (CANA Brief #1B at 87, ¶551.) On April 30, 1881, Bishop Francis M. Whittle consecrated the building as St. Stephen's Church. (PX-COM-118-047, -051; PX-SSH-002-026; Tr. 994-96.) Since completion in or about 1881, the original church building has been continuously used as a church. CANA Brief #1B at ¶553. Over time, St. Stephen's has expended vari-

ous sums of money to modify and repair the church and to build a new parish hall. *Id.* at ¶554-56. Other than $1,000 contributed by Bishop Peter Lee out of his Discretionary Fund, the costs of the parish hall, and renovations and repairs have been paid by the congregation and its supporters. *(Id.; see also* Tr. 3686.)

Unlike almost all of the other deeds before the Court, the 1874 deed contains additional and explicit language regarding the intended use of the deeded property. The CANA Congregation, in fact, filed a separate post-trial brief regarding the 1874 deed. In that brief, CANA argues as follows: (1) the language in question does not constitute an enforceable restrictive covenant; (2) if it does constitute a restrictive covenant, it has no continuing force because the purpose of the covenant has been substantially met; (3) if it does constitute a restrictive covenant, it has been nullified by inconsistent uses in the form of six conveyances out of the 1874 deed parcel; (4) in any event, neither TEC nor the Diocese has asked the Court to find the language to constitute a restrictive covenant.

In support of its argument that the quoted language above does not constitute a restrictive covenant, CANA asserts that the reference in the deed to the "Protestant Episcopal Church" is "manifestly language of identification only and, as such, cannot fairly be read to restrict the use of the property solely by those affiliated with a particular denomination." (St Stephen's Church Post-Trial Brief Re Its 1874 Deed at 7 (citations omitted).) Further, CANA argues that since a 1874 deed could only be a conveyance to a local congregation, and not to a denomination *(see Brooke v. Shacklett,* 54 Va. 301, and *Hoskinson v.*

Pusey, 73 Va. 428), the language's reference to "religious society and congregation" can only be a reference to the local church itself. (St. Stephen's Church Post-Trial Brief Re Its 1874 Deed at 7.) Thus, argues CANA, the language quoted above only obligated St. Stephen's to build a church and to use it in accordance with "the *congregation's* own governing rules." *Id.* at 8 (emphasis in original). In other words, argues CANA, "the language of the 1874 Deed cannot fairly be read to mean that the property must be used by a congregation attached to The Episcopal Church." *Id.* Finally, CANA argues that the quoted language is much less specific and explicit than that used in *Brooke, Hoskinson,* or *Finley v. Brent,* 87 Va. 103.

The Court disagrees. Even if the reference to "religious society or congregation" is a reference to the local church and not to the Diocese or the denomination, that local church is clearly identified as an *Episcopal* church and the language states that the church "shall be used and enjoyed by said religious society or congregation *according to the laws and canons of said church* not inconsistent with the laws and constitution of Virginia." (DSTS-005 (emphasis added).) In a hierarchical church, the "laws and canons" of a local church necessarily include the governing rules of the hierarchical church. Therefore, the Court rejects CANA's argument that the language in St. Stephen's 1874 deed is a "purely descriptive reference to the local congregation and with no direction that the property be used for the worship of members of a particular denomination." (St. Stephen's Church Post-Trial Brief Re Its 1874 Deed at 8-9, fn. 6.) Rather, the Court reads this deed as manifesting the intent by the grantor that the property be used for the worship of members of The Episcopal Church.

CANA also argues in the alternative, i.e., if the language is held to be enforceable it was satisfied when the church was completed, and in any event, the language has been "nullified" by various conveyances and easements granted over time. The Court finds neither of these arguments to be persuasive. In particular, the Court notes that the obligations under the deed were not completed when the church was completed. Rather, the language quoted above also required that the "house for divine worship when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church not inconsistent with the laws and constitution of Virginia." (DSTS-005-031, 015-098-099.) In short, the language of the deed contemplates both construction *and* use; and the specific use contemplated was by an *Episcopal* church subject to the "laws and canons" of the church.[55]

The second deed is dated August 27, 1957, and it is to "Trustees of Saint Stephens Parish of the Protestant Episcopal Church, Northumberland County, Virginia, for the use and benefit of Saint Stephens Protestant Episcopal Church of Heathsville, Virginia." (DSTS-006-033.) The deed was for a 2.5 acre parcel encompassing the church cemetery and a frame house. (DSTS Exs. 6, 53; Tr. 3677.) The property cost St. Stephen's $9,250. *Id.* Subsequently, St. Stephen's expended $12,977 to remodel the house so that it could be used as a parish

[55] The Diocese also makes the argument that at the time the deed in question was executed in 1874, TEC had adopted (in 1868 and 1871) its anti-alienation canon for consecrated property, which made clear that such property was protected from removal from the Church to another denomination. (TEC Brief #3 at 31.)

house. (DSTS Ex. 53-01010; Tr. 3677.) The project was funded with funds on hand, a $12,000 loan secured by the deed to the parcel, and a $3,500 contribution from the Diocese. (DSTS Ex. 53-01009-10; Tr. 3677.) The frame house is now used as the Thrift Shop. (Tr. 3676.)

The third deed is dated January 12, 1967, and it is to "Trustees of Saint Stephens Parish of the Protestant Episcopal Church of said county and state, for the use and benefit of Saint Stephens Protestant Episcopal Church of Heathsville, Virginia." (DSTS-007-040.) St. Stephen's purchased the property for $1,200 for the purpose of building a new rectory. (PX-SSH-17; DSTS Ex. 7; Tr. 3678.) St. Stephen's vestry authorized the church to borrow $15,000 from a bank to build the new rectory. (DSTS Ex. 90-01428.)

The fourth deed is dated April 14, 1967, and it is to -Trustees of Saint Stephens Parish of the Protestant Episcopal Church, Northumberland County, Virginia, for the use and benefit of Saint Stephens Protestant Episcopal Church of Heathsville, Virginia." (DSTS-008-042.)

The fifth deed is dated December 21, 1967, and it is to "Trustees of Saint Stephen's Parish of the Protestant Episcopal Churches of Northumberland County, Virginia." (DSTS-009-044.)

The sixth deed is dated October 18, 1972, and it is to "Trustees of St. Stephens Protestant Episcopal Church, Heathsville, Virginia." (DSTS-010-046.)

The seventh deed is dated April 1, 1996, and it is to "TRUSTEES OF ST. STEPHENS PARISH OF THE PROTESTANT EPISCOPAL CHURCH, P.O.

BOX 609, Heathsville, Virginia 22473." (DSTS-011-048.)[56]

The eighth deed is dated November 20, 1998, and it is to "Church Trustees of St. Stephen's Episcopal Church." (DSTS-012-053). St. Stephen's purchased the land for $40,000, which is used for overflow parking and other outdoor activities. According to CANA, there is no evidence that either TEC or the Diocese contributed to the acquisition of this parcel. (CANA Brief #1B at 89, ¶¶567-69 (citations omitted).

e. Church of the Apostles

There are three deeds at issue in connection with the Church of the Apostles:

The first deed is dated April 20, 1971 and is by and between the "Diocesan Missionary Society of Virginia (formerly known as Trustees of The Diocesan Missionary Society of Virginia, a Virginia Corporation)" and certain named "Trustees for The Church of the Apostles, Fairfax County, Virginia." The deed is signed by Bishop Samuel B. Chilton. (Apostles Ex. 033.0001.) The property involved is commonly called the "Pickett Road" property and had been acquired by the Diocese in 1958. (PX-APOST-0289-002.)

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[56] The CANA Congregations describe the 1967, 1972, and 1996 deeds as follows: "Between 1967 and 1996, St. Stephen's acquired four small parcels of property for the purpose of rounding out its existing land. In 1967, it acquired through two gifts two separate strips of land. In 1972, St. Stephen's acquired another small strip of land adjacent to its rectory parcel. In 1996, St. Stephen's acquired the fourth small parcel near the church parcel. Neither TEC nor DVA [Diocese of Virginia] contributed funds for the acquisition of any of these four small parcels." CANA Brief #1B at 86, ¶¶545-46 (citations omitted).)

The second deed is dated November 17, 1999, and it is to certain named "Trustees for Church of the Apostles (Episcopal)." The property involved is commonly called the "Spencer" property. (Apostles Ex. 034.0001.)

The third deed is dated May 8, 2001 and is to certain named "Trustees of the Church of the Apostles (Episcopal)." The property involved is commonly called the "Swart" property. (Apostles Ex. 035.0001.)

The background associated with these deeds is as follows:

Church of the Apostles was formed as a mission of the Diocese in 1968, "through planning and coordination between the Diocese and Truro Episcopal Church and after receiving the requisite approvals from the Diocese's Board of Missions and leadership of existing Episcopal churches in the area." (Diocese Brief #1 at 161.) Apostle's first service was held in a local elementary school in March 1968. *Id.*

On October 27, 1968, the congregation approved purchase of a parcel of land on Pickett Road in Fairfax, Virginia from the Diocese. (PX-APOST-0311.) Apostles paid the Diocese $11,983 for the property in June 1969. (Tr. 3067-3071; PX-APOST-0319A; PX-APOST-320.) Because the congregation had not achieved parish status, legal title remained in the Diocesan Missionary Society until Apostles was granted parish status at the 1970 Annual Council of the Diocese. The Diocesan Missionary Society transferred the parcel to Apostles' trustees by deed in April 1971, as described above.

This deed demonstrates how closely the Diocese and a mission church worked together to provide the land for construction of a church. First, the property

was owned by the Diocese well before the Church of the Apostles existed, even as a mission. Second, the Diocese held onto the property until Church of the Apostles was granted parish status at the Diocese's 1970 Annual Council and could name its own trustees.[57] Third, the property was conveyed by deed directly from the Diocesan Missionary Society to the Trustees of the Church of the Apostles, in a deed signed by the Bishop. While it is true that Church of the Apostles paid for the property, that does not undermine the clear record that the property was conveyed by the *Episcopal* Diocese to an *Episcopal* church for the purpose of providing a place upon which to build an *Episcopal* church sanctuary.

A worship space was built on the property in 1980. (Apostles Ex. 013.0032-34.) The construction was paid for by Apostles' membership. (Apostles Ex. 013.0032-27.) They also paid for an expansion to the sanctuary in 1988. (Tr. 3097.) Both the second and third deeds involve adjacent properties on Braddock Road, in Fairfax County. The properties were to be the site of a new church to replace the Pickett Road facility and were purchased without contribution of funds from TEC or the Diocese. (Tr. 3135, 3172.) Apostles were unable to sell the Pickett Road property (Apostles Ex. 144) nor to build a new church on

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[57] *See* this excerpt at page 162 of Diocese Brief #1:

> As Apostles recognized, and as the Diocese's Chancellor explicitly told Apostles, the appropriate time for a transfer to locally-appointed trustees was after achieving parish status. *See* PX-APOST-311-002 ("The phrase 'within the legal provisions of Cannon *[sic]* law' was used to authorize having legal title remain in the Dioceses Missionary Society *[sic]* until the Church of the Apostles can attain a status permitting us to name our own trustees.").

the Braddock Road properties. (Tr. 3175.) Apostles attempted unsuccessfully to sell some 20 acres of excess land on Braddock Road. (Apostles Exhibits 76, 148.)

f. St. Margaret's Church

There are two deeds at issue in connection with St. Margaret's Church:

The first deed is dated June 19, 1972 and is by and between "The Right Reverend Robert F. Gibson, Jr., Bishop of the Diocese of Virginia" and "Trustees of St. Margaret's Church, Dettingen Parish, Prince William County, Woodbridge, Virginia." (DSTM-042-00323-00328.) In addition to the land itself, the real estate conveyed included a church, parish house and rectory. The deed notes that the property conveyed upon which sits the church and parish house is the same property conveyed by deed from Glebe Properties, Inc., dated July 26, 1963, to Bishop Gibson (which deed appears in the exhibits as DSTM-005-00031-33) and that the property conveyed upon which sits the rectory is the same property conveyed by deed from "Marumsco Village, Incorporated," dated January 7, 1964, to Bishop Gibson.

The trustees agree in the deed to assume the balances due on two deeds of trust from Bishop Gibson: (1) in the original amount of $70,000, securing a note to the "Prince William Savings and Loan Association (now Perpetual Savings & Loan Association)," with a remaining balance of $51,306.21; and (2) in the original amount of $18,250, securing a note to the "Prince William Savings and Loan Association (now Perpetual Savings & Loan Association)," with a remaining balance of $15,011.87.

The deed also states the following:

> Section 3 of Canon IV of the Canons of the Protestant Episcopal Church in the Diocese of Virginia in effect at the time of the conveyance of the aforesaid property to the party of the first part continues in full force and effect as of the date of this conveyance and provides as follows:
>
> > Section 3. The Bishop, or the Ecclesiastical Authority, of the Diocese is hereby authorized to administer the affairs of the Diocese in connection with the establishment of churches under the provisions of the Canons, and as such shall have power to acquire by deed, devise, gift, purchase, or otherwise, any real property for use in the missionary work of the Diocese or for use as Diocesan headquarters or offices for the administration of the affairs of the Diocese. Property so acquired shall be held and transferred in accordance with the provisions of Section 57-16, Code of Virginia, 1950, as from time to time amended.",
>
> and the party of the first part is the Bishop of the Diocese as of the date of this conveyance.

(DSTM-042-327.)

The second deed is dated February 13, 2004, and it is to "ST. MARGARET'S EPISCOPAL CHURCH by its [named] Trustees."

The following points should be noted about St. Margaret's:

St. Margaret's grew out of the Diocese's "program for church planting" in the early 1960's. (PX-STMARG-1119-004.) "In September 1963, the Diocese inquired of the Woodbridge members of St. Mar-

tin's Episcopal Church in Triangle and Pohick Episcopal Church in Fairfax if there was interest in starting a new parish in Woodbridge. During the first week in October a small group met with [Suffragan] Bishop [Samuel] Chilton in a furniture store." *Id.*

On October 6, 1963, St. Margaret's held its first worship service in a middle school classroom. (DSTM Exs. 6,7; PX-STMARG-1119-0004; Tr. 3899:20-3900:1.) "The Venerable W. Leigh Ribble, Archdeacon of the Diocese....was conducting the Eucharist." (PX-STMARG-285-00L)

On January 28, 1965, St. Margaret's was admitted to the Diocese as a Mission (PX-COM Ex. 204-33; Tr. 3900:7-8) and on January 24, 1971, St. Margaret's was admitted to the Diocese as a church. (PX-COM Ex. 210-63; Tr. 3900:2-6.)

The first deed concerns what is called the - Church Hill Drive Property" upon which presently sits the church and related properties at issue. According to the CANA Congregations' brief, the property was initially owned by Ethel Wigglesworth, the grandmother of a St. Margaret's parishioner, who donated a 10 acre parcel of land for the construction of a church. -Because St. Margaret's was not at that point organized legally to receive real property, the transaction was structured so that Ms. Wigglesworth conveyed the land to Glebe Properties, Inc. a Diocese of Virginia corporation, which, on July 26, 1963, conveyed to the Bishop of the Diocese the 10-acre parcel now located at 13900 Church Hill Drive in Woodbridge." (CANA Brief #1B at 104, ¶656; DSTM Ex. 48.)

While the land was still owned by the Bishop, ground was broken for a sanctuary. (PX-STMARG-

1119-004.) Funds for construction of the sanctuary and related start-up expenses were arranged by the Diocesan Missionary Society, which in January and February 1964, borrowed from Perpetual Savings and Loan $18,250 and $70,000, respectively. (DSTM Ex. 390-00263; TR. 3901:12-21.) (These are the same loans referenced in the deed described above.) Additional start-up funds were borrowed from the Diocesan Missionary Society, with promissory notes dated September 16, 1964 ($28,450), December 4, 1964 ($4,000), and April 10, 1968 ($17,200). On November 12, 1968, St. Margaret's signed a consolidated promissory note. (DSTM Ex. 12.) Between 1974 and 1975, St. Margaret's did additional construction on the property, which was funded with cash and an additional $20,000 loan from the Diocesan Missionary Society. (DSTM Ex. 26.) By 1998, St. Margaret's had paid off all six of the DMS loans. (DSTM Ex. 125, 38, 371-02201; Tr. 3930:16-20.)

In 1998 or 1999, St. Margaret's built a new parish hall, which was paid for by the congregation and by a loan from a bank, secured by a mortgage on the Church Hill Drive parcel. The mortgage has been paid off. (DSTM Ex. 520, 336, 48-00491; Tr. 3904, 3905:2-9, 3930:21-3931:9.)

The second deed involves what is called the "Cross Lane Property." This is a 40-acre parcel on the Prince William Parkway, upon which St. Margaret's plans to relocate the church. St. Margaret's closed on the property on February 13, 2004 and paid $500,000 plus $13,000 in closing costs, for which the "congregation paid cash." (CANA Brief #1B at 102-07, ¶¶667-70.) St. Margaret's gave the Diocese first right of refusal regarding the sale of the original Church Hill Drive property, where the present

church is located. After St. Margaret's received an offer to purchase the Church Hill Drive property from a builder (which was contingent upon securing rezoning of the property within 12 months), St. Margaret's communicated the offer to the Diocese so that the Diocese could decide whether to exercise its first right of refusal, which it declined to exercise. *Id.* at ¶¶·673-75. After the builder failed to meet the zoning contingency, St. Margaret's completed the rezoning approval process itself. *Id.* at 676. St. Margaret's expended considerable sums of money in obtaining the rezoning of the Church Hill Drive Property and obtaining site planning approval for the Cross Lane Property. The site planning approval process for the new property has cost St. Margaret's over one million dollars and was financed by St. Margaret's with cash on hand and a construction loan. *Id.* at 677. Including the purchase price of the Cross Lane property, the total cost expended on the effort to move St. Margaret's has been "about $2.7 million." *Id.* at 679.

This first deed is particularly significant because it demonstrates the pervasive involvement of the Diocese in the acquisition of church property and in support of its development. First the Diocese was actively involved in the formation of the church in 1963. Second, the Diocese took ownership of the donated property and held it for almost ten years until it could be conveyed to the church itself. Third, the church was constructed while the property remained in the possession of the Diocese. Fourth, it was the Diocesan Bishop who actually conveyed the property to St Margaret's. Fifth, the Diocesan Missionary Society provided substantial loan support *on six different occasions* that permitted both the construction of the church's core facilities and helped St Margaret's

with its start-up costs. Sixth, the 1972 deed itself quotes from one of the Diocesan canons, authorizing the Bishop "to acquire by deed, devise, gift, purchase, or otherwise, any real property for use in the missionary work of the Diocese...," which both demonstrates the authority of the canons, and the canonical requirement that property acquired be used "in the missionary work of the Diocese." Seventh, other official documents demonstrate St. Margaret's own perception over time that the Diocese had an ownership interest in the church.[58]

Against the above, the CANA Congregations make a number of points: First, it was St. Margaret's own parishioners who provided the labor in some of the construction done at the church. (CANA Brief #1B at 105,1-664.) Second, loans from the Diocesan Missionary Society were at market rates. Third, all

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[58] Specifically, there is a Deed of Easement dated March 14, 1983, which refers collectively to St. Margaret's Rector, Trustees, and Senior Warden and the Diocesan Bishop as "St. Margaret's Episcopal Church" and "Grantors" and states that the "Grantors warrant that they [we]re the true and lawful owners of the premises described herein." (PX-STMARG-546-001, 003.) In addition, notes the Diocese, there are other official records of St. Margaret's that recognize the Diocese's ownership interest in the property at issue, specifically three documents: (1) an application for waiver of provisions of County Design and Construction Standards Manual dated May 1, 1987, which describes "Owner's Name" as "Episcopal Diocese of Virginia, Department of Missions/Trustees of St. Margaret's Episcopal Church and the owner's address as that of Diocesan headquarters," (PX-STMARG-583-001); (2) a 1988 special use permit listing "Owner" as "Episcopal Diocese of Virginia — Department of Missions," (PXSTMARG-595); and (3) a church profile prepared in or around 2003, which states in part: "Three trustees hold title to St. Margaret's property in the name of the diocese." (PXSTMARG-670-013, 015.)

loans were repaid. Fourth, the deeds contain no explicit restrictive covenant requiring that the property be used for Episcopal Church purposes. Fourth, since the property was conveyed to St. Margaret's trustees in 1972, they have always held the property for the benefit of St. Margaret's. Fifth, St. Margaret's own resources were used to fund the acquisition of the second parcel and also funded the land development and improvements to both parcels. Finally, CANA notes that neither the congregation nor vestry of St. Margaret's ever voted to convey a property, trust, or contract interest to TEC or the Diocese.

The Court is not persuaded that any of these points undermine the clear indication that the deeded properties were conveyed with the clear intent that the properties be used for *Episcopal* church purposes.

g. Church of the Epiphany

There is one deed at issue in connection with Church of the Epiphany. On August 25, 1987, Glebe Properties, Inc., deeded the property to "Trustees of the Church of the Epiphany (Episcopal)." (DCOE Ex. 497-2643.)

The following points should be noted about this deed:

First, according to the Diocese, Glebe Properties, Inc., was a corporation of "certain prominent Northern Virginia Episcopalians,"[59] who decided to give Church of the Epiphany a 5.2 acre site in a large

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[59] The CANA Congregations describe Glebe Properties, Inc. as a Diocese of Virginia corporation. (CANA Brief #1B at page 104, ¶656.)

residential community for a new church building. *See* Diocese Brief #1 at Page 176.)

Second, the property was not sold to the Church at fair market value. According to CANA, it had an assessed value of $153,900, *(see* CANA Brief #1B at 132, ¶851) but was given to the church "without cost to us now with the agreed understanding that our Parish would become firm financial supporters of the Diocesan efforts to secure additional land, and develop new congregations." (DCOE Ex. 520.) Thus, the land was acquired "at no cost to the parish." (PX-EPIPH-039-003.)

Third, once the parcel was conveyed to it, the church borrowed $730,000 from George Mason Bank. Significantly, the church also sought and received financial assistance from the Diocese, specifically a $500,000 loan from the Diocesan Missionary Society to fund construction of a first phase of its new church and related expenses. (DCOE Ex. 483-02568, -02570; Tr. 2080; *see also* CANA Brief #1B at 132, ¶852.) The construction loan from the Diocesan Missionary Society was secured by a mortgage and fully repaid. (DCOE Ex. 483-02568,-02570.) Ground-breaking occurred on March 27, 1988 *(see* DCOE Ex. 458-2296) and Bishop Lee visited the building site at his December 1988 Episcopal visit. *(See* DCOE Ex. 61-398.) Bishop Lee then returned to dedicate and consecrate the church on April 23, 1989. (PX-EPIPH Ex. 3-003; PX-EPIPH Ex. 86.)

In summary then, valuable property was deeded to the Church of the Epiphany — which was described in the deed as an Episcopal church — at no cost to the church with the explicit understanding that in return the Church would financially support

the Diocese's efforts in the future to obtain additional land and develop new Episcopal congregations. After acquisition of the land, the Diocesan Missionary Society loaned the church one-half million dollars to partially fund the construction. Bishop Lee visited the site and then, after the church construction was complete, he dedicated and consecrated the church.

2. General Discussion Regarding the Deeds

There are several general points the Court should make with regard to the deeds at issue in this case:

a. The CANA Congregations assert generally that the deeds before the Court are to the congregations and that they are the "legal title holders." (CANA Brief #2 at 19.) The Court does not agree. With the exception of the earliest deed before the Court, which predates the existence of TEC or the Diocese, every deed is to trustees of the church itself. This is significant because CANA uses some very charged language, such as "forfeiture," *(see* CANA Brief #2 at 16) to describe the effect of ordering the conveyance of the properties to the Diocese. It would only be a "forfeiture" if the CANA Congregations were the legal owners of the property. It is true, of course, that the CANA Congregations now *control* the properties but *control* does not equal *ownership,* and the CANA Congregations do not own the properties and, hence, the issue before the Court is not whether to "forfeit" them.[60]

[60] As TEC and the Diocese put it: "[The CANA Congregations] are *not* the 'entity' — the local Episcopal church to whose trustees the property was deeded. They are a current local majority of individuals who claim the right to take the local church entity

b. The vast majority of deeds before the Court make explicit reference to the Episcopal character of the church. Of the 41 deeds, this Court counts 33 that refer explicitly to the churches being *Episcopal* churches or make other reference to their *Episcopal* character. (And even as to those deeds that do not use the word Episcopal, the deeds were to trustees of "a local church that was at the time of the conveyance indisputably an Episcopal church." (TEC Brief #3 at 23.)) The CANA Congregations argue, however, that the reference in a deed to the *Episcopal* character of a church merely serves to identify the church and can be attributed no deeper meaning or significance.[61] The Court disagrees with this "Yellow Pages" argument[62] When a deed refers to the *Episcopal*

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and its property out of the Church and the Diocese for use in another denomination." TEC/DOV Brief #2 at 22.)

[61] *See,* e.g., the CANA Congregations' characterization of language in the 1874 St. Stephen's Church deed. The deed reads in part: ".... In trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal Church." (DSTS Exs. 5, 15-00098-00099.) In St. Stephen's Church PostTrial Brief Re Its 1874 Deed at 9, fn. 6, the CANA Congregation asserts that the language identifying the congregation as the "Protestant Episcopal Church" is a "purely descriptive reference to the local congregation and with no direction that the property be used for the worship of members of a particular denomination." *See also* this argument from The Falls Church's Opening Post-Trial Brief Regarding The Falls Church Endowment Fund, at 6: ".... the Articles and Bylaws [of the Endowment Fund] demonstrate that these terms [Episcopal Church and Protestant Episcopal Church] are not a restriction but rather a *description;* that is, they identify the legal entity that was using the name 'The Falls Church' in 1976." (emphasis in original).

[62] CANA Brief #1A at 37: "[I]t merits emphasis that deed language identifying a congregation as 'Episcopal' or 'Lutheran' or 'Catholic' serves to distinguish such congregations from others

character of a church, that is not merely a reference to the location of the church, or its proper name, but rather an indication "that the designated *cestui que trust* in each deed was a unit or component of The Protestant Episcopal Church in the United States of America within the then existing diocese." *Buhrman,* 5 Va. Cir. at 503. This Court agrees, therefore, with Judge Stephenson that "a reasonable interpretation of these deeds leads inescapably to the conclusion that the trustees cannot hold title to the subject property for persons or groups who are withdrawn from and not under the authority of The Episcopal Church." *Id.*[63]

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bearing similar names. One need only thumb through the Yellow Pages to see that churches of different denominations often bear the same name (e.g., "St. Paul's Church")."

[63] CANA also argues that *Davis v. Mayo,* 82 Va. 97 (1885), "disposes" of the argument that there is some significance in the use of the word *Episcopal* in the deeds. (CANA Brief #1A at 35.) The Court disagrees. *Davis* involved a completely different situation, not involving religious entities, nor a denominational reference in a deed. CANA relies upon this sentence from *Davis* at 105: "The property was not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the orders and regulations of the Grand Division, or any other body; and, consequently, they were left free to change the name of their division whenever they might see fit to do so." As TEC and the Diocese note, that language might be applicable if the issue was the 1934 change from Zion to Truro. *(see* TEC/DOV Brief #2, at 21.) Here, the CANA Congregations, by dropping *Episcopal* from their name, by disaffiliating from the Episcopal denomination and affiliating with CANA, did something of a wholly different character than simply change names. In other words, for the very same reason that a church affiliating with a new denomination would drop the name of its old denomination, the presence of that old denomination in the name of the church as it appears in the deeds *is* significant.

c. As to several of the deeds, it is significant that the grantor of the deed is itself the Diocese or the Diocesan Missionary Society (Church of the Apostles 1971 deed and St. Margaret's 1972 deed) or from an entity closely associated with the Diocese (Church of *Epiphany's* 1987 deed from Glebe Properties.) And there are other compelling and explicit indications in several of the deeds as to their intended purpose.

For example, in the Truro 1843 Rumsey Deed, the Deed states:

> Trustees for Zion Protestant Episcopal Church.... To have & to hold....forever but upon the following purposes, uses, trusts & conditions & none other — that is to say, for the use of the members & congregation of the Protestant Episcopal Church of the Diocese of Va. worshipping & to worship in the building on said lot known as & called "Zion Church," subject to the Constitution, canons & regulations of the Protestant Episcopal Church of the Diocese of Va. (DX-TRU001.)

