In the
SUPREME COURT OF VIRGINIA

RECORD NO. 090682

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA,

Appellant,

v.

TRURO CHURCH, *et al.*,

Appellees.

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AG Br.	Brief of the Commonwealth *ex rel*. Cuccinelli in Record Nos. 090682 & 090683
CANA Br.	Brief for Appellees CANA Congregations in Record No. 090682
Diocese Br.	Brief of Appellant (The Protestant Episcopal Church in the Diocese of Virginia) in Record No. 090682
Appellees	The Congregations and the Attorney General
Congregations	The nine appellee Congregations (*see* Diocese Br. at 7 n.1)
Diocese	The Protestant Episcopal Church in the Diocese of Virginia, also known as the Episcopal Diocese of Virginia or the Diocese of Virginia
Religion Clauses	The Free Exercise and Establishment Clauses of the Constitution of Virginia and the First Amendment to the United States Constitution
TEC or the Church	The Episcopal Church, also known as the Protestant Episcopal Church in the United States of America (sometimes referred to by the older acronym “ECUSA”)

ARGUMENT

This case presents starkly different views of religious freedom. The Congregations and their allies assert a broad state power to regulate and restrict churches. We believe that the Commonwealth should regulate and restrict churches as little as possible and that when it does so it must do so neutrally. It may not enact a law that (i) discriminates among churches and against churches in comparison to secular groups, (ii) overrides church rules adopted – at the invitation of the United States Supreme Court – to resolve property disputes, (iii) has a purpose and effect of advancing congregational governance over denominational rules, and (iv) entangles civil courts in religious questions. These two views of religious freedom are much deeper than the difference between "neutral principles" and a "polity" approach. They are fundamentally different views of whether the Religion Clauses protect the rights of religious groups and individuals or of States.

The need to reject appellees' view has been articulated as follows:

> For religious institutions to fulfill their role, they must be permitted to control their own organization; to formulate and enforce their own doctrine; to choose their own structure; … and to adopt their own set of relationships between believer and institution and between hierarchy (if any) and subordinate. If the government assumes control over these matters, then the church loses its independent existence. Free exercise cannot survive if the internal affairs of religious institutions are subject to governmental control.

Michael W. McConnell (counsel for amicus Becket Fund), *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146, 159 (1986). Religious freedom includes the freedom to be part of a hierarchical church and subject to its rules, and "the church property cases" exemplify the need to respect "the right of the church to organize its internal affairs in accord with its own doctrine." *Id.* at 158 & n.58.

I. "Majority rule" is not a "neutral principle." (Assignments of Error 1 and 4)

Appellees argue that § 57-9(A) "reflects a neutral principle – majority rule." *E.g.*, CANA Br. at 3. They fundamentally misunderstand the term "neutral principles." As this Court held in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 504, 201 S.E.2d 752, 756 (1974), "civil courts may properly adjudicate disputes over church property…. according to 'neutral principles of law, *developed for use in all property disputes*'" (emphasis added). *Accord, Jones v. Wolf*, 443 U.S. 595, 603 (1979) ("the neutral-principles approach…. relies exclusively on objective, well-established concepts of trust and property law…"). "Majority rule" is not a principle of law used in all property disputes nor an established concept of trust and property law.

Appellees' paean to majority rule also begs the question: *which majority*? Section 57-9 not only imposes majority rule; it also dictates that a local majority, which is a small minority of the Diocese, may override rules

established by the Diocese's locally-elected representative governing body, its Annual Council. *See*, *e.g.*, JA 3036 (total membership of all seceding congregations is only 11% of Diocese's members); JA 1269 (composition of Annual Council). It is not neutral to promote local majorities over diocesan majorities. And it is ironic to sing the praises of majority rule while seeking to avoid rules enacted by a representative governing body.

