

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re Multi-Circuit Episcopal Church	)	Case Nos.: CL 2007-248724,
Litigation:	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5250,
	)	CL 2007-5682,
	)	CL 2007-5683,
	)	CL 2007-5684, and
	)	CL 2007-5902

THE EPISCOPAL CHURCH'S FIRST POST-TRIAL BRIEF

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
STATEMENT OF FACTS	5
I. The Structure of The Episcopal Church and the Diocese of Virginia	5
II. The Church’s and the Diocese’s Governance of Local Churches	7
III. The Church’s and the Diocese’s Rules Governing Property	11
IV. Pertinent Historical Facts Relating to Each Local Church	15
V. The Current Dispute.....	18
ARGUMENT	19
I. UNDER VIRGINIA’S “CONTRACTUAL” APPROACH, THE UNDISPUTED FACTS SHOW THAT THE CHURCH AND THE DIOCESE HAVE A CONTRACTUAL INTEREST IN ENSURING THAT THE LOCAL CHURCH PROPERTY AT ISSUE IN THIS CASE IS POSSESSED AND CONTROLLED BY EPISCOPALIANS	19
A. The Church’s and the Diocese’s Governing Documents Conclusively Establish Their Contractual Interest in Keeping Local Church Property in The Episcopal Church.....	21
1. The Constitutions and Canons of the Church and the Diocese are Binding on the Local Churches.....	21
2. The Church’s and the Diocese’s Governing Documents Establish Their Contractual Interest in Ensuring that Local Church Property Must Remain in The Episcopal Church	25
(i). The visitation canon, the consecration service, the “debt” canon, and the business methods canons	26
(ii). The anti-alienation canons for consecrated property	26
(iii). The rector’s canons	29
(iv). The vestry canons	29
(v). The anti-alienation canons for unconsecrated property.....	30

(vi).	The “abandonment” canon.....	30
(vii).	The “Trust Canons”	31
B.	The “Dealings Between the Parties” Support a Finding that the Church and the Diocese Have a Contractual Interest in Keeping Local Church Property in The Episcopal Church.....	33
C.	The Deeds Support a Finding that the Church and the Diocese Have a Contractual Interest in Keeping Local Church Property in The Episcopal Church.....	34
D.	Virginia Statutes Support a Finding that the Church and the Diocese Have a Contractual Interest in Keeping Local Church Property in The Episcopal Church.....	36
E.	An Overwhelming Majority of Other State Courts Applying a “Neutral Principles” Test Such as That Adopted in <i>Green</i> Have Concluded that the Church and Its Dioceses Have an Interest in Local Episcopal Church Property.....	37
II.	UNDER VIRGINIA’S “IDENTITY” APPROACH, LOYAL EPISCOPALIANS ARE IN ANY EVENT ENTITLED TO POSSESS AND CONTROL THE PROPERTY OF THE SEVEN LOCAL CHURCHES AT ISSUE HERE.....	47
A.	Virginia Law Requires that Local Church Property Affiliated with a Larger Denomination Must Remain with Loyalists to that Denomination.....	47
B.	The CANA Congregations Concede They are Not Part of The Episcopal Church.....	55
C.	The Diocese of Virginia is the Appropriate Episcopal Church Entity to Recover Possession and Control of the Local Church Property at Issue Here.....	58
	CONCLUSION.....	60

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.</i> , 685 S.E.2d 163 (S.C. 2009)	39, 40
<i>Bennison v. Sharp</i> , 329 N.W.2d 466 (Mich. Ct. App. 1982).....	23, 38
<i>Bishop & Diocese of Colo. v. Mote</i> , 716 P.2d 85 (Colo. 1986).....	<i>passim</i>
<i>Bjorkman v. The Protestant Episcopal Church in the U.S. of the Diocese of Lexington</i> , 759 S.W.2d 583 (Ky. 1988).....	39, 40
<i>Brooke v. Shacklett</i> , 54 Va. (13 Gratt.) 301 (1856)	<i>passim</i>
<i>Cardinal Dev. Co. v. Stanley Constr. Co.</i> , 255 Va. 300, 497 S.E.2d 847 (1998).....	25
<i>Cha v. Korean Presbyterian Church of Wash.</i> , 262 Va. 604, 553 S.E.2d 511 (2001)	29
<i>Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens, & Vestrymen of St. Andrew’s Parish</i> , No. 09-2092-11, Summary Judgment Order (Tenn. Ch. Ct. Apr. 29, 2010).....	39
<i>Cumberland Presbytery of the Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter</i> , 824 S.W.2d 417 (Ky. 1992)	40
<i>Daniel v. Wray</i> , 580 S.E.2d 711 (N.C. Ct. App. 2003).....	23, 39
<i>Diocese of Cent. N.Y. v. Rector, Church Wardens, & Vestrymen of the Church of the Good Shepherd</i> , No. 2008-0980, 2009 N.Y. Slip. Op. 50023, 880 N.Y.S.2d 223 (Sup. Ct. Jan. 8, 2009).....	38
<i>Diocese of Sw. Va. of the Protestant Episcopal Church v. Buhrman</i> , 5 Va. Cir. 497 (Clifton Forge 1977) (Stephenson, J.), <i>pet. refused</i>	<i>passim</i>
<i>Diocese of Sw. Va. of the Protestant Episcopal Church v. Wyckoff</i> , Opinion (Amherst Cty. Nov. 16, 1979) (Koontz, J.)	<i>passim</i>
<i>Dixon v. Edwards</i> , 290 F.3d 699 (4th Cir. 2002).....	22
<i>Episcopal Church Cases</i> , 198 P.3d 66 (Cal. 2009).....	22, 37, 46
<i>Episcopal Church in the Diocese of Conn. v. Gauss</i> , No. CV X06 08 4020456 S, Mem. of Decision (Conn. Super. Ct. Mar. 15, 2010), <i>appeal pending</i> , Nos. SC18718 & 18719 (Conn.)	37

<i>Episcopal Diocese of Mass. v. DeVine</i> , 797 N.E.2d 916 (Mass. App. Ct. 2003)	38
<i>Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration</i> , No. CV-08-654973, Omnibus Op. & Order (Ohio Ct. C.P. Cuyahoga Cnty. Apr. 15, 2011).....	39, 45, 46
<i>Episcopal Diocese of Rochester v. Harnish</i> , 899 N.E.2d 920 (N.Y. 2008).....	<i>passim</i>
<i>Episcopal Diocese of San Diego v. Rector, Wardens & Vestry of St. Anne's Parish in Oceanside</i> , No. 37-2007-00068521-CU-MC-CTL, Judgment (Cal. Super. Ct. June 4, 2010).....	37
<i>Finley v. Brent</i> , 87 Va. 103, 12 S.E. 228 (1890).....	1, 49
<i>First Born Church of the Living God v. Hill</i> , 481 S.E.2d 221 (Ga. 1997).....	56
<i>Gonzalez v. Roman Catholic Archbishop of Manila</i> , 280 U.S. 1 (1929).....	29, 58
<i>Gottlieb v. Economy Stores</i> , 199 Va. 848, 10 S.E.2d 345 (1958).....	23
<i>Gov't Emp. Ins. Co. v. Hall</i> , 260 Va. 349, 533 S.E.2d 615 (2000).....	25
<i>Grace Church & St. Stephen's v. Bishop & Diocese of Colo.</i> , No. 07 CV 1971, Order (Colo. Dist. Ct. Mar. 24, 2009).....	37
<i>Grand Court of Wash., Foresters of Am. v. Hodel</i> , 133 P. 438 (Wash. 1913)	27-28
<i>Green v. Lewis</i> , 221 Va. 547, 272 S.E.2d 181 (1980)	<i>passim</i>
<i>Henry v. Cox</i> , 159 N.E. 101 (Ohio Ct. App. 1927).....	50
<i>Hermione Lodge No. 16, Knights of Pythias, of Decatur v. Grand Lodge, Knights of Pythias of Ala.</i> , 28 So. 2d 166 (Ala. 1946)	28
<i>Hoskinson v. Pusey</i> , 73 Va. (32 Gratt.) 428 (1879)	1, 2, 48
<i>Huber v. Jackson</i> , 96 Cal. Rptr. 3d 346 (Cal. Ct. App. 2009), <i>review denied</i> , No. S175401, 2009 Cal. LEXIS 9850 (Sept. 17, 2009), <i>cert. denied</i> , 78 U.S.L.W. 3498 (U.S. Mar. 1, 2010).....	37, 54, 56
<i>In re Church of St. James the Less</i> , 2003 Phila. Ct. Com. Pl. LEXIS 91 (C.P. Phila. Cnty. Mar. 10, 2003), <i>aff'd in relevant part</i> , 888 A.2d 795 (Pa. 2005)	23
<i>In re Church of St. James the Less</i> , 888 A.2d 795 (Pa. 2005)	39