A second example is the 1874 St. Stephen's Deed, which states:

> In trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal Church for the purpose of erecting a house for divine worship and such other houses as said congregation may need, and said church or house for divine worship when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church not in-

consistent with the laws and constitution of Virginia. (DSTS-005-031, 015-098-099.)

d. CANA argues that it is significant that TEC and the Diocese did not require the Deeds at issue in this case to include, or to be modified to include, reversionary clauses or restrictive covenants to ensure their perpetual use as Episcopal churches, as opposed to churches of a different denomination or for some other purpose. *(See, e.g.,* CANA Brief #1 at 25.)[64] But the fact that TEC and the Diocese could have done more (including titling property in the name of the Bishop (CANA Brief #1A at 24)) does not mean that what was actually done regarding the deeds was inadequate. These deeds explicitly deed property to trustees on behalf of constituent members of the *Episcopal* denomination. The CANA Congregations are not constituent members of the *Episcopal* denomination; by contrast, one of the Plaintiffs in this case is the *Episcopal* denomination itself.[65]

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[64] But, as TEC and the Diocese note, "silence is hardly a one-way proposition — the property also was not conveyed, for example, to 'the congregation of Truro Church, regardless of what denomination it might affiliate with.' TEC/DOV Brief #2 at 21, fn. 19.)

[65] Moreover, it certainly would not be credible to argue that TEC's or the Diocese's failure to insist on reversionary clauses, or similar provisions, is somehow a reflection of their intent. For that intent is plainly demonstrated by the adoption of the Dennis Canon, and subsequently of Diocesan Canon 15.1, almost immediately after the Supreme Court stated in *Jones* that "the constitution of the general church can be made to recite an express trust in favor of the denominational church" as a means to insure that "the faction loyal to the hierarchical church will retain the church property." *Jones,* 443 U.S. at 606. That this Court now concludes that these Canons were unsuccessful in achieving their stated objective, due to the invalidity of denominational trusts in the Commonwealth, does not diminish this clear indication of TEC's and the Diocese's intentions.

The fact that TEC and the Diocese did not do what Methodists do (CANA Brief #1A at 29), or what Presbyterians do (CANA Brief #1A, at 30), or what Lutherans do (CANA Brief #1A at 31), or what Baptists do (CANA Brief #1A at Page 31), does not diminish the significance of the fact that these deeds *explicitly* conveyed property to constituent members of the *Episcopal* denomination.

e. The CANA Congregations similarly note that none of the deeds at issue contain an express trust on behalf of TEC or the Diocese. The Court does not find this to be significant, given the undisputed fact that at least until 1993, denominational trusts were deemed invalid. *See, e.g.,* the Virginia Supreme Court's statement in *Green* that "[t]he addition of a trust clause to the deed would have provided the A.M.E. Zion Church with no additional or further interest in the Lee Chapel property," in part because the property was "already held by the trustees for that church and no other," and in part because express trusts for supercongregational churches are invalid under Virginia law, as are implied trusts. *Green,* 221 Va. at 554-55. And the fact that this Court has now held that denominational trusts continue to be invalid in the Commonwealth certainly provides additional support for the proposition that requiring a deed to reflect an express trust for TEC or the Diocese would have been a hollow and unavailing exercise in the Commonwealth.

f. TEC argues that, in construing a deed, the Court first "looks to see if the instrument on its face discloses what the grantor intended regarding the conveyed property in the particular circumstances presented," and cites *Camp v. Camp,* 220 Va. 595, 598 (1979) for the proposition that "[i]f the language

[of the deed] is explicit and the intention is thereby free from doubt, such intention is controlling." (TEC Brief #3 at 28.) If, however, the deeds do not contain such express language, the Court looks at "the surrounding circumstances" to surmise the grantor's intentions. *See, e.g., Schultz v. Carter,* 153 Va. 730 (1930). TEC then argues that none of the deeds contain *express* language addressing the present situation. In other words, none of the deeds *explicitly* address the grantor's intentions in the event a congregation votes to renounce its affiliation with TEC and affiliate with a different denomination.

In an effort to evaluate the "surrounding circumstances" that existed at the time these deeds were executed, TEC analyzed the 41 deeds in chronological order, breaking them down into eight time periods.

The first time period had just one deed in it, the 1746 deed regarding The Falls Church, which TEC argues is "neutral" on the intent of grantor issue.[66]

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[66] TEC makes the point, however, that -even though this deed does not dispose of the issues in this case, it is the Church's view that the property conveyed by this deed, and all of the property described herein, became subject to the Church's and the Diocese's governing documents, under *Green,* by virtue of the totality of the relationship between the local church and the Church and the Diocese." (TEC Brief #3 at 30, fn. 8.) This Court agrees. As the Virginia Supreme Court said in *Green* on a related issue: "The appellees say that the church, when rebuilt in 1939, was never formally dedicated and therefore the new structure never became an A.M.E. Zion Church. We disagree. Assuming that there never was a formal dedicatory ceremony following the conveyance in 1875, we conclude that 100 years of continuous services in the church by the pastors supplied Lee Chapel by the A.M.E. Zion Church constitutes an adequate dedication of the property for its intended spiritual and ecclesiastical purposes."

The second time period has one deed in it, and TEC notes no pertinent surrounding circumstances.

The third time period covers the two 1874 deeds, one involving Truro and one involving St. Stephen's. TEC notes that by the time these deeds were executed, TEC had adopted, in 1868 and 1871, its anti-alienation canons for consecrated property. TEC also notes that one of its expert witnesses, Dr. Robert Bruce Mullen, testified that shortly after the adoption of the anti-alienation canon but before 1874, nearly 100 congregations left the Church to join another denomination, and each of those churches left its property behind, including Virginia congregations. (TEC Brief #3 at 31.) TEC also notes that by this point in time, the Virginia Supreme Court had issued *Brooke v. Shacklett,* 54 Va. 301 (1856). And, notes TEC, there was language in *Brooke* protecting the property interests of a denomination.[67] "In light of these circumstances," argues TEC, "any reasonable grantor would have understood that property

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Green, 221 Va. at 554. Here, The Falls Church was a constituent member of TEC and the Diocese, subject to their Constitutions and Canons, for more than 200 years.

[67] The pertinent language from *Brooke,* at 321, is the following:

> If at any time before the division of the church a controversy had arisen among the members of the society at Salem church-house, in respect to the occupancy of the house — each party under the lead of a preacher claiming its exclusive use for purposes of worship — the dispute must have been determined by enquiring, not which of the two parties constituted a majority, or represented the wishes of a majority, of the members of the society, but which of the two preachers had been appointed and assigned to the society in accordance to the laws of the church; which of the two parties was acting in conformity with the discipline of the church, and submitting to its lawful government.

conveyed to a local Episcopal church could not be removed from the denomination without the larger church's consent." (TEC Brief #3, at 31.)

The fourth time period covers three deeds in the time period of 1882 to 1904. In addition to the circumstances existing at the time of the 1874 deeds, TEC notes that the Virginia Supreme Court had reiterated its *Brooke* holding in *Hoskinson v. Pusey,* 73 Va. 428, 440 (1879).

The fifth time period covers one 1918 deed involving The Falls Church. TEC notes that by this time, TEC had adopted its "rector" canon (1904), "which provides that the rector of a local church — someone required to be an Episcopal priest and thus having declared an oath of conformity with the Church's rules — is entitled to use and control local church property and must do so in accordance with the Church's rules and the Bishop's direction, (TEC-09-2) and the Diocese had adopted its abandonment canon (1906), empowering diocesan representatives to take charge of local church property that those representatives declared to be abandoned, PX-COM-144-168.)" TEC Brief #3 at 34.)

The sixth time period covers 13 deeds from 1952 to 1972. TEC notes that in addition to the canons described above, TEC "had adopted (in 1916 and 1919) canons mandating business methods to be followed by local Episcopal churches, including requiring the insurance of local church property, (TEC-10-2-3; TEC-11-2-4); the Diocese had adopted (in 1938) a canon regulating local churches' ability to incur debt, (PX-COM-177-032); and the Church and the Diocese had each adopted (in 1940) canons regulat-

ing the alienation of unconsecrated property, (TEC-13-2-3; PX-COM-179-036.)" (TEC Brief #3 at 35.)

The seventh time period covers a 1982 Truro deed. In addition to all the foregoing, TEC notes that by this point in time, the Virginia Supreme Court had issued *Norfolk Presbytery* and *Green,* the United States Supreme Court had issued *Jones* and two Virginia trial courts in *Buhrman* and *Wyckoff* had resolved disputes over the control of local TEC churches in favor of the denomination. In addition, notes TEC, the denomination had adopted the Dennis Canon at this point.

The final time period concerns 19 deeds from 1986 to 2006. To the foregoing, TEC adds the fact that the Diocese had adopted its Trust Canon. (PX-COM-222-105- 06.)[68] TEC also notes that during this time period, "courts around the country found overwhelmingly in favor of the larger Church and loyal Episcopalians in disputes over local Episcopal church property." (TEC Brief #3 at 38.)

TEC concludes — and this Court agrees — that "under these circumstances, any reasonable grantor would have understood that property conveyed to a local Episcopal church at that time could not be removed from the denomination without the larger church's consent, and that the local church to which he or she was conveying property was bound to use, maintain, and control the property in accordance with the Church's and the Diocese's rules and ensure that property it acquired be used for the mis-

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[68] In this context, the Court gives limited significance to TEC's adoption of the Dennis Canon and the Diocese's adoption of Canon 15.1, given its finding that neither Canons were effective in validating denominational trusts.

sion of The Episcopal Church and for no other denomination." *Id.*

C. CONSTITUTION AND CANONS OF CHURCH

From the evidence and argument presented in the trial of this matter, the Court finds as follows:[69]

Structure of TEC and the Diocese

(1.) TEC is a hierarchical church, and the Diocese of Virginia is a diocese of a hierarchical church.

(2.) TEC is composed of three levels in descending order of authority: TEC's General Convention; geographically-defined dioceses, including the Diocese of Virginia; and local congregations, called parishes or churches. *See* TEC Const. Art. I (describing the General Convention), TEC Const. Art. V (describing dioceses and parishes); TEC Canon 1.13 (describing parishes); Diocesan Canon 10.1[70] (describing local churches).

(3.) The governing documents of TEC is its Constitution, its Canons, and the *Book of Common Prayer*. The General Convention, which is composed of representatives from the Church's dioceses, adopts and amends the governing documents of the church. *See* TEC Const. Preamble (adoption and amendment of Constitution); TEC Const. Art I (composi-

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[69] *See* TEC Brief #1, at pages 5-19.

[70] Unless otherwise noted, whenever the Court refers to "Diocesan Const." Or "Diocesan Canon" it is referring to the Diocese of Virginia.

tion of General Convention); Const. Art. X (amendment of *Book of Common Prayer);* TEC Const. Art. XII (amendment of Constitution); and TEC Canon V.I (amendment of canons).)

(4.) New dioceses must promise "unqualified accession" to the *Church's* Constitution and Canons. (TEC Const. Art V.)

(5.) The Diocese of Virginia, in its Constitution Preamble, "acknowledges the authority and power of the General Convention....as set forth in the Constitution and Canons adopted thereby."

(6.) The Diocesan Constitution also provides that "[e]very Congregation within the Diocese..., however called, shall be bound by the Constitution and the Canons adopted in pursuance hereof." (Diocesan Const. Art, XVII.)

(7.) The Canons of the Diocese require that a congregation petitioning the Diocese to be granted status as a "church" must "acknowledge the jurisdiction of the Bishop or Ecclesiastical Authority of the Diocese of Virginia." (Diocesan Canon 10.1.)

(8.) The failure of a church to meet that requirement may result in it being reduced to mission status. (Diocesan Canon 10.6.)

(9.) Each diocese, including Virginia's, is governed by a legislative body. In Virginia, that legislative body is called the "Annual Council." Each diocese has an ecclesiastical and administrative leader, called the Diocesan Bishop. *See* TEC Const. Art. II (discussing

Bishop); TEC Const. Art. V.1; and TEC Canon IA 0(4) (discussing Diocesan Conventions).)

(10.) The Diocesan Bishop is elected by the Diocesan Convention (the "Annual Council" in Virginia) and his or her selection must be consented to by a majority of the leadership of the other dioceses. (TEC Const. Art. II; TEC Canon III.11(3)-(4).)

(11.) Each diocese's convention elects a "Standing Committee" that acts as the "Ecclesiastical Authority" in the absence of a Diocesan Bishop and that shares authority with the Bishop over certain matters prescribed by TEC' s and the Diocese's canons. (TEC Const. Art. IV.)

(12.) The Annual Council of the Diocese of Virginia is composed of representatives from the Diocese's churches and other congregations. (Diocesan Const. Art. III; Diocesan Canon 2.)

(13.) The Annual Council adopts and amends the Diocese's Constitution and Canons. (Diocesan Const. Art. I, XIX, Diocesan Canon 30, which supplement but may not be inconsistent with TEC's Constitution and Canons. TEC Const. Art. V.)

(14.) The Diocese also has an Executive Board, made up of elected representatives from geographical areas of the Diocese and the Bishops of the Diocese, which is responsible for the business of the Annual Council between its meetings. Diocesan Canon 7.5.)

(15.) Each church is part of the diocese in which it is located. (TEC Canon 1.13.1.)

(16) In order to achieve church status, in addition to making the acknowledgements described above, a congregation must have a "vestry," which is a governing body of lay persons and its ecclesiastical and administrative leader, as well as a "rector," who is a priest of TEC elected by the vestry in consultation with the Bishop. (TEC Canons 1.1 4, and 111.9(3); and Diocesan Canons 10.3, and 12.1.)

(17.) The rector has control over a parish's physical property, while the vestry retains control over all other parish property. (TEC Canons III.9(5)(a), 1.14(2).)

(18.) A vestry may adopt by-laws so long as they are not inconsistent with TEC' s canons or the Canons of the Diocese. (Diocesan Canon 11.10.)

(19.) A church with no functioning vestry is deemed "inactive," and its authority is assigned to the Executive Board. (Diocesan Canon 9.3.) The Bishop, with the advice and consent of the Standing Committee, may reduce a church's status to that of a mission if the church becomes unable to satisfy the requirements of church status for any other reason, including the failure to make the acknowledgements described above. (Diocesan Canon 10.6.)

(20.) All clergy, as a condition of ordination, must subscribe to a "Declaration of Conformity,"

affirming that they will "conform to the Doctrine, Discipline, and Worship of the Episcopal Church." (TEC Const. Art. VIII; TEC-38-513,-526, -538.)

(21) Vestry members are required by TEC's Canons to "well and faithfully perform the duties of that office in accordance with the Constitution and Canons of [the] Church and of the Diocese." (TEC Canon I.17(8).)

(22.) Every person chosen to serve on a vestry in the Diocese must subscribe to a "declaration and promise" stating that "I do yield my hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church." (Diocesan Canon 11.8.)[71]

Non-Property Rules of TEC and the Diocese

(23.) The Church's Constitution requires that the *Book of Common Prayer* "shall be in use" throughout TEC, and allows for deviation by way of "special forms of worship" only pursuant to the "rubrics," or special instructions, of the Prayer Book and with the Bishop's permission. (TEC Const. Art. X; see also TEC Canon 11.3.)

(24.) The Church's Canons specify the process to be followed by dioceses and local churches in the development and ordination of the Church's priests and deacons and sets out substantive standards that ordinands must meet. (TEC Canons 111.2, 111.5-6, 111.8,

[71] The "discipline" of the Church "refers to the constitution, the canons, the rubrics, and the ordinal of the Book of Common Prayer." (Tr. 231 (Bishop Jones); accord, PX-COM-001-164.)

and III.15.) Under TEC's Canons, only a priest who has met these qualifications may become the rector of an Episcopal church. (TEC Canon II1.9(3)(a)(3).)

(25.) TEC's Canons establish the process by which a local church may elect a new rector, including the requirement that the church "promptly notify" the Bishop that the church needs a rector, prohibiting the local church from electing a rector without first notifying the Bishop of the nominee's identity and allowing time for the Bishop to respond, and requiring that the Bishop be "satisfied that the person so elected is a duly qualified Priest" before that person may take office. (TEC Canon III.9(3)(a)(1-3).)

(26.) TEC's Constitution and Canons provide detailed procedure for the disciplining of clergy, prescribing also the standards of conduct. (TEC Const. Art. IX; TEC Canons IV.1-16.) These provisions make clergy subject to discipline for violating the Constitutions or Canons of TEC or its dioceses, violating the ordination oath, and abandonment of the communion of the Church. (TEC Canons 1V.1(1)(e)-(h), IV.9, IV.10.)

(27.) TEC's Canons require every church to provide its diocese an annual report in the form specified by the Executive Council. (TEC Canon 1.6(1); *see also* Diocesan Canon 16.1, 16.2 (requiring an annual "parochial report").)

(28.) TEC's Canons also govern aspects of church life, prescribing for example which transla-

tions of the Bible shall be used in worship, (TEC Canon 11.2), and imposing rules regarding marriage, divorce, and remarriage. (TEC Canons 1.18, 1.19.)

(29.) TEC's Canons forbid a rector from resigning without the consent of the vestry and bar a vestry from removing a rector against his or her will, except under prescribed conditions, each of which require the action of the Bishop. (TEC Canon III.9(13)(Dissolution of the Pastoral Relation); *see also* Diocesan Canon 28 (Relationships Among Clergy and Congregations.).)

(30.) Diocesan Canons prescribe in detail the manner in which a church of the diocese conducts its affairs, including prescribing: the size of the vestry, the requirement that vestry members be elected annually, the length of a vestry member's term, the prohibition against consecutive terms, the requirement that the rector preside at vestry meetings, the qualifications for vestry members ("confirmed adult communicants in good standing of the [Episcopal] church,") who can vote in a vestry election, the manner in which a vestry election is conducted, how vestry meetings are to begin, the ·declaration and promise" that each newly-elected vestry member must make before taking office; how vestry member vacancies are filled, and how often the vestry must meet. *(See* Diocesan Canons 11.2 to 11.12.)

(31.) Additionally, the Diocesan Canons set out the duties of vestry members, including its

obligation to annually review the rector's compensation in keeping with published guidelines of the Diocese, and to advise the Diocese by a certain date each year what percentage of its income it will contribute to the Diocese, and to provide for the appointment of trustees to hold church property, and to establish a "Finance Committee" to advise the rector, vestry, and treasurer in financial matters; and, as to wardens, or the elected leaders of the vestry, to oversee the operation and maintenance of church property, and collect the offerings. *(See* Diocesan Canons 12.3-12.7, and 25.2.)

(32.) The Diocesan Canons also require that the wardens "possess a copy of the current General Convention and Diocesan Constitutions and Canons for the information and guidance of the Rector, vestry, and congregation." (Diocesan Canon 12.7.)

(33.) Churches in the Diocese are required to participate in the Diocesan health insurance plan, unless the Executive Board grants them an exemption. (Diocesan Canon 31.1, 31.2.)

(34.) Both TEC's and the Diocese's Canons require churches to contribute to the Church Pension Fund on behalf of their clergy. (TEC Canon 1.8, Diocesan Canon 5.)

(35.) The Diocese prescribes how and where local church endowment and other permanent funds may be deposited or invested. Diocesan Canon 13.2.

(36.) The Diocese requires that each church's treasurer be bonded. (Diocesan Canon 13.3.)

(37.) The Diocese requires the vestry to conduct an annual audit of all accounts exceeding $500. (Diocesan Canon 13.4.)

(38.) The Diocese requires the provision of workers' compensation insurance for all employees. (Diocesan Canon 13.5(c).)

(39.) The Diocese requires fire and casualty insurance as well as comprehensive liability insurance, and prescribes the minimum amounts of coverage. (Diocesan Canon 13.5.)

Property Rules of TEC and the Diocese [72]

(40.) From its beginning, 'I EC has required Bishops to visit their parishes "for the purpose of examining the state of [the] church." (TEC-01-33.) For example, Bishop Meade of Virginia regularly commented on the physical condition of the churches in the Diocese in his annual address to the Diocese in the 1830's. (Tr. 1189-1190.)

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[72] As stated earlier in this opinion, in 1979, following the Supreme Court's decision in *Jones v. Wolf,* the General Convention adopted the Dennis Canon (now TEC Canon 1.7(4)), which provided that all real and personal property held by or for the benefit of any parish, mission or congregation was held in trust for TEC and the diocese in which it was located. The Diocese adopted a parallel Canon (Diocese Canon 15.1) in 1983. (PX-COM-222-105-06.) Because this Court has concluded that the Commonwealth of Virginia does not validate denominational trusts, the trust canons are not considered in this section of the Opinion.

(41.) In 1799, TEC included in its Prayer Book a "Form of Consecration of a Church or Chapel." (TEC-33-01,09; Tr. 1192.)

(42.) In 1868, the General Convention adopted a Canon (now Canon 11.6) prohibiting parishes from encumbering or alienating "consecrated" property, without the Diocese's consent. (TEC-04-1, 2; Tr. 1193.) The same Canon provided that no church would be consecrated until the Bishop was satisfied that it was "fully paid for, and.... free from lien or other encumbrance." (TEC-04-2.) Similarly, Diocesan Canon 15.2 requires diocesan consent for the alienation or encumbrance of consecrated church property.[73]

(43.) In 1871, the General Convention required that consecrated property be "secured .. from the danger of alienation from those who profess and practice the doctrine, discipline, and worship of the ... Church." (now TEC Canon 11.6; TEC-05-42-43; Tr. 1197.) This Canon was adopted to "prevent..., the alienation of church buildings to parties, congregations, or corporate bodies, no longer in accordance with the doctrine, discipline, or worship of the [Church]." (TEC-39-1.)

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[73] The CANA Congregations argue that anti-alienation and debt canons cannot create proprietary rights because they "do not purport to affect ownership...." (CANA Brief #2 at 29.) That misses the point of TEC' s and the Diocese's reliance on these Canons. To use the language of *Green,* 221 Va. at 555, canons such as these give the Diocese "right[s] customarily associated with ownership," "dominion," and "control," i.e., the right to prevent property from being sold or encumbered.

(44.) In 1904, the General Convention adopted a Canon (now Canon II1.9(5)(a)), providing that the rector be entitled to control parish property "[f]or the purpose of [his or her] office," and "subject to the [Church's] Book of Common Prayer, [its Constitution and] Canons...and the godly counsel of the Bishop." (TEC-09- 2; Tr. 1206.)

(45.) In 1916 and 1919, the General Convention adopted a Canon entitled -On Business Methods in Church Affairs" (now Canon 1.7), governing the management of parish property, including the requirement that all buildings be adequately insured. (TEC-10-2-3; TEC-11-2-4; Tr. 1208.)

(46.) In 1940, the General Convention adopted a canon (now Canon 1.7(3)), expanding the requirement of diocesan consent for alienation or encumbrance of real property to cover unconsecrated parish property. This Canon allowed diocese to prescribe a condition other than diocesan consent for transactions involving unconsecrated property. (TEC-13-3.)

(47.) The Diocese requires churches seeking to alienate or encumber unconsecrated real property to secure "the consent of the congregation in a meeting called for that purpose." (Diocesan Canon 15.2.)

(48.) The Diocese also requires that where a church's property in not held by "duly constituted Trustees," the Executive Board "shall" take steps to "recover or secure" the property. (Diocesan Canon 15.3.)

(49.) The Diocese further requires that where church property has ceased being used by a "congregation of the Episcopal Church in the Diocese," the Executive Board may declare the property "abandoned" and "shall have the authority to take charge and custody thereof," including selling the property or transferring it to the Bishop. (Diocesan Canon 15.3.) And, in fact, on various occasions, the dioceses in Virginia have declared local church property to be "abandoned," and Virginia courts have enforced these determinations. *(See, e.g.,* PX-COM-295 to PX-COM-307.)

(50.) Churches in the Diocese may not incur debt of certain specified amounts without the consent of the Bishop and the Standing Committee. (Diocesan Canon 14.1.) The Bishop and Standing Committee must approve the church's plan for debt repayment. *Id.*

The foregoing 50 references to the Constitution and Canons of TEC and the Diocese — as significant as they are — are only some of the ways that a local Episcopal church is subject to the denominational hierarchy. Other examples include: regular visitations to each church and mission in the Diocese by the Bishops; the role of the Bishop at "Initiatory Rites" (confirmation and reception), which only a Bishop may perform; the Bishop's obligation to review church records and inspect its properties; the power of the Bishop to appoint the vestry of a mission; the Bishop's control over the entire process of ordination, from "aspirant" to "postulant" to "candidate" to "deacon" and, finally, to "priest;" and the requirement that clergy obtain authorization from the Diocesan Bishop to remarry a previously divorced person or to

allow a lay person to deliver the sacrament of communion. *(See* Diocese Brief 41 at 9-12.)

And while it is certainly true that the disposition of a dispute of this nature does not depend on a determination as to whether the Diocese obtains more from a local church than the church obtains from the Diocese,[74] it must nevertheless be observed that the Diocese does provide tangible benefits to a local church. Beyond any spiritual benefits a local church might receive, there are secular benefits like assistance in the recruitment of clergy, the provision of "supply priests" as temporary clergy at congregations, assistance in the preparation of parish profiles, investigating clergy recruited from other dioceses, the preparation of clergy compensation guidelines, the provision of help with the preparation of audits and parochial reports, serving as a resource for advice in areas like taxes and insurance, providing mandatory sexual misconduct training, providing educational programs, providing human resources assistance, providing the Church Pension Fund for a church's clergy, providing group health and dental insurance, providing investment management services through the Diocesan Trustees of the Funds, and providing loans to churches through the Diocesan Missionary Society. (Diocese Brief #1 at 12-14.)

The foregoing provides compelling evidence that TEC is a hierarchical church and that its dioceses,

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[74] *See, e.g.,* this statement by the Virginia Supreme Court in *Green,* 221 Va. at 556: "The fact that the general church has made no loans or grants for the benefit of Lee Chapel and that, in fact, it may have refused to contribute to the remodeling program of the local church, is not dispositive. A proprietary interest or a contractual obligation does not necessarily depend upon a monetary investment."

including the Diocese of Virginia, exercise control, supervision, and authority over each Episcopal local church and parish. That control, supervision, and authority absolutely extends to matters related to property, even when one excludes from consideration the trust canons.

In *Green,* the Virginia Supreme Court defined a "proprietary right" as follows: "[a] proprietary right is a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls." 221 Va. at 555. TEC's and the Diocese's Constitution and Canons demonstrate *pervasive* dominion, management, and control over local church property, in a manner normally associated with ownership, title, and possession. To cite just a few examples:

(1.) Consecrated property cannot be sold without the Bishop's permission, nor can it be encumbered without the consent of the Diocese, nor can a church be consecrated until the Bishop is satisfied that it is fully paid for and free from encumbrances;

(2.) Unconsecrated property can only be sold in accordance with procedures established and authorized by the Diocese pursuant to authority granted the Diocese by TEC's Canons;

(3.) Bishops must visit their parishes to examine the state of the church;

(4.) In multiple ways, local churches are bound to act in accordance with the laws of the denomination: dioceses must promise "unqualified accession" to TEC' s Constitution and Canons; every congregation in the Diocese of Virginia is "bound" by the Diocesan Constitution and Canons; and a congregation

petitioning for church status must "acknowledge" the jurisdiction of the Diocesan Bishop or Ecclesiastical Authority of the Diocese;

(5.) A church that fails to meet its requirements may be reduced by the Diocese to mission status; a church with no functioning vestry is deemed "inactive" and its authority is assigned to the Diocese's Executive Board; where a church's property is not held by "duly constituted Trustees," the Executive Board must step in to "recover or secure" the property; and where church property has ceased being used by a "congregation of the Episcopal Church in the Diocese," the Executive Board may declare the property "abandoned" and take custody and charge of it;

(6.) By TEC's Canons, it is the Rector of a local church — an individual who is ordained by a Bishop, and who has, as a condition of ordination, subscribed to a "Declaration of Conformity" in which he or she affirms that he or she will "conform to the Doctrine, Discipline, and Worship of the Episcopal Church," and who cannot become Rector of a local church without the Diocesan Bishop being satisfied that the person selected by the local church is a duly qualified Priest, and who cannot be removed from office by the vestry against his or her will, except under prescribed conditions, each of which require the action of the Bishop — who has control over a parish's physical property, and whose control is subject to the Constitution and Canons of the church; and

(7.) By TEC's Canons, it is the Vestry of a local church — a group of parishioners each of whom must be in the "good standing of the [Episcopal] church, and each of whom has subscribed to a "declaration

and promise" stating that "I do yield my hearty assent and approbation to the doctrines, worship, and discipline of The Episcopal Church," and each of whom are required by TEC' s Canons to "well and faithfully perform the duties of that office in accordance with the Constitution and Canons of [the] church and of the Diocese," and whose substantive duties and methods of operations are prescribed by Diocesan Canons — who has control of all other parish property.[75]

D. COURSE OF DEALINGS EVIDENCE

Most of the facts in this section are common to all seven churches.[76]

(1.) It is undisputed that before December 2006 (and, for Church of the Epiphany, January 2007), each of the churches before the Court were constituent members of TEC and the Diocese. (Of course, it is the position of TEC and the Diocese, with which this Court agrees, that the churches remain *Episcopal* churches today, even if the Congregations now in possession of

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[75] CANA argues that the vestry and rector canons "add nothing to [TEC's and the Diocese's] claim of a proprietary interest." (CANA Brief #2, at 32.) The Court disagrees. The Rector and the Vestry control the property of a church and the Canons establish the obligations, duties, authorities, and responsibilities of the Rector and Vestry. Moreover, it is only the Bishop as the Ecclesiastical Authority that can involuntarily change local church leadership. (Diocese Brief #1 at 95; *see also* Diocesan Canon 28 (Neither the vestry nor the rector can unilaterally discharge a rector, and they are to submit any such significant problems to the Bishop).)