II. The Diocese's arguments are consistent with its property holding practices, which are part of its polity. (Assignment of Error 4)

The Congregations argue that there is no Free Exercise issue because the Diocese "routinely" holds property in a form that avoids § 57-9(A). *E.g.*, CANA Br. at 30-31; JA 4150-51. They are wrong.[1]

Hierarchical church governance "depends upon matters of faith and doctrine," and such ecclesiastical decisions and practices "are immune from judicial review." *Reid v. Gholson*, 229 Va. 179, 189, 327 S.E.2d 107, 113 (1985) (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976), and *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181

[1] There has never been a trial on the Diocese's property holdings. The Circuit Court ordered that the 2007 trial "shall not" involve title evidence. JA 1871. After that trial, the Congregations argued for the first time that the Diocese's property holdings preclude consideration of § 57-9(A)'s constitutional defects, citing evidence that they had introduced ostensibly for other purposes. Responding, the Diocese proffered some evidence about its holdings. JA 3991-94, 4006-10. The Circuit Court adopted the Congregations' argument and foreclosed any trial on the issue.

(1980)). A denomination's governance and polity includes the forms in which it holds property; and Diocesan Canon 15.1 requires that trustees hold property used by "churches." JA 1290. As this Court and the U.S. Supreme Court have recognized, the light of religious freedom grows dim when the State rejects an ecclesiastical rule or practice because civil authorities are not satisfied with its theological basis or consistency.[2]

In any event, the Congregations ignore the difference between "churches" and "missions," which are distinct entities in the Diocese's polity. Diocesan Canon 10.1 (JA 1282) states five requirements to be a "church," which show that it is well established. A congregation that cannot meet those requirements may be a "mission." Canon 10.6 (JA 1283). Reflecting such ecclesiastical differences, *inter alia*, the Diocese holds property used by missions in the name of the Bishop or trustees named by the Diocese. *See*, *e.g.*, JA 1290 (Canon 15.1, requiring churches to elect trustees to hold

[2] *See*, *e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651 (2000) ("it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent"); *Thomas v. Review Board*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *Reid*, 229 Va. at 190, 327 S.E.2d at 113 (courts may not "examin[e] whether an hierarchical church correctly followed its own internal procedures, or correctly applied its canon law"). Thus, the suggestion that a court must find, and that a church must prove, that something in its "theology" "requires that church property be held by trustees," AG Br. at 2, is off the mark. The church's theology is off limits.

title but not allowing missions to do so except as authorized by the Bishop). Transition of legal title usually occurs when the Diocese grants church status but sometimes is deferred because of concerns or until a need arises later. *Compare* JA 3346 with JA 4316 (¶¶ 38-40) (title transitioned in granting "church" status to the Church of Our Saviour at Oatlands but not with Church of the Word because of concern that it intended to secede).

The Congregations' many references to "29 properties" (*e.g.*, CANA Br. at 31, 44) are misleading. Eighteen of those 29 properties are not used by congregations at all.[3] Only six of those properties are used by *churches* (one as clergy housing and five for worship). JA 4006-10. One is used by an Episcopal congregation excluded from appellee St. Margaret's Church. JA 4007. The other four churches that use property held by the Bishop began as Diocesan missions. Title has not yet been transitioned, and there has been no event or request requiring a change. *See* JA 3993-94.

III. The Congregations misinterpret key Religion Clause cases and principles. (Assignments of Error 1 and 4)

A. *Jones* does not sanction presuming local majority ownership.

In *Jones v. Wolf*, the Supreme Court had to decide whether Georgia courts properly held that (1) property was "vested in the local congregation"

[3] Five of those 18 properties are connected with a development center related to the Diocese, one is associated with a cemetery, and 12 either are undeveloped land or are not used regularly. *See* JA 4006-10.

and (2) "the local congregation was represented by the majority faction." 443 U.S. at 601. It held (1) that "neutral principles" was constitutionally employed in holding that the property belonged to the congregation, and (2) that in deciding "the question of *which faction is the true representative of the [local congregation]*," Georgia could adopt "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." *Id*. at 607 (emphases added), quoted *in part* in CANA Br. at 7.[4]

The Congregations muddle the Supreme Court's analysis by applying the "presumptive rule of majority representation" language – which addressed only the second question, "the identity of the local church" – to the first question, whether the local or hierarchical church is the beneficial owner. Nothing in *Jones* holds or implies that a state may presume that a local majority is always the beneficial owner of disputed church property.[5]

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[4] "Most importantly, *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*." *Jones*, 443 U.S. at 607-08 (emphases added).