<i>Jones v. Wolf</i> , 443 U.S. 595 (1979)	<i>passim</i>
<i>Judicial Commission of PCA Korean Capital Presbytery v. Kim</i> , 56 Va. Cir. 46 (Fairfax Cnty. 2001).....	29, 58
<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.</i> , 344 U.S. 94 (1952).....	58
<i>Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg</i> , 396 U.S. 367 (1970).....	2
<i>Masterson v. Diocese of Nw. Tex.</i> , 335 S.W.3d 880 (Tex. Ct. App. 2011)	39, 55
<i>Minor v. St. John’s Union Grand Lodge of Free & Accepted Ancient York Masons</i> , 130 S.W. 893 (Tex. Civ. App. 1910).....	50
<i>New v. Kroeger</i> , 84 Cal. Rptr. 3d 464 (Cal. Ct. App. 2008).....	37, 54, 56, 57
<i>Norfolk Presbytery v. Bollinger</i> , 214 Va. 500, 201 S.E.2d 752 (1974)	<i>passim</i>
<i>Parish of the Advent v. Protestant Episcopal Diocese of Mass.</i> , 688 N.E.2d 923 (Mass. 1997)	23, 38
<i>Phillips v. Widow’s Son Lodge No. 54</i> , 152 Va. 526, 147 S.E. 193 (1929).....	50
<i>Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church</i> , 393 U.S. 440 (1969).....	2
<i>Protestant Episcopal Church in the Diocese of N.J. v. Graves</i> , 417 A.2d 19 (N.J. 1980)	22-23, 38, 54
<i>Protestant Episcopal Church in the Diocese of Va. v. Truro Church</i> , 280 Va. 6, 694 S.E.2d 555 (2010)	21, 22
<i>Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.</i> , 699 S.E.2d 45 (Ga. Ct. App. 2010), <i>appeal pending</i> , No. SC10G1909 (Ga.).....	38, 40, 43, 44
<i>Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in the Diocese of Conn.</i> , 620 A.2d 1280 (Conn. 1993).....	<i>passim</i>
<i>Reid v. Gholson</i> , 229 Va. 179, 327 S.E.2d 107 (1985).....	21, 23
<i>Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich</i> , 426 U.S. 696 (1976)	29, 58

<i>Smith v. Church of the Good Shepherd</i> , No. 04CC-864, Judgment & Order (Mo. Cir. Ct. Oct. 12, 2004).....	38
<i>St. Francis on the Hill Church v. Episcopal Church</i> , No. 2008-4075, Final Summ. J. Order (Tex. Dist. Ct. Dec. 16, 2010)	39, 55
<i>St. James Church, Elmhurst v. Episcopal Diocese of Long Island</i> , No. 22564/05, Mem. (N.Y. Sup. Ct. Mar. 12, 2008)	38, 54
<i>Tea v. Protestant Episcopal Church in the Diocese of Nev.</i> , 610 P.2d 182 (Nev. 1980) ..	23, 38, 54
<i>Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville</i> , 250 A.D.2d 282 (N.Y. App. Div. 1999)	32, 38
<i>Watson v. Jones</i> , 80 U.S. 679 (1871).....	1, 50, 51, 58
<i>Wheelock v. First Presbyterian Church of L.A.</i> , 51 P. 841 (Cal. 1897).....	56

STATUTES:

Va. Code § 57-7.1	36
Va. Code § 57-9	48, 49
Va. Code § 57-15	34, 36
Va. Code § 57-15(A).....	36
Va. Code § 57-16.1	55

OTHER AUTHORITIES:

7 C.J.S. <i>Associations</i> § 43 (2011)	23
10 C.J.S. <i>Beneficial Associations</i> § 37 (2011).....	23
10 C.J.S. <i>Beneficial Associations</i> § 38 (2011).....	50

INTRODUCTION

Since the mid-Nineteenth Century, Virginia law has consistently ensured that, where a dispute has arisen over the control of property of a local church that has been affiliated with a hierarchical denomination, that property must remain in the hands of the loyalists to that denomination, even when a majority of the congregation of the local church no longer wishes to be affiliated with the denomination. Virginia courts have applied two distinct legal approaches to reach this result, both of which have been affirmed by the U.S. Supreme Court. Applied to the present case, both approaches require the same conclusion: That the local church property at issue must remain in the hands of Episcopalians.

The first approach, initially developed in the mid-Nineteenth Century, arose in cases presenting a question of “identity”: that is, which of two factions of a local congregation of a hierarchical denomination should retain control of the local church property when one faction has determined to withdraw from the denomination. *See Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856); *Hoskinson v. Pusey*, 73 Va. (32 Gratt.) 428 (1879); *Finley v. Brent*, 87 Va. 103, 12 S.E. 228 (1890). In those cases the Supreme Court of Virginia held, consistent with contemporary U.S. Supreme Court precedent and fundamental principles governing secular voluntary associations, *see Watson v. Jones*, 80 U.S. 679 (1871), that the local faction remaining loyal to the denomination – even if it is the minority faction – is entitled to control the local church property. Each of these cases embraces the principle, echoed in voluntary association law, that a local entity’s affiliation with a larger, hierarchical organization is an essential, defining characteristic of the local entity’s identity, and therefore property owned by that entity cannot be removed to another national organization without a formal conveyance to the new organization in accordance with the rules of the original parent organization.

Even as the Supreme Court of Virginia enunciated these principles in the mid-Nineteenth Century, it acknowledged that the Commonwealth's statutes at that time prohibited local church property from being held in trust for the larger denomination. *Brooke*, 54 Va. (13 Gratt.) at 312-13; *Hoskinson*, 73 Va. (32 Gratt.) at 428, 431. In none of those cases, however, did the denomination itself assert any claim of interest, trust or otherwise, in the local church property.

By the mid-Twentieth Century, church denominations were asserting an interest in the property of their local affiliated churches in cases where a faction of the local church was attempting to remove the property from the denomination; and the U.S. Supreme Court approved the application of "neutral principles of law" to resolve those questions. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 367-68 (1970). In 1974, the Supreme Court of Virginia was faced with its first dispute in which a hierarchical denomination asserted an interest in local church property. *See Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974). Recognizing the then-existing bar on denominational trusts, *see id.* at 506-07, 201 S.E.2d at 758, the Court nonetheless held that a hierarchical church could, under "neutral principles of law," establish "contractual rights" in the property of a local affiliated church by "whatever evidence it had tending to establish its interest in the [local church] property," including "the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church." *Id.* at 503, 505, 507, 201 S.E.2d at 755, 756-57, 758.

In 1979, the U.S. Supreme Court again approved the application of "neutral principles of law," this time expressly recognizing the "identity" approach as a continuing alternative. *Jones v. Wolf*, 443 U.S. 595, 604, 606-09 (1979). In 1980, the Supreme Court of Virginia reaffirmed

the “contractual” approach it had set out in *Norfolk Presbytery*, holding that a hierarchical church could establish a “contractual” or “proprietary” interest in local church property based on state statutes and evidence found in “the language of the deed conveying the property, . . . the constitution of the general church, and . . . the dealings between the parties.” *Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 185-86 (1980).

Thus, Virginia courts apply the “contractual” approach to determine whether a hierarchical church has an enforceable interest in the property of its local affiliate church. If the larger church is found to have no such interest in the local property, the question becomes who constitutes the “true” local church entitled to the property, and the “identity” approach applies.