[76] *See* Diocese Brief #1 at 23-25; *and* TEC Brief #1 at pages 15-18.)

those churches are no longer in the Episcopal Church.)

(2.) Each of the churches became a local church of TEC and the Diocese in accordance with the rules of the Diocese, in some cases by petitioning the Diocese for recognition as a church and in other cases by signifying, by various means, its acceptance of the authority of TEC and the Diocese.

(3.) Each of these churches were known in the community as *Episcopal* churches, using the names and symbols of denominational affiliation, including street signs to point the public in the direction of an *Episcopal* church.

(4.) Each of these churches have vestry manuals that acknowledge that the churches are bound by the rules of TEC and the Diocese.

(5.) Each of these churches have sought consent from the Diocese to encumber or alienate real property or incur debt.

(6.) Each of these churches were served by a Rector who was an ordained Episcopal priest, a Rector who made at his or her ordination the Declaration of Conformity to the Doctrine, Discipline, and Worship of the Church. Further, at each of these churches, the Diocese has been involved in the selection of one or more of its Rectors.

(7.) Each of these churches used the Episcopal Church's Book of Common Prayer.

(8.) The vestry members of each of these churches, upon taking office, have sworn to uphold the doctrine, worship, and discipline of the Church.

(9.) Each of these churches used the Episcopal Church Hymnal. Some used Episcopal Sunday School materials or other Episcopal hymn books.

(10.) Each of these churches followed the Canons of the Constitution and Diocese with respect to property, generally obtaining consent when required.

(11.) Each of these churches organized themselves as required by Canon, electing vestries, selecting wardens, and administering the canonical oath described above.

(12.) Each of these churches elected and sent lay delegates, and their clergy, to the Diocese's Annual Council.

(13.) Each of these churches recognized the authority of the Diocesan Bishop and other Bishops of the Diocese, received official visitations from Bishops of the Diocese, and presented individuals to those Bishops for confirmation or reception into TEC.

(14.) Each of these churches submitted annual parochial reports through the Diocese to TEC.

(15.) Each of these churches contributed financially to the support of the Diocese.

(16.) Each of these churches contributed to the Church Pension Fund on behalf of their clergy.

(17.) Each of these churches obtained health insurance through the Diocese, as required, or obtain exemptions from the Diocese.

(18.) Each of these churches obtained consent from the Diocesan Bishop as required in certain ecclesiastical matters.

(19.) Each of these churches were regularly represented at the Diocese's Annual Council.

(20.) In various ways, each of these churches acknowledged the authority of TEC and the Diocese, such as by applying to the Diocese for a license for a lay Eucharistic minister, or seeking permission from the Bishop of the Diocese to officiate at a wedding of a divorced person.

In addition to the foregoing, there is some "course of dealing" evidence unique or particular to individual churches.

As to The Falls Church, the Court would note the following additional facts:

- On at least two occasions, Diocesan Bishops vetoed the employment of clergy at TFC, and the church complied.
- The Diocesan Bishop made numerous visits to TFC over the years. Bishops of the Diocese, or other Bishops acting on behalf of the Diocese or at his invitation, have visited TFC in *every* year between 1934 and 2005.
- In January 1988, Bishop Lee wrote TFC's Vestry regarding TFC's plans for a new church building. The letter states in part that "In the Episcopal Church, all church property is held in trust for the diocese." (PX-FALLS-349.) In another letter to TFC in July 1990, Bishop Lee stated: "it is well to remember that the property which the vestry plans to mortgage in this

plan is held in trust for the Episcopal Church and the Diocese of Virginia." (DX-FALLS-035-002.)

- TFC has been represented by one or more lay or clerical delegates at the Annual Council for the 100 year period from 1909-2010.
- Vestry members subscribed to the oath or declaration prescribed by Diocesan Canons, in *at least* each of the following years: 1874, 1876, 1877, 1880, 1889, 1890, 1894, 1899, 1902, 1908-1910, 1912-1915, 1918-1921, 1924, 1930, 1933, 1935, 1937, 1939-1942, 1944-1962, 1964-1968, 1970-1980, 1983, and 1999.

As to St. Paul's, the Court would note the following additional facts:

- In 1834, Bishop William Meade consecrated the former courthouse that is now St. Paul's sanctuary as St. Paul's Episcopal Church.
- In August 1984, St. Paul's celebrated its 150th anniversary as an Episcopal church. The Presiding Bishop, John M. Allin, sent greetings.
- St. Paul's has provided Episcopal ministry to a number of communities in northern Virginia. An October 1, 1987 letter from its Rector to Bishop Lee enclosed a brochure stating: "St. Paul's is a renewed parish of the Diocese of Virginia (Bishop Peter James Lee), serving Haymarket, Gainesville, Buckland, Catharpin, Waterfall, Hickory Grove, Thoroughfare, and surrounding communities within historic Haymarket Parish (1832)." (PX-STPAUL-107-003.)

- A letter dated August 27, 1990, from the Diocese to St. Paul's Senior Warden certifies to Post Office officials in connection with St. Paul's bulk mailing permit "that St. Paul's has been an established church and parish of the Diocese of Virginia (Episcopal) since 1833." (PX-STPAUL-115.)
- In 1961, in accordance with Diocesan Canons, St. Paul's requested and received permission from the Diocese to incur indebtedness to build a parish house. They did so again in 1968.
- When Grace Chapel had fallen into disrepair and become a safety hazard, St. Paul's obtained approval from the Diocese to deconsecrate it and tear it down.
- In 1892, the vestry consulted with the Diocesan Bishop regarding a request by pastors of other denominations to use the church for services. The vestry expressed concern that such use might "go in opposition to the Canons or the wishes of our Bishop." (PX-STPAUL-007.)

As to Truro Church, the Court would note the following additional facts:

- Truro's 1998 Vestry Handbook, (PX-TRU-028), instructs vestry members to "have a thorough understanding of the functions and operations of the Protestant Episcopal Church in the United States, the Diocese of Virginia, and Truro Episcopal Church." Toward that end, Vestry members are "strongly encouraged" to "read, or at a minimum, review, the Constitution and Canons for The Episcopal Church."

- Truro started four mission churches in the Diocese, pursuant to Diocesan canons and processes.
- When Truro lacked a Rector, the Diocesan Bishop assigned or approved a deacon or priest-in-charge. When it needed to hire clergy, Truro obtained guidance from the Diocese, and used the resources of TEC and the Diocese. At various points in time, the Bishop assigned and subsidized the costs of deacons and licensed clergy to assist Truro's Rectors.
- Since 1844, Bishops of the Diocese have regularly visited Truro. [6] Bishops of the Diocese have consecrated Truro buildings on four separate occasions.
- Truro members have served as Diocesan deputies or alternates at TEC' s General Conventions.
- Truro members have participated actively in Diocesan governance and have served in numerous leadership capacities, including the service by one member as Chancellor of the Diocese for several years.
- In 1934 and 1974, Truro executed and delivered to the Bishops "Instrument[s] of Donation" in connection with the consecration of new church buildings. These instruments are optional. They state, in part, that the instruments (i) "appropriate and devote [the buildings] to the worship and service of Almighty God.... according to the provisions of the Protestant Episcopal Church in the United States of America, in its Ministry, Doctrine, Discipline, Liturgy, Rites and Usages, and by a

> Congregation in communion with said Church, and in union with the Convention thereof in the Diocese of Virginia," (ii) request that the Bishop "take the said building under his spiritual jurisdiction;" (iii) "relinquish all claim to any right of disposing of said building, or allowing of the use of it in any way inconsistent with the terms and true meaning of this Instrument of Donation, and with the consecration;" and (iv) "certify ... that said building and ground are secured from danger of alienation from those who profess the Doctrine, Discipline and Worship of the said Church, except as provided by laws and canons in such case applicable." Both instruments were signed by the Rector and Register of the Vestry. While the parties dispute the legal enforceability of these Instruments of Donation, their significance to the Court is not based on the presumption that they are legally enforceable transmittals of title but, rather, that they demonstrate the understanding of the parties that Truro Church's property was to be used for the "mission and ministry" of TEC and the Diocese. (Diocese Brief #1 at 111.)

As to St. Stephen's, the Court would note the following facts:

- On April 30, 1881, Bishop Whittle consecrated its building as St. Stephen's Church.
- Bishops of the Diocese have visited St. Stephen's regularly and preached and/or confirmed, received, reaffirmed and/or baptized one or more members in many years.

- The church and its leaders were aware of the Constitution and Canons of TEC and the Diocese, and complied with them regarding incurring debt and encumbering property.
- Like the other six churches, St. Stephen's obeyed canonical rules regarding the vestry, wardens, meetings, and the duties and prerogatives of Rectors.
- Rector Jeffrey Cerar's prepared remarks for the 2003 Annual Meeting stated, in part, as follows: "Given the canons of the Episcopal Church and the Diocese of Virginia, we cannot just change our sign and no longer be Episcopalians." (PX-SSH-334.)
- St. Stephen's had a policy governing use of the parish house, which incorporated "Episcopal Church Policy on Serving of Alcoholic Beverages at a Local Parish" and required parish house users to sign a form stating, "If alcoholic beverages are to be served, I have read and will comply with the Episcopal Church policy and St. Stephens policy." (PX-SSH-280.)
- The Senior Warden's Annual Report in 2004 contained a lengthy criticism. of the actions of the 2003 General Convention but nevertheless noted that "[t]wo person control over church collections was instituted in compliance with National Church Guidelines." (PX-SSH-254.)
- St. Stephen's received financial assistance from both the Diocese and the Diocesan Missionary Society. St. Stephen's also made financial contributions to the Diocese.

- Even though St. Stephen's was opposed to the 1979 Book of Common Prayer, it accepted the mandate to use the book in its services.
- St. Stephen's Rector described the General Convention as "our national governing body" and as "the legislative body of our denomination...." (PX-SSH-334; PX-SSH-174.)
- In the minutes of the vestry meeting in February 2005 (PX-SSH-137), it was reported that the Rector explained to the vestry the meaning of the term "doctrines and discipline" of the Episcopal Church that is a part of the vestry oath: "Discipline' refers to the Constitution and canons of the Episcopal Church and the Diocese of Virginia, by which we are bound as a member of ECUSA."

As to St. Margaret's, the Court would note the following facts:

- As set forth in more detail in the deeds section, *supra,* St. Margaret's Episcopal Church grew out of the Diocese's "program for church planting" in the early 1960's and began as an organized mission of the Diocese.
- When the vestry of St. Margaret's held its organizational meeting, it had the assistance of a Diocesan representative from the Department of Missions, who provided substantial assistance in St. Margaret's early years. *See* Diocese Brief #1 at 143, fn. 46.)
- There are numerous references in St. Margaret's records to the distribution of and instruction concerning TEC' s and the Diocese's Constitution and Canons.

- The vestry minutes for May 2003 recorded the appointment of individuals "to serve as trustees of St. Margaret's Episcopal Church, in accordance with the Constitution and Canons of the Protestant Episcopal Church in the United States of America and the Constitution of St. Margaret's Episcopal Church." (PX-STMARG-261.)
- St. Margaret's complied with canonical rules regarding the sale or encumbrance of property, including the rules requiring the consent of the Diocesan Bishop and Standing Committee.
- St. Margaret's recognized the controlling authority of TEC' s and the Diocese's Constitution and Canons. *See, e.g.,* PX-STMARG-601 ("No action of the Stewardship Commission shall be authorized if it does not contain' with National and Diocesan Canons"); PX-STMARG-677 (Notes to Financial Statements, stating: "St. Margaret's Episcopal Church is guided and directed by the Constitution and Canons of the Protestant Episcopal Church of the Diocese of Virginia").)
- St. Margaret's received startup gifts from other Episcopal churches.
- St. Margaret's received substantial assistance from the Diocese when it needed to locate and employ a new rector or priest-in-charge. In addition, Bishops of the Diocese visited St. Margaret's and installed its rectors.
- According to St. Margaret's First Annual Report to the Parishioners, dated September 30, 1980, the vestry approved a church constitution "delineating purpose, organization, re-

sponsibility, and leadership of the church, under the authority of the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia." (PX-STMARG-516.)

- There are various versions of St. Margaret's Constitution in the record, from 1980, 1982, 1986, 1995, 1999, and 2003. Each version begins: "St. Margaret's Episcopal Church in Woodbridge, Virginia is guided and directed by the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia."
- The 1995, 1999, and 2003 church Constitutions also describe the purpose of "Parish Organization" as "[t]o comply with the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia...." and provide, further, that "[n]o amendment contrary to canon law will be permitted to take effect." (PX-STMARG-698, 700, and 701.)
- St. Margaret's written Policies and Procedures state in their first paragraph: "No policy, procedure, or amendment thereto may be adopted which conflicts with St. Margaret's Constitution, the Constitution and Canons of this Diocese, or the Constitution and Canons of the Episcopal Church." (PX-STMARG-718, 719, and 724.) Similar provisions appeared in the By-Laws of St. Margaret's Day School, approved by the Vestry in 1966.
- In every year between 1963 and 2006, a Bishop of the Diocese visited St. Margaret' s.
- The vestry oath was routinely taken by incoming vestry members. A Check List for Vestry Nominees (PX-STMARG-450) included the re-

quirement that vestry members "subscribe to the canonically required vestry declaration."

As to Church of the Apostles, the Court would note the following facts:

- As further described in the deeds section, *supra,* Church of the Apostles was formed as a mission of the Diocese in 1968, through planning and coordination between the Diocese and Truro church.
- The deeds section, *supra,* also set forth the assistance provided by the Diocese in the formation and establishment of Church of the Apostles.
- In 1985, the Church called the Rev. David Harper, a New Zealand priest. Bishop Lee accepted a letter dimissory for him, issued a formal call to him "subject to the requirements of the Canons of The Episcopal Church," and installed him as Rector in 1986.
- In "Submitted Questions and Rector's responses" for a congregational meeting in February 2004, Rector Harper acknowledged the Diocese's interest in the church's property: "[p]arishes hold title to their buildings in trust for the diocese, which is the real owner. Should a parish violate the canons in a way that brings it into conflict with the diocese....the diocese might very well claim its rights to own, occupy, and use the property, including the church's assets, by suing the church." (PX-APOST-033.)

- The Church understood that it needed Diocesan approval for certain transactions regarding real property and repeatedly sought such permission, including seeking approval to sell and encumber property.
- Apostles purchased copies of the Canons and, from 1985 through 2006, when Rev. Harper was Rector, he always had a copy of the Canons.
- The Vestry handbook verified that the vestry would follow the Canons.
- The Church submitted parochial reports to the Diocese in every year from 1987 to 2005.
- The Church donated money to the Diocese in every year from 1968 to 2003. Apostles acknowledged that it had a "responsibility to tithe to the next higher authority." (Apostles_Ex_013.012.)

As to Church of the Epiphany, the Court would note the following facts:

- Epiphany began through the efforts of the Diocese and Truro and began worshipping in 1986.
- In 1986, Epiphany petitioned the Annual Council for admission as a church under the Constitution and Canons of the Diocese. The petition stated that the congregation was "a group of people which acknowledge and accept the doctrine, worship, and discipline of the Protestant Episcopal Church and the jurisdiction of the Bishop or Ecclesiastical Authority of the Diocese of Virginia." (PX-EPIPH-001.)

- Bishop Lee installed Epiphany's first rector, the Rev. Reardon, on February 1, 1987.
- As stated in the deed section, *supra,* the land upon which the Church was to be constructed was acquired from Glebe Properties at no cost to the parish.
- Bishop Lee consecrated the church on April 23, 1989.
- Since its beginning, Epiphany was aware of its obligation to adhere to the Constitution and Canons of the Diocese. A document signed by Rev Reardon sometime during his tenure states that "[t]he Bylaws of The Church of the Epiphany (a non-profit organization), are the Constitution and Canons of the Episcopal Church in the U.S.A. and the Constitution and Canons of the Diocese of Virginia." (PX-EPIPH-014.)
- New By-Laws were adopted in May 2001 that state that Epiphany "is a constituent part of the Diocese of Virginia of [the Episcopal Church] and is subject to the Canons of the Protestant Episcopal Church in the Diocese of Virginia." (PX-EPIPH-002.)
- Article VIII of the By-Laws, *Id.,* concerns "Parish Property" and provides:

  > 8.01 Ownership and Use: All Parish property assets and funds shall be owned and held by the Parish in trust for the uses purposes and the benefit of the Diocese of Virginia of the Protestant Episcopal Church in the United States of America.

> 8.04 Dissolution: In the event of dissolution of the Parish, all property assets and funds of the Parish and Parish corporation shall be distributed exclusively for exempt purposes to the Diocese of Virginia of the Protestant Episcopal Church in the United States of America.

- The notes to Epiphany's financial statement dated December 31, 2002, state: "the Church is a constituent part of the Episcopal Church, U.S.A. and the Diocese of Virginia require the real property of all Episcopal parishes to be held in trust for the national church and the Diocese even though the individual churches hold legal title for all other purposes." (PX-EPIPH-048.)

E. NEUTRAL PRINCIPLES OF LAW CONCLUSION

The Court concludes that TEC and the Diocese have carried their burden of proving that they have a contractual and proprietary interest in the seven Church's properties at issue. In coming to this conclusion, the Court has carefully considered the factual and legal arguments tendered by the CANA Congregations on these issues. Many of their arguments are addressed elsewhere in this opinion. Others are addressed here:

(1) CANA argues that it was the CANA Congregations and not TEC and the Diocese that fulfilled the responsibilities "customarily associated with ownership, title, and possession," and who "exercise[d] dominion" over, and "manage[d] and control[led]," the properties. See Green, 221 Va. at 555. (CANA Brief #1A at 2.)

It is undoubtedly true that the Episcopal congregations who held stewardship over these properties for generations largely (but not exclusively) paid for the land and the buildings on the land out of congregant funds, maintained the properties with congregant funds and their own labors, and preserved and improved the properties over time. But that does not diminish at all the reality that TEC and the Diocese, through their Constitutions and Canons, and through the direct involvement of the Diocese, its Bishop and its personnel, had *pervasive* and *controlling* involvement in these churches and their properties. The power and authority that TEC and the Diocese held to forbid alienation of property, to forbid encumbrance of property, to declare property abandoned and to take it over, to require oaths and affirmances of fidelity to Constitutions and Canons containing numerous property provisions, to discipline and even authorize removal of a Rector in control of property, to inspect the property, to require annual reports, to require audits and other financial systems, are all indicia of dominion, management, and control.

(2) CANA argues that the CANA Congregations had the power to exclude third parties from access to their property, including Diocesan representatives. (CANA Brief #1A at 2.)

That is true, but it must be evaluated in the context of the pervasive control which TEC and the Diocese exercised over the seven churches.

(3) CANA argues that the Congregations exercised autonomy over their personal property, making contributions and withholding contributions as they chose. Id.

The Court does not agree at all that the Congregations were truly autonomous with regard to their real and personal property. When a denomination delegates or assigns authority to a local congregation, or reserves to a local congregation certain powers, the exercise of that authority by that congregation does not constitute "autonomy." Thus, if the Congregations had the power to withhold contributions, it was because the Constitutions and Canons of TEC or the Diocese did not compel such contributions. What is directly at odds with this assertion of -autonomy" is the indisputable fact that each Congregation within TEC and the Diocese was obligated to obey the Constitution and Canons of TEC and the Diocese and to act only in accordance with these governing documents. The powers these local churches exercised are not proof that the churches existed outside or beyond the hierarchy; rather, they are merely proof of the way in which the hierarchy chose to organize and structure itself

Although the CANA Congregations certainly do not deny the undeniable fact that these seven churches were a part of a hierarchical denomination for decades and, in some cases for centuries, at every turn throughout their post-trial pleadings they portray themselves as if they were an independent congregational-type church, free from hierarchy in every pertinent respect. Their assertions of independence and autonomy, however, are contradicted by the overwhelming body of evidence before this Court.

(4) CANA argues that TEC's own annotations to their Constitution and Canons indicate that the property Canons are ineffective as a means of preventing alienation of property. Id. at 4.

TEC and the Diocese challenge whether any statement made in these annotations can be legally attributed to TEC or the Diocese as admissions. More to the point, however, is this: It is for the Court - not the annotators - to determine the legal significance attached to the Constitution and Canons as part of the "neutral principles of law" analysis. For example, this Court has concluded that neither the Dennis Canon nor Diocesan Canon 15.1 creates a denominational trust in the Commonwealth.

(5) CANA argues that neither TEC nor the Diocese made any material contribution toward the improvement of these church properties and the land was acquired almost entirely without help from TEC or the Diocese.

The CANA Congregations are correct that it is the Episcopal church congregations, rather than TEC or the Diocese, that largely paid for the properties and the improvements upon them. As *Green* makes clear, however, that does not control the proprietary interest analysis. Indeed, if it were true that any proprietary interest claim asserted by a general church could be defeated by proof that a local congregation paid for the property in question, or for most of the property in question, or, for that matter, simply paid more than the general church paid, a Court would not need to apply a "neutral principles of law" analysis to the controversy but, rather, simply apply its calculator and give judgment to the party who spent the most. That is not the law. And, while one can hypoth-

esize that circumstances could exist in which a court conducting a "neutral principles of law" analysis might conclude that some language in a deed, or in the terms of the constitution of the general church, or in the course of dealings between the parties, established that they had, in fact, defined their relationship in a way that attached dispositive significance to who spent the most amount of money, *here* there is nothing in the deeds, the Constitutions or Canons of TEC and the Diocese, or in the course of dealings between the parties, to suggest that is the case.

(6) CANA argues that if the Court does consider "course of dealing" evidence, it cuts in the CANA Congregations' favor. The CANA Congregations assert that they "not only exercised dominion over the properties at issue by purchasing, designing, building, improving, maintaining, mortgaging, zoning, leasing managing insuring possessing using and worshiping at them [but they] gave tens of millions of dollars to the Diocese, receiving a pittance in return.[77] *They selected their own rectors and staff They chose their own Sunday school curricula, education materials, and forms of worship. They designed their own liturgies. They set their own service schedules. They secured copyrights and licenses for their worship music. They ran their own day schools. They designed and carried out their own ministries and outreach. They operated their own youth programs. And they commissioned their own missionaries — all with little or no involvement of TEC or the Diocese. To be sure, the*

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[77] Elsewhere, the CANA Congregations describe the denomination's contributions to the local churches as the "proverbial drop in the bucket." (CANA Brief #3, at 68.)

Congregations used Episcopal hymnals and the Book of Common Prayer (materials for which they paid standard rates), were occasionally visited by Episcopal bishops, respected Diocesan standards for incurring debt, and received occasional spiritual input from denominational bishops." (CANA Brief #1A at 89.)

Thus is portrayed the denomination and the Diocese as essentially uninvolved by-standers in the life of the church, their biggest contribution to the CANA congregations being to provide some hymn and prayer books and occasionally visit. Yet this portrayal is wholly at odds with the lengthy recitation that precedes this section, which is itself only a small sampling of almost 140 pages of detailed, documented indications of active involvement and participation in the life of these churches, and the understanding and acceptance of those churches that they were part of a hierarchical denomination and subject to its laws. *(See* Diocese Brief #1 at 56-194.) Put simply, the Court finds far more persuasive TEC' s and the Diocese's presentation on the course of dealings between the parties.

To be clear, the Court does not doubt that the congregations that held these churches over the years actually managed the churches on a day-to-day basis and contributed most of the funds used to buy land, build sanctuaries and parish houses and rectories, maintain them, and improve them. Nor does the Court doubt that the local congregations ran these churches on a daily basis. Neither TEC nor the Diocese has claimed otherwise. *(See* CANA Brief #1A at fn. 52 and 53.) Nor does the Court doubt CANA's chart indicating that since 1950, the seven churches contributed a total of $11.97 million to the Diocese.

(CANA Brief #1A at 105-06. The salient point, however, is that none of this is inconsistent with a hierarchical or connectional polity.

If CANA is correct, no hierarchy could have a proprietary interest based on "course of dealing" testimony, because the circumstances CANA is focusing upon — the local congregation's day to day management of the local church, the local congregation's purchase of land and the construction of church buildings, and the local congregation's making of contributions to its diocese — are not at all inconsistent with a supercongregational polity. And, more to the point, none of this evidence undermines the compelling evidence offered and accepted by this Court that TEC' s and the Diocese's course of dealings with the seven congregations strongly support their assertion of a contractual and proprietary interest.

(7) CANA argues that the CANA Congregations' "affiliation with TEC and the Diocese was more of a burden than a benefit." (CANA Brief #1A at Page 121.)

That this is a sincere expression of the CANA Congregations' view is hardly to be doubted, given their disaffiliation from TEC and the Diocese. Nevertheless, it is not the province of a civil court to evaluate the "pluses and minuses" of denominational affiliation, in general, or as applied to a particular denomination.

(8) CANA disputes the Diocese's assertion that vestries are agents for the church. Rather, CANA argues that "[a] closer analogy" of the relationship between the denomination and a local congregation is that between a "franchisor and a franchisee." Thus, "McDonalds may dictate the restaurant's accounting

practices, layout, menu, promotions, prices, employee uniforms, employee training, and placement of the golden arches," and a "franchisee [that] fails to do business in a prescribed manner ... may be enjoined from continuing to operate in any manner that suggests an affiliation with the franchise," but that does not mean "a disaffiliating franchisee will forfeit any land it purchased with its own money in furtherance of the franchise relationship." (CANA Brief #2 at 35-36.)

This analogy is not apt at any level. The nature of the relationship between a hierarchical denomination, its diocese, and a local congregation is not analogous to that between a hamburger company and a hamburger outlet. The contributions made by a diocese to a local church, especially one which begins as a diocesan mission, and the contributions made by a local church to its diocese, is not analogous at any level to the fast food industry or its franchisees. The constitutional and canonical requirements for serving as a rector or a member of a vestry, and the requirements governing the alienation and encumbrance of consecrated and unconsecrated properties, and the role that lay leaders in a congregation may play in the governance of the Diocese and even of the denomination, simply do not compare to the business of running a McDonald's franchise. While it is true that "placement of the golden arches" may be no more complicated than the placement of a street sign announcing the presence of an Episcopal Church, what lies behind that sign is infinitely more complex.

* * *

When this Court considers the applicable statutes, deeds, the Constitution and Canons of TEC and

the Diocese, and the course of dealings between the parties, and applies "neutral principles of law" as established by United States and Virginia Supreme Court precedent, it is clear — indeed, to this Court, it is overwhelmingly evident — that TEC and the Diocese have contractual and proprietary interests in the real and personal property of each of these seven churches. Simply put, the facts here are at least as compelling as the facts in *Norfolk Presbytery* and *Green* and therefore require this Court to reach a similar judgment Similarly, the facts here are at least as compelling as the facts before Judge Stephenson and Judge Koontz in *Buhrman* and *Wyckoff* and warrant this Court in reaching the same result.

The CANA Congregations suggest that a ruling for the denomination would be to defer to the hierarchy "with a vengeance." This Court disagrees. Rather, the finding here that TEC and the Diocese have a contractual and proprietary interest in the property of these *Episcopal* churches is no more than a recognition that, while the CANA Congregations had an absolute right to depart from TEC and the Diocese, they had no right to take these seven *Episcopal* churches with them.[78]

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[78] In light of this Court's determination that TEC and the Diocese have contractual and proprietary interests in the church property at issue, the Court does not need to address TEC's and the Diocese's alternative "identity" approach to the resolution of church property disputes. (TEC describes the identity approach as one that focuses on "who is the local church" and, in the case of a dispute involving a local church that is part of a hierarchical denomination, resolves it by finding that the congregants who remain loyal to the denomination are entitled to retain control of church property. (TEC Brief #1 at Page 47.) In support of this proposition, TEC cites *Brooke, Hoskinson,* and *Finley* and notes that “when faced with the question, 'Who is the local church?'

VII. AMENDED COUNTERCLAIMS OF CANA CONGREGATIONS

The amended counterclaims, which were filed individually against TEC and the Diocese in January 2011 each sought the same relief: (1) a declaration that each of the properties at issue were in the sole and exclusive ownership of their respective congregation, free and clear of any claim of right or interest by TEC or the Diocese; (2) a claim for unjust enrichment/quantum meruit, if the Court should determine that TEC or the Diocese had rights to the individual church's real or personal property that were "superior or otherwise" to the rights of the CANA Congregation; and (3) a request for imposition of a constructive trust on TEC or the Diocese, if the Court should determine that TEC or the Diocese had rights to the individual church's real or personal property that were "superior or otherwise" to the rights of the CANA Congregation.