[5] *Reid v. Gholson* concerned a dispute in an "independent congregational church." 229 Va. at 181, 327 S.E.2d at 108. It also does not support imposing local majority rule on a hierarchical church.

B. Discrimination between religious groups is unconstitutional, with or without a discriminatory purpose.

Appellees misread *Larson v. Valente*, 456 U.S. 228 (1982), which is "the leading case on denominational discrimination." *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). *Larson* held that a statute regulating religious groups based on the sources of their property was invalid because it explicitly distinguished between religious groups. There is no constitutional difference between that statute and § 57-9. Neither singles out denominations by name, and both use a property criterion to discriminate (§ 57-9 applies to churches that hold property by trustees, and the statute in *Larson* applied only to churches that raised less than half of their funds from members or affiliates). Moreover, neutrality and strict scrutiny analyses apply even when a legislature does not intend to target a religious group. *E.g.*, *id.* at 1260 (the argument that a state may discriminate between religions if the discrimination "is not based on 'animus' against religion" has "no support … in any Supreme Court decision, or any of the historical materials bearing on our heritage of religious liberty"). *Larson* examined legislative intent *only* in its alternative holding, involving the "secular legislative purpose" aspect of the *Lemon* test. *See* 456 U.S. at 254-55; Diocese Br. at 41-43.

An "escape hatch" (*see* JA 4152; Diocese Br. at 31-34) does not

avoid such constitutional defects. *See*, *e.g.*, *Colorado Christian*, 534 F.3d at 1259 ("The [*Larson*] Court did not suggest that the problem would go away because the Unification Church could change its fundraising methods …; the Court instead held that the law was 'not simply a facially neutral statute' because it 'ma[de] explicit and deliberate distinctions between different religious organizations'").[6]

C. Burdening only religious groups is unconstitutional.

The neutrality principle bars imposing burdens only on religious conduct or groups, regardless of discriminatory purpose. Section 57-9(A) singles out religious groups and conduct (churches' rules and polity) and disadvantages selected groups by overriding their rules and polity. In § 57-9, Virginia "has expressed a preference to and aided those who profess a belief in a congregational structured church. This it cannot do." *Goodson v. Northside Bible Church*, 261 F.Supp. 99, 104 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967).

Appellees fail to distinguish the only cases that have ever addressed

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[6] Appellees assert erroneously that strict scrutiny applies only to facial discrimination. CANA Br. at 43-44; AG Br. at 24. *See*, *e.g.*, *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination"). But strict scrutiny must be applied in any event, because § 57-9 singles out hierarchical churches for distinctive, unfavorable treatment. *See id.* at 533-34, 542-43, 545; *Colorado Christian*, 534 F.3d at 1257-58.

statutes like § 57-9(A), *i.e.*, *Goodson*, *supra*; *Sustar v. Williams*, 263 So.2d 537 (Miss. 1972); and *First Methodist Church of Union Springs v. Scott*, 226 So.2d 632 (Ala. 1969). Neither the absence of an "escape hatch" in those state laws (AG Br. at 19-20) nor the Alabama Act's "departure-from-doctrine provision" (CANA Br. at 40 n.26) was a factor in the decisions holding them unconstitutional, and the Mississippi statute's "'deep-seated disagreement" provision (*id*.) was at best incidental to the *Sustar* decision.[7]

IV. Appellees' claim that the scope of the Virginia Religion Clauses may not be addressed is erroneous. (Assignment of Error 4)

This Court should take pride in applying the independent and more fully developed statement of religious freedom found in the Virginia Bill of Rights. Diocese Br. at 36-37. Appellees wrongly claim that this argument was not preserved. They do not deny that the Diocese asserted below that § 57-9(A) violates the Virginia Constitution, nor do they say that the Diocese argued that the Religion Clauses are co-extensive. The Attorney General supports looking first to the Constitution of Virginia. AG Br. at 8. Appellees' attempt to limit argument in the guise of preservation should be