There has never been a judicial decision in Virginia, under either the “contractual” or the “identity” approach, removing local church property from those persons remaining loyal to the hierarchical denomination. In keeping with these precedents, the only two Virginia cases to date involving a split within a local Episcopal congregation (the present matter excepted) have concluded that local church property must remain in the control of Episcopalians. *Diocese of Sw. Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497, 508 (Clifton Forge 1977) (Stephenson, J.), *pet. refused* Rec. No. 780347 (June 15, 1978); *Diocese of Sw. Va. of the Protestant Episcopal Church v. Wyckoff*, Op. at 7, 8 (Amherst Cty. Nov. 16, 1979) (Koontz, J.). And, cases from other states around the nation have almost unanimously reached this result in disputes involving local Episcopal church property, applying analyses similar, if not identical, to Virginia’s two approaches for resolving such disputes.

The present case, with its multitude of parties and voluminous evidentiary record, is nevertheless no different from these other cases, and the same result should obtain. As applied to the present case, the “contractual” approach compels the conclusion that The Episcopal Church

(the “Church”) and the Diocese of Virginia (the “Diocese”) have a contractual right to ensure that loyal Episcopalians control the local church property at issue. The governing documents of a hierarchical church – like those of a secular voluntary association – are universally recognized as a contract binding on its members and subordinate units. Because the Church’s and the Diocese’s governing documents regulate local churches’ control of their property and expressly forbid the unilateral removal of such property from the denomination, these documents alone conclusively establish the Church’s and the Diocese’s contractual interest in keeping local church property in the Church. The other facts in this case – including the language of the deeds (all of which were conveyances to an *Episcopal* church, and most of which include the term “Episcopal”); the statutes (which support the notion that a hierarchical church’s rules may constrain a local church’s freedom to dispose of or otherwise control its property); and the dealings between the parties (which consistently and repeatedly show the local churches’ submission to the authority of the Church and the Diocese, agreement to comply with the rules of those bodies, and actual compliance with those rules, including those governing church property) – also compel the conclusion that the Church and the Diocese have a contractual interest in keeping local church property in the denomination. The efforts by the CANA Congregations to remove that property from the control of Episcopalians violates those contractual rights.

Even if the court should conclude that the Church and the Diocese have no “contractual” interest in the local church property at issue, the “identity” approach produces the same result. Whatever else they may be, the CANA Congregations and their members are *not* units or members of The Episcopal Church, and thus they are not entitled to local church property that has historically been affiliated with the Church and the Diocese. Rather, Virginia’s “identity” approach requires the conclusion that loyal Episcopalians are entitled to that property.

STATEMENT OF FACTS

I. The Structure of The Episcopal Church and the Diocese of Virginia

The Episcopal Church is a hierarchical religious denomination comprising three democratically-elected tiers in descending order of authority: The Church's "General Convention"; geographically-defined "dioceses" (including the Diocese of Virginia); and local worshipping congregations, typically called "parishes" but called "churches" in the Diocese (and including the seven local churches whose property is at issue here). Church Const. (hereinafter "Const.") Art. I (describing General Convention); Const. Art. V (dioceses and parishes); Church Canon (hereinafter "Canon") I.13 (parishes); Diocesan Canon 10.1 (local churches).¹ The General Convention, composed of representatives from the Church's dioceses, adopts and amends the Church's governing documents, its Constitution and bylaws, or "canons," and *Book of Common Prayer*. Const. Preamble (adoption and amendment of Constitution), Const. Art. I (composition of General Convention), Const. Art. X (amendment of *Book of Common Prayer*), Const. Art. XII (amendment of Constitution), Canon V.1 (amendment of canons).

New dioceses are required to promise "unqualified accession" to the Church's Constitution and canons. Const. Art. V. The Diocese of Virginia "acknowledges the authority and power of the General Convention . . . as set forth in the Constitution and Canons adopted thereby." Diocesan Const. Preamble. The Diocesan Constitution 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. The Diocesan canons require

¹ The Church's 2003 edition of its "Constitution and Canons" (those in effect when the CANA Congregations purported to disaffiliate from the Diocese and the Church) is found at TEC-23 and PX-COM-001, and the Diocese's 2005 edition of its "Constitution and Canons" (also in effect at that time) is found at PX-COM-003.

a group of people, or “congregation,” petitioning the Diocese to be granted status as a “church” to “acknowledge the jurisdiction of the Bishop or Ecclesiastical Authority of the Diocese of Virginia,” Diocesan Canon 10.1; and the failure of any church to meet that requirement may result in its being reduced to the status of a “mission,” Diocesan Canon 10.6, an entity with less freedom of self-governance than a fully-fledged church, Diocesan Canon 11.14.

Each diocese is governed by a legislative body (typically called the “Diocesan Convention” but in the Diocese of Virginia called the “Annual Council”) and has an ecclesiastical and administrative leader (its “Diocesan Bishop”). Const. Art. II (discussing bishop), Const. Art. V.1 (discussing Diocesan Conventions), Canon I.10(4) (same). The Diocesan Bishop is elected by the Diocesan Convention, and his or her selection must be consented to by a majority of the leadership of the other dioceses before taking office. Const. Art. II; Canon III.11(3)-(4). Each Diocesan 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 the Church’s and Diocese’s canons. Const. Art. IV.

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. It adopts and amends a Constitution and canons, Diocesan Const. Arts. I, XIX; Diocesan Canon 30, which supplement and may not be inconsistent with the Church’s Constitution and canons. Const. Art. V. The Diocese also has an Executive Board, composed of elected representatives from geographical areas of the Diocese and the Bishops of the Diocese, which is responsible for carrying on the business of the Council between its meetings. Diocesan Canon 7.5.

Each local parish or “church” is part of the diocese in which it is located. Canon I.13.1. In order to achieve “church” status, in addition to making the acknowledgment set out above, a congregation must have a “vestry,” a governing body of lay persons and its ecclesiastical and administrative leader, the “rector,” a priest of the Church elected by the vestry in consultation with its Bishop. Canon I.14, III.9(3); Diocesan Canon 10.3, 12.1. The rector is vested with control over a parish’s physical property, while the vestry retains control over all other parish property. Canons III.9(5)(a), I.14(2). A vestry is empowered to adopt by-laws so long as they are “not inconsistent with Diocesan or National Canons.” Diocesan Canon 11.10.

In the Diocese of Virginia, a church with no functioning vestry is deemed “inactive,” and its authority is assigned to the Executive Board. Diocesan Canon 9.3. If a church becomes unable to satisfy the requirements of “church” status for any other reason (including failure to adhere to the “acknowledgment” set out above), the Bishop may, with the advice and consent of the Standing Committee, reduce the church to “mission” status. Diocesan Canon 10.6.

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.” Const. Art. VIII, TEC-38-513, -526, -538. The members of a vestry are required by the Church’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.” Canon I.17(8). In the Diocese of Virginia, every person chosen to serve on a vestry is required to 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.

II. The Church’s and the Diocese’s Governance of Local Churches

The Church’s General Convention, through the Church’s Constitution, canons, and *Book*

of Common Prayer, extensively regulates the life of its local churches. The Annual Council of the Diocese of Virginia similarly imposes multiple rules, through its Constitution and canons, on its local churches. Setting aside their specific regulation of local church property (which will be discussed below), the Church's and the Diocese's rules pervasively govern local church life in a number of important spheres.

The Church's rules. First, the Church's Constitution requires that the *Book of Common Prayer* "shall be in use" throughout the Church, 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 permission of the bishop. Const. Art. X; *see also* Canon II.3. Thus, by its adoption and occasional amendment of the Prayer Book, the General Convention profoundly affects the worship life of every local Episcopal church.

Second, the Church's canons dictate a detailed process to be followed by dioceses and local churches in the discernment, development, and ordination of the Church's priests and deacons and set out substantive standards that ordinands must meet. Canons III.2, III.5-6, III.8, III.15. And, under the canons, only a Priest qualified under this process and meeting these standards may become the rector of a local Episcopal church. Canon III.9(3)(a)(3).

Third, the Church's canons establish the process by which a local church may elect a new rector, requiring the local church to "promptly notify" the bishop that it needs a rector; forbidding the local church from electing a rector without first notifying the bishop of the identity of the nominee 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 as rector. Canon III.9(3)(a)(1-3).