This Court has already determined that TEC and the Diocese have contractual and proprietary interests in the church properties and that the trustees must promptly convey the properties to the Diocese and the CANA Congregations must promptly relinquish control over the properties to the Diocese. In such an event, the Amended Counterclaims seek recovery for unjust enrichment/quantum meruit and imposition of a constructive trust. TEC and the Diocese moved to strike these Counterclaims but the Court took the motions under advisement in order to permit the CANA Congregations to fully present

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the Supreme Court of Virginia has consistently and repeatedly answered: 'Those persons remaining loyal to the hierarchical denomination.'" (TEC Brief #1, at 49.))

their evidence. The Court now orders that these Counterclaims be striken.

A. UNJUST ENRICHMENT/QUANTUM MERUIT COUNTERCLAIM

To state a cause of action for unjust enrichment, the counter-plaintiff must allege: (1) that he conferred a benefit on the counter-defendant; (2) that the counter-defendant knew of the benefit and should reasonably have expected to repay the counter-plaintiff; and (3) that the counter-defendant accepted or retained the benefit without paying for its value. *Schmidt v. Household Fin. Corp.,* 276 Va. 108, 116 (2008).

The CANA Congregations' evidence fails on all three elements. First, the Court agrees with the Diocese that "Nile unjust enrichment counterclaims ask the Court to hold that its own adjudication, applying the law of the Commonwealth, would be unjust — a contradiction and indeed an absurdity." (Diocese Brief #1 at page 49.) Second, these seven churches were, and remain, *Episcopal* churches that are part of the *Episcopal* hierarchy. These churches no more "unjustly enriched" the Diocese or TEC than the Diocese or TEC "unjustly enriched" the seven churches. The fact that the *Episcopal* congregations that held stewardship over these churches purchased property with congregants' funds, constructed churches with congregants' funds, improved these churches with congregants' funds, maintained these churches with congregants' funds, and made substantial contributions to the Diocese over the years with congregants' funds, in no way constitutes an "unjust enrichment." Indeed, this point is obvious when one considers the second element of an unjust enrichment claim, i.e., that the

defendant knew of the benefit and should reasonably have expected to repay the plaintiff. There is no support in the evidence for the notion that TEC or the Diocese should "reasonably have expected to repay" the individual congregations.

The Court also finds no merit in CANA' s assertion that *after* disaffiliation the CANA Congregation unjustly enriched TEC or the Diocese. From 2007 forward, the CANA Congregations have had the use and control of these seven churches *over the strenuous objection* of TEC and the Diocese, as manifested not only by the resolution declaring the property to be abandoned, not only by their unsuccessful effort to direct the trustees of the properties to convey them to the Diocese, but by the filing of the instant litigation itself. If proof of unjust enrichment requires that a defendant know of the benefit received and should reasonably have expected to repay it, the proof here is utterly lacking.

In short, before disaffiliation, the congregations were constituent members of TEC and the Diocese; whatever contributions they made are not subject to recovery on a claim of unjust enrichment. After disaffiliation, any financial outlays made by the congregations for maintenance, upgrades, improvements, etc., on properties which this Court now holds should not have remained in the possession of *non-Episcopal* congregations in the first place, and remained in their possession for the past five years over the vociferous objection of TEC and the Diocese, are not subject to an unjust enrichment claim.[79]

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[79] The Court would also note the assertion by TEC and the Diocese that no court considering a church property dispute has

Having rejected CANA's unjust enrichment claim, the Court need not address the various arguments related to the proper value to place on such a claim, including those arguments related to property appraisals, valuation dates, maintenance and improvement costs, replacement value, and fair market value.

B. CONSTRUCTIVE TRUST COUNTERCLAIM

Constructive trust is not a cause of action but, rather, a remedy "against unjust enrichment, usually after an act of fraud, or breach of confidence or duty." *Pair v. Rook,* 195 Va. 196, 213 (1953). Here the Court finds no unjust enrichment and there is no basis for consideration of a constructive trust.

VIII. FALLS CHURCH ENDOWMENT FUND

This Court has previously had two occasions upon which to address issues related to the Falls Church Endowment Fund.[80] In the Court's Letter

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ever granted an unjust enrichment claim. (TEC/DOV Brief #2 at 101.)

[80] *See* 76 Va. Cir. 975; *see also* 76 Va. Cir. at 986. The question before the Court in these two decisions was whether the Fund was subject to The Falls Church's §57-9(A) petition. The Court summarized the position of the parties as follows:

> The Diocese and TEC argue that because the Endowment Fund is a corporation, because it is a distinct legal entity from TFC, because its Directors are appointed by the vestry of TFC rather than by its trustees, and because TFC cannot have a 'personal property' interest in a charitable non-profit entity, there is no basis for a finding that its property is subject to TFC's 57-9(A) petition. TFC does not dispute a number of these assertions. It agrees that the Endowment Fund is a corporation, that it has a distinct legal existence, that its assets are not property held by TFC's trustees, that its directors are not elected by TFC's trustees, and

Opinion of October 17,2008, *see* In Re: *Multi-Circuit Episcopal Church Property Litigation,* 76 Va. Cir. 975 (2008), the Court provided this brief description of the Fund:

> The Endowment Fund is a non-profit corporation, organized in 1976, whose "main purpose" is "to further the ministry and outreach of the Christian Church." (Articles of Incorporation of the Endowment Fund at Page 1.) The Articles provide that the membership of the Corporation is comprised of two classes. Class A members are individuals serving as the vestry of TFC [The Falls Church]. Class B members are members of the parish who are eligible to vote for the vestry at TFC's annual meeting. According to the Articles, Class A members — i.e., the vestry of TFC — have the duty of electing Directors of the Endowment Fund.

Id. at 975.[81] The sole question before the Court is which vestry — that of the CANA congregation or

> that it is indeed a charitable non-profit entity. TFC asserts, however, that it does have a 'personal property' interest in the Endowment fund that brings the Endowment Fund within the scope of its 57-9(A) petition.

76 Va. Cir. 975. The "personal property" interest asserted by TFC was the power of the vestry to appoint the Endowment Fund's Directors. On December 19, 2008, the Court ruled that the power to appoint Directors to a charitable, non-stock, non-profit corporation is not a 'personal property' interest. 76 Va. at 986. Therefore, the Court held that the Endowment Fund was not subject to The Falls Church's §57-9(A) petition and would be reserved for resolution in the Declaratory Judgment actions. *Id.*

[81] Specifically, the Endowment Fund's Articles of Incorporation provide, in part, -Membership shall be comprised of Class A and Class B members, as described below: A. Class A members shall

that of the Episcopal "continuing congregation" recognized by the Episcopal Diocese of Virginia — has the power and duty to elect the directors of the Fund.

TEC and the Diocese's position is that the issue has been resolved by the fact that the Annual Council of the Diocese has seated the delegates elected by the Vestry of The Falls Church (Episcopal) at every meeting of Annual Council since 2007, and that "a civil court may not second-guess or review that decision." *See* Diocese Brief #1 at 80.)

The Falls Church makes six arguments in support of the position that it is the CANA congregation whose vestry now has authority to appoint the Endowment Fund's directors: (1) The Endowment Fund has historically been funded primarily by contributions from TFC and its congregants; (2) The Endowment Fund has consistently been described as one method of donating to The Falls Church or supporting its ministry; (3) The Falls Church's annual reports have described the Endowment fund as "formed in 1975 to administer bequests to The Falls Church" and as a way to contribute to The Falls Church; (4) The Endowment Fund's audited annual financial

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be those individuals who are members of the vestry of The Falls Church, Episcopal Church. B. Class B members shall be those members of the parish who are defined as eligible to vote for the vestry at each of the annual meetings of The Falls Church." (DX-FALLS-367-002.) The By-Laws of the Endowment Fund are also instructive. Article I §2 of the By-Laws provides, "None but members of The Falls Church, Protestant Episcopal Church, Falls Church, Virginia, shall be members of the Board of Directors." Article I §3 of the By-Laws provides, in part, "The Directors shall be elected by the vestry of The Falls Church, Episcopal Church, as set forth in Articles of Incorporation." (PX-FALLS-368-001.) *(See* Diocese Brief #1 at 79-80.)

statements for the years up to 2006 were consolidated with The Falls Church's annual audited financial statements; (5) In The Falls Church consolidated audited financial statements, the Endowment Fund was "treated" as a "subsidiary" and a "ministry" of The Falls Church and the Endowment Funds' assets were treated as assets of the consolidated operation; and (6) Even with the vote to disaffiliate imminent, the five directors of the Endowment Fund in November 2006 voted unanimously to recommend to the vestry of The Falls Church the reappointment of two directors, thus acknowledging that vestry's control over the appointment of directors.

The Court does not find any of CANA's arguments persuasive, for several reasons:

First, this Court has already determined that it is the Diocese — not the CANA Congregation — that has control and ownership over The Falls Church. In other words, it is the Diocese that owns the church whose vestry is charged with appointing the Endowment Fund's directors.

Second, to the extent that the CANA brief makes it clear that the Endowment Fund is closely linked to and associated with The Falls Church — even to the point of noting that the church's consolidated audited financial statements "treat[ ] the fund as a subsidiary and a ministry of The Falls Church," The Falls Church's Opening Post-Trial Brief Regarding the Falls Church Endowment Fund at 3 — it would make little sense to hold that the Diocese controls and owns The Falls Church but it is the CANA Congregation that controls and owns this closely-related entity.

Third, the Court rejects The Falls Church's assertion that the multiple references in the governing

documents of the Endowment Fund to "The Falls Church, Episcopal Church" and "The Falls Church, Protestant Episcopal Church" are merely a description identifying the church, rather than a substantive reference to its character as a constituent member of the Episcopal Church. In fact, these references make it clear that the vestry that is authorized to elect directors is an *Episcopal Church* vestry, not a vestry of a different denomination. Since it is beyond dispute that the CANA Congregation is no longer a member of the Episcopal denomination, its' vestry no longer has the authority to elect the Endowment Fund's directors.

Fourth, the bylaws of the Endowment Fund are explicit as to who may serve as directors: "None but members of The Falls Church, Protestant Episcopal Church, Falls Church, Virginia, shall be members of the Board of Directors." The CANA Congregation is not a Protestant Episcopal Church; its vestry is not a vestry of a Protestant Episcopal Church. To hold that it is the CANA Congregation that has the authority to elect the Endowment Fund's directors would essentially be to hold that the CANA Congregation may elect the Endowment Fund's directors *so long as they do not select any of their own members.*

Therefore, the Court finds that it is The Falls Church (Episcopal) — the congregation recognized by the Diocese as The Falls Church's Episcopal congregation — whose vestry has the power, authority, and duty to elect Directors to the Endowment Fund.

One more point should be stated regarding this matter. In making this decision, the Court categorically rejects The Falls Church's assertion that to rule for the Diocese is to "exalt semantics over sub-

stance."[82] In the §57-9 litigation, this Court was persuaded by the CANA Congregations — over the strenuous objections of TEC and the Diocese — that a major division had occurred within The Episcopal Church.[83] The Falls Church congregation disaffiliated

[82] The Concluding paragraph of The Falls Church's Opening Post-Trial Brief Regarding The Falls Church Endowment Fund, at Page 10, reads as follows:

> At heart, the conflict here is over whether the purpose of the vestry of The Falls Church in establishing the Fund in 1976 was to ensure that the Fund supported and was controlled by a specific congregation — The Falls Church — or by any congregation (including one that did not yet exist at that time) so long as the congregation had a particular name and aparticular affiliation. To adopt the second perspective would exalt semantics over substance and contravene the governing documents of the Fund and thirty years of actual practice by the Fund and The Falls Church. TFC respectfully submits that the first perspective correctly focuses on the continuity of the church — TFC is the same church that originally established the Fund in 1976 and must continue to exercise the same right to appoint directors that it exercised for more than thirty years.

[83] Much of the §57-9(A) litigation concerned whether, in fact, there was a division within TEC and the Diocese of such dimension as to permit invocation of §57-9(A). The Court concluded as follows:

> [I]t blinks at reality to characterize the ongoing division within the Diocese, ECUSA, and the Anglican Communion as anything but a division of the first magnitude, especially given the involvement of numerous churches in states across the country, the participation of hundreds of church leaders, both lay and pastoral, who have found themselves "taking sides" against their brethren, the determination by thousands of church members in Virginia and elsewhere to "walk apart" in the language of the Church, the creation of new and substantial religious entities, such as CANA, with their own structures and disciplines, the rapidity with which the ECUSA's problems became that of the Anglican Commun-

from The Episcopal Church precisely *because* of this major division and it became a CANA Congregation as a *direct consequence* of this major division. Thus, and contrary to The Falls Church's assertion in its opening brief on the Endowment Fund, it is not "exalt[ing] semantics over substance" to attribute significance to a "particular name" and a "particular affiliation." What this Court previously described as the "profound and wrenching" decision of each of these congregations to renounce their affiliation with TEC and to affiliate with CANA cannot under any conceivable construct be termed a matter of "semantics." Indeed, it is just the opposite, for the Court's decision attributes dispositive significance to the fact that, while the CANA Congregation is still *called* "The Falls Church," it is no longer an *Episcopal* entity.

IX. CONCLUSION

For the reasons stated above, the Court finds for TEC and the Diocese in the Declaratory Judgment actions and against each of the seven CANA Congregations. The trustees of the churches must, therefore, promptly convey the properties to the Diocese and the CANA Congregations must promptly relinquish control over the properties to the Diocese. Further, the

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ion, and the consequent impact — in some cases the extraordinary impact — on its provinces around the world, and, perhaps most importantly, the creation of a level of distress among many church members so profound and wrenching as to lead them to cast votes in an attempt to disaffiliate from a church which has been their home and heritage throughout their lives, and often back for generations. Whatever may be the precise threshold for a dispute to constitute a division under 57-9(A), what occurred here qualifies.

76 Va. Cir. 785, 872.

Court finds the Amended Counterclaims to be without merit and grants TEC's and the Diocese's Motions to Strike the claims for unjust enrichment, quantum meruit, and constructive trust. Further, the Court finds that the Vestry entitled to elect the directors of the Falls Church Endowment Fund is the Falls Church Episcopal congregation recognized by the Diocese.

It remains to determine the disposition of the personal property of the seven churches. Virginia Code §5740 provides as follows:

> When personal property shall be given or acquired for the benefit of an unincorporated church or religious body, to be used for its religious purposes, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts or, if the church has created a corporation pursuant to §57-16.1, to be held by it as its land is held, and for the same purposes.

Thus, the disposition of the personal property of these churches follows the disposition of the real property of these churches, that is to say, it must also be turned over to the Diocese. There is a significant caveat to this, however, and it arises from the fact that there came a point in time when it was absolutely clear that a contribution or donation or the payment of membership dues to one of the seven congregations was *not* a contribution to an *Episcopal* congregation. Therefore, the personal property acquired by the CANA congregations after this point in time should remain with the CANA congregations. There are foul possible points in time which the Court has considered:

First, the Court has considered using as a point of demarcation the various points in time when the congregations made varying arrangements to withhold contributions from the Diocese.[84] Putting aside the accounting difficulties in applying these various dates to the various circumstances, and whether it would even be possible to account for the individual choices of parishioners where they were given the opportunity to designate, there is a much more dispositive objection to using this as the point of demarcation: Whatever may have been the level of discord and disenchantment with TEC and the Diocese, each of the seven churches in 2003, 2004, 2005, and through most of 2006 remained *Episcopal* churches, constituent members of the Diocese and TEC.

Second, the Court has considered using as the point of demarcation the date upon which each of the CANA Congregation voted to disaffiliate pursuant to §57-9(A)(December 2006-January 2007). (Alternatively, the Court could use the date when each congregation filed its §57-9(A) petition.) Here, too, there are significant problems: first, it has now been conclusively determined that §57- 9(A) is inapplicable to these proceedings; second, it is not the act of taking a vote, or even the filing of a petition, that renders a decision to affiliate with a different denomination fi-

[84] According to CANA, "all of the CANA Congregations curtailed or terminated their donations to the Diocese in response to the actions of the denomination at its 2003 General Convention." (CANA Brief #1A at 159.) Congregants were given the opportunity to designate that no portion of their title should go to the Diocese; or the congregation stopped giving money to the Diocese entirely; or the congregation established a congregation only fund. *Id.* at fn. 120.

nal and conclusive — rather it is the Court's *approval* of the petition. That did not come until January 8, 2009, and in any event was reversed by the Virginia Supreme Court.

Third, the Court has considered using as the point of demarcation the Diocese's January 22, 2007 Notice of Inhibition, or January 22, 2007 resolution determining the properties to have been abandoned, or the August 1, 2007 Notice of Removal. While arguments could be made in support of each of these dates, especially the January 22, 2007 resolution declaring the properties to be abandoned, they do not have the public notice character of the fourth possibility, which is the one this Court adopts.

This fourth possibility, which this Court adopts as the point of demarcation, is the filing date of the Declaratory Judgment actions by the Diocese against each congregation on either January 31, 2007 (involving five of the congregations) or February 1, 2007 (involving the two remaining congregations). After this date, no contribution made, no donation made, no dues paid by a congregant, could reasonably have been made with the understanding that the money was going to *Episcopal* congregations. (While the seven churches, for the reasons stated in this opinion, never lost their character as *Episcopal* churches, the Court's focus here is on the actions taken by — and the Declaratory Judgment actions filed against — the CANA congregations.)

Therefore, the Court orders that all personal property acquired by the congregations before January 31, 2007 or February 1, 2007 (depending on the congregation) shall be conveyed to the Diocese and all *liquid* personal property (e.g., contributions and do-

nations of money) acquired after these dates shall remain with the CANA Congregations. As to *tangible* personal property acquired by the CANA Congregations after these dates, they shall be conveyed to the Diocese unless the CANA Congregations can establish that they were purchased solely with funds acquired after these dates or were donated to the CANA Congregations after these dates.[85]

TEC and the Diocese seek an accounting as part of their requested relief. To the extent an accounting is necessary to implement the Court's orders, an accounting is ordered.

TEC and the Diocese are to prepare and submit a proposed final order within 45 days of the issuance of this Letter Opinion, affording the CANA Congregations a reasonable opportunity to note their exceptions. If either party believes a hearing is necessary regarding the terms of the Final Order, they should communicate this to the Court, by letter, no later than 30 days from today.

Sincerely,

(signed)

Randy I. Bellows

[85] As to the argument that the CANA Congregations should not have to convey to the Diocese funds on hand as of January 31, 2007 because such funds were used to maintain the church facilities since then, the Court would note the obvious fact that the CANA Congregation had the use of the property since that point in time as well.

APPENDIX E

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re Multi-Circuit Episcopal Church Litigation:	Case Nos,: CL 2007-48724, CL 2007-1235, CL 2007-1236, CL 2007-1238, CL 2007-1625, CL 2007-5250, CL 2007-5682, CL 2007-5683, and CL 2007-5902

FINAL ORDER

THIS MATTER is before the Court for entry of a Final Order in the cases listed above.

UPON CONSIDERATION WHEREOF, and for the reasons stated in the Court's January 10, 2012, Letter Opinion, which is incorporated herein by reference, the Court ADJUDGES, ORDERS and DECREES as follows:

A. (1) The Episcopal Church ("TEC") and the Diocese of Virginia ("Diocese") have contractual and proprietary interests in the real and personal property at issue in this litigation; (2) the defendants The Church At The Falls — The Falls Church, a Virginia non-stock corporation; St. Stephen's Church, a Virginia non-stock corporation, doing business as "St. Stephen's Anglican Church"; Truro Church, a Virginia non-stock corporation; St. Paul's Church, Haymarket, a Virginia non-stock corporation; St. Margaret's Church, a Virginia non-

stock corporation; Church of the Apostles, a Virginia non-stock corporation; Church of the Epiphany, Herndon, a Virginia non-stock corporation (collectively, "CANA Congregations") do not have either contractual or proprietary interests in the real or personal property at issue in this litigation; (3) the Court finds no merit in the CANA Congregations' counterclaims for unjust enrichment, quantum meruit and constructive trusts, and the motions of TEC and the Diocese to strike those claims are granted; and (4) the vestry empowered to elect the directors of The Falls Church Endowment Fund, Inc. is the vestry recognized by the Diocese as the Episcopal vestry of The Falls Church Episcopal Church. Accordingly,

B. The defendant trustees (excluding Trustee William Latharn who resigned prior to entry of this Order)[1] and the defendant CANA Congregations hold, and, until the real and personal property at issue in this litigation is conveyed to the Bishop of the Diocese as required by this Order, will continue to hold, the real and personal property at issue in this litigation subject to the contractual and proprietary rights of TEC and the Diocese. The defendant trustees and the CANA Congregations are enjoined from further use of the real and personal property at issue in this litigation in accordance with the deadlines and terms set forth below, excepting personal property identified on Exhibit L attached hereto.

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[1]All future references to trustees or defendant trustees or however such term may be phrased in this Final Order and in any of the exhibits hereto exclude Trustee William Latham, Consequently, the Court finds that Trustee William Latham is not subject to the Final Order.

C. On or before April 30, 2012, (1) the defendant trustees and the CANA Congregations shall quitclaim and release all real estate, fixtures, improvements and appurtenances comprising the properties identified in Exhibit A attached hereto to the Bishop of the Diocese by means of quitclaim deeds. The defendant trustees shall use quitclaim deeds substantially in the form of Exhibit B attached hereto with all blanks therein appropriately completed and all exhibits thereto appropriately attached; and the CANA Congregations shall use quitclaim deeds substantially in the form of Exhibit C attached hereto with all blanks therein appropriately completed and all exhibits thereto appropriately attached, and (2) the defendant trustees and the CANA Congregations shall thereupon (except as may otherwise be agreed by the parties) relinquish possession and control over such properties to the Bishop of the Diocese in an orderly fashion. The CANA Congregations and the defendant trustees shall represent and warrant to the Bishop of the Diocese that to the best of their knowledge, information and belief, after review of their own files, such properties are free and clear of deeds of trust, mechanics' and other monetary liens, leases and parties in possession, except as set forth in Exhibit A attached hereto. The Diocese shall assume the obligations as of the date of conveyance pursuant to this Order on all such indebtedness shown on Exhibit A subject to the consent of the lender or otherwise indemnify the CANA Congregations for such obligations before the quitclaim deeds described herein are executed and recorded.

As to the Church of the Apostles' Braddock Road property and as to St. Margaret's Church Parcel 2 listed on Exhibit A, the Diocese will either assume or pay off the current loan on the property and take title to it, or it will surrender its interest in the property on or before March 30, 2012. Church of the Apostles and St. Margaret's Church shall make loan payments due for the months of February and March 2012 using current funds on hand that would otherwise be payable to the Diocese under this order. If the Diocese surrenders its interest in the Braddock Road property and/or St. Margaret's Church Parcel 2, the property shall be deemed deleted from Exhibit A and will not be subject to any provisions of this Order. On or before April 2, 2012, the defendant trustees who hold record title to the properties which are described on Exhibit A attached hereto as "Church of the Apostles Property," "Church of The Epiphany Property," and "Truro Church Property," and which lie in Fairfax County, together with the respective CANA Congregations whose joinder to the petitions shall be limited by the qualification that it is only to the extent necessary, the Diocese, and TEC, shall submit petitions pursuant to Va. Code Section 57-8 and Va. Code Section 57-15 to the Circuit Court of Fairfax County, or before the judge of such court in vacation, asking for confirmation of the appointment of such defendant trustees as trustees, asking for leave to grant and convey the respective properties to the Bishop of the Diocese and seeking entry of an order (in the form of Exhibit D attached hereto) confirming the appointment of such defendant trustees and providing for and approving such grants and conveyances.

On or before April 2, 2012, the defendant trustees who hold record title to the properties which are described on Exhibit A attached hereto as "St. Margaret's Church Property" and "St. Paul's Church Property," and which lie in Prince William County, together with the respective CANA Congregations whose joinder to the petitions shall be limited by the qualification that it is only to the extent necessary, the Diocese, and TEC, shall submit petitions pursuant to Va. Code Section 57-8 and Va. Code Section 57-15 to the Circuit Court of Prince William County, or before the judge of such court in vacation, asking for confirmation of the appointment of such defendant trustees as trustees, asking for leave to grant and convey the respective properties to the Bishop of the Diocese and seeking entry of an order (in the form of Exhibit D attached hereto) confirming the appointment of such defendant trustees and providing for and approving such grant and conveyance.

On or before April 2, 2012, the defendant trustees who hold record title to the property which is described on Exhibit A attached hereto as "The Falls Church Property," and which lies in the City of Falls Church, Fairfax County, or Arlington County, together with the CANA Congregation whose joinder to the petitions shall be limited by the qualification that it is only to the extent necessary, the Diocese, and TEC, shall submit a petition pursuant to Va. Code Section 57-8 and Va. Code Section 57-15 to the Circuit Court of Arlington County, or before the judge of such court in vacation, asking for confirmation of the appointment of such defendant trustees as trustees, asking for leave to grant and convey The Falls Church

Property to the Bishop of the Diocese and seeking entry of an order (in the form of Exhibit D attached hereto) confirming the appointment of such defendant trustees and providing for and approving such grant and conveyance.

On or before April 2, 2012, the defendant trustees who hold record title to the property described on Exhibit A attached hereto as "St. Stephen's Church Property," and which lies in Northumberland County, together with the CANA Congregation whose joinder to the petitions shall be limited by the qualification that it is only to the extent necessary, the Diocese, and TEC, shall submit a petition pursuant to Va. Code Section 57-8 and Va. Code Section 57-15 to the Circuit Court of Northumberland County, or before the judge of such court in vacation, asking for confirmation of the appointment of such defendant trustees as trustees, asking for leave to grant and convey the St. Stephen's Church Property to the Bishop of the Diocese and seeking entry of an order (in the form of Exhibit D attached hereto) confirming the appointment of such defendant trustees and providing for and approving such grant and conveyance.

Such petitions and orders shall be in substantially the same form as Exhibits E and F attached hereto with all blanks therein appropriately completed and all exhibits thereto appropriately attached, with such modifications thereto as may be required by the applicable court.

The relinquishment of real and personal property or any other act in compliance with this Order shall not make moot any claims the CANA

Congregations may raise on appeal to ownership and control of any real and personal property so relinquished.

D. On or before April 30, 2012, the defendant trustees and the CANA Congregations shall (1) convey to the Bishop of the Diocese all of their respective rights, titles and interests in the tangible and intangible personal property identified in Exhibit G attached hereto (other than liquid personal property that is the subject matter of paragraph E of this Order) and excepting after acquired property identified in Exhibit L attached hereto, pursuant to bills of sale and assignments substantially in the form of Exhibit H attached hereto with all blanks therein appropriately completed and all exhibits thereto appropriately attached, and (2) deliver and relinquish possession and control over such tangible and intangible personal property to the Bishop of the Diocese in an orderly fashion. The CANA Congregations shall represent and warrant to the Bishop of the Diocese that to the best of their knowledge, information and belief, after review of their own files, such tangible and intangible personal properties are free and clear of liens and encumbrances, except as set forth in Exhibit G attached hereto (which exceptions will also be set forth in properly completed Exhibits A to the bills of sale and assignments to be delivered to the Bishop of the Diocese by the respective defendant trustees and CANA Congregations). Delivery of possession of the premises wherein such tangible personal property is situated shall be deemed delivery of possession of all tangible personal property located on such premises at the time of delivery. The CANA Congregations shall

represent and warrant to the Bishop of the Diocese that to the best of their knowledge, information and belief, after review of their own files, they are not aware of any omitted tangible and intangible personal property held by the CANA Congregations or their trustees as of the applicable "Ownership Determination Date" (January 31, 2007, in the cases of The Church at the Falls — The Falls Church, Truro Church, Church of the Apostles, Church of The Epiphany, and St. Stephen's Church; and February 1, 2007, in the cases of St. Margaret's Church and St. Paul's Church) or acquired by them after such date with property that was liquid personal property described in paragraph E of this Order held by them on such date. The CANA Congregations shall also represent and warrant to the Bishop of Diocese that to the best of their knowledge, information and belief, after review of their own files, they and the defendant trustees have conveyed such tangible and intangible personal property to the Bishop of the Diocese free and clear of liens and encumbrances created by the acts of the defendant trustees and the CANA Congregations, except as set forth in Exhibit G hereto. The foregoing representation by the CANA Congregations as to the defendant trustees shall not be deemed to create any cause of action on behalf of the Diocese arising out of any act of any trustee which is outside the best knowledge, information and belief of the corresponding CANA Congregation after review of its own files. Each defendant trustee, solely with respect to such trustee and not the other trustees, shall also represent and warrant to the Bishop of the Diocese that to the best of such trustee's knowledge, information and belief after review of such trustee's own files, such trustee has

conveyed such tangible and intangible personal property to the Bishop of the Diocese free and clear of liens and encumbrances created by the acts of such trustee, except as set forth in Exhibit G attached hereto.