[7] In *Sustar*, a majority of the Justices joined in a concurring opinion which pointed out that "there was no quarrel over doctrines," only "over a matter of internal administration." 263 So.2d at 544. *See also id*. at 546: "Any law attempting to provide a scheme for the unilateral cancellation of a solemn contract is clearly unconstitutional for that reason alone."

rejected. This Court always may address fully a statute's constitutionality.[8]

V. Section 57-7.1 means what it says, and it validates all trusts for religious entities, including trusts established prior to 1993. (Assignments of Error 1 & 2)

The presumption of legislative acquiescence (CANA Br. at 18-19) does not resuscitate the repealed rule of § 57-7. Changes in statutes are presumed to have meaning (*e.g.*, *Va.-Am. Water Co. v. Prince William County Serv. Auth.*, 246 Va. 509, 517, 436 S.E.2d 618, 623 (1993)), and the presumption of legislative knowledge applies to current law. *See Commonwealth v. Bruhn*, 264 Va. 597, 602, 570 S.E.2d 866, 869 (2002); Diocese Br. at 20-21 n.10. Thus, the General Assembly knew in 1993 that (i) modern constitutional law forbids discrimination among religious entities, and (ii) hierarchical churches' interests in property may be confirmed by trust provisions in their governing documents, as stated in *Jones*, 443 U.S. at 603, 606, 607-08.[9]

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[8] *E.g.*, *Almond v. Day*, 197 Va. 419, 430, 89 S.E.2d 851, 858-59 (1955) ("the unconstitutionality of a law need not be specially pleaded and may be raised for the first time in this court"); *Portsmouth v. Weiss*, 145 Va. 94, 103, 133 S.E. 781, 784 (1926) ("If unconstitutional for any reason, whether assigned or not, the statute is void"). *See Jaynes v. Commonwealth*, 276 Va. 443, 453-54 & n.7, 666 S.E.2d 303, 308 & n.7 (2008) (refusing to limit a constitutional challenge based on whether one aspect was raised below).

[9] *Unit Owners' Ass'n v. Gillman*, 223 Va. 752, 292 S.E.2d 378 (1982), confirms the principle, in accordance with *Green* and *Norfolk Presbytery*, that associational rules have legal force. *Id.* at 766, 292 S.E.2d at 385. The

(footnote continued)

The claim that § 57-7.1 applies only "prospectively" also is wrong.[10] First, the express function of § 57-7.1 is to confirm that trusts for "any" religious group "shall be valid." Validating commonly applies to existing matters or acts that already have occurred.[11] Section 57-7.1 does not alter past arrangements. It simply validates any trust that "is" established, whether before or after its enactment. Retroactivity is not an issue because the parties' actions (whenever they occurred) are determinative. Second, § 57-7 applied to past and future trusts; and the obvious intent of § 57-7.1 was to eliminate limits on the validation, not to create them. Finally, the First Amendment forbids denying some religious entities the right to hold property in trust, and judicial decisions interpreting federal law operate retroactively. *See*, *e.g.*, *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 94-97 (1993). The constitutional rule requiring Virginia to treat hierarchical

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Congregations misapply *Gillman*, however. First, unlike churches, "[t]he entire condominium concept, and all pertaining to it, is … a statutory creation," and the Condominium Act's limits were decisive. *Id.* at 762, 763-64, 292 S.E.2d at 383, 383-84. Second, the issue in *Gillman* was the owners' association's power to impose a significant fine, a "governmental power." *Id.* at 764, 292 S.E.2d at 384. Third, the Religion Clauses are a crucial restraint on government's power over churches, unlike government's "broad powers to regulate the internal governance" of secular groups. McConnell, *supra*, 81 Nw. U. L. Rev. at 161.

[10] Seven of the nine Congregations use property pursuant (at least in part) to deeds that post-date § 57-7.1. *See*, *e.g.*, JA 905-06; JA 4312, 4454.