Fourth, the Church's Constitution and canons provide a detailed system for the discipline

of clergy, prescribing both the disciplinary process and the standards of conduct that form the basis of a disciplinary action. Const. Art. IX; Canons IV.1-16. These include making clergy subject to discipline for violating the Constitutions or canons of the Church or its dioceses, violating one's ordination vows (including the Declaration of Conformity set out above), and abandonment of the communion of the Church. Canons IV.1(1)(e), (f), (g), (h), IV.9, IV.10.

Fifth, the Church's canons require every parish to provide to the Diocese an annual report "in the form authorized by [the Church's] Executive Council." Canon I.6(1). The Diocesan canons echo that requirement. *See* Diocesan Canon 16.1, 16.2 (requiring every rector to "maintain a register of official acts" (such as baptisms and marriages) and to provide the bishop with an annual "parochial report" as required by Church canons, "in such form as shall be prescribed by the Bishop or Council").

Sixth, the Church's canons also govern the substance of certain specific aspects of local church life, by, for example, prescribing which translations of the Bible shall be used in worship, Canon II.2, and imposing rules regarding marriage, divorce, and remarriage. Canons I.18, I.19.

Finally, the Church's canons govern perhaps the most fundamental relationship within a local church – that between the church and its rector. These rules severely circumscribe a local church's ability to dissolve its relationship with its rector, by forbidding a rector from resigning without the consent of the vestry, and barring a vestry from removing a rector against his or her will, except under certain prescribed conditions, all of which require action of the bishop. Canon III.9(13) (Dissolution of the Pastoral Relation); *see also* Diocesan Canon 28 (Relationships Among Clergy and Congregations).

The Diocese's rules. In addition to the Church's rules, every local church in the Diocese is subject to the Diocese's rules. These rules dictate, in intimate detail, how local churches,

through their vestries, must govern themselves. Thus, the Diocesan canons prescribe:

- (a) the size of the vestry (Diocesan Canon 11.2);
- (b) that vestry members shall be elected annually (Diocesan Canon 11.3);
- (c) the length of a vestry member's term (Diocesan Canon 11.3) and that there shall be no consecutive terms (Diocesan Canon 11.4);
- (d) who shall preside at meetings of the vestry (the rector) (Diocesan Canon 11.3, 11.10);
- (e) the qualifications for vestry members (must be "confirmed adult communicants in good standing of the [Episcopal] church" (Diocesan Canon 11.4);
- (f) who can vote in an election of vestry members (Diocesan Canon 11.5);
- (g) that an election of vestry members must be by ballot and in person (Diocesan Canon 11.5);
- (h) how vestry meetings are to begin (with certain prayers) (Diocesan Canon 11.7);
- (i) the "declaration and promise," set out above, that each newly-elected vestry member must make before taking office (Diocesan Canon 11.8);
- (j) how vacancies on the vestry are to be filled (Diocesan Canon 11.11); and
- (k) how often a vestry must meet (Diocesan Canon 11.12).

Further, Diocesan canons set out in detail the duties of vestry members, requiring them, for example, to support the Church's programs and encourage others to do the same (Diocesan Canon 12.3); "extend personally a hearty welcome" to new members of the church (Diocesan Canon 12.3); annually review the rector's compensation "in keeping with the published guidelines of the Diocese" (Diocesan Canon 12.4); provide for music for the church, subject to the rector's control (Diocesan Canon 12.4); advise the Diocese by a certain date each year what percentage of its income it will contribute to the Diocese, and remit that amount in monthly

installments (Diocesan Canon 12.5); provide for the appointment of trustees to hold church property (Diocesan Canon 12.6); establish a “Finance Committee” to advise the rector, vestry, and treasurer in financial matters (Diocesan Canon 12.6, 25.2); and, as to the “wardens,” or elected leaders of the vestry, to oversee the operation and maintenance of church property, collect the offerings, and “to 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).

III. The Church’s and the Diocese’s Rules Governing Property

The Church’s policy and practice has always required that parish property be held and used for the mission of the Church and its dioceses and not diverted to other purposes, a principle inherited from the Church of England. As early as the Church’s founding in 1789, the General Convention adopted canons requiring bishops to visit their parishes “for the purposes of examining the state of [the] church.” TEC-01-33. This practice was always understood to include an inquiry into the condition of parish property, and, indeed, Bishop Meade of Virginia regularly commented on the physical state of churches in the Diocese in his annual addresses to the Diocese in the 1830s. Trial Transcript (“Tr.”) 1189:3, 1189:14-1190:17.

In 1799, the Church included in its *Prayer Book* a “Form of Consecration of a Church or Chapel,” a service affirming that parish property was devoted to the worship and service of the Church. TEC-33-01, 09; Tr. 1192:12-16.

In 1868, the General Convention adopted a canon (now Canon II.6) prohibiting parishes from encumbering or alienating “consecrated” property – that is, property formally dedicated by the bishop for use in worship and other ministry – without the consent of the diocese. TEC-04-1, 2; Tr. 1193:16. The canon also provided that no church would be consecrated until the bishop

was satisfied that it was “fully paid for, and . . . free from lien or other incumbrance.” TEC-04-2. There is ample evidence that, since its adoption, this canon has been routinely complied with in the Diocese (Tr. 1194:15-1195:11), and the Diocese has its own canon, mirroring the Church’s canon, which requires diocesan consent for the alienation or encumbrance of consecrated church property. Diocesan Canon 15.2.

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 Canon II.6). TEC-05-42--43; Tr. 1197:2-4. After a congregation in Chicago severed its ties with the Church and took “their church [building] with them,” Tr. 1197:13-19, the General Convention adopted this canon 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. Shortly after its passage, between 90 and 100 congregations left the Church to form another denomination, including in Virginia, and none attempted to take church property. Tr. 1202:7-1203:7.

In 1904, the General Convention adopted a canon (now Canon III.9(5)(a)), providing that the rector be entitled to control parish property “[f]or the purpose of [his or her] office,” “subject to the [Church’s] Book of Common Prayer, [its Constitution and] Canons . . . and the godly counsel of the Bishop.” TEC-09-2; Tr. 1206:13.

In 1916 and in 1919, the General Convention adopted a canon entitled “On Business Methods in Church Affairs” (now Canon I.7), governing the management of parish property including, *inter alia*, requiring parishes to keep all buildings adequately insured. TEC-10-2--3; TEC-11-2--4; Tr. 1208:20-22.

In 1940, the General Convention adopted a canon (now Canon I.7(3)), expanding the

requirement of diocesan consent for alienation or encumbrance of real property to cover unconsecrated parish property. TEC-13-2--3; Tr. 1212:4. In contrast to the Church's canon addressing consecrated property, however, this canon allows dioceses to prescribe a condition other than diocesan consent when the transaction involves unconsecrated property. TEC-13-3. Thus, the Diocese of Virginia 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.

In 1979, the U.S. Supreme Court decided *Jones v. Wolf*, in which it held that hierarchical churches could avoid church property disputes by amending their governing documents "to recite an express trust in favor of the denominational church." *Jones*, 443 U.S. at 606. The General Convention responded by adopting a canon (now Canon I.7(4)) (the "1979 Trust Canon," or the "Dennis 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. 1214:9-16.

The Annual Council of the Diocese of Virginia adopted a parallel canon (current Diocesan Canon 15.1) in 1983. PX-COM-222-105--06. Each of the local churches whose property is at issue in this case (except Church of the Epiphany, which was founded in 1986) had representatives at that meeting of the Annual Council. PX-COM-222-010, -012, -015, -016, -022, -057, -059, -060, -062. Until this dispute, none of the seven has ever objected to any of the Church's property canons.

In addition to its Trust Canon and canons regulating the alienation and encumbrance of real property set out above, the Diocese has adopted other canons governing parish property, including the management of such property, both real and personal. Thus, where a church's property is not held by "duly constituted Trustees," the Executive Board of the Diocese "shall" take steps to "recover or secure" that property. Diocesan Canon 15.3. 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 "shall have the authority to take charge and custody thereof," including selling the property or transferring it to the bishop. *Id.* Virginia Courts have routinely recognized and enforced determinations by the three Episcopal dioceses in the Commonwealth that local church property has been "abandoned," and have granted the dioceses' requests for permission to sell or otherwise transfer the title to such property. *See, e.g.,* PX-COM-295, PX-COM-296, PX-COM-297, PX-COM-298, PX-COM-300, PX-COM-301, PX-COM-302, PX-COM-303, PX-COM-304, PX-COM-305, PX-COM-306, PX-COM-307.