E. On or before April 30, 2012, the defendant trustees and the CANA Congregations shall either (1) convey to the Bishop of the Diocese all of their respective rights, titles and interests in all liquid personal property (e.g., cash, cash equivalents, securities and entitlements, instruments, investments, bank and other deposit accounts, certificates of deposit, endowment funds, and contributions and donations of money received as of the applicable Ownership Determination Date, and including restricted funds, as defined below, except to the extent that payments were made from such funds prior to the date of conveyance pursuant to this Order); or (2) pay to the Bishop of the Diocese the value of same, as of the applicable Ownership Determination Date, via cashier's check or equivalent form; or (3), at the CANA Congregations' election, pay the value of the same into the Court registry pending any appeal together with sufficient sums to pay interest at the rate of 6 percent per annum on the principal amounts for nine months from May 4, 2012. Additional interest at the rate of 6 percent per annum on the judgment amounts paid into the Court registry shall be made every three months thereafter until the conclusion of such appeals. At the conclusion of such appeals the interest payments shall be reconciled so as to account for any overpayment or underpayment of interest, crediting the CANA Congregations with all interest earned on the amounts deposited. The

values of such liquid personal property as of the applicable Ownership Determination Date are to be determined by the parties net of reconciliations including uncleared checks and uncleared deposits and including such legal liabilities incurred as of the applicable Ownership Determination Date but paid thereafter including, but not limited to, payroll, payroll deductions, taxes, withholding, pension contributions, accrued vacation, pre-paid tuition and fees, and funds belonging to third parties, and net of the pro-rated prepaid expenses that provide benefits after the applicable Ownership Determination Date (including but not limited to any prior payments of legal fees but not including any prior payments of insurance premiums). Further deductions are allowed for payments made after the applicable Ownership Determination Date and in accordance with the terms and conditions of restricted funds which are defined as follows: restricted funds are funds held by the CANA Congregations as of the applicable Ownership Determination Date which were subject to restrictions which limited the use of such funds to particular purposes which were not for the benefit of the Congregation, the Diocese, or TEC, leaving no discretion to or for the Congregation or its Vestry, clergy, or other persons associated therewith to use or disburse such funds for the benefit of the Congregations, the Diocese, or TEC. Such restricted funds that remain in the possession of the CANA Congregations as of the date of this Order shall be transferred to the Diocese subject to the same restrictions, and in accordance with all applicable laws. Investment accounts owned by the CANA Congregations and held by the Diocese shall remain with Diocese. The St. Stephen's accounts subject to the interpleader action involving St.

Stephen's and the Diocese shall convey to the Diocese as currently valued, net of interest earned thereon.

To the extent that any accounts are conveyed in any fashion other than by cashier's check or equivalent form, the defendant trustees and the CANA Congregations shall execute appropriate documents to effect such conveyances, including bills of sale and assignments substantially in the form of Exhibit J attached hereto with all blanks therein appropriately completed and all exhibits thereto appropriately attached. The CANA Congregations shall represent and warrant to the Bishop of the Diocese that to the best of their knowledge, information and belief, after review of their own files, such liquid personal property constitutes all liquid personal property acquired and held by the defendant trustees or the CANA Congregations as of the applicable Ownership Determination Date. The CANA Congregations shall also represent and warrant to the Bishop of Diocese that to the best of their knowledge, information and belief, after review of their own files, they and the defendant trustees have conveyed such liquid personal property and interest to the Bishop of the Diocese free and clear of liens and encumbrances created by the acts of the CANA Congregations and the defendant trustees, except as disclosed to the Diocese (which exceptions will also be set forth in properly completed Exhibits A to the bills of sale and assignments to be delivered to the Bishop of the Diocese by the respective defendant trustees and the CANA Congregations). The foregoing representation by the CANA Congregations as to the defendant trustees shall not

be deemed to create any cause of action on behalf of the Diocese arising out of any act of any trustee which is outside the best knowledge, information and belief of the corresponding CANA Congregation after review of its own files. Each defendant trustee, solely with respect to such trustee and not the other trustees, shall also represent and warrant to the Bishop of the Diocese that to the best of such trustee's knowledge, information and belief, after review of such trustee's own files such trustee has conveyed such liquid personal property to the Bishop of the Diocese in which such trustee may have an interest free and clear of liens and encumbrances created by the acts of such trustee, except as disclosed to the Diocese.

By March 15, 2012, the CANA Congregations shall provide the Diocese with their comprehensive position regarding the amounts of liquid property owed to the Diocese pursuant to this Order along with the source documentation. By March 7, 2012 the Diocese shall notify the CANA Congregations of the categories of source documentation that the Diocese requires to conduct its own calculation and evaluation. If, by March 30, 2012, the parties are unable to agree as to an amount to be conveyed by each CANA Congregation, the Diocese shall so advise the Court and may seek to enforce this Final Order as to any such CANA Congregation.

Money judgments are hereby entered as of May 4, 2012 in any amounts due to the Diocese in accordance with this Paragraph E which remain unpaid as of May 1, 2012. Such money judgments, if any, are in favor of the Diocese and against each CANA Congregation which has not paid the full amount owed. The money judgments shall include

interest at the judgment rate beginning on May 4, 2012 until paid.

F. The parties shall cooperate with each other as may reasonably be required from time to time for the following purposes: (1) to effectuate the provisions of paragraphs B through E of this Order, (2) to seek and obtain appropriate or necessary consents and approvals from third parties with respect to the transfers, conveyances and assignments described in paragraphs C, D and E of this Order, (3) to cause such third parties to acknowledge and recognize such transfers, conveyances and assignments and the Bishop of the Diocese as the owner and titleholder of the subject properties for all purposes and (4) to transfer certificates of title to all properties that are subject to certificates of title to the Bishop of the Diocese.

G. Upon or prior to delivering the quitclaim deeds, bills of sale and assignments and other documents required pursuant to this Order, the CANA Congregations shall (a) take or cause to be taken all board, corporate and other actions necessary to authorize and approve all actions required of them pursuant to this Order and (b) deliver to the Bishop of the Diocese certificates of their respective secretaries substantially in the form of Exhibit K attached hereto with blanks therein appropriately completed and exhibits thereto appropriately attached.

H. On or before April 30, 2012, the CANA Congregations shall take or cause to be taken all necessary board, corporate and other actions so as to effect a change to the names by which they hold themselves out to the public such that they do not

use and shall not use the terms "Episcopal" or "Episcopalian" in their names. The Court further finds that the parties have agreed that if the CANA Congregations incorporate some derivative of the word "Anglican" in their signage, stationery, and websites, the use of such names does not infringe on the Diocese's property rights. The CANA Congregations' amended counterclaims are dismissed with prejudice in their entirety.

I. The CANA Congregations' Motion for Partial Reconsideration is denied.

J. The Clerks of the Circuit Courts of Fairfax County, Arlington County, Prince William County, Loudoun County and Northumberland County shall enter this Order in the Civil Order books of such counties in regard to each of the following dockets or cases:

- *The Protestant Episcopal Church in the Diocese of Virginia v. The Church at the Falls — The Falls Church* (Circuit Court of Arlington County, case no. 07-125) (Circuit Court of Fairfax County, case no. CL 2007-5250);
- *The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church* (Circuit Court of Fairfax County, case no. CL 2007-1236);
- *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon* (Circuit Court of Fairfax County, case no. CL 2007-1235);
- *The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles* (Circuit Court of Fairfax County, case no. CL 2007-1238);

- *The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church* (Circuit Court of Prince William *County*, case no. CL 73465) (Circuit Court of Fairfax County, case no. CL 2007-5682);
- *The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church, Haymarket* (Circuit Court of Prince William County, case no. CL 73466) (Circuit Court of Fairfax County, case no. CL 2007-5683);
- *The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church* (Circuit Court of Northumberland County, case no. CL 07-16) (Circuit Court of Fairfax County, case no. CL 2007-5902); and
- *The Episcopal Church v. Truro Church, et al.* (Circuit Court of Fairfax County, case no. CL 2007-1625)

THIS IS A FINAL ORDER.

THE Clerk will send copies of this Order to all counsel of record.

Entered this 1st day of March, 2012,

Circuit Court Judge Randy I. Bellows

SEEN AND OBJECTED TO, all exceptions noted, based upon the evidence and for the reasons previously stated in motions and briefing and at oral argument and trial:

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SEEN:

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SEEN AND AGREED:

WILLIAM LATHAM, nominal defendant

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SEEN AND OBJECTED TO, all exceptions noted, based upon the evidence and for the reasons previously stated in motions and briefing and at oral argument and trial:

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA
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GEORGE C, FREEMAN, JR,
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APPENDIX F

VIRGINIA: IN THE CIRCUIT COURT OF FAIR-FAX COUNTY

In re Multi-Circuit Episcopal Church Litigation:	Case No.: CL 2007-248724, CL 2007-1235, CL 2007-1236, CL 2007-1238, CL 2007-1625, CL 2007-5250, CL 2007-5682, CL 2007-5683, and CL 2007-5902

CONSENT ORDER CORRECTING FINAL ORDER

Pursuant to Va. Code § 8.01-428(B), the following errors arising from oversight or inadvertent omissions in the Final Order entered in these consolidated actions on March 1, 2012, are hereby corrected, as follows. Nothing herein alters or affects the finality of the Final Order entered on March 1, 2012.

(1) In Section C, on page 3, begin a new paragraph with the words "On or before April 2, 2012," following the sentence that reads, "If the Diocese surrenders its interest in the Braddock Road property and/or St. Margaret's Church Parcel 2, the property shall be deemed deleted from Exhibit A and will not be subject to any provisions of this Order."

(2) In the penultimate paragraph of Section C, on page 5, "Such petitions and orders shall be in substantially the same form as Exhibits E and F ..."

is corrected to read, "Such petitions and orders shall be in substantially the same form as Exhibits E and D ...."

(3) In Section D, in the last several lines on page 6, the words "or acquired by them after such date with property that was liquid personal property described in paragraph E of this Order held by them on such date" are deleted.

(4) In the third line of the first paragraph of Section E, on page 7, the words "valued as of the applicable Ownership Determination Date" are added, following the words "all liquid personal property" and preceding the "e.g." parenthetical, in the following clause:

> (1) convey to the Bishop of the Diocese all of their respective rights, titles and interests in all liquid personal property (e.g., cash, cash equivalents, securities and entitlements, instruments, investments, bank and other deposit accounts, certificates of deposit, endowment funds, and contributions and donations of money received as of the applicable Ownership Determination Date, and including restricted funds, as defined below, except to the extent that payments were made from such funds prior to the date of conveyance pursuant to this Order)

(5) In Section J of the Final Order, on page 11, the words "Loudoun County" are deleted.

(6) In Exhibit E to the final order, at page E-2, in Section 3, the words "Exhibit B attached hereto" are deleted and the words "Exhibit B attached hereto (excluding the exhibits attached to such order)" is substituted in their place.

(7) In Exhibit H to the Final Order, at page H-1, in the first line of the Recitals, "February 29" is deleted and "March 1" is substituted in its place.

(8) In Exhibit H to the Final Order, in the second paragraph of Section 2 at page H-2, the words "or acquired by the Church Parties after such date with property that was Liquid Personal Property held by the Church Parties on such date" are deleted.

(9) In Exhibit J to the Final Order, at page J-1, in the first line of the Recitals, "February 29" is deleted and "March 1" is substituted in its place.

(10) In Exhibit J to the Final Order, in the second paragraph of Section 2 at page J-2, the words "or acquired after such date in exchange for or with the proceeds from the sale or other disposition of property that was Tangible and Intangible Personal Property held by the Church Parties on such date, with the exception of Liquid Personal Property that was used after such date to acquire Tangible and/or Intangible Personal Property conveyed pursuant to the Other Bill of Sale" are deleted.

(11) In Exhibit K to the Final Order, at page K-5 (Exhibit C to Exhibit K), in the first line of text, "February 29" is deleted and "March 1" is substituted in its place.

(12) In Exhibit L to the Final Order, the personal property inventory of Church of Apostles is amended to reflect that the inventory includes personal property which should be included under Exhibit G to the Final Order, as well as after-acquired property. Property with a designated date of acquisition on Exhibit L was acquired after the demarcation date. The parties shall do a walk through on a mutually agreeable date to identify any other specific af-

ter-acquired property not subject to conveyance.

The foregoing corrections are subject to all arguments and objections of record. The Clerk will send copies of this Order to all counsel of record.

Entered this _6_ day of March, 2012, *unc Pro Tunc* to March 1, 2012.

Circuit Court Judge Randy I. Bellows

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APPENDIX G

Supreme Court of Virginia.
The PROTESTANT EPISCOPAL CHURCH IN the DIOCESE OF VIRGINIA

v.

TRURO CHURCH, et al.
The Episcopal Church

v.

Truro Church, et al.

Record Nos. 090682, 090683.
June 10, 2010.

George A. Somerville (Bradfute W. Davenport, Jr., Richmond; Mary C. Zinsner, McLean; Joshua D. Heslinga, Richmond; A.E. Dick Howard, Charlottesville; Troutman Sanders, on briefs), for appellant The Protestant Episcopal Church.

Heather H. Anderson (Soyong Cho, Washington, DC; Goodwin Proctor, on briefs), for appellant The Episcopal Church.

Steffen N. Johnson; E. Duncan Getchall, Jr., State Solicitor General (Gordon A. Coffee; Gene C. Schaerr; Andrew C. Nichols; Scott J. Ward; George O. Peterson; Tania M.L. Saylor; Mary A. McReynolds; James A. Johnson; Paul N. Farquharson; Scott H. Phillips; James E. Carr; E. Andrew Burcher; R. Hunter Manson; Kenneth T. Cuccinelli II, Attorney General; Charles E. James, Jr., Chief Deputy Attorney General; Stephen R. McCullough, Senior Appellate Counsel; William E. Thro, Special Counsel; Winston & Strawn; Gammon & Grange; Sands Anderson Marks & Miller; Semmes, Bowen & Semmes; Carr & Carr;

Walsh, Collucci, Lubeley, Emerick & Walsh, on briefs), for appellees.

Amici Curiae: The American Anglican Council; Presbyterian Lay Committee; Association for Church Renewal (Forrest A. Norman III; Kenneth W. Starr, Los Angeles, CA; C. Kevin Marshall; Christopher J. Smith, Washington, DC; Gallagher Sharp; Jones Day, on brief), in support of appellees.

Amici Curiae; Episcopal Diocese of Southwestern Virginia; Episcopal Diocese of Southern Virginia (Mark D. Loftis; Frank K. Friedman, Roanoke; Gordon B. Tayloe, Jr., Virginia Beach: Samuel J. Webster, Norfolk; Woods Rogers; Kellam, Pickrell, Cox & Tayloe; Wilcox & Savage, on briefs), in support of appellants.

Amici Curiae: General Council on Finance and Administration of the United Methodist Church; Baptist Joint Committee for Religious Liberty; Evangelical Lutheran Church in America; Gradye Parsons; General Conference of Seventh-day Adventists; African Methodist Episcopal Zion Church; African Methodist Episcopal Church; The Right Reverend Charlene Kammerer; W. Clark Williams; Virginia Synod of the Evangelical Lutheran Church in America; Metropolitan Washington, D.C. Synod of the Evangelical Lutheran Church in America; The Reverend Dr. G. Wilson Gunn, Jr.; Elder Donald F. Bickhart; Virlina District Board—Church of the Brethren, Inc.; Mid–Atlantic II Episcopal District of the African Methodist Episcopal Zion Church (Michael McManus; Thomas E. Starnes, Washington, DC; Drinker Biddle & Reath, on briefs), in support of appellants.

Amici Curiae: Beckett Fund for Religious Liberty (Lori H. Windham; Kevin J. Hasson; Eric C.

Rassbach; Luke W. Goodrich; Michael W. McConnell, on brief), in support of appellees.

Present: HASSELL, C.J., KOONTZ, KINSER, and MILLETTE, JJ., and LACY, S.J.

OPINION BY Justice LAWRENCE L. KOONTZ, JR.

These appeals arise from a dispute concerning church property between a hierarchical church and one of its dioceses in Virginia and a number of the diocese's constituent congregations. The principal issue we must decide is whether under the specific facts of these cases Code § 57–9 (A) authorized the congregations to file petitions in the appropriate circuit courts for entry of orders permitting them to continue to occupy and control real property held in trust for the congregations after voting to disaffiliate from the church and affiliate with another polity.[1]

BACKGROUND

While the consolidated record in these cases is voluminous, we need recite only those facts necessary to our resolution of the dispositive issue of whether the circuit court correctly ruled that Code § 57– 9(A) is applicable to the specific facts in these cases.[2] *See, e.g., Asplundh Tree Expert Co. v. Pacific Employers Ins. Co.,* 269 Va. 399, 402, 611 S.E.2d 531, 532 (2005).

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[1] When used in reference to religious entities, the term "polity" refers to the internal structural governance of the denomination. *See, e.g.,* Note, *Judicial Intervention in Disputes Over the Use of Church Property,* 75 Harv.L.Rev. 1142, 1143–44 (1962).

[2] An extended period of discovery, a six-day ore tenus hearing with witnesses, and many subsidiary hearings before the circuit court generated a manuscript record of over 8000 pages, many thousands of transcript pages of testimony and argument, and copious exhibits.

Because the resolution of these appeals requires us to construe the language of Code § 57–9(A), we will set out that language here so that the relationship of the recited facts to the issues to be resolved will be clear:[3]

> If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth.

The Ecclesiastical Relationships Among the Parties

We have previously held that Code § 57–9(A) applies to congregations of "hierarchical churches," that is "churches, such as Episcopal and Presbyterian

[3] The original statute addressing how property rights are to be determined upon a division within a church or religious society was adopted by the General Assembly in 1867. 1866–67 Acts ch. 210. Although the statute has been reenacted and amended several times during the past 150 years, the most significant change being to create separate subsections for its application to hierarchical and congregational churches, 2005 Acts ch. 772, the operative language of the statute construed by the circuit court, and which is the focus of our discussion in these appeals, has remained unchanged.

churches, that are subject to control by super-congregational bodies."[4] *Baber v. Caldwell,* 207 Va. 694, 698, 152 S.E.2d 23, 26 (1967). The dispute that resulted in the litigation from which these appeals arise involves a complex interplay between various entities within a faith community that has local, national, and international ties. It is not disputed that the entities involved in this litigation are part of a hierarchical church, although the parties differ on which entities compose that church. In order to better understand the context in which the dispute arose, we will first identify the entities involved and their relationship to one another.

The Anglican Communion is an international body that consists of 38 "provinces," which are "regional and national churches that share a common history of their understanding of the Church catholic through the See of Canterbury" in England. The Archbishop of Canterbury is the head of the Church of England, one of the national churches within the Anglican Communion, and is considered the "chief pastor," "first among equals in the wider Anglican Communion," and the "focus of the unity" within the leadership in the Anglican Communion.

The Anglican Communion functions through three "instruments of unity": the decennial Lambeth Conference; the Anglican Consultative Council, which

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[4] Code § 57–9(B) authorizes a circuit court to approve a vote concerning the use and control of property held in trust for the benefit of an autonomous congregation not affiliated with a hierarchical church. The parties stipulated in the circuit court that the petitioning congregations were "not, in their organizations and governments, entirely independent of any other church or general society" and, thus, Code § 57–9(B) would not apply to the facts of these cases.

meets every two or three years; and the biennial Primates' Meeting. The Lambeth Conference is the oldest of these institutions, dating from 1867. Participation in the Lambeth Conference is by "invitation only" from the Archbishop of Canterbury, with invitations being directed to individual church bishops and other leaders among the clergy, not to regional or national churches as a unit. Although the Lambeth Conference issues resolutions and reports, these are not binding on the regional and national churches. Rather, the function of the Lambeth Conference and the other international activities of the Anglican Communion are "primarily consultative." Thus, any action within the Anglican Communion has efficacy within a regional or national church only if the church adopts the resolution or report through its own polity structure for the governance of that church.

The Episcopal Church ("TEC") is a province of the Anglican Communion and the principal national church following the Anglican tradition within the United States.[5] TEC consists of 111 geographical dioceses with over 7000 congregations and over 2 million members. The highest governing body of TEC is the triennial General Convention, which adopts TEC's constitution and canons to which the dioceses must give an "unqualified accession." Each diocese in turn is governed by a Bishop and Annual Council that adopts the constitution and canons for the diocese. Each congregation within a diocese in turn is bound by the national and diocesan constitutions and

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[5] TEC is also known by the longer form "The Protestant Episcopal Church in the United States of America," and was identified as such, and by the acronym "ECUSA," in the circuit court. We have adopted the form used in the style of the appeal brought by TEC and by the parties in briefing both appeals.

canons. The Protestant Episcopal Church in the Diocese of Virginia ("the Diocese") is one of the dioceses within TEC.[6]

Priests of TEC are "canonically resident" within a specific diocese and may not function as priests in any other diocese of TEC without the permission of the local bishop. Similarly, a priest ordained by a diocese of TEC may not function as a priest for one of the other regional or national churches that participate in the Anglican Communion without permission from the local authority of that church.

At the 2003 General Convention of TEC, three major points of controversy arose: the Convention's confirmation of the election of Gene Robinson, a homosexual priest, as a bishop of one of the dioceses of TEC; the adoption of a resolution permitting the blessing of same-sex unions; and the rejection of a resolution concerning the "historic formularies of the Christian faith." Following the 2003 General Convention, Peter James Lee, the bishop of the Diocese, who had supported the confirmation of Robinson as a bishop, received "hundreds of letters" opposing these actions taken by the General Convention. Additionally, several congregations opposed to the actions of the General Convention stopped paying pledges owed to the Diocese and TEC, placing the funds in escrow. As a result, Bishop Lee became concerned that the dissident congregations would "attempt to create a parallel province."

In response to the discord within the Diocese, in 2004 a "Reconciliation Commission" was formed "to

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[6] There are three dioceses affiliated with TEC in Virginia. The "Diocese of Virginia" consists of 38 counties in the northern and central parts of the Commonwealth.

find ways to bring about some peaceful conflict resolution." Despite this effort, dissent concerning the actions of the 2003 General Convention continued, and in 2005 Bishop Lee created a new commission "to give attention to this rising threat of division in the Diocese." The following year, the commission promulgated a "Protocol for Departing Congregations." Under this protocol, the Diocese initiated procedures for congregations to conduct votes "regarding possible departure from the Diocese," and several congregations initiated procedures under the protocol to separate from the Diocese. However, Bishop Lee subsequently advised leaders of the dissident congregations that due to a change in leadership in TEC, separation of congregations had become a matter of concern to the national church, and that a vote to separate would not be binding on the Diocese or TEC.

Nonetheless, between December 2006 and November 2007, 15 congregations voted to separate from the Diocese. As a result, 22 members of the clergy associated with these congregations were deposed, or removed, from their pastoral duties in the Diocese by Bishop Lee. Congregations in other dioceses of TEC also took similar action to separate from their dioceses over the controversies arising from the 2003 General Convention. These congregations, as well as newly formed congregations of former members of TEC, began seeking to affiliate with other polities within the Anglican Communion in order "to be a part of the worldwide church."

The Church of Nigeria is a province of the Anglican Communion and governs the Anglican churches in the Federal Republic of Nigeria, a former British colony. In 2005, the Convocation of Anglican Nigerians in America was established as a mission of the

Church of Nigeria to provide oversight for expatriate Nigerian congregations in the United States. In 2006, the Church of Nigeria changed the name of this mission to the Convocation of Anglicans in North America ("CANA") and began accepting former TEC congregations. In 2006, the Anglican District of Virginia ("ADV") was formed as a district of CANA. By 2007, CANA included 60 congregations in eighteen states and 12,000 members, of which 10,000 were in congregations previously affiliated with dioceses of TEC. This action was viewed by the Archbishop of Canterbury and the leadership of TEC as an improper "incursion" of one member of the Anglican Communion on the territory of another member.

The leadership of TEC actively opposed the decision of the Nigerian Primate, Archbishop Peter J. Akinola, to install Rev. Martyn Minns, the Rector of one of the dissident congregations in the Diocese, as the bishop of CANA. In part because of this conflict, Archbishop Akinola made a declaration of "broken communion" with TEC. Although Archbishop Akinola installed Minns as the Bishop of CANA, Minns was not placed on the "invitation list" for the Lambeth Conference.

Procedural History

These appeals arise from petitions filed between December 2006 and July 2007 pursuant to Code § 57–9(A) by nine congregations formerly affiliated with the Diocese which now purport to be congregations within ADV and CANA ("the CANA Congregations").[7]

[7] The nine congregations are The Church at the Falls—The Falls Church, in Arlington County; Truro Church, Church of the Apostles, and Church of the Epiphany, Herndon, in Fairfax County; St. Margaret's Church, Woodbridge, St. Paul's Church,

The petitions were originally filed in the five circuit courts "wherein the property held in trust for [each] congregation or the greater part thereof" is located. Each congregation averred in its petition that a "division has occurred at the international, national, and local levels" that "resulted from a profound theological break by TEC and the Diocese from the majority of the other provinces of the Anglican Communion." The congregations alleged that as a result of this division, they had "determined to disaffiliate from TEC and the Diocese and to reaffiliate with another branch of the Anglican Communion." Although the petitions did not expressly identify the "branch" with which the congregations proposed to affiliate, exhibits attached to the petitions identify it as the ADV as a constituent part of CANA, acknowledging that CANA is a part of the Church of Nigeria.

The Diocese and TEC intervened in these cases to oppose the granting of the petitions and also filed declaratory judgment actions against the CANA Congregations, seeking a determination of trust, proprietary, and contract rights, if any, that the Diocese and TEC had in the properties used by the CANA Congregations which were the subject of the Code § 57–9(A) petitions.[8] The CANA Congregations filed an-

Haymarket, and Church of the Word, Gainesville, in Prince William County; Church of Our Saviour at Oatlands, in Loudoun County; and St. Stephen's Church, Heathsville, in Northumberland County.

[8] TEC filed a single complaint for declaratory judgment against the CANA Congregations along with two others, Christ the Redeemer Church and Potomac Falls Church; the Diocese filed individual complaints for declaratory judgment against the CANA Congregations and the two others. The congregations of Christ the Redeemer Church and Potomac Falls Church are not parties to these appeals.

swers to the declaratory judgment actions as well as counterclaims seeking declaratory judgment in favor of the congregations, to which the Diocese and TEC filed answers. A three-judge panel appointed by this Court under the Multiple Claimant Litigation Act, Code §§ 8.01–267.1, et seq., consolidated all these cases in the Circuit Court of Fairfax County.

Both TEC and the Diocese challenged the legitimacy of the CANA Congregations' petitions on multiple grounds. Their threshold position, and the issue that is ultimately dispositive in these appeals, was that relief under Code § 57–9(A) is not available to the CANA Congregations because there has been no "division" within TEC or the Diocese and that, even if there had been, neither CANA nor the ADV is a "branch of the church" resulting from that division to which the congregations could, as contemplated by the statute, attach themselves. The circuit court held a six-day evidentiary hearing to determine the scope and application of Code § 57–9(A) and, specifically under the facts of these cases, whether the statute would authorize the court to grant the requested relief to the petitioning congregations.

During this hearing, the CANA Congregations, TEC, and the Diocese presented extensive expert testimony regarding the enactment of Code § 57–9(A) and the history of divisions in religious denominations in Virginia. The CANA Congregations' experts testified that TEC had experienced a "division" because various congregations had separated from TEC in order to join a separate polity. In contrast, TEC's and the Diocese's experts testified that TEC could not divide without action by the General Convention, and therefore TEC had not experienced a "division" as a result of the underlying ecclesiastical differences. The

experts also gave conflicting testimony as to whether the statutory terms "branch," "attached," and "church or religious society" were met by the situation presented. We will recount more fully the arguments of the parties and the evidence of the expert witnesses on these points subsequently in this opinion.

In a letter opinion dated April 3, 2008, the circuit court opined that the CANA Congregations had properly invoked Code § 57–9(A). The circuit court found the Diocese, TEC, and the Anglican Communion were all "church[es] or religious societ[ies]," and that CANA, the ADV, the Church of Nigeria, TEC, and the Diocese were all "branches" of the Anglican Communion for purposes of applying Code § 57–9(A). Likewise, the court reasoned that CANA and the ADV were also "branches" of TEC and the Diocese. Accordingly, the court concluded that the CANA Congregations were entitled to file petitions under Code § 57–9(A) in order to have the court determine "the title to and control of any property held in trust" for the benefit of those congregations.