[11] *See, e.g.*, 2 Oxford English Dictionary 3586 (Compact Ed. 1971) (defining "validate," with Jefferson referring to validating "retrospectively").

churches equally and neutrally applies to pre-1993 events. *See id.* at 97.[12]

VI. The *amici*'s trust arguments are inaccurate and premature. (Assignments of Error 1 and 2)

Amici American Anglican Council*, et al*., assert that the Diocese has no trust interest. Their arguments mischaracterize the Diocese's claims and the record, and disregard Virginia procedure and the issues on appeal.

First, the Diocese claims not only trust interests but also proprietary and contractual rights, pursuant to *Green* and *Norfolk Presbytery*. *E.g.*, JA 658. A trust is sufficient, but not essential, for the Diocese to prevail. Virginia courts were not "powerless to prevent a hierarchical church from being deprived of contractual rights in church property held by trustees of a local congregation," even before such trusts were validated by enactment of § 57-7.1. *Norfolk Presbytery*, 214 Va. at 507, 201 S.E.2d at 758.[13]

Second, although the Diocese contends that its Canon 15 is sufficient to confirm that the properties are held for its benefit (*e.g.*, *Jones*, 443 U.S.

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[12] Selectively quoting a brief regarding an unrelated issue (the statute of frauds), the Congregations argue at 9 & 20 that the Diocese may not rely on §§ 57-7.1 or 57-15. They are mistaken. Every property was conveyed to an Episcopal entity and is held in trust. The Diocese's Complaints claim trust, proprietary, and contractual rights in the properties.

[13] The attempt to limit *Norfolk Presbytery* and *Green* to interpretation of § 57-15 (*see* CANA Br. at 4, 9-11) is meritless. *Green* involved secession, not a conveyance of property under § 57-15, but this Court applied the "neutral principles" analysis. *See* 221 Va. at 550-51, 272 S.E.2d at 182-83. Nothing in *Green* indicates that the presenting statute is determinative.

at 606, 607-08; JA 1274 (Art. XVII), the *amici* wrongly claim that it relies on a canon alone. Abundant evidence confirms what the Diocese's Canons (*see* Diocese Br. at 27) proclaim. For example, two Congregations petitioned the Diocese for church status after Canon 15.1's enactment in 1983. *See* JA 3629, 3633, 4310 (¶¶ 2 & 3). The others participated in its enactment. *See* Diocese Br. at 27 n.17. The Congregations' governing documents and leaders have affirmed the Diocese's authority and Canons. *See id*. at 10 & n.5. "[T]he designated *cestui que trust* in each deed was a unit or component of" the Diocese. *Diocese of Sw. Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497, 503 (Clifton Forge 1977). *See*, *e.g.*, JA 1488-92. Some deeds' habendum clauses expressly refer to TEC, the Diocese, and the Canons.[14] One deed conveys property to Diocesan Trustees in trust for the Diocese (JA 4454), and the Congregation using that property represented in court that it would be so held. JA 4408.[15]

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[14] *E.g.*, Stip. Between Truro and the Diocese and TEC, Ex. A at 2 (Sept. 9, 2008) (deeding property "subject to the Constitution, canons & regulations of the Protestant Episcopal Church of the Diocese of Va."); JA 4270-71.

[15] Discovery on the Diocese's claims was suspended in light of the Circuit Court's rulings, but there already is much more evidence to demonstrate the Diocese's interests in the properties at issue. *See*, *e.g.*, JA 3722, 3724 ("relinquish[ing] all claim to any right of disposing of the said building" and certifying that the property would remain dedicated to use in the Church and the Diocese); Proffer, TEC's and the Diocese's Reply Brief Pursuant to July 16, 2008 Order, Ex. 1 (Aug. 7, 2008) (including a statement to a City

(footnote continued)