Churches in the Diocese may not incur debt of certain specified amounts without the consent of the Bishop and Standing Committee. Diocesan Canon 14.1. Further, the Bishop and Standing Committee must approve the church's plan for repayment of the debt. *Id.*

Churches in the Diocese are required to participate in the Diocesan health insurance plan, unless they receive an exemption from the plan by the Executive Board. Diocesan Canon 31.1, 31.2. And, under Church and Diocesan Canons, churches are required to contribute to the Church Pension Fund on behalf of their clergy. Canon I.8; Diocesan Canon 5.

Finally, the Diocese has supplemented the Church's canons establishing business methods for the whole church, by prescribing how and where local church endowment and other

permanent funds may be deposited or invested (Diocesan Canon 13.2); requiring that each church's treasurer be bonded (Diocesan Canon 13.3); requiring the vestry to conduct an annual audit of all accounts exceeding \$500 (Diocesan Canon 13.4); requiring the provision of workers' compensation insurance for all employees (Diocesan Canon 13.5(c)); and requiring fire and casualty insurance as well as comprehensive liability insurance, and prescribing the minimum amounts of coverage (Diocesan Canon 13.5).

IV. Pertinent Historical Facts Relating to Each Local Church

The record in this case is replete with evidence of dealings between each of the seven local churches, on the one hand, and the Diocese and the Church, on the other, showing the subordinate nature of the local church within the denominational structure; and the Diocese's brief provides a comprehensive view of that evidence. For the purposes of this brief, the Church sets out the following, condensed statement of pertinent historical facts that are common to all seven churches. Thus, the undisputed evidence in this case shows that:

- Each of seven churches became a local church of the Diocese and the Church in accordance with the rules of the Diocese, in some cases petitioning the Diocese for recognition as a church and in other cases by signifying its subordination to the Church's and the Diocese's rules. *See, e.g.,* PX-COM-209-038, PX-COM-007-007, 012-013 (Apostles); PX-COM-227-122, PX-COM-011-013, 022-023 (Epiphany); PX-COM-072-007, PX-COM-072-020 (The Falls Church); PX-COM-210-063, PX-COM-006-009, 020-021 (St. Margaret's); PX-COM-083-015, PX-COM-072-020 (St. Paul's); PX-COM-119-013, PX-COM-125-246 (St. Stephen's); PX-COM-086-005, PX-COM-086-062 (Truro).

- The governing documents or vestry manuals of the seven local churches have acknowledged that the churches are bound by the rules of the Church and/or the Diocese. *See,*

e.g., PX-APOST-005-002, -003, -007, -010; PX-EPIPH-002-003, -012; PX-FALLS-078-085; PX-STMARG-002-001--004; PX-STPAUL-002-001; PX-SSH-004-001, -003; PX-TRU-002-001.

- At least six of the seven local churches have had property consecrated by a Bishop of the Diocese and the Church. *See, e.g.*, PX-APOST-481-003; PX-EPIPH-086-001--002; PX-FALLS-136-001--003; PX-STPAUL-106-001, -005, -014; PX-SSH-482-003; PX-TRU-003-001.

- The deed or deeds to one or more parcels of the real property of each of the seven churches in evidence show as the grantee an “Episcopal” entity. *See, e.g.*, PX-APOST-001-010; PX-EPIPH-004-008; 2008-TFC-005-072; PX-STMARG-001-015; PX-STPAUL-001-020; PX-SSH-001-009; PX-TRU-001-012.

- Each of the seven churches has sought consent from the Diocese to encumber or alienate real property or incur debt. *See, e.g.*, PX-APOST-329-001--002; PX-EPIPH-048-024; DX-FALLS-016-003; PX-STMARG-460-001; PX-STPAUL-015-001; PX-SSH-414-001; PX-TRU-047-001.

- Vestry members of each of the seven churches have sworn to uphold the doctrine, worship, and discipline of the Church. *See, e.g.*, PX-APOST-480-001--003; PX-EPIPH-033-001; 2008-TFC-036-013; PX-STMARG-1132-001--003; PX-STPAUL-007-146; PX-SSH-0481-001--002; PX-TRU-009-002--003.

- Clergy serving at each of the seven churches have made at their ordination the Declaration of Conformity to the Doctrine, Discipline, and Worship of the Church. *See, e.g.*, PX-APOST-480-003--004; Tr. 2329:13-2330:15 (testimony of Rev. Robin Rauh of Epiphany); Tr. 2626:2-12 (testimony of Rev. John Yates of The Falls Church, referring to PX-COM-001-

015; PX-STMARG-1132-003--004; PX-STPAUL-010-001; PX-SSH-425-001; PX-TRU-009-004.

- The Diocese has been involved in the selection of one or more rectors at each of the seven churches. *See, e.g.*, PX-APOST-403-001, -003--004, -005 ; PX-EPIPH-126-001; PX-FALLS-147-001; PX-STMARG-200-001, PX-STMARG-201-001; PX-STPAUL-008-020; PX-SSH-443-001; PX-TRU-143-001.

- Each of the seven churches has been regularly represented at the Diocese's Annual Council, including, for example, each of the years from 1997 to 2005. *See, e.g.*, PX-COM-245A-183, 186--198 (2005 Annual Council); PX-COM-244A-183, 186--201 (2004 Annual Council); PX-COM-243A-177, 180--195 (2003 Annual Council); PX-COM-242-112, 117--130 (2002 Annual Council); PX-COM-241-083--089 (2001 Annual Council); PX-COM-240-081, 084--090 (2000 Annual Council); PX-COM-239-076--081 (1999 Annual Council); PX-COM-238-078--083 (1998 Annual Council); PX-COM-237-079--085 (1997 Annual Council).

- Each of the seven churches submitted parochial reports, as required by Church and Diocesan canons. *See, e.g.*, PX-APOST-480-007; PX-EPIPH-141; DX-FALLS-313-001; PX-STMARG-1132-007; PX-STPAUL-005-007--008; PX-SSH-481-007; PX-TRU-009-007.

- Clergy of each of the seven churches have participated in the Church Pension Fund. *See, e.g.*, PX-APOST-480-010--011; Tr. 2311:14-16 (testimony of Rev. Robin Rauh of Epiphany); Tr. 941:1-4 (testimony of Prof. Bond regarding The Falls Church); PX-STMARG-1132-010--011; PX-STPAUL-005-011; PX-SSH-0481-011; PX-TRU-009-010.

- In addition to the foregoing, the record shows that each of the seven churches has recognized the authority of the Diocese and/or the Church in other ways. *See, e.g.*, PX-APOST-309-001 (application for license for lay Eucharistic minister); PX-EPIPH-048-040 (in notes to

financial statements, stating that Epiphany “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-FALLS-496-001 (application for license for lay Eucharistic minister); PX-STMARG-1093-001 (seeking permission from Diocesan Bishop to officiate at wedding of divorced person); PX-STPAUL-732-001 (letter from vestry to members and friends of St. Paul’s stating that “the Episcopal Church is governed by the National and Diocesan Canons (Laws), which are determined by the General Convention of the National Church and by the Council of each Diocese, respectively.... The Vestry and Rector have the responsibility of enforcing these Canons”); PX-SSH-070-002 (in vestry minutes, stating that in adopting parish bylaws, “Canons of the Episcopal Church or of the Diocese of Virginia must be adhered to”); PX-TRU-046-001 (application for license for lay Eucharistic minister).