Following these rulings, the circuit court conducted further proceedings addressing constitutional challenges to Code § 57–9(A) raised by TEC and the Diocese under the establishment and free exercise clauses of the First Amendment of the United States Constitution and the equivalent provisions of the Virginia Constitution, as well as arguments concerning whether the statute violates principles of constitutional due process and the contracts clause. During this stage of the proceedings, the Commonwealth intervened for the purpose of defending the constitutionality of the statute.

On June 27, 2008, the circuit court issued a further letter opinion in which it upheld the constitutionality of the statute. Following additional proceedings, the court ultimately issued a final judgment on January 8, 2009 granting the CANA Congregations' petitions and dismissing TEC's and the Diocese's declaratory judgment actions as moot.[9] By orders dated November 9, 2009, we awarded appeals from this judgment to TEC and the Diocese.

DISCUSSION

Although the assignments of error in TEC's appeal and that of the Diocese are not entirely concordant, the two appeals broadly address the same principal themes in challenging the judgment of the circuit court with respect to its finding that Code § 57–9(A) is applicable to the facts in these cases and is not violative of the various constitutional principles argued below. Consistent with the analytical approach taken in the circuit court, we will first decide whether Code § 57–9(A) is applicable in these cases, only reaching the questions concerning the statute's constitutionality if necessary. *Davenport v. Little–Bowser,* 269 Va. 546, 557, 611 S.E.2d 366, 372 (2005).

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[9] The circuit court ruled that an endowment fund related to one of the CANA Congregations was held in corporate form and, thus, a determination of its ownership and control could not be decided under Code § 57–9(A). Accordingly, it ordered the resolution of the declaratory judgment actions with regard to the fund to be severed from the proceedings. This ruling has not been challenged by the effected congregation in these appeals. As relevant to the Diocese's appeal only, the court also determined that it lacked jurisdiction to consider a challenge to deeds transferring property to one of the CANA Congregations from another congregation of the Diocese.

The circuit court's rulings with respect to the applicability of Code § 57–9(A) are addressed in TEC's first three assignments of error:

> 1. The circuit court erred in interpreting and applying the term "division" in Va.Code § 57–9(A) and the statute itself to supersede the Episcopal Church's polity, because its interpretation ignores and conflicts with related Virginia statutory case law, the principle of Constitutional avoidance, and the statute's past application.
>
> 2. The circuit court erred in holding that CANA and the ADV are "branches" of the Episcopal Church or the Diocese of Virginia (the "Diocese") for purposes of § 57–9(A), because CANA and the ADV were formed by the Church of Nigeria, and because the court's holding impermissibly rested on its own finding of "communion."
>
> 3. The circuit court erred in holding that the Anglican Communion satisfied § 57–9(A), because the Anglican Communion has not "divided," even under the court's definition of the term, and also is not a "church or religious society" to which the congregations were "attached."

The Diocese addresses the same issues within its third assignment of error:

> The Circuit Court erred as a matter of law by holding that the requirements of Va.Code § 57–9(A) were satisfied in these cases. That holding was error because the court adopted erroneous and entangling definitions of the statutory terms "division," "branch," and "attached," leading the court to err by holding that a "division" has occurred in the Anglican Communion, the Episcopal Church (the "Church" or "TEC"), and the Di-

> ocese of Virginia (the "Diocese"); that all relevant entities were "branches" of and "attached" to the Anglican Communion; and that the Convocation of Anglicans in North American [*sic*] ("CANA") and Anglican District of Virginia ("ADV") are "branches" of the Church and the Diocese.

While the issues raised by these assignments of error deal primarily with questions of statutory construction which are reviewed de novo, *Smit v. Shippers' Choice of Va., Inc.,* 277 Va. 593, 597, 674 S.E.2d 842, 844 (2009), to the extent that we must also review the circuit court's application of a statute, we accord deference to the court's determinations of fact. *Virginia Baptist Homes, Inc. v. Botetourt County,* 276 Va. 656, 663, 668 S.E.2d 119, 122 (2008). Accordingly, we will first consider de novo the meaning of the relevant terms in Code § 57–9(A), and then apply our construction of those terms to the circuit court's findings of fact to the extent that they remain applicable.

The circuit court's analysis of the applicability of Code § 57–9(A) focused on the meanings of the specific words "division," "church or religious society," "attached," and "branch" within the statute. The court considered each separately and ultimately concluded that, as they were not otherwise defined within the statute or elsewhere in the Code, each of these words was to be given its plain and ordinary meaning, taking into account the historical context of the enactment of the original predecessor statute. While the use of "plain and ordinary meaning" is, of course, a fundamental rule of statutory construction to be applied where a word or phrase is not otherwise defined by the Code, the rule also requires that the courts should be guided by " 'the context in which [the word or phrase] is used.' " *Sansom v. Board of Supervisors,*

257 Va. 589, 595, 514 S.E.2d 345, 349 (1999) (quoting *Department of Taxation v. Orange–Madison Coop. Farm Serv.,* 220 Va. 655, 658, 261 S.E.2d 532, 533–34 (1980)).

When considered in the overall context of the statute, a proper construction of the language of Code § 57–9(A) must take into account the interrelationship of the words being considered. Thus, in order to determine whether a congregation is entitled to petition for the relief afforded by Code § 57–9(A), as a prerequisite the congregation must show that there has been a "division ... in a church or religious society[ ] to which any such congregation ... is attached." Likewise, the authority afforded by the statute permitting such congregations to vote in order to determine "to which branch of the church or society such congregation shall thereafter belong" must be construed within the context of the first phrase of the statute. That is, the "branch of the church or society" to which the congregation votes to belong must be a branch of the "church or religious society[ ] to which [the petitioning congregation] is attached" prior to the "division." Accordingly, we will construe the language of these two phrases together in this related context.

Initially, we note that the parties to this litigation do not dispute that TEC and the Diocese are each a "church" as contemplated by the phrase "church or religious society" contained in Code § 57–9(A). The circuit court correctly found that such was true when applying the plain meaning of these terms. The circuit court also found that "it need not reach the question as to whether the Anglican Communion is in fact a 'church' under Code § 57–9(A), because there is

abundant evidence in the record ... that the Anglican Communion is, at the very least, a 'religious society.' "

The clear purpose of Code § 57–9(A) is to provide a method by which the disputed title to and control of any property held in trust for a congregation may be conclusively determined. The "church or religious society" referenced in the statute in which a "division" has occurred contemplates one that has an interest in the property for which the title and control is at issue. TEC and the Diocese have asserted an interest in the property at issue in this litigation. No such assertion is made by the Anglican Communion. However, for purposes of our analysis in these appeals, we need not decide whether the Anglican Communion is a church or religious society as contemplated by Code § 57–9(A) because the evidence in the record does not establish that there has been a "division" in the Anglican Communion. While undoubtedly there was theological disagreement between TEC and the Diocese and CANA, the ADV, the dissenting congregations and the Church of Nigeria concerning the actions of the 2003 General Convention of TEC, all of these entities continue to admit a strong allegiance to the Anglican Communion. Accordingly, we conclude that the circuit court erred in its holding that there was a division in the Anglican Communion for purposes of the application of Code § 57–9(A) in these cases.

It then follows that the focus of our analysis in these appeals is whether the dissenting congregations have established that there had been a "division" in TEC and the Diocese, churches to which the congregations were "attached," and whether the congregations voted to belong to a "branch" of TEC and

the Diocese. We first address the issue of a division in TEC and the Diocese.

As a prerequisite to a congregation being permitted to petition a circuit court to confirm the result of a vote to separate from a church to which it is attached as provided in Code § 57–9(A), the congregation must establish that there has been a "division" within that church. Indeed, the circuit court expressed the view that in order to resolve the issue of whether Code § 57–9(A) applied to the CANA Congregations' petitions it had to "address the question at the heart of this litigation: *Has a division occurred* ?" Thus, much of the expert testimony presented by the parties was directed toward placing the concept of a "division" within a church into a historical context in an effort to establish the intention of the General Assembly when choosing this word in enacting the original predecessor statute to Code § 57–9 in 1867.

Dr. Mark Valeri, an expert witness for the CANA Congregations, testified that the most commonly understood definition of "division," as understood in the mid–19th century, both nationally and specifically in Virginia, is the "separation out of the group of members of a religious ... denomination in sufficient numbers to begin to form an alternative polity and the renunciation of the authority of the original group in that process." Further, Dr. Valeri stated that typically when a group left the particular denomination, it was not an amicable split, nor was it "with the approval or consent of the higher ecclesiastical authorities." Dr. Valeri highlighted several historical examples of this type of "division," agreeing that in these instances it was not the case that "the new group be acknowledged by the entity from which it divided in order to be viewed in common parlance as a branch."

The circuit court found that "[i]n sum, Dr. Valeri testified that the 'average, ordinary Virginian in 1867' would have understood 'division' to mean 'the separation out of a group in rejection of the authority [of that group],' and that 'it is that act of division which creates a branch.' This understanding would 'encompass situations in which the church or religious society' did not 'approve' of the [']division,' as well as situations in which the 'new entity, the new polity, was not formally affiliated with the church and religious society from which it divided.' "

Dr. Charles Irons, another expert for the CANA Congregations, testified that "the most common definition of division would be the fragmentation of one religious jurisdiction to create two or more jurisdictions." But there were "additional possible meanings of division" including "internal conflict or discord within a religious body.... Division could also be used to describe not the act of separation itself, but one of the resulting branches." Dr. Irons specifically noted that in reviewing prior cases involving petitions under the predecessor statutes to Code § 57–9(A), it was never alleged that the division had been approved by "higher ecclesiastical authorities," or that the filing of the petitions "had been approved by higher ecclesiastical authorities."

By contrast, Dr. Ian Douglas, an expert called for TEC and the Diocese, asserted that neither TEC nor a diocese of TEC could divide "without the action of [the] General Convention." Dr. Douglas further testified that "a congregation or a people can choose to leave a parish or leave the Episcopal Church," but that such action would "not fundamentally constitute a division or a departure of a parish ... from the wider Episcopal Church."

Dr. Douglas opined that "there can be no division without formal approval of the division by the highest adjudicators of the religious body involved." Dr. Douglas also testified that the term "division" as used in Code § 57–9(A) would not be applicable to the Anglican Communion because it was a "family of churches" with a shared historical relationship, but it was not an "intact whole" that would be subject to division.

Dr. Robert Bruce Mullen also testified for TEC and the Diocese. Dr. Mullen stated that in the context of hierarchical church structures "a division is usually understood as a formal separation of a larger religious body such that it looks markedly different after this has been done. Such that we might say that one body becomes two.... [I]t [is] a much more formal category than just simply an informal separation." According to Dr. Mullen, in the 19th century there would have been a distinction made "between a division [in] a denomination as a whole and a mere departure o[r] separation from that denomination."

After reviewing the conflicting testimony of these experts in its April 3, 2008 letter opinion, the circuit court stated that it found "the testimony of the two CANA congregation experts—Dr. Valeri and Dr. Irons—to be more persuasive and convincing." The court reasoned that these two experts had based their opinion on "the particular and pertinent historical record relevant to the instant case," while the opinions of the experts for TEC and the Diocese "did not appear to be so tethered."

The circuit court also reviewed the prior cases from this Court dealing with divisions within churches. The court recognized that *Baber v. Caldwell,* 207

Va. 694, 152 S.E.2d 23 (1967), and *Reid v. Gholson,* 229 Va. 179, 327 S.E.2d 107 (1985), involved divisions within autonomous congregations, not hierarchical churches, but nonetheless found that the discussion of the division that occurred in each case to be instructive. The court recognized that in *Baber,* "division" was described as "intra-congregational strife" and "dissension," which the circuit court took as supporting Dr. Valeri's contention "that a division need not be consensual or amicable." The court noted that in *Reid* this Court found that the requisite "division" had not occurred because the petitioners in that case "expressed no desire to separate from the body of their church, or to rend it into groups, each of which seeks to take over all the property and characterize the other as apostate, excommunicated, and outcast." 229 Va. at 192, 327 S.E.2d at 115.[10]

The circuit court ultimately concluded that "the definition of 'division' as that term is used in [Code §] 57–9(A) is in fact that assigned to it by the CANA Congregations, which is '[a] split ... or rupture in a

[10] The circuit court also reviewed *Brooke v. Shacklett,* 54 Va. (13 Gratt.) 301 (1856), a case decided prior to the enactment of the original predecessor statute to Code § 57–9, but found that it was "not helpful precedent" because the decision in that case was "premised on a 'division' whose existence was not in serious dispute." Similarly, the court concluded that *Hoskinson v. Pusey,* 73 Va. (32 Gratt.) 428 (1879), did not establish, as the CANA Congregations contended, that the statute did not "require that a division be recognized or approved by a denomination," finding that the absence of any express discussion of that issue beyond the fact that such was apparently the case in *Hoskinson* could mean that the "Court simply did not reach the issue." Likewise, the court found that *Finley v. Brent,* 87 Va. 103, 12 S.E. 228 (1890), was decided "on other grounds" that did not require the Court to construe the meaning of division.

religious denomination that involve[s] the separation of a group of congregations, clergy, or members from the church, and the formation of an alternative polity that disaffiliating members could join.' " The court further concluded that the more restrictive definition proposed by TEC and the Diocese requiring a formal approval of a division by the consent of the hierarchical church "would make [Code §] 57–9(A) a nullity." While agreeing with TEC and the Diocese "that division, under [Code §] 57–9(A), ought not be 'easy,' " the court opined that the definition it had adopted placed an appropriate burden on a petitioning congregation to show "three major and coordinated occurrences." That is, a "split" or "rupture" resulting in a separation from the church and the formation of or attachment to an alternative polity.

In addressing its first assignment of error, TEC contends that the circuit court erred in adopting this definition of division because it effectively would allow congregational majorities to "strip hierarchical churches of property rights in violation of denominational polity and rules." TEC contends that historically Code § 57–9(A) "was prompted by and has been applied only to divisions accomplished in conformity with denominational polity." Similarly, the Diocese contends within the argument of its third assignment of error that the "[c]ircuit [c]ourt's interpretation treats the separation of a small minority that form or join an alternative polity as a 'division,' ignoring the Church's hierarchical polity and rules and vesting control solely in local majorities." TEC disputes that its proposed construction of the term would render the statute a nullity because even in divisions formally recognized by the church, the statute would still be necessary to permit congregations to choose between

the old and the new polities created by the division. We are not persuaded by these contentions.

Inherent in the concept that a division must be recognized through a formal process within the church's polity is that the courts would ultimately be drawn into an ecclesiastical dispute to determine whether a division as contemplated by Code § 57–9(A) had occurred. Such a circumstance would risk entangling the courts in matters of religious governance, contrary to the well established principle that under the First Amendment "civil courts are not a constitutionally permissible forum for a review of ecclesiastical disputes." *Jae–Woo Cha v. Korean Presbyterian Church,* 262 Va. 604, 610, 553 S.E.2d 511, 514 (2001); *see also Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658, (1969). While what is or is not an "ecclesiastical dispute" is often debatable, issues of religious governance are unquestionably outside the jurisdiction of the civil courts. *Reid,* 229 Va. at 187, 327 S.E.2d at 111–12. The record of the present cases confirms that permitting the polity of the church to determine whether a division has occurred could potentially involve the court in disputes involving church governance.

While it is certainly possible that a division within a hierarchical church could occur through an orderly process under the church's polity, history and common sense suggest that such is rarely the case. To the contrary, experience shows that a division within a formerly uniform body almost always arises from a disagreement between the leadership under the poli-

ty and a dissenting group. The construction of division adopted by the circuit court does not, as TEC and the Diocese contend, "vest[ ] control solely in local majorities" to determine whether a division has occurred. Indeed, it is clear that a majority vote by one or more congregations to separate from a hierarchical church under Code § 57–9(A) would not alone be sufficient to establish the fact of a division. To the contrary, we agree with the circuit court that the standard it adopted places a significant burden on the petitioning congregation to establish that the requisite "division" has occurred and that this "division" led to the vote to separate. Moreover, in resolving the issue of whether a division has occurred under the standard adopted by the circuit court, there is no requirement that the court involve itself in questions of religious governance or doctrine. Rather, the court simply determines from the facts presented whether the division has occurred, without regard to the nature of the dispute, whether over doctrine or some other cause, which lead to the separation of the congregation and its attachment to a different polity.

The evidence presented by the CANA Congregations clearly establishes that a split or rupture has occurred within the Diocese and, given the evidence of similar events in other dioceses of TEC, the split or rupture has occurred at the national level as well. Likewise, there can be no question that as a result, members and congregations have separated from the Diocese and TEC and have aligned with different polities, formed in response to the dissension within the Diocese and TEC. Accordingly, we hold that the circuit court did not err in finding that a "division" had occurred in the Diocese and TEC within the meaning of Code § 57–9(A).

The circuit court next found that the CANA Congregations were "attached" to the Diocese and TEC. There was not, nor could there be, any serious dispute that, until the discord resulting from the 2003 General Convention, the CANA Congregations were "attached" both to TEC and the Diocese because they were required to conform to the constitution and canons of TEC and the Diocese. Accordingly, we agree that for purposes of Code § 57–9(A), the CANA Congregations established that they were previously "attached" to TEC and the Diocese.

We turn now to consider the circuit court's finding that CANA and the ADV are "branches" of TEC and the Diocese for purposes of applying Code § 57–9(A). For the reasons that follow, we hold that the circuit court's finding was erroneous.

In its second assignment of error, TEC contends that the circuit court's definition of a "branch" as meaning "a division of a family descending from a particular ancestor" demonstrates that CANA is a branch of the Church of Nigeria, not of TEC. Likewise the ADV, as a district of CANA, descends from the Church of Nigeria and CANA, not the Diocese or TEC. TEC contends that the historical connection between it and the Church of Nigeria through the Anglican Communion is not sufficient to establish that constituent parts of each church are "branches" of the other. TEC further contends that the circuit court erred in giving particular significance to the fact that the majority of the congregations in the ADV and CANA were formerly affiliated with TEC and its dioceses. We agree.

When it was initially formed, CANA was a mission of the Church of Nigeria designed to minister to

expatriate members of that church in North America. The subsequent expanding of the mission to allow dissident congregations of TEC and the Diocese to affiliate with CANA, and the formation of the ADV, unquestionably occurred *in response* to the disputes that had occurred within TEC. However, it is equally clear that the revision of CANA's mission and the formation of the ADV did not occur as a *result* of the division within TEC and the Diocese. Indeed, the dissenting congregations maintained that they had "determined to disaffiliate from TEC and the Diocese" in order to join CANA, a pre-existing polity within the Church of Nigeria. Thus, while CANA is an "alternative polity" to which the congregations could and did attach themselves, we hold that, within the meaning of Code § 57–9(A), CANA is not a "branch" of either TEC or the Diocese to which the congregations could vote to join following the "division" in TEC and the Diocese as contemplated by Code § 57–9(A).

In summary, we conclude that the evidence does not establish that there was a division in the Anglican Communion for purposes of the application of Code § 57–9(A). We further conclude that a proper construction of Code § 57–9(A) requires a petitioning congregation to establish both that there has been a division within the church or religious society to which it is attached and that subsequent to that division the congregation seeks to affiliate with a branch derived from that same church or religious society. While the branch joined may operate as a separate polity from the branch to which the congregation formerly was attached, the statute requires that each branch proceed from the same polity, and not merely a shared tradition of faith. The record in these cases shows that the CANA Congregations satisfied the

first of these requirements in that there was a division within TEC and the Diocese, but not the second, as CANA clearly is not a branch of either TEC or the Diocese. Accordingly, we hold that the circuit court erred in ruling that the CANA Congregations' petitions were properly before the court under Code § 57–9(A).[11]

By granting the CANA Congregations' Code § 57–9(A) petitions, the circuit court ruled that this "obviate[d] the need to address the merits of the Declaratory Judgment Actions filed by the Episcopal Church and the Diocese and thus render[s] them legally moot." In light of our holding that the circuit court erred in granting the Code § 57–9(A) petitions, the control and ownership of the property held in trust and used by the CANA Congregations remains unresolved. Accordingly, the declaratory judgment actions filed by TEC and the Diocese, and the counterclaims of the CANA Congregations in response to those suits, must be revived in order to resolve this dispute under principles of real property and contract law.[12]

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[11] Because we have concluded that the CANA Congregations have not satisfied the requirements for petitioning the circuit court for relief under Code § 57–9(A), we need not address TEC's and the Diocese's assignments of error challenging the court's finding that the statute was not violative of the First Amendment and Due Process.

[12] The Diocese has also assigned error to the circuit courts' determination that it lacked jurisdiction to reconsider an order entered in a prior proceeding approving the transfer of property from Christ Redeemer Church to Truro Church. *See* note 9, *supra*. While we agree with the circuit court that the Diocese was attempting to bring an improper collateral attack on a final judgment, it is nonetheless evident that as the property is held for the benefit of Truro Church, the ultimate determination of ownership and control of that property will be resolved in the

See, e.g., Code § 57–7.1; *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.,* 249 Va. 144, 452 S.E.2d 847 (1995); *Green v. Lewis,* 221 Va. 547, 272 S.E.2d 181 (1980); *Norfolk Presbytery v. Bollinger,* 214 Va. 500, 201 S.E.2d 752 (1974).

CONCLUSION

For these reasons, we will reverse the judgment of the circuit court and remand with direction to dismiss the CANA Congregations' Code § 57–9(A) petitions. We will further direct the circuit court to reinstate the declaratory judgment actions filed by TEC and the Diocese and the counterclaims of the CANA Congregations to those actions, and conduct further proceedings thereon consistent with the views expressed in this opinion.

Record No. 090682—*Reversed and remanded.*

Record No. 090683—*Reversed and remanded.*

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proceedings on the declaratory judgment actions. Accordingly, we need not address this issue.

APPENDIX H

Circuit Court of Virginia,
Fairfax County.
In re MULTI–CIRCUIT EPISCOPAL CHURCH PROPERTY LITIGATION

No. CL 2007–0248724.
Dec. 19, 2008.

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Letter Opinion on Remaining 57–9 Issues

RANDY I. BELLOWS, J.

Dear Counsel:

This Letter Opinion resolves the eight remaining issues related to the section 57–9 petitions.[1] It will permit the Court to enter a Final Order resolving all the section 57–9 petitions and those Declaratory Judgment actions now rendered moot. Those Declaratory Judgment actions which have not been rendered moot have been stayed pending resolution of the appeals of the final order in the section 57–9 proceedings.

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[1] All other issues relating to 57–9, including the applicability and constitutionality of 57–9, have been addressed in the Court's prior letter opinions. *See In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 139 (Va.Cir.Ct. Oct. 17, 2008); *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 102 (Va.Cir.Ct. Aug. 19, 2008); *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 104 (Va.Cir.Ct. Aug. 19, 2008); *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 76 (Va.Cir.Ct. July 16, 2008); *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 85 (Va. Cir. Ct. June 27, 2008); *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 74 (Va. Cir. Ct. June 27, 2008); *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 134 (Va. Cir. Ct. June 6, 2008); *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 49 (Va.Cir.Ct. May 12, 2008); *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 22 (Va. Cir. Ct. April 3, 2008).

1. CANA CONGREGATIONS' MOTION TO STRIKE PRAECIPE FILED NOVEMBER 18, 2008

CANA's motion is **DENIED.** All that ECUSA and the Diocese have done is file copies of briefs filed with the Supreme Court of Virginia in connection with the *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.,* 249 Va. 144, 452 S.E.2d 847 (1995). This Court finds no prejudice to CANA, or grounds for relief.

2. ECUSA'S AND THE DIOCESE'S MOTION TO RECONSIDER PART OF THE LETTER OPINION ON THE COURT'S FIVE QUESTIONS

ECUSA's and the Diocese's motion to reconsider is **DENIED.** In their pleadings, the parties argue about the scope and meaning of the Court's Five Question opinion. The opinion, however, speaks for itself, and this Court sees no basis to reconsider or revise its decision.

3. THE FALLS CHURCH'S MOTION TO STRIKE THE DIOCESE'S AND THE EPISCOPAL CHURCH'S PROFFER OF EVIDENCE—THE FALLS CHURCH, EPISCOPAL "CONTINUING CONGREGATION."

The Falls Church's Motion to Strike is **GRANTED.** Throughout this litigation, this Court has endeavored to accommodate counsel, both in connection with the scheduling of hearings and the setting of deadlines for the filing of pleadings. Indeed, to the extent possible, the Court has permitted counsel to consult with each other and come up with their own proposed deadlines, and then this Court has incorpo-

rated those agreed-upon deadlines into its scheduling orders. In turn, counsel for both parties, despite the enormous pressures of trial preparation and the requirement of voluminous filings, have been respectful of the Court's orders and the deadlines contained therein. Where the parties have been unable to meet a deadline, and properly sought an extension, this Court has consistently accommodated counsel.

Nevertheless, the situation now confronting the Court requires it to grant The Falls Church's Motion to Strike. In order to allow the Diocese and ECUSA to make its record for appellate purposes, the Court permitted the filing of a proffer regarding evidence excluded by the Court. The Court set a firm deadline for the filing of the proffer and reiterated that deadline multiple times. The Diocese and ECUSA, however, did not file their proffer in a timely fashion. And, when they did file the proffer two weeks late, they provided no explanation for the late filing. Nor, significantly, did they seek leave from the Court for permission to make a late filing.[2]

This Court rejects the explanation now submitted by the Diocese and ECUSA that they did not seek leave of court because "Virginia law does not require leave of court to make a proffer...." (Opp'n TFC's Mot. Strike & Mot. Extend Time 1). If that is the case, the Diocese and ECUSA should have advised the Court at the time it established the deadline that it needed no deadline because it could file its proffer when it saw fit to do so. The salient point is that this Court

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[2] Only in response to the Motion to Strike does the Diocese and ECUSA now seek to extend the time for proffer. That Motion is itself untimely.

authorized a specific proffer with specific parameters[3] and with specific deadlines (for both the proffer and counter-proffer). The Diocese and ECUSA did not meet that deadline.

This Court also rejects the Diocese's and ECUSA's argument that The Falls Church is not prejudiced by the Diocese's and ECUSA's untimely filing, for the reasons stated at paragraph 10 of the Memorandum in Support of Falls Church's Motion to Strike. (See Mem. Supp. TFC's Mot. Strike ¶ 10).

Finally, this should be said: The Falls Church argues that ECUSA and the Diocese have acted in "willful disregard" of the Court's deadlines. (Mem.Supp.¶ 9). The Court does not so find. Indeed, ECUSA's and the Diocese's explanation that it failed to make its filing in a timely fashion because it "slipped through the cracks amidst the flurry of post-trial filings," strikes the Court as credible. (*See* Opp'n ¶ 1). But the issue here is not one of good faith vs. bad faith. Rather, the issue here is that a party missed a material and specific deadline by two weeks, that it did not seek leave of the Court for permission to late file its pleading, and that the opposing party has been prejudiced.

Therefore, The Falls Church's Motion to Strike is granted. However, because the granting of the Motion to Strike may itself be an appellate issue, the Court directs the Clerk of the Court to retain in the record the proffer filed by ECUSA and the Diocese, and the briefings filed by the parties on the Motion to Strike.

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[3] Because this Court rejects the proffer on timeliness grounds, the Court does not reach The Falls Church's alternative argument that the Diocese and ECUSA have exceeded the parameters authorized for the proffer.

4. ECUSA'S AND THE DIOCESE'S MOTION TO RECONSIDER RULING FROM THE BENCH ON OCTOBER 8, 2008

On October 8, 2008, this Court held that it did not have jurisdiction to review Judge Keith's September 29, 2006 final order authorizing the transfer of the property of Christ the Redeemer Episcopal Church to Truro Church. ECUSA and the Diocese now seek reconsideration of that ruling. Their Motion to Reconsider is **DENIED.**

First, the Court finds that Rule 1:1 of the Supreme Court of Virginia is applicable to this situation. Rule 1:1 states that "[a]ll final judgments, orders and decrees ... shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Va. Sup.Ct. R. 1:1. Here, well over 21 days elapsed before ECUSA and the Diocese challenged Judge Keith's Order, and thus, this Court has no jurisdiction to modify, vacate or suspend the Order. While ECUSA and the Diocese now argue that they are not directly attacking Judge Keith's Order and that the instant proceedings are separate and distinct, (Mot. Reconsider Ruling from Bench & Supporting Mem. ¶ 4), this Court finds, as Truro Church argues at page 6 of its brief, that ECUSA and the Diocese are making "a direct attack on the September 29, 2006 final Order" and that ECUSA and the Diocese are "specifically seek[ing] to have the order modified vacated or suspended—actions which are prohibited by Rule 1:1." (Truro Church's Opp'n Mot. Reconsider 6). Moreover, this Court does not find that the resolution of this matter is controlled by *Niklason v. Ramsey,* 233 Va. 161, 353 S.E.2d 783 (1987).