The Circuit Court ignored such facts on the ground that as a matter of law, the Diocese could have no trust interest (*e.g.*, JA 4886-87); and it refused to allow the Diocese to prove the proprietary and contractual rights that this Court's decisions say it may have. The *amici* seek to extend the rulings below, ignoring the evidence, ignoring *Green v. Lewis*, and ignoring the cardinal principle against short-circuiting claims. *E.g.*, *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 618, 611 S.E.2d 600, 604 (2005). Their brief sheds no light on the issues before this Court: (i) whether property may be held in trust for religious groups other than congregations, as § 57-7.1 says; (ii) whether § 57-9, contrary to its terms, applies to property that is held in trust for a diocese; and (iii) whether § 57-9 empowers congregations to destroy denominational rights, despite this Court's holdings that such rights are not subject to local majority will.[16]

VII. Section 57-9(A) does not provide for adjudication of competing claims; it grants a private party unilateral power to take title to and control of property. (Assignment of Error 5)

The Congregations now concede that "§ 57-9 overrides the interests

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architectural board that the "Property Owner" was the Diocese, Vestry minutes stating that trustees hold property in trust for the Diocese, and requests under Canon 15 for Diocesan permission to encumber property).

[16] *Amici* also fail to address contractual (as opposed to donative) trusts in their arguments regarding "settlors." *See*, *e.g.*, 1 A. Scott, *et al.*, *Scott and Ascher on Trusts* (5th ed. 2006) § 3.1.3; Restatement (3d) of Trusts (2003) § 10, cmt. g. Such issues will be ripe once the Diocese's claims are tried.

of whichever side loses the vote." CANA Br. at 41. If the Diocese has contractual or proprietary interests, which it has not yet been allowed to prove, the Commonwealth cannot give those interests to the Congregations or empower the Congregations to eliminate them by vote. The very point of "neutral principles" is to determine whether a denomination has interests which "*cannot be eliminated by the unilateral action of the congregation*." *Green*, 221 Va. at 556, 272 S.E.2d at 186 (emphasis added).[17]

As applied below, § 57-9(A) is not a statute for "adjudicat[ion of] competing claims." CANA Br. at 48. The Circuit Court did not adjudicate the Diocese's claims. It held them "moot" (JA 4903), without a trial.[18]

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[17] The Congregations claim that the Diocese did not argue below that "the Virginia 'takings' provision is more protective than its federal counterpart." CANA Br. at 49 n.33. They are wrong. *See* Supplemental Constitutional Brief of the Diocese of Virginia Pursuant to April 3, 2008 Order (April 23, 2008) at 38-39, explaining that Va. Const. Art. I, § 11, as implemented by Code § 1-219.1(A), is broader than the federal Due Process and Takings Clauses. That is the same argument made now. *See* Diocese Br. at 48.

[18] Constitutional issues can and should be avoided (Diocese Br. at 22, 49) by construing § 57-9(A) as not applying to property in which the Diocese has trust, proprietary, or contractual rights. If the Diocese has such rights, then either § 57-9 does not apply or it cannot be applied without a "taking."

If the Congregations mean to suggest that the Diocese did not dispute ownership or agreed that § 57-9 overrode its claims (*see* CANA Br. in Record No. 090683 at 9), they are wrong. The Order that they cite was expressly based on opinions to date and merely memorialized that there was no question about the effect of those opinions. *See* Order (Sept. 3, 2008). Property stipulations signed thereafter expressly preserved the Diocese's claims. *See* Stipulations filed September 9 and 10, 2008.

Respectfully submitted,

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CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:29, I hereby certify that on this 1st day of March, 2010, fifteen printed copies of this brief have been transmitted by hand for filing in the office of the Clerk of this Court, and a copy of this brief has been sent via electronic mail to scvbriefs@courts.state.va.us and to counsel for all parties. Electronic copies of this brief, in PDF and Word formats, will follow on CD.

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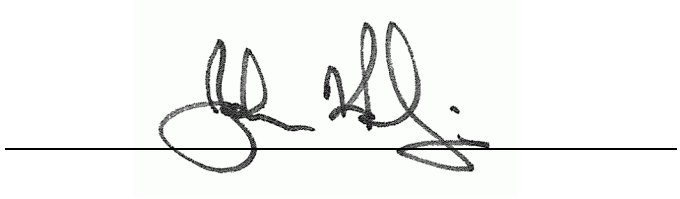

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