V. The Current Dispute

In December 2006 and January 2007, a majority of the members of the seven local churches purported to vote to withdraw their churches from the Church and the Diocese and to realign their churches with another denomination. These persons comprise the membership of the defendant “CANA Congregations.” Later in January 2007, the Standing Committee of the Diocese determined that the rectors of each of the seven churches had “abandoned the communion” of the Church, and shortly thereafter the Bishop “inhibited” the rectors, prohibiting them from functioning as clergy of the Church pursuant to Church Canon IV.10. PX-COM-0253, PX-COM-0254. In August 2007, the Bishop deposed the rectors, also under Canon IV.10, removing them entirely from the ministry of the Church. PX-COM-0275. Also in January 2007,

the Executive Board of the Diocese declared the real property of each of the seven local churches to be “abandoned” and directed the Trustees appointed to hold the property to transfer such property to the Bishop, pursuant to Diocesan Canon 15.3. PX-COM-247A-093; PX-TRU-510; PX-FALLS-788; PX-APOST-477; PX-EPIPH-283; PX-STMARG-1128; PX-STPAUL-764; PX-SSH-485. Since that time, the Diocese has recognized only those Episcopalians who remain loyal to the Church as authorized representatives to Annual Council, and the “inactive” churches are by canon under the authority of the Executive Board. Nevertheless, the CANA Congregations, their rectors, and their vestries continue to assert that they are the “true” congregations of the seven local churches and maintain possession and control of the real and personal property of those churches in defiance of the loyal Episcopalians in the Diocese.

ARGUMENT

I. UNDER VIRGINIA’S “CONTRACTUAL” APPROACH, THE UNDISPUTED FACTS SHOW THAT THE CHURCH AND THE DIOCESE HAVE A CONTRACTUAL INTEREST IN ENSURING THAT THE LOCAL CHURCH PROPERTY AT ISSUE IN THIS CASE IS POSSESSED AND CONTROLLED BY EPISCOPALIANS.

Virginia has adopted a “contractual” approach for resolving whether a hierarchical denomination has an interest in local church property such that the property cannot be diverted away from the denomination. Under this approach, Virginia courts examine certain categories of facts – “[state] statutes, . . . the language of the deed conveying the property, . . . the constitution of the general church, and . . . the dealings between the parties” – to determine whether the denomination has a contractual right to bar the removal of local church property from the denomination without its consent. *Green*, 221 Va. at 555, 272 S.E.2d at 185-86. These cases, like the overwhelming majority of cases from around the country involving Episcopal church property, have found provisions in the hierarchical church’s governing documents to be binding (as the Supreme Court has already in this case). This is in keeping with the law of secular

voluntary associations, which regards the governing documents of a national association as binding on local affiliates. And, where the governing documents of a hierarchical church *specifically govern* the removal of local church property from the denomination, Virginia courts, like the overwhelming majority of courts around the nation, have enforced that requirement – even where the deed to the local real property is in the name of the local church. Thus, the two Episcopal church property cases decided in the Commonwealth prior to the present case ordered that such property remain in the Church and be returned to the control of Episcopalians. *Buhrman*, 5 Va. Cir. at 508; *Wyckoff*, Op. at 7, 8.

In the present case, the governing documents of the Church and the Diocese undisputedly prohibit the removal of consecrated church property from the denomination without the denomination’s approval, and prescribe the consent required for removal of unconsecrated property. The governing documents also require that local church property be controlled by a rector who is an Episcopal priest, and by vestry members who are members in good standing of the Church. They also authorize the Executive Board of the Diocese to take charge of local church property that it has declared to be “abandoned,” which declaration has been made here as to the property of each of the seven local churches. Other provisions in the Church’s and the Diocese’s governing documents intrusively govern local churches’ management of both real and personal property, and require that the property be used in furtherance of the mission of the Church and the Diocese, and no other denomination. These binding provisions conclusively prohibit the CANA Congregations’ efforts to remove local Episcopal church property from the denomination. Moreover, the other facts in the case – the language of the real property deeds, Virginia statutes recognizing a hierarchical denomination’s right to assert control over local church property, and the historically subordinate relationship between the local churches and the

Diocese and the Church – support the conclusion that local church property must remain in the hands of Episcopalians. Accordingly, the CANA Congregations’ attempt to unilaterally remove local church property to another denomination violates the Church’s and the Diocese’s contractual rights and should be forbidden.

A. The Church’s and the Diocese’s Governing Documents Conclusively Establish Their Contractual Interest in Keeping Local Church Property in The Episcopal Church.

1. The Constitutions and Canons of the Church and the Diocese are Binding on the Local Churches.

As the Supreme Court of Virginia has already stated in this case, “[e]ach congregation within a diocese [of The Episcopal Church] . . . is bound by the national and diocesan constitution and canons.” *Protestant Episcopal Church in the Diocese of Va. v. Truro Church*, 280 Va. 6, 15, 694 S.E.2d 555, 559 (2010). That conclusion is the law of this case, and reflects the well-established principle that the governing documents of a hierarchical church are binding on the church’s members and local affiliates. *See Reid v. Gholson*, 229 Va. 179, 188-89, 327 S.E.2d 107, 113 (1985) (“[o]ne who becomes a member of [a hierarchical] church, by subscribing to its discipline and beliefs, accepts its internal rules”); *Brooke*, 54 Va. (13 Gratt.) at 320 (“[t]o constitute a member of any church, two points at least are essential . . . a profession of its faith and *a submission to its government.*”) (emphasis added) (citations omitted). The same conclusion was reached by Judge Stephenson in *Buhrman*, 5 Va. Cir. at 505 (“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,” thus the “constitutional and Canonical provisions are binding upon all units of The Episcopal Church, including St. Andrew’s”).

Applying this principle, the Supreme Court in *Green*, after reviewing facts showing the hierarchical structure of the denomination and the subordinate nature of the local church's relationship to the denomination, concluded:

“It is reasonable to assume that those who constituted the original membership of [the local church], 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.” 221 Va. at 555-56, 272 S.E.2d at 186.

In other words, by virtue of its affiliation with the hierarchical denomination, the local church became contractually bound by the denomination's governing documents.

In the present case, the Church's and the Diocese's governing documents make clear that local churches, by their affiliation with the Church and the Diocese, are bound by their rules. It is undisputed that the Constitutions and canons of the Church and the Diocese impose a pervasive system of regulation on local Episcopal churches, governing every critical aspect of local church life, including the mode of worship, the development of priests, the calling of a rector (and dissolution of that relationship), the discipline of clergy, and the composition, functioning and duties of the vestry. *See supra* at 7-11. These provisions reflect the hierarchical nature of the Church, and the subordinate relationship that local churches have to the Diocese and the Church.² Moreover, the Church expressly requires all Dioceses to be bound by the

² As the evidence in this case overwhelmingly shows, The Episcopal Church is hierarchical. “The highest governing body of [the Church] is the triennial General Convention, which adopts [the Church'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 constitution and canons.” *Truro*, 280 Va. at 15. Every court that has ever passed on the question has determined that the Church is hierarchical. *See, e.g., Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002); *Episcopal Church Cases*, 198 P.3d 66, 71, 80-81 (Cal. 2009); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19,

Church's Constitution and canons, *see* Const. Art. V, and the Constitution of the Diocese of Virginia acknowledges that it is so bound. Diocesan Const. Preamble. The Diocese's Constitution, in turn, requires every local church to be bound by the Diocesan Constitution and canons, Diocesan Const. Art. XVII. That provision that has been in effect since at least as early as 1815. *See* PX-COM-0071-395. Thus, the principle that the Supreme Court found to be implicit in *Reid*, *Brooke*, and *Green* – that local affiliates of a hierarchical church are bound by the denomination's governing documents – is explicit in the governing documents here.

This principle is not unique to churches or religious societies. It applies with equal force in the law governing secular voluntary associations, where a national entity's governing documents are considered to be “contractual” in nature and binding on the entity's members and local affiliates. *See, e.g.,* *Gottlieb v. Economy Stores*, 199 Va. 848, 856, 10 S.E.2d 345, 351 (1958) (“[t]he constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy or the law, will be enforced by the courts”) (internal quotation marks and citation omitted); 10 C.J.S. *Beneficial Associations* § 37 (2011) (“the constitution and by-laws of a fraternal order, consisting of a supreme lodge and subordinate lodges, are a part of the contract entered into by each member of the order when a person becomes a member, and property owned by a subordinate lodge is subject to the constitution and by-laws”); 7 C.J.S. *Associations* § 43 (2011) (“[a]ssociations may,

24 (N.J. 1980); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008); *In re Church of St. James the Less*, 2003 Phila. Ct. Com. Pl. LEXIS 91, at *24 (C.P. Phila. Cnty. Mar. 10, 2003), *aff'd in relevant part*, 888 A.2d 795, 810 (Pa. 2005); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 931 (Mass. 1997); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1285 (Conn. 1993); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 183 (Nev. 1980); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003); *Bennison v. Sharp*, 329 N.W.2d 466, 472 (Mich. Ct. App. 1982).

by the adoption of a constitution or other general rules, determine finally the property rights and interest of a member, or of a subordinate branch or lodge, in and to the funds and property of the association”).