Second, the Court does not find at all persuasive the argument by ECUSA and the Diocese that what is at issue here is merely a "clerical error" subject to subsequent correction by this Court pursuant to section 8.01–428(B). Va.Code Ann. § 8.01–428(B) (2007); (*see* Mot. Reconsider ¶ 6). That term is defined narrowly because it has the potential to undermine finality of judgments. Thus, it typically applies to scrivener's errors and the like. It certainly does not apply to the instant situation, which is an attack on the substance of Judge Keith's Order.

Finally, although the Diocese and ECUSA allude to section 8.01–428(D) as a basis to re-open and set aside Judge Keith's Order, (*see* Mot. Reconsider ¶ 6), the Court does not have before it an "independent action" the purpose of which is "to set aside a judgment or decree for fraud upon the court." § 8.01–428(D).

Therefore, the Motion to Reconsider is denied.

5. THE ST. STEPHEN'S CHURCH 1874 DEED

The sole issue regarding St. Stephen's Church is whether the 1874 deed contains an enforceable restriction as to the use of the property that takes it beyond the reach of section 57–9(A). Va.Code Ann. § 57–9(A) (2007). The Court rules that the property conveyed pursuant to the 1874 deed *is* subject to section 57–9(A) and rejects the arguments asserted by ECUSA and the Diocese in this regard.

In large measure, this matter has already been decided by the Court. As this Court has stated on more than one occasion, section 57–9(A) covers property of a congregation held by trustees. The parties in this case do not dispute that the congregational prop-

erty in question is held by trustees.[4] Therefore, unless section 57–9(A) raises a contracts clause issue in the context of this particular deed, the property is subject to section 57–9(A).

ECUSA and the Diocese argue, however, that there is language in the deed which restricts the assignment of this property pursuant to section 57–9(A) to an entity other than an Episcopal Church. They cite the following deed language:

'To have and to hold the said lot ... [i]n trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal church for the purpose of erecting a house for divine worship and such other houses as said congregation may need,' and further, provided that 'said church or house for divine worship when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church....' [5]

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[4] The Stipulation provides that "[s]ince the date of the Deed, legal title has been vested in the trustees of St. Stephen's Church." (Stipulation Regarding St. Stephen's Church 1874 Deed ¶ 6).

[5] It should be noted that the parties disagree as to the meaning and significance of this language. ECUSA and the Diocese argue that the language constitutes "an intent to restrict the estate conveyed ." (ECUSA/Diocese Responsive Br. Regarding St. Stephen's 1874 Deed 4). St. Stephen's Church argues that language "referring to the Protestant Episcopal Church is language of identification only, used but once in the deed" and that "this identifier should not be read permanently to restrict the use of the property solely to and by those affiliated with a particular denomination, for if it were so construed, it would defeat entirely the purpose of [section] 57–9(A) ." St. Stephen's Church Opening Br. Re 1874 Deed 8–9). The Court does not resolve this dispute because under either interpretation, this is still "property

(ECUSA/Diocese Opening Br. Regarding St. Stephen's 1874 Deed 1–2 (emphasis omitted)).

This deed, however, was entered into after the passage of the predecessor statute to section 57–9(A) and is, therefore, subject to its terms.[6] While not necessary to the resolution of this matter, it is worth noting that the deed, itself, recognizes the preeminence of Virginia law, stating that "said church or house for divine worship when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church *not inconsistent with the laws and constitution of Virginia* ...." *Id* (emphasis added and omitted). One of those laws, of course, was the 1867 division statute, and this deed, to the extent that it involves property held in trust for a congregation, is subject to the division statute.

As to the Contracts Clause, as this Court stated in its August 19, 2008 Letter Opinion on the Contracts Clause, it "protects only contractual rights that existed prior to the effective date of the 1867 predecessor statute to 57–9...." *In re Multi–Circuit Episcopal Church Prop. Litig.*, CL 2007–0248724, 2008 Va. Cir. LEXIS 102, at *3 (Va.Cir.Ct. Aug. 19, 2008). Sig-

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held in trust for such congregation," which is the operative language of section 57–9(A). Va.Code Ann. § 57–9(A) (2007).

[6] Nor were the parties involved unaware of the portion of the Virginia Code containing the division statute. (*See* St. Stephen's Opening Br. 7 ("Indeed, not only does the 1874 Deed expressly state that the property is to be used in a manner 'not inconsistent with the laws and constitution of Virginia,' the 1874 Deed and the circuit court order authorizing the conveyance both expressly cited Chapter 76 of the 1873 Virginia Code—the very statute that authorized disaffiliation votes as a remedy for denominational divisions.")).

nificantly, each of the cases relied upon by ECUSA and the Diocese— *Finley v. Brent*, 87 Va. 103, 12 S.E. 228 (1890), *Brooke v. Shacklett*, 54 Va. 301, 13 Gratt. 301 (1856), and *Hoskinson v. Pusey*, 73 Va. 428, 32 Gratt. 428 (1879)—involve deeds that predated the predecessor statute to section 57–9. (Cf. ECUSA/Diocese Opening Br. 4–8).

As to the assertion that parties are free to "order their affairs in a different manner" than contemplated by section 57–9(A), *see id.* at 9, this is a variant of the "contracting around" theory that this Court has already rejected as untimely and waived. *See In Re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–248724, 2008 Va. Cir. LEXIS 104, at *3–4 (Va.Cir.Ct. Aug. 19, 2008). More significantly, however, is the fact that there is no evidence of an effort to "contract around" or avoid the reach of section 57–9(A) in this Deed. To the contrary, the Deed expressly notes the preeminence of Virginia law, which would of course include the division statute.

Therefore, the Court finds for St. Stephen's Church.

6. CHURCH OF THE WORD PROPERTY DISPUTE

One issue remains related to the applicability of section 57–9(A) to the Church of the Word (hereafter "COTW"). That is whether the property in question—conveyed by deed dated December 3, 1993 from the Resolution Trust Corporation to "Bradfute W. Davenport, Jr., A.C. Epps and H. Merrill Pascoe, as Trustees for the Episcopal Church in the Diocese of Virginia, whose address is 8317 Centreville Road, Manassas, Virginia 22111, as Grantee"—is subject to

COTW's section 57–9(A) petition. The Court finds that the property *is* subject to the petition.

COTW argues, and ECUSA and the Diocese concede, that this Court's June 27, 2008 *Five Questions* Opinion disposes of this matter. (COTW Opening Br. 12; ECUSA/ Diocese Opening Br. Regarding COTW 4–5). That opinion held, in part, that in Virginia "church property may be held by trustees for the local congregation, not for the general church." *In re Multi–Circuit Episcopal Church Prop. Litig.,* CL 2007–0248724, 2008 Va. Cir. LEXIS 74, at *20 (Va. Cir. Ct. June 27, 2008) (footnote omitted). Therefore, if the property in question can only be held in trust for the local congregation, ECUSA's and the Diocese's argument that this particular property was held in trust for the Diocese cannot prevail. With that in mind, ECUSA and the Diocese seek reconsideration of that portion of the Court's *Five Questions* Opinion. (ECUSA/Diocese Opening Br. 4–6).

The parties make multiple additional arguments:

On the issue of who has made the biggest financial contributions to purchase and maintain the property, ECUSA and the Diocese argue that the Diocese and its member churches contributed far more than COTW. (ECUSA/Diocese Opening Br. 15). In contrast, COTW argues that it has contributed almost $ 1 million toward the purchase of the property and servicing the mortgage for the past 15 years. (COTW's Opp'n Br. 2–3, 5 n. 2).

On the issue of the significance of a September 2005 Circuit Court Order replacing the Diocesean trustees with trustees selected by COTW (*see* Stipulation Ex. 28), ECUSA and the Diocese argue that it is irrelevant because the Deed was unchanged and re-

placing one group of trustees with another has no effect on the beneficial owners of the property. (ECUSA/Diocese Responsive Br. Re COTW 7–9). COTW argues that replacing the Diocesean trustees with trustees selected by COTW establishes COTW's beneficial interest in the property. (COTW Opening Br. 9–10; COTW Opp'n Br. 4–7).

On the issue of the language of the Deed itself, ECUSA and the Diocese state that it unambiguously states that the beneficial owner is the Diocese. (ECUSA/ Diocese Opening Br. 11–12). COTW argues that by using a Manassas address in the Deed that is associated only with COTW, and not with the Diocese, the Deed makes clear that the beneficial owner is the congregation, not the Diocese. (COTW Opening Br. 7–8).

The Court need not resolve these issues because it declines to reconsider its *Five Questions* Opinion. Both parties recognize that this resolves the instant dispute. Section 57–9(A) covers "property held in trust for such congregation ..." and covers those "congregation[s] whose property is held by trustees...." Va.Code Ann. § 57–9(A) (2007). The property in question meets this criteria and is, therefore, subject to the disposition under section 57–9(A).

7. THE APPLICABILITY OF 57–9(A) TO THE FALLS CHURCH ENDOWMENT FUND

The sole question before the Court is whether The Falls Church ("TFC") at the time of the vote to disaffiliate had a personal property interest in The Falls Church Endowment Fund by virtue of its vestry's power to appoint the Directors of the Fund. If so, the Endowment Fund is subject to TFC's section 57–9(A) petition. If not, final disposition of the Endow-

ment Fund—*i.e., Who owns the Endowment Fund?*—will have to await the Declaratory Judgment trial. For the reasons stated below, the Court **GRANTS** ECUSA's and the Diocese's Motion for Partial Summary Judgment and finds that the Endowment Fund is not subject to TFC's section 57–9(A) petition. Disposition of the Endowment Fund is therefore reserved for resolution in the Declaratory Judgment action.

A. October 17, 2008 Letter Opinion

On October 17, 2008, this Court issued a Letter Opinion laying out the background of the instant dispute. The Court's Opinion read in part as follows:

In large measure, the facts are not in dispute. The Endowment Fund is a non-profit corporation, organized in 1976, whose "main purpose" is "to further the ministry and outreach of the Christian Church." (Articles of Incorporation of the Endowment Fund at Page 1 .) The Articles provide that the membership of the Corporation is comprised of two classes. Class A members are individuals serving as the vestry of TFC. Class B members are members of the parish who are eligible to vote for the vestry at TFC's annual meeting. According to the Articles, Class A members—i.e., the vestry of TFC—have the duty of electing Directors of the Endowment Fund.

The Diocese and TEC argue that because the Endowment Fund is a corporation, because it is a distinct legal entity from TFC, because its Directors are appointed by the vestry of TFC rather than by its trustees, and because TFC cannot have a "personal property" interest in a charitable non-profit entity, there is no basis for a finding that its property is subject to TFC's 57–9(A) petition. TFC does not dispute a number of these assertions. It agrees that the En-

dowment Fund is a corporation, that it has a distinct legal existence, that its assets are not property held by TFC's trustees, that its directors are not elected by TFC's trustees, and that it is indeed a charitable non-profit entity. TFC asserts, however, that it does have a "personal property" interest in the Endowment Fund that brings the Endowment Fund within the scope of its 57–9(A) petition.

The resolution of this issue actually turns on the application of 57–10, rather than 57–9(A), as both parties recognize and concede. 57–10 states the following:

> When personal property shall be given or acquired for the benefit of an unincorporated church or religious body, to be used for its religious purposes, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts or, if the church has created a corporation pursuant to Section 57–16.1, to be held by it as its land is held, and for the same purposes.

Thus, if personal property is "given or acquired for the benefit" of a church, it stands "vested in the trustees having the legal title to the land ...," and would therefore be subject to a 57–9(A) petition. In this case, TFC does not assert that its personal property interest arises out of some ownership interest it claims to have in the assets of the Endowment Fund. Rather, TFC asserts that its personal property interest is the power of the vestry to appoint the Endowment Fund's Directors. The Diocese and TEC argue that the right to appoint Directors to a non-profit corporation can never be a "personal property" interest and that, as a pure question of law, the Court should

reject TFC's argument and grant the Diocese's and TEC's Motion for Partial Summary Judgment. TFC argues that there are factual matters relevant to the resolution of this issue and, on that basis, the Motion for Partial Summary Judgment, should be denied.

The Court takes the Motion for Summary Judgment under advisement and will give both parties the opportunity to present such evidence as each party deems warranted on the question of whether TFC—at the time of the vote to disaffiliate—had a personal property interest in the Endowment Fund by virtue of its vestry's power to appoint the Directors of the Fund. While the Court is skeptical that there is a factual component to this question, and is inclined to believe that it is a pure question of law, the Court will give the parties the opportunity to put their facts before the Court.

In re Multi–Circuit Episcopal Church Prop. Litig., CL 2007–0248724, 2008 Va. Cir. LEXIS 139, at *2–*5 (Va.Cir.Ct. Oct. 17, 2008).

B. Discussion

Following issuance of the Court's Letter Opinion, the Court presided over the trial on issues related to the Endowment Fund. Having now heard this evidence, and reviewed the documentation offered by the parties in support of their respective positions, and having studied what little legal authority exists on the issue, the Court is convinced that, as it is suspected, this is a pure question of law.

The Court's opinion on this issue can be summarized in two words: *form matters*. Indeed, form matters so much that it is a principal reason the Court upheld the constitutionality of section 57–9(A). *See In re Multi–Circuit Episcopal Church Prop. Litig. (Letter*

Opinion of June 27, 2008 on the Constitutionality of Va.Code Section 57–9(A)), CL 2007–0248724, 2008 Va. Cir. LEXIS 85 (Va. Cir. Ct. June 27, 2008). That ECUSA and the Diocese could have held the departing churches in a different form, e.g., in corporate form or in the name of the Bishop, and thus, placed the church properties beyond the reach of the Division Statute, is a critical reason for the Court's ultimate holding that the statute did not offend the Free Exercise Clause of the First Amendment. *Id* at *55–*61.

Here, the funds in question are held by a corporation, the Falls Church Endowment Fund. They are not held by the Diocese. They are not held by TFC. They are not held by its trustees. This form of corporate ownership takes the Endowment Fund wholly beyond the reach of TFC's section 57–9(A) petition, except for the thinnest of reeds upon which TFC's entire argument is precariously premised. That reed is that the vestry's power to appoint the directors of the Endowment Fund constitutes "personal property" under section 57–10. (TFC's Opening Br. Regarding Endowment Fund 1). The Court disagrees.

There is no controlling case law in Virginia that defines the term "personal property" as it is used in section 57–10. Thus, the parties with the Court's encouragement have had to look elsewhere for authority as to whether the power to appoint directors to a charitable, non-stock, non-profit corporation constitutes a "personal property" interest.

The Court is persuaded by the cases cited by ECUSA and the Diocese that, as a matter of law, the power to appoint directors to a charitable, nonstock, non-profit corporation is not a "personal property" in-

terest. *See, e.g., In re Mount Sinai Hospital,* 164 N.E. 871 (N.Y.1928) ("[W]hen in the judgment of the Legislature the interests of a charitable corporation will be promoted by a change in the method of electing trustees, once intrusted to the members, whereby the members are disfranchised and the board is made self perpetuating, no one's property is taken....") While TFC argues that this case, and other cases cited by ECUSA and the Diocese, principally involve issues of vested rights, (TFC's Opp'n Br. Concerning Endowment Fund 2–4), the Court finds that TFC reads these cases too narrowly. These cases, and other involving similar matters, *see, e.g., Commonwealth of Virginia v. Joco Found.,* 263 Va. 151, 163, 558 S.E.2d 280, 286 (2002) (members of a charitable corporation acquire no property rights in the assets of the corporation), support the general proposition that an individual's or entity's control or influence over a non-stock, non-profit charitable corporation is not a "personal property" interest. *See, e.g.,* 1 Marilyn E. Phelan, *Nonprofit Enterprises: Corporations, Trusts, and Associations* § 3.06 (2000), cited in (ECUSA's and Diocese's Renewed Mot. Strike & Opening Br. Regarding Endowment Fund 3) ("[T]he right of a member of a nonprofit corporation to vote is not constitutionally protected because a member of a nonprofit corporation does not have any interest in the property of the corporation.")

Therefore, this Court finds that section 57–10 and, hence, section 57–9, do not control the disposition of the Endowment Fund, and the matter is therefore reserved for the Declaratory Judgment action.[7]

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[7] Without expressing a view as to the merits, the Court would note that many of the factual arguments made by the parties

8. THE FALLS CHURCH'S TWO–ACRE PARCEL

On March 20, 1746, John T. Trammole deeded to "the ... Vestry of Truro parish and their Successors" a two-acre parcel, upon which the original Falls Church sanctuary was built. (Diocese Ex. 64, at 249.) The ultimate question before the Court today is whether the vestry of TFC is the legal successor to the vestry of Truro Parish as to this two-acre parcel. The Court finds for TFC on this matter and holds that the vestry of TFC *is* the legal successor to the vestry of Truro Parish as to this two-acre parcel.

The Court categorically rejects the claims of ECUSA and the Diocese that the true legal successor in connection with this two-acre parcel is Christ Church, Alexandria. (*See* ECUSA/Diocese Br. Supp. Mot. Strike Concerning Two–Acres Parcel 9–14, 25.) TFC argues that ECUSA's and the Diocese's claims regarding Christ Church, Alexandria's ownership of this property is an 11th hour revision in theory made seventeen months into this litigation which was designed to fit within the narrowing window left by this Court's multiple letter opinions. (*See* TFC's Opp'n Br. Concerning 1746 Parcel 1). The Court does not need to adopt such a characterization to find that ECUSA's and the Diocese's claims regarding Christ Church, Alexandria's interest in this property are wholly at odds with the historical record, with numerous court orders and petitions over the past century and a half, with the land records of Fairfax and Arlington Counties, and with ECUSA's and the Dio-

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regarding the Endowment Fund, while not relevant to the section 57–9(A) petition, might well be relevant to a declaratory judgment action.

cese's own repeated assertions and admissions recognizing TFC as the legal owner of this two-acre parcel. Moreover, this Court rejects ECUSA's and the Diocese's argument that what is before the Court is really an adverse possession claim that TFC has failed properly to present or prosecute. (*See* ECUSA/Diocese Responsive Br. Regarding Two Acres Parcel 10–14). Suffice it to say, one need not claim adverse possession of that which one legally owns.

In sum, for the reasons stated below, the two-acre parcel is subject to TFC's 57–9(A) petition.

A. Discussion

There is actually little in factual dispute regarding the history of this matter, although the parties of course sharply contest the implications of those undisputed facts.

In 1765, by act of the General Assembly, Truro Parish was split into Fairfax Parish and Truro Parish. The two-acre parcel, at that point, became part of the new Fairfax parish. (*See* Test. Diocese's expert witness, Dr. Edward Lawrence Bond, Trial–Day 3 Tr. 49–51, Oct. 20, 2008). Eventually, the church at the Falls fell into disuse and disrepair. *Id* at 98–99. In 1836, however, TFC petitioned the Diocesan convention, which admitted TFC " 'as a separate and distinct church," ' pursuant to Canon XII. *Id.* at 88–89 (quoting Diocese Ex. 75 at 13).[8] According to Dr.

[8] ECUSA and the Diocese suggest that it is inconsistent with the positions taken by TFC and the other CANA congregations for TFC *now* to rely upon a Diocesan canon and the acts of the Diocese's Annual Convention, where in the past TFC has argued that the canons and actions of the convention did not create enforceable property rights. (*See* ECUSA/Diocese Responsive Br. 4–5 & n. 4.) TFC argues, and this Court is persuaded, that it is

Bond, after TFC was admitted to the Diocese, the vestry of TFC and the vestry of Christ Church, Alexandria operated independently. *Id.* at 107–108. Each elected its own vestry and took over the management of its own affairs. *Id.* at 106. Dr. Bond also testified that when a new parish was created, "[i]f the property was in the new parish, it stayed with the new parish." *Id.* at 54.

ECUSA and the Diocese argue that the admission of TFC as a separate and distinct church did not have the effect of making TFC the legal successor to the vestry of Truro parish in connection with the two-acre parcel.[9] The Court disagrees. Indeed, it would make little sense for TFC to even have come into existence "as a separate and distinct church from the Parish Church of Fairfax Parish," (*see* Diocese Ex. 75 at 13), *with its own vestry,* if it was not the legal successor to the property in question.[10]

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not taking inconsistent positions. (*See* TFC's Reply Br. Concerning 1746 Parcel 5 n. 3).

[9] ECUSA and the Diocese argue that TFC was admitted into the Diocese in 1836 "as a separate and distinct church," not a parish. (ECUSA/Diocese Responsive Br. 6 (quoting Trial–Day 3 Tr. 88–89)). But, as TFC notes in its Reply Brief, TFC was admitted pursuant to Canon XII, "For the Division of Parishes," pursuant to which a new entity was "received as a distinct Parish." (TFC's Reply Br. 1–2 (quoting Diocese Ex. 116 at 12–13)).

[10] The Court also finds persuasive TFC's additional argument that it is "the 'successor' to ... Truro Parish under the 1746 deed [because its] vestry's function most closely parallels that of the Truro Parish vestry in colonial times," albeit it with only ecclesiastical powers, rather than the additional governmental powers that Truro Parish exercised. (TFC's Opening Br. 14). Thus, it is the TFC's vestry that for more than 150 years has governed the property in question, raised funds to upgrade the property,

Professor Bond, who was ECUSA's and the Diocese's own expert witness, testified that "you could not have two vestries in the same parish." (Trial–Day 3 Tr. 107). Yet, as TFC points out, if this Court accepts the arguments of ECUSA and the Diocese, this is precisely what the Court would be required to find existed from 1836 to the present, i.e. one vestry to manage and administer the two-acre parcel (TFC) and another vestry actually to own it (Christ Church, Alexandria). (*See* TFC's Reply Br. 1). Once ECUSA and the Diocese concede, as they must, that TFC did in fact manage and administer the property for the past 150 years and more, it cannot escape the implications of its "two vestry" theory, not the least of which is that it is at odds with the testimony of their own expert.

This Court's conclusion that the vestry of the TFC is the legal successor of the vestry of Truro parish is dispositive of the question now before the Court. Having said that, the Court will note three other points in support of TFC's position.

First, there is a record of court orders, petitions, resolutions and related documentation demonstrating that for more than 150 years, the Circuit Courts of Fairfax and Arlington have clearly and explicitly understood the two-acre parcel to be the property of the vestry of TFC. (*See* TFC's Opening Br. 1).

Second, prior to the instant litigation, Christ Church, Alexandria never asserted a claim on this two-acre parcel, nor contributed to its development,

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repaired the property, financed additions to the property and decided how the property was to be used.

maintenance, repairs, or improvements. (See ECUSA/Diocese Br. Supp. Mot. Strike 3 (citing Test.William E. Deiss, Trial–Day 2 Tr. 45–78, Oct. 15, 2008)).

Third, there is a clear record of admissions by ECUSA and the Diocese recognizing TFC's ownership of this property. While ECUSA and the Diocese seek to diminish the significance of these admissions, and argue that at most they constitute evidential admissions, this Court finds the admissions to be quite significant.[11] They establish in this Court's view that, until quite recently, even ECUSA and the Diocese understood that the vestry of TFC owned the two-acre parcel. TFC, in its Opening Brief, cites the following examples of ECUSA's and the Diocese's admissions: [12]

"[O]n February 5, 2007[,] ... the Diocese brought a Lis Pendens action against TFC and its trustees in Arlington County Circuit Court. See TFC Exh. 61. That action sought 'to establish and confirm title' in [the Diocese's Bishop] to various parcels of property, including" the two-acres at issue here. "[T]he Dio-

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[11] ECUSA and the Diocese argue that these admissions are of "limited probative value." (*See, e.g.* ECUSA/Diocese Br. Supp. Mot. Strike 21). Given the repeated and categorical nature of these admissions, the Court does not agree that they should only be assigned "limited probative value." *See West v. Anderson,* 186 Va. 554, 564 (1947) ("The admission of a party during the course of a judicial proceeding, relevant to an issue, is of the highest evidential value.") Nor does the Court find persuasive ECUSA's and the Diocese's argument, in connection with the Lis Pendens action, that the memorandum signed and filed by the Diocese's counsel should not be attributed to the Diocese itself. (ECUSA/Diocese Br. Supp. Mot. Strike 22).

[12] (TFC's Opening Br. 11–13).

cese's suit ... recognized the 'Record Owner[s]' of these parcels" as the trustees of TFC. (TFC's Opening Br. 11 (quoting TFC Ex. 61 at 1–2) (alteration in original)).

ECUSA in its answer to TFC's 57–9 petition states that "[t]he Episcopal Church admits and avers that trustees for the Falls Church hold legal title to the real property currently possessed by The Falls Church for the congregation of The Falls Church, a parish or mission of the Episcopal Church, subject to the Constitution and Canons of the Episcopal Church and the Diocese of Virginia." *Id.* at 11–12 (quoting TFC Ex. 4, at ¶ 2) (citation omitted).

ECUSA's [Declaratory Judgment] complaint states " '[the Trustees] are named as defendants in this action because, on information and belief, they continue to hold legal title to some of the real property at issue in this case, which was deeded over the years to the "Vestry of Truro Parish....' " " *Id.* at 12 (quoting ECUSA Complaint ¶ 23). Similar language appears in the Diocese Complaint at Paragraph 5. *Id*

In response to a TFC request for admission that " 'Falls Church real property is currently titled in the names of Trustees for Falls Church," ' *id.* at 12 (quoting TFC Ex. 9 at 3), the Diocese responded that "The deeds grant the subject property to trustees for the Falls Church, a subordinate, constituent part of the Diocese and the Episcopal Church...." *Id* (quoting TFC Ex. 10 at 5) (citing TFC Ex. 10 at 9). ECUSA made similar admissions. *Id* at 12–13 (citing TFC Ex. 11 at 4).[13]

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[13] That the Diocese formally denied the Request for Admission does not take away from the significance of these admissions. Moreover, the claim of ECUSA and the Diocese that it "lim-

These admissions provide compelling support for the conclusion that the two-acre parcel is owned by the vestry of TFC and not by any other entity, including Christ Church, Alexandria.[14]

B. ECUSA and the Diocese's Arguments

1. ECUSA's and the Diocese's Claim that Mason v. Muncaster, 22 U.S. 445 (1824) Controls the Outcome of this Controversy

In *Mason v. Muncaster,* the Supreme Court of the United States held that the "Vestry of the church in Alexandria [Christ Church] is, in succession, the regular Vestry of the parish of Fairfax." 22 U.S. 445, 469 (1824). Since it is undisputed that the "parish of Fairfax" was at that point in time the legal successor to Truro Parish, ECUSA and the Diocese argue that the vestry of Christ Church, Alexandria is, by dint of this Supreme Court opinion, the successor to Truro

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it[ed]" its admission by noting that TFC held title as an Episcopal entity subject to the Constitutions and Canons of the Episcopal Church and the Diocese, (*see* ECUSA/Diocese Responsive Br. 4 n. 2), does not limit the admission at all. The significance of the admission is that ECUSA and the Diocese was not challenging that TFC held legal title to the property in question (at least not until well into the instant litigation.) The fact that ECUSA and the Diocese viewed TFC as subordinate to the Episcopal Church and the Diocese is a different matter, and one that does not help resolve the question of whether TFC was the lawful successor to Truro Parish's interest in the two-acre parcel.

[14] The Court need not reach the question posed by ECUSA and the Diocese as to whether these are "judicial" admissions that bind a party or merely "evidential" admissions that a court may consider. (*See* ECUSA/Diocese Br. Supp. Mot. Strike 21–25). Under either characterization, the Court finds the admissions to be persuasive evidence in support of TFC's position that the legal holder of title to the two-acre parcel was TFC *and no one else.*

Parish's property interest in the two-acre parcel. (*See* TFC Opening Br. 13–18; ECUSA/Diocese Br. Supp. Mot Strike 12–14). While TFC makes a number of arguments to rebut the assertions of ECUSA and the Diocese, (e.g., that the Supreme Court was applying District of Columbia law, not Virginia law, and that there is language in the lower court's opinion, *Mason v. Muncaster,* 2 Cranch C.C. 274 (C.C.D.C.1821), that supports TFC's contentions), their principal assertion—which is one this Court adopts—is that there is nothing in either opinion to suggest or imply that its findings on succession are immutable and unchangeable over the course of time. In fact, *Mason v. Muncaster,* explicitly recognizes a procedure for the creation of new Episcopal entities. *See* 22 U.S. at 464 ("And yet it is not denied that, by the rules and customs of the sect, new Episcopal societies are not admitted to be formed within the bounds of existing parishes, without the consent of the proper ecclesiastical authority.") In 1836, as this Court has found, the vestry of TFC became the successor to the vestry of Truro Parish in connection with the two-acre parcel. (*See* TFC Opening Br. 13–18). Nothing in *Mason v. Muncaster* prohibited such an eventuality.[15]

2. ECUSA's and the Diocese's Claim that No Deed Conveys the Property to TFC's Trustees

It is undisputed that no deed conveys the two-acre parcel to the vestry of TFC. If, however, the ves-

[15] This is especially the case given the fact, as TFC notes in its Opening Brief that at the time *Mason* was decided in 1824 there was "only one vestry for 'the whole parish.' " (TFC Opening Br. 17) When TFC was subsequently admitted to the Diocese in 1836 as a distinct and separate church, there then existed a distinct and separate vestry, as well. *Id.* at 17–18.

try of TFC is the legal successor to the vestry of Truro Parish, as this Court has concluded, no deed was required. ECUSA and the Diocese explicitly acknowledge this principle in their final brief. (See ECUSA/Diocese Reply Br. 5 ("[W]e have never argued that such a deed is required. We have merely pointed out that the Property is not subject to TFC's § 57–9 Petition because TFC has no deed to its trustees and has failed to prove that it is the legal successor to the entity named in the Deed.") In other words, ECUSA and the Diocese acknowledge that if TFC is the legal successor to Truro Parish as to the two-acre parcel, no deed was required.[16] Moreover, as TFC notes in its

[16] It naturally follows from this acknowledgement that if no deed was required, section 55–2 of the Virginia Code would not compel a different result. The current version of the law reads as follows:

No estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed or will, nor shall any voluntary partition of lands by coparceners, having such an estate therein, be made, except by deed; nor shall any right to a conveyance of any such estate or term in land accrue to the donee of the land or those claiming under him, under a gift or promise of gift of the same not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him.