The CANA Congregations will presumably argue that, even if the Church’s and the Diocese’s governing documents are binding, only those provisions that were in effect when each local church achieved “church” status, or when deeds were executed, can be said to be binding on those churches. But this argument (made in *Wyckoff*, see PX-COM-0308-22--23, and apparently rejected by Judge Koontz, *Wyckoff*, Opinion at 7-8), ignores the fact that the Church and the Diocese have pervasively governed local church property, including its removal from the Church, from earliest times. See *supra* at 11-15 (listing Church provisions governing local church property). Moreover, it ignores the fact that, even after new rules have been adopted governing local church property, these seven local churches have *continued to participate in the denomination for decades*, complying with the Church’s and the Diocese’s rules, including their rules governing real and personal property. See, e.g., *supra* at 16 (citing evidence that each of the seven churches has sought diocesan consent to alienate or encumber real property or incur debt, in compliance with canons). In return, as the Supreme Court acknowledged in *Green*, the local church “presumably benefitted from the association, spiritually and otherwise.” 221 Va. at 554, 272 S.E.2d at 185. The CANA Congregations cannot credibly claim that they were unaware of the Church’s and the Diocese’s rules governing local property, as each of the seven churches regularly sent representatives to meetings of the Annual Council, see, e.g., *supra* at 17, and their wardens were required by Diocesan canon to possess copies of the Church’s and Diocese’s Constitutions and canons for use in church governance. Diocesan Canon 12.7. Under these circumstances, all amendments to the Church’s and the Diocese’s Constitutions and canons

adopted after each local church's achievement of "church" status are as binding as the provisions that were in effect when that status was achieved. *See, e.g., Cardinal Dev. Co. v. Stanley Constr. Co.*, 255 Va. 300, 497 S.E.2d 847 (1998) (finding original contract to have been modified by conduct where defendant was aware of proposed modification, did not object to it, instructed plaintiff to continue with the modified project, and behaved in every way as though modified project was going forward); *Gov't Emp. Ins. Co. v. Hall*, 260 Va. 349, 356, 533 S.E.2d 615, 618 (2000) ("course of dealing by contracting parties, considered in light of all the circumstances, may evince mutual intent to modify the terms in their contract"; "mutual intention" must be shown by "clear, unequivocal and convincing evidence, direct or implied") (citation omitted).³

Accordingly, the Church's and Diocese's governing documents, as they have been amended over time, have the effect of contracts, binding the local churches to their terms.

2. The Church's and the Diocese's Governing Documents Establish Their Contractual Interest in Ensuring that Local Church Property Must Remain in The Episcopal Church.

The Supreme Court in *Green* described a "proprietary" interest in property as "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, 272 S.E.2d at 186. The Constitutions and canons of the Church and

³ The CANA Congregations may also argue that the law in effect at the time each of the churches achieved "church" status, or when the property at issue was acquired, did not permit the Church or Diocese to hold any interest, trust or otherwise, in local church property. But this argument (also made in *Wyckoff*, see PX-COM-308-009 & -023 at 18 n.22, and not adopted by Judge Koontz) ignores the fact that the law has since changed, at least since the Supreme Court recognized in 1974 in *Norfolk Presbytery* that hierarchical churches could have a contractual or proprietary interest in local church property, see 214 Va. at 507, 201 S.E.2d at 758; and that since that time all seven local churches have continued to subordinate themselves to the larger church including obeying its rules governing property. Indeed, it is telling that the Supreme Court in *Green* did not focus on when the hierarchical church's anti-alienation canon was adopted, but rather on the fact that the local church had continued to participate in the larger Church after its adoption. See 221 Va. at 555-56, 272 S.E.2d at 186.

the Diocese contain, and have historically contained, multiple provisions exhibiting their ultimate “dominion” and “control” over local church property, including governing the removal of such property from the denomination. These provisions, alone and in the aggregate, establish the Church’s and the Diocese’s contractual interest in guarding local church property for use in the Church. We review them in turn.

(i). The visitation canon, the consecration service, the “debt” canon, and the business methods canons. Since its foundation, the Church has embraced the principle that property is held for the mission of larger church, first codified in the requirement (dating to 1789) that bishops visit and oversee the use of local church property, *see supra* at 11, and the inclusion (since 1799) of a service for the consecration of a church building in the *Book of Common Prayer*. *See id.*

In the early Twentieth Century, the Church further articulated its oversight into the temporal affairs of its local churches with the adoption of elaborate canons governing business methods, including requiring local churches to keep their buildings adequately insured. *See supra* at 12. The Diocese has supplemented these canons with provisions governing the handling of local church funds, requiring diocesan approval before local churches may incur certain amounts of debt, requiring audits and bonding for treasurers, and mandating various types of insurance, including participation in the Diocese’s health insurance plan. *See supra* at 15. These provisions unequivocally show the Church’s and the Diocese’s assertion of “control” over local church assets, sufficient to establish a “contractual” or “proprietary” interest under *Green*.

(ii). The anti-alienation canons for consecrated property. In 1868, the General Convention adopted Canon I.21 (now Canon II.6), prohibiting parishes from encumbering or alienating consecrated parish property without the consent of the bishop and Standing Committee

of the Diocese. *See supra* at 11. The canon also provided that no church would be consecrated until the bishop was satisfied that the building and grounds were “fully paid for” and “free from “lien or other incumbrance.” *See supra* at 12. The canon was amended in 1871, after dissenters attempted to remove local church property to another denomination, to further require that consecrated property be “secured . . . from the danger of alienation from those who profess and practice the doctrine, discipline, and worship of the Protestant Episcopal Church.” *Id.* Diocesan Canon 15.2 echoes the requirement for diocesan consent.

These canons *alone* conclusively establish the Church’s and the Diocese’s contractual interest in ensuring that consecrated church property remain in The Episcopal Church. They are identical to – and, with the 1871 amendment, even stronger than – the single provision that the Supreme Court found to be conclusively binding in *Green*. In that case, after concluding that the local church was “governed by . . . the Discipline of the general church,” *Green*, 221 Va. at 556, 272 S.E.2d at 186, the Court focused on one provision in the denomination’s governing documents, which “require[d] that all property transfers be approved by the bishop.” *Id.* at 556, 272 S.E.2d at 186. Specifically, the denomination’s Discipline provided that “no congregation, pastor, nor Trustee Board or agent of the congregation shall mortgage or sell any property of the African Methodist Episcopal Zion Church without the written consent of the bishop of the district or the Annual Conference.” *Id.* at 556 n.3, 272 S.E.2d at 186 n.3. Because this provision was binding, the Court concluded, efforts by dissenters in the local church to remove property from the denomination without the bishop’s consent was a contractual violation. *Id.* at 556, 272 S.E.2d at 186.⁴ Similarly, the CANA Congregations’ attempt here to remove consecrated

⁴ In cases involving secular voluntary associations, courts have similarly enforced specific provisions in a national organization’s governing documents that prevent local affiliates from removing locally-owned property from the national organization. *See, e.g., Grand Court of*

property from the Church without diocesan consent violates binding obligations to the Church and the Diocese.

Both *Wyckoff* and *Buhrman* found a similar anti-alienation canon to be binding.⁵ See *Wyckoff*, Op. at 6, 7 (anti-alienation canon “expressly prohibits” alienation of local church property by “a vote of even the majority of the local congregation . . . without the written consent of the Bishop acting with the advice and consent of the Standing Committee”; thus “[t]he net result . . . based on the constitution and canons of the church . . . is that the effect of the congregational vote [to remove the local church and its property from the Church and the Diocese] 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”)⁶; *Buhrman*, 5 Va. Cir. at 505. There is no basis for finding otherwise here.