Va.Code Ann. § 55–2 (2007). TFC argues, first, that it is not clear that section 55–2 even applies to church property and, second, that the Virginia Supreme Court has recognized exceptions to section 55–2, as for example where there has been a long period of prior peaceful possession by one claiming to be a fee owner. TFC cites *Prettyman v. M.J. Duer & Co.,* 189 Va. 122, 139 (1949), for the proposition that " '[i]t requires no stretch of the imagination to presume that a grantee has legal title to land which has been in the possession of himself and his predecessors in title for 190 years.' " (TFC Opp'n Br. 3–4 (quoting *Prettyman v. M.J. Duer & Co.,* 189 Va. 122, 139, 52 S.E.2d 156, 164 (1949))). The Court does not need to resolve either of these ar-

Opposition Brief, if it is necessary for a deed to have conveyed the two-acre parcel, that assertion would also negate Christ Church, Alexandria's claim on the property. (TFC Opp'n Br. 2).

3. ECUSA's and the Diocese's Claim that the Testimony of TFC's Expert on Land Records, Kenneth Schrantz, Does not Establish TFC's Ownership Claim

ECUSA and the Diocese argue that Kenneth Schrantz, who was TFC's expert title examiner, would go no farther than to tell the Court what the land records "indicate" regarding ownership of the two-acre parcel, rather than explicitly expressing an opinion on the issue of ownership. (ECUSA/Diocese Br. Supp. Mot. Strike 3–4). Given that Mr. Schrantz testified that "[t]he land records indicate the property is owned by the trustees of The Falls Church," and further testified that "[e]very indication would be that the trustees of The Falls Church as to this property are the successors to Truro, the Vestry of Truro Parish," (Trial–Day 2 Tr. 121–22, Oct. 15, 2008), the Court finds that Mr. Schrantz' testimony unequivocally supports TFC on this issue. ECUSA and the Diocese argue that the use of the word "indicate" is "manifestly insufficient," (ECUSA/Diocese Opening Br. Supp. Mot. Strike 4), to prove title. The Court disagrees that there is any material difference between the use of the term "indicate" and similar terminology to describe the title examiner's findings.

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guments because both parties in the instant case agree that no deed to TFC was required *if* TFC was the legal successor to Truro Parish as to this two-acre parcel. (*See* TFC Opp'n Br. 2–6; ECUSA/Diocese Reply Br. 5).

4. ECUSA's and the Diocese's Dismissal of the Significance of the Various Court Orders and Related Documents Confirming TFC as the Property Owner.

ECUSA and the Diocese argue that none of the court orders, resolutions, petitions, easements, encumbrances, deeds of trust, property exchange documents, and other documentation, prove anything other than that TFC was making the "bald allegation," of ownership of the two-acre parcel. *Id* at 5–8. The Court disagrees.

These documents go back to 1851 and demonstrate a consistent understanding on the part of both the Circuit Courts of Fairfax and Arlington that the property in question was owned by the vestry of TFC. These records and court orders encumbered property, granted easements over property, exchanged property, consolidated property and took numerous other actions regarding the two-acre parcel.[17] Some of these actions were taken with the knowledge of the Diocese, which interposed no objection. (*See, e.g.,* TFC's Opening Br. 9 n. 5; TFC Exs. 20, 48, 55A, 57, 62). To dismiss more than 150 years of such documentation as some huge misunderstanding is just not persuasive.[18]

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[17] The implication of the position taken by ECUSA and the Diocese is that all of these court orders, and the actions taken pursuant to these orders, are invalid. ECUSA and the Diocese adopt this implication most explicitly when they argue that any claim of ownership based on multiple *ex parte* orders would be a "legal nullity." (ECUSA/Diocese Responsive Br. 1).

[18] ECUSA and the Diocese further argue that these orders were "not the product of adjudication designed to test evidence and reach the correct legal conclusion...." (ECUSA/Diocese Br. Supp. Mot. Strike 6). Even if correct, however, it does not alter the

5. ECUSA's and the Diocese's Claim that Christ Church, Alexandria is the Legal Successor to the Vestry of Truro Parish as a Matter of "Historical Fact "

As stated above, the Court is not persuaded that Christ Church, Alexandria has any interest in the property in question. After 1836, for the reasons stated above, it was the vestry of TFC that succeeded to Truro Parish's interest in the property.

6. ECUSA's and the Diocese's Claim that TFC Never Pled Adverse Possession

This is, of course, true. It is equally true, however, that TFC was no more under an obligation to plead or establish adverse possession than any typical owner of a house or a commercial property is required to prove adverse possession of that which the owner actually owns.[19]

Court's view of the legal significance of these orders. Virtually every day this Court signs uncontested orders that, like the documents in question, are not the "product of adjudication." Nevertheless, such orders have the same force and effect as if they were the product of a hotly contested trial. ECUSA and the Diocese further argue that the orders were *ex parte. See id.* The fact that the orders were *ex parte,* however, does not undermine the Court's finding that they reflect a consistent understanding by the courts regarding ownership of the two-acre parcel.

[19] Because the Court finds no merit in the assertion that TFC had to plead adverse possession, this Court does not reach two questions contested by the parties: first, whether TFC properly pled an adverse possession claim and, second, whether TFC established the elements of adverse possession. (ECUSA/Diocese Responsive Br. 10–14) Similarly, the Court need not reach the question of laches, which has been raised in this litigation by TFC as part of its defense against the claims of Christ Church, Alexandria. (TFC Opening Br. 22–25).

Therefore, for the foregoing reasons, the Court finds in TFC's favor and holds that the two-acre parcel is subject to TFC's 57–9 petition.

CONCLUSION

The parties are to prepare an Order to be submitted to the Court by December 29, 2008, that reflects the decisions contained in this Letter Opinion and which constitutes a Final Order resolving all the 57–9 petitions and such Declaratory Judgment actions as have been rendered moot by the Court's prior orders.

Sincerely,

Randy I. Bellows

APPENDIX I

Circuit Court of Virginia, Fairfax County
In re **EPISCOPAL CHURCH PROPERTY LITIGATION (CL 2007-0248724)**

Letter Opinion on the Court's Five Questions

June 27, 2008.

The Court has now received and reviewed the briefs filed by all parties in response to this Court's June 6, 2008, order. In that order, this Court posed five questions to the parties, each of which the Court today resolves as matters of law. Those questions, and this Court's decisions regarding those five questions, are as follows.

(1) Did the Supreme Court of Virginia, in *Green v. Lewis,* hold that a trial court presiding over a § 57–9(A) petition must consider the factors set out in *Green v. Lewis,* in addition to making the determinations actually set out in § 57–9(A)? Does the holding of *Green v. Lewis* apply only to proceedings brought under § 57–15, or does it apply to proceedings brought under § 57–9 as well?

Decision of the Court: In this Court's April 3, 2008, Letter Opinion (hereinafter § 57–9 Opinion, 2008 Va. Cir. LEXIS 22), the Court found that "there is no controlling case law on point with the issues confronting this Court, and that "[i]ndeed, there is almost no case law that can even be characterized as bearing on the issues before this Court." § 57–9 Opinion, *supra,* 2008 Va. Cir. LEXIS 22 at *130. The Court's view of the matter has not changed. *Green v.*

Lewis is not a case interpreting or applying § 57–9(A). *Green* is a case interpreting and applying Va.Code § 57–15. ECUSA/Diocese argue that *Green* began as a § 57–9 case,[1] and that therefore, the holding of *Green v. Lewis* applies to any case brought under § 57–9(A).[2] This is incorrect for two reasons.

(1) Although ECUSA/Diocese are correct that the initial petition filed by the Pastor of the departing congregation in *Green,* Wesley J. Green, mentioned " § 57–9," Pastor Green's invocation of this statutory section appears to be nothing more than "a basis for invoking the court's equitable jurisdiction."[3] Nowhere

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[1] *See* ECUSA/Diocese Resp. Br. Pursuant to June 6, 2008, Order at 1 ("[T]hey [the CANA Congregations] do not and cannot deny that both parties' pleadings invoked § 57–9, there was a congregational vote, those materials were before the Court, and, indeed, the Court quoted the congregation's resolutions.").

[2] ECUSA/Diocese likewise argue that the case of *Trustees of Cave Rock Brethren Church v. Church of the Brethren,* No. 1802 (Va. Cir. June 20, 1976) (unpublished), a Botetourt County Circuit Court case, was "explicitly litigated under § 57–9." (ECUSA/Diocese Opening Br. Pursuant to June 6, 2008, Order). *Cave Rock* never reached any of the issues that this Court is faced with, however. Moreover, *Cave Rock* involved the withdrawal of a single congregation from a supercongregational church. Finally, the petitioners invoked the portion of § 57–9 that applies to independent and autonomous congregations. (At the time *Cave Rock* was decided, § 57–9 had not yet been divided into sections lettered A and B). Thus, *Cave Rock* is not helpful.

[3] (CANA Congregations' Opening Br. Pursuant to the Court's June 6, 2008, Order.) The CANA Congregations correctly state in their brief that "[n]either petition [as originally filed with the circuit court that decided *Green]* contains any allegation (or denial) that (1) a 'division' had occurred in the AME Zion Church with which the congregation was affiliated, or (2) the congregation voted to affiliate with a 'branch' of the divided body." (CANA Congregations' Opening Br. Pursuant to the Court's June 6, 2008, Order.)

in the Chesterfield Circuit Court's eventual opinion or order does the trial court even cite § 57–9.[4] Similarly, the briefs filed before the Supreme Court of Virginia in that case could not possibly lead a reader to believe that this was a § 57–9(A) case.[5] And, finally, there is the Supreme Court of Virginia's decision in *Green,* which, in this Court's opinion, clearly establishes that the decision made by the Supreme Court of Virginia is under § 57–15, not § 57–9.

(2) This conclusion is corroborated by the circumstances giving rise to the suit in *Green.* That is because *Green* involved the withdrawal of a single congregation from a hierarchical church. Moreover, there was no alleged "division" within the A.M.E. Zion Church, which was the church to which the departing congregation in *Green* was attached. In other words, there was not even a colorable claim of division which could give rise to invocation of § 57–9(A).

ECUSA/Diocese further argue that, in addition to the holding of *Green,* the following language from *Norfolk Presbytery,* 214 Va. 500, 201 S.E.2d 752 (1974), suggests that this Court may not apply the plain language of § 57–9(A) to the instant dispute: "[I]t is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds, and the provisions of the constitution of the general church." *Id.* at 505, 201 S.E.2d 752. But *Norfolk Presbytery,* just like *Green,*

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[4] *See* CANA Congregations' Opening Br. Pursuant to the Court's June 6, 2008, Order, Exs. A & B.

[5] *See* CANA Congregations' Opening Br. Pursuant to the Court's June 6, 2008, Order, Exs. C & D.

did not involve invocation of § 57–9(A).[6] And, while ECUSA/Diocese may argue that it ought not make a difference that § 57–9 was not the subject of the opinion, this Court finds just to the contrary. Section 57–9(A) places a very substantial burden on the moving party, e.g. they must prove that there is a division, the requirements of attachment and branch must be met, and, of course, there is the requirement of a majority vote. Only if every criteria is met can § 57–9(A) be properly invoked and church property disputes resolved in accordance with the statute. To argue, in effect, that there is no material or practical difference between § 57–9 and § 57–15 is to give neither statute its proper due and to give *Norfolk Presbytery* and similar cases an application and breadth for which there is no support in the law.

In sum, *Green v. Lewis* does not hold that a trial court presiding over a § 57–9(A) petition must consider the *Green* factors in addition to making the determinations actually required by § 57–9(A), nor is that the import of the decision. Further, the holding of *Green* applies to § 57–15 proceedings, not § 57–9 proceedings.

(2) Has the Court in its April 3, 2008, opinion already resolved the issue described in Question 1 above, as asserted by the CANA Congregations?

Decision of the Court: Even if the Court did not squarely address Question # 1 in its April 3, 2008, opinion, it does so now. See Answer to Question # 1.

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[6] ECUSA/Diocese concede this point, stating that "[t]here are many Virginia Code sections under which a property dispute between congregations (or majority factions thereof) and a general church might begin. In *Norfolk Presbytery,* it was § 57–15." (ECUSA/Diocese Resp. Br. Pursuant to June 6, 2008, at 3, n. 3.)

(3) What is the meaning of the phrase "if the determination be approved by the court" as that phrase is used in § 57–9(A)? Specifically, once this court determines that § 57–9(A) has been properly invoked, is the "approval" limited to a review of the vote taken or does it permit, or even require, as ECUSA and the Diocese assert, that the court examine various other considerations, including those set forth in *Green v. Lewis'*?

Decision of the Court: For the answer to the question as to the meaning of "if the determination be approved by the court," this Court first looks to the various orders that were entered pursuant to petitions filed under the predecessor statute to § 57–9 in the time period directly following the passage of that original statute. These petitions were filed by congregations seeking to join one branch or the other of a hierarchical church that had divided. In looking at the language of the various orders entered by Virginia courts in response to such petitions, it becomes clear as to what the meaning of the phrase "if the determination be approved by the court" actually means.

For example, Plaintiffs' Ex. 96 contains an order from the Augusta County CL Order Book, entered on June 28, 1867, which reads as follows:

> A Religious Congregation of Methodists in the town of Staunton this day presented to the Court certain papers in which it is recited and claimed that "the Baltimore Conference of the Methodist Episcopal Church severed its connection with the General Conference of said Church, by resolution adopted during its [illegible] in Staunton, Va., in March, 1861 and in February, 1866 by a

> unanimous vote, formed a union with the Methodist Episcopal Church South"—which the said Congregation is one of the congregations of the said Baltimore Conference, known as Staunton Station, in Rockingham District, and which the said Congregation of Staunton Station having assembled at their Church on the [illegible] day of April, 1867, to determine to which division of the Church they should thereafter belong; and the question having been submitted to the communicants and pew holders and pew-owners of said congregation over twenty-one years of age—it was determined by vote of the majority of the whole number, that said congregation should thereafter belong to the Methodist Episcopal Church South; and it appearing to the Court from an inspection of the said papers that the vote of the said Congregation has been fairly taken, according to the provisions of the Act of Assembly in such cases made and provided, and that of 118 members of the said Congregation, entitled to vote [illegible] voted in accordance with the determination of the Congregation, and the remaining 17 either failed or refused to vote—the Court doth approve the proceedings of the said Congregation and their said determination, as having been taken and ascertained according to law, and doth order that such approval be entered of record; and that the said papers be filed and preserved by the Clerk among the records of the Court.

(Pls.' Ex. 96, "Augusta County CL Order Book 6/28/1867.")

Similarly, Plaintiffs' Ex. 97, which is an order from the Augusta County CL Order Book, entered on November 20, 1867, states as follows:

> A Religious congregation of Presbyterians, worshipping at [illegible], in Augusta County, this day presented to the Court certain papers, in which it is recited and claimed, that "whereas the church to which this church congregation has been attached, has been divided, and now exists as two separate and distinct Presbyterian Churches, the one known as the "Presbyterian Church in the United States of America," and the other as the "Presbyterian Church in the United States"—and that the said Congregation of [illegible] having assembled in their church on the [illegible] day of November, 1867, to determine to which branch of the said church they should thereafter belong, and the question having been submitted to the pew-holders and pew-owners of said congregation over twenty-one years of age—it was determined by vote of the majority of the whole number, that said congregation should thereafter belong to the Presbyterian Church in the United States (South), and it appearing to the Court, from an inspection of the said papers that the vote of the said Congregation has been fairly taken according to the provisions of the Act of Assembly in such cases made and provided, and that of 163 members of said Congregation entitled to vote, 118 voted in accordance with the determination of the congregation, and the remaining 45 either failed or refused to vote—the Court doth approve the proceedings of said Congregation and their said determination, as having been taken and ascer-

> tained according to law, and doth order that such approval be entered of record; and that the said papers be filed and preserved by the Clerk among the records of the Court.

(Pls.' Ex. 97, "Augusta Co CL Order Book 11/12/1867.")[7]

In addition, relevant case law, which has previously been explicated in full within this Court's § 57–9 Opinion, 2008 Va. Cir. LEXIS 22, also supports the Court's holding as to the meaning of "if the determination be approved by the court." For example, in *Hoskinson v. Pusey,* 73 Va. (32 Gratt.) 428 (1879), the Supreme Court of Virginia addresses the predecessor statute to § 57–9. Its discussion of that statute is telling.

> It is also insisted that the action of the congregation of "Harmony" church, after the conference at Alexandria held in 1866, operated to transfer the title and control of the property to that portion of the congregation which adhered to the Methodist Episcopal Church South. That action has already been adverted to, and is claimed to have been had under an act of the general assembly, passed February 18th, 1867 (acts of 1866–7, ch. 210, pp. 649, 650; Code of 1873, ch. 76, § 9), which had the effect, as contended, to transfer the control and use of the property as aforesaid. It is not clear, from the evidence, whether this action of the congregation was had

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[7] *See also*, Pls.' Ex. 98, "Augusta Co. CL Order Book 11/20/1867, Pls.' Ex. 118, "Rockbridge Co. CL Order Book, 9/26/1867, and Pls.' Ex. 119, "Rockbridge Co. CL Order Book, 4/17/1869," which each contain similar language in regard to the particular court's consideration of the congregational vote.

> before or after the passage of the act referred to. I should rather infer that it was in 1866, before the act was passed. If that were so, of course there would be nothing in the point made by the appellants on the operation of the act. But suppose it was after the passage of the act. It is a sufficient answer to the claim of the appellants based on this statute, that it does not appear by the record that the provisions of the statute have been fully complied with. The portion bearing on this case reads as follows: "And whereas divisions have occurred in some churches or religious societies to which such religious congregations have been attached, and such divisions may hereafter occur, it shall, in any such case, be lawful for the communicants and pewholders over twenty-one years of age, by a vote of a majority of the whole number, as soon as practicable after the passage of this act, or whenever such division shall occur, to determine to which branch of the church or society such congregation shall thereafter belong; and which determination shall be reported to the said court, and, if approved, shall be so entered on the minutes, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and shall be respected and enforced accordingly in all the courts of this commonwealth.
>
> A vote of the members of the congregation[8] was taken at some time, as already stated, but there is no evidence that the determination of the congregation

[8] Here the *Hoskinson* Court refers to the particular congregation seeking to invoice the statute in that case.

manifested by the vote was reported to the circuit court of Loudoun county, approved by that court, and so entered on its minutes. Compliance with these requirements is essential to the effect given by the statutes.

Id. at 439–40.

Thus, the *Hoskinson* Court sets forth the "requirements" that are essential in order for the statute to have its effect: (1) a determination of the congregation manifested by a vote; (2) a report of that vote to the appropriate circuit court; and (3) approval of that vote by the circuit court. Nowhere does *Hoskinson* suggest that the various "factors" similar to those set forth in *Green v. Lewis* must also be examined in order to give effect to the statute.

Likewise, in *Finley v. Brent,* 87 Va. 103, 12 S.E. 228 (1890), the Supreme Court of Virginia describes the lower court's finding regarding a petition that had been filed in the circuit court pursuant to the predecessor statute to § 57–9 as follows:

> The circuit court of Northumberland county dismissed the bill of the plaintiffs, by virtue of the provisions of the act of the Legislature of 1867, (Sess.Acts, pp. 649–50), providing that, in the contingency of a division of any religious society, it should be lawful for a majority to determine to which branch such congregation shall hereafter belong, which determination, duly reported to court, should conclude questions as to the property held in trust for such congregation.

Id. at 108, 12 S.E. 228. Although the Supreme Court in *Finley* held that the predecessor statute to § 57–9, as applied, violated the Contracts Clause, and thus gave effect to the 1860 deed at issue, *Finley* 's brief

discussion of the "act of the Legislature of 1867" is telling. For, as in *Hoskinson,* nowhere in that brief discussion is found any reference to "factors" similar to those described in *Green v. Lewis.*

Thus, in light of the above orders and case law, the definition of "if the determination be approved by the court" becomes clear. That phrase, in fact, means that the Court must consider whether the congregational vote was "fairly taken,"[9] in accordance with the provisions of § 57–9(A). Thus, the word "if" as used within § 57–9(A) does not mean that this Court can or should consider the factors set forth in *Green v. Lewis,* a case that did not involve the application of § 57–9(A).

(4) What is the meaning of the phrase "shall be conclusive as to the title to and control" of the property in question, as that phrase is used in § 57–9(A)?

Decision of the Court: Once the Circuit Court approves the determination of the congregation as to which branch of a church or society such congregation shall belong, the Court's approval under § 57–9(A) "shall be conclusive as to the title to and control of any property held in trust for such congregation...." There is nothing ambiguous or elusive in this language. Conclusive means final. In other words, if a trial court finds § 57–9(A) to have been properly invoked (as this Court has done), and if a trial court finds § 57–9(A) to be constitutional (which this Court does today, except in regard to the Contracts Clause issue which is not yet decided), and if the trial court approves the determination of the congregation regarding its majority vote as to its choice of branch,

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[9] *See supra,* Pls. Ex. 96 & 97.

this then becomes a matter decided. In that event, and only as to those churches that filed § 57–9(A) petitions, the declaratory judgment actions will have been rendered moot. If, on the other hand, the trial court ultimately rules that the Contracts Clause claim renders § 57–9(A) unconstitutional as applied to one or more of the churches that have filed § 57–9(A) petitions, the declaratory judgment actions regarding those churches must be heard and decided, because petitioners, in that event, will not be able to avail themselves of the division statute. In addition, if the Court does not approve the majority vote determination under § 57–9(A) as to one or more churches, the declaratory judgment actions regarding those churches must be heard and decided.

(5) What is the meaning of the phrase "congregation whose property is held by trustees," as that phrase is used in § 57–9(A)? Specifically, is Mr. Hurd correct when he asserted at oral argument on May 28, 2008, that the phrase "congregation whose property is held by trustees" is not simply a reference to the property that is the subject of the § 57.9(A) petition but, rather, requires the Court to make an initial determination, prior to the Court's consideration of the validity of the vote, as to "who" owns the property at issue?

Decision of the Court: ECUSA/Diocese contended at the May 28, 2008, hearing on the constitutional issues that the 2005 amendments to § 57–9 were substantive and constitute a change in the law. The Court does not find merit in this contention. This is confirmed by a reading of the legislative history surrounding the 2005 amendments, which confirms that the phrase "whose property is held by trustees" was also added to § 57–13, and § 57–14.

These changes were implemented by the legislature simultaneously with the addition of § 57–16.1. The purpose of § 57–16.1, added in the wake of *Falwell v. Miller,* 203 F.Supp.2d 624 (W.D.Va.2002), was to allow churches in Virginia to incorporate.[10] Viewed in context, the phrase "whose property is held by trustees" was added in order to make clear that § 57–9 can be invoked only in the event that property is held by trustees, and not when the property is held in other forms, such as corporate.

ECUSA/Diocese's argument that the phrase "whose property" should be read by this Court to mean that this Court is required to make a determination of ownership <u>prior</u> to determining whether a congregation has satisfied the requirements of § 57–9(A) would, in fact, make § 57–9(A) a nullity. This is because the purpose of § 57–9(A) is to settle the question of ownership of property that is held by trustees in the event of a division. This Court will not interpret a statute so as to deprive it of its independent meaning. Rather:

> [t]he rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the en-

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[10] *See* 2005 Va. ALS 772 (LexisNexis 2008) ("*synopsis:* An Act to amend and reenact Sections 57–7.1 through 57–11, 57–13, 57–14, 57–15, 57–16, 57–17, 57–21, and 57–32 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 57–16.1, relating to conversion of church entities and church property to corporate status.").

> actment to remedy the mischief at which it is directed.

Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61 (1984).

Thus, the phrase "whose property is held by trustees" is simply a reference to the property at issue. These six words, added to § 57–9(A) in 2005, do not change the substantive meaning of the statute.[11]

ECUSA/Diocese further argue that Va.Code § 57–7.1, enacted in 1993, requires this Court to make a preliminary determination of ownership before embarking on a § 57–9 analysis. The Court finds no merit in this position, because § 57–7.1 did not change long-established precedent in Virginia regarding trusts for general hierarchical churches. 57–7.1 states as follows:

> Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation, or religious society, whether by purchase or gift, shall be valid.
>
> Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation, or religious society as determined appropriate by the

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[11] The Court would also note that ECUSA/Diocese make a claim within their briefs which amounts to an argument that they should be allowed to prove that the CANA Congregations have waived the right to invoke § 57–9(A). Because the issue of waiver was not posed to the parties within the Court's five questions, the Court does not address that issue within this opinion. Any party wishing to address the issue of waiver should file an appropriate motion.

> authorities which, under its rules or usages, have charge of the administration of the temporalities thereof.
>
> No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation, or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57–8, is incorporated, has created a corporation pursuant to § 57–16.1, or has ecclesiastical officers pursuant to the provisions of § 57–16.

Va.Code § 57–7.1 (2008).[12]

Since its original enactment in 1993, this code section has been interpreted to validate transfers of real property for the benefit of local congregations. See *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.,* 249 Va. 144, 152, 452 S.E.2d 847 (1995) ("[A]cquisition and ownership of property by churches are matters governed by statute, in accordance with Article IV, § 14, of the Constitution of Virginia. *Code § 57–7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations.*") (citing *Norfolk Presbytery v. Bollinger,* 214 Va. 500, 506, 201 S.E.2d 752, 757 (1974)) (emphasis added). The Attorney General has found likewise.

> The provisions of Article 2 relate to property held "for the benefit of any *church,* church dio-

[12] Clause 3 of the 1993 Act which enacted this section states that it is "declaratory of existing law." 1993 Va. ALS 370 (LexisNexis 2008).

> cese, *religious congregation, or religious society*." Section 57–7.1 (emphasis added). While these terms are not defined, the Supreme Court of Virginia has held that Article 2 encompasses property held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body.

1996 Va. Op. Att'y Gen. 194 (April 4, 1996) (citation omitted). Thus, § 57–7.1 did not change the policy in Virginia, which is that church property may be held by trustees for the local congregation, not for the general church.[13]

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[13] *See, e.g.*, *Reid v. Gholson,* 229 Va. 179, 187, n. 12, 327 S.E.2d 107 (1985) ("Because of this strong tradition, we have, for instance, refused to adopt the "implied trust" theory in favor of hierarchical churches, [*Norfolk Presbytery v. Bollinger*], 214 Va. 500, 201 S.E.2d 752 (1974), notwithstanding its acceptance by the federal courts and by the majority of our sister states, and we have refused to apply the traditional chancery doctrine of judicial cy pres, in favor of religious trusts for indefinite beneficiaries. *Gallego's Ex'ors v. Attorney General,* 30 Va. (3 Leigh) 450, 24 Am. Dec. 650 (1832)); *see also Norfolk Presbytery v. Bollinger,* 214 Va. 500, 507, 201 S.E.2d 752 (1974) ("As express trusts for super-congregational churches are invalid under Virginia law, no implied trusts for such denominations may be upheld."); *Hoskinson v. Pusey,* 73 Va. (32 Graft.) 428, 431 (1879) ("The deed is the same in substance as the deed in *Brooke v. Shacklett,* 54 Va. (13 Graft.) 301, and the construction must be the same. According to that construction, the conveyance is not for the use of the Methodist Episcopal Church in a general sense. Such a conveyance in this state would be void. But it is a conveyance for the use of a particular congregation of that church, in the limited and local sense of the term, that is, for the members, as such, of the congregation of the Methodist Episcopal Church, who, from their residence at or near the place of public worship, may be expected to use it for that purpose.").

Sincerely,

Randy I. Bellows,
Circuit Court Judge