Wash., Foresters of Am. v. Hodel, 133 P. 438 (Wash. 1913) (enforcing trust where national association’s rules provided that “[a]ll property and funds of a [local affiliate] shall be held exclusively as a trust fund for carrying on the fraternal and beneficial features of the order”); *Hermione Lodge No. 16, Knights of Pythias, of Decatur v. Grand Lodge, Knights of Pythias of Ala.*, 28 So. 2d 166 (Ala. 1946) (holding that national association had interest in property of local affiliate where the “statutes of the Grand Lodge” provided that receipts from fees and dues constituted a trust fund for carrying out the goals of the national organization; the funds of the local lodge should not be subject to partition among the members; and if the local lodge ceased to exist its funds would revert to the Grand Lodge).

⁵ That canon (Canon 21 of the Diocese of Southwestern Virginia) required diocesan consent for alienation of all local church property, both consecrated and unconsecrated: “It shall not be lawful for the Trustees of a congregation, in whom is vested the title to any real estate, such as a rectory, parish house, or any other real estate to encumber, alienate, or lease for more than three years said property belonging to said congregation without the previous written consent of the Bishop of the Diocese, acting with the advice and consent of the Standing Committee.” *Buhrman*, 5 Va. Cir. at 507; see also *Wyckoff*, Op. at 6 (citing Canon 21).

⁶ The dissenting congregation in *Wyckoff* proceeded to argue that they were “in fact the local episcopal congregation as contemplated by the . . . deeds.” Op. at 7. As we show below, see *infra* Part II., Judge Koontz rejected this argument, holding that the remaining Episcopalians constituted the true congregation, even though they constituted a minority, and therefore were entitled to the church property. Op. at 7-8.

(iii). The rector's canons. Church Canon III.9(5)(a) provides that the rector of a local church is entitled to control its real and other physical property – both consecrated and unconsecrated – subject to the Church's rules and the direction of the Bishop. The “rector” of an Episcopal church must be an Episcopal priest. Canon III.9(3)(a)(3). It is undisputed that each of the persons who were rectors at the time of the CANA Congregations' disaffiliation vote have been deposed, *see supra* at 18, and that none of the persons claiming to be rectors of the CANA Congregations is an Episcopal priest.⁷ The CANA Congregations' attempt to remove real and other physical property from the control of Episcopalians and their rectors violates this canon and thus constitutes an independent basis for finding a contract violation.

(iv). The vestry canons. Church Canon I.14.2 makes local church vestries the “agents and legal representatives of the [local church] in all matters concerning its corporate property.” As just discussed, control of real and other physical church property rests with the rector; thus, the vestry retains control of a local church's personal property. Diocesan Canon 11.4 requires all vestry members to be Episcopalians. It is undisputed here that the CANA Congregations and their members are not Episcopalians. Accordingly, they are not qualified under these canons to control any of the real or personal property of the seven local churches, and their efforts to do so violates those canons.

⁷ Indeed, if there were any doubt about which persons are and are not Episcopal priests, the court would be required to defer to the Church's and the Diocese's determination of such an issue. *See Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713 (1976) (civil courts required to defer to hierarchical church's determination of who was true bishop); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (civil court required to defer to hierarchical church's determination of person's eligibility to be chaplain); *Judicial Commission of PCA Korean Capital Presbytery v. Kim*, 56 Va. Cir. 46, 51 (Fairfax Cnty. 2001) (deferring to hierarchical church's determination of which of two factions within local church entitled to control of church and its property); *see also Cha v. Korean Presbyterian Church of Wash.*, 262 Va. 604, 553 S.E.2d 511 (2001) (no jurisdiction to determine whether pastor was wrongfully terminated).

(v). The anti-alienation canons for unconsecrated property. Like its canon governing consecrated property, the Church's canon governing unconsecrated property requires consent from the Diocese for alienation or encumbrance of such property. *See supra* at 12-13. Unlike the earlier canon, however, this canon allows each diocese to provide for an alternate method of consent to such alienation or encumbrance, *see supra* at 13, and the Diocese of Virginia has done just that, providing in Diocesan Canon 15.2 that unconsecrated real property of churches may be alienated or encumbered only upon the consent of the congregation in a meeting called for that purpose. The CANA Congregations may view this provision as supporting their position, but they miss the point: Local churches are not free to govern their property as they please, because the *Diocese* dictates what steps a local church must go through in order to alienate its property. These canons, too, demonstrate the larger Church's ultimate "control" over the disposal of local church property.

(vi). The "abandonment" canon. Diocesan Canon 15.3 provides that the Executive Board may declare local church property to be "abandoned" where it has ceased being used by a "congregation of the Episcopal Church in the Diocese," and gives the Board "authority to take charge and custody thereof," including selling the property or transferring it to the Bishop. That is precisely what has happened here: It is undisputed that the Executive Board of the Diocese has declared all of the real property of each of the seven local churches to be "abandoned," *see supra* at 18-19, and accordingly has "authority to take charge" of those properties. Indeed, outside of the context of property disputes, Virginia courts have routinely enforced the Executive Board's declaration of local church property as "abandoned" and enforced the Diocese's authority over such property by granting it permission to sell or otherwise transfer the title to such property. *See, e.g.,* PX-COM-295, PX-COM-296, PX-COM-297, PX-COM-298, *see also*

PX-COM-300, PX-COM-301, PX-COM-302, PX-COM-303, PX-COM-304, PX-COM-305, PX-COM-306, PX-COM-307 (enforcing “abandonment” determinations by other Virginia dioceses of the Church). This is yet another enforceable, contractual provision that the CANA Congregations have breached by their refusal to return local church property to Episcopalians.

In *Buhrman*, Judge Stephenson found an abandonment canon, as well as the Diocese of Southwestern Virginia’s actions under it, to be particularly persuasive. Nearly identical to the Diocese of Virginia’s canon, that canon provided:

“In the case of any property which is determined by the Executive Board to be abandoned property, the said Committee (on Church Property) shall take such steps, through the trustees holding the legal title thereto, . . . or, if there be no such trustee or trustees, then through any one or more members of the congregation, either to cause the title and possession of (where appropriate) said property to be transferred to the Trustees of the Funds of the Protestant Episcopal Church in the Diocese of Southwestern Virginia, Inc., or to make sale thereof.” 5 Va. Cir. at 506-07.

After stating that the canon “illustrate[d] the proprietary interest of the Diocese in the contested property,” *id.* at 506, the court noted that “[t]he Executive Board, by formal resolution, has determined that the St. Andrew’s property has 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. Thus, in Judge Stephenson’s view, the Diocese’s abandonment canon was binding on the local church, and the Diocese’s actions taken under that canon could not be undermined by the action of the dissenting congregants. The same conclusion should adhere here.

(vii). The “Trust Canons.” The Church’s 1979 Trust Canon (Canon I.7.4) provides that all real and personal property of a local church property is held “in trust” for the Church and its Dioceses. The Annual Council of the Diocese adopted a similar canon in 1983. *See supra* at 13. Representatives from each of the six local churches then existing attended that meeting of the Annual Council. *See id.* Professor Mullin testified that the Church’s Trust Canon merely

codified its long-standing interest in retaining local church property within the Church. Tr. 1215:9-1216:1; 1231:6-10. That testimony remains uncontradicted; and indeed, several courts from other states have reached that same conclusion. *See, e.g., Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish*, 620 A.2d at 1292 (1979 Trust 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 [the Church] in 1789”); *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 250 A.D.2d 282, 288 (N.Y. App. Div. 1999) (1979 Trust Canon “expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the [Church]”).

As an overwhelming majority of courts in other states have found, these canons are binding, and therefore local church real and personal property may not be removed from the Church or its dioceses without their consent. *See infra* at 37ff. Virginia’s historical bar on denominational trusts, having been lifted by the General Assembly in 1993, presents no obstacle to the same conclusion here.⁸ But even if this court were to conclude that denominational trusts may not be enforced, it should not ignore the additional weight these canons add to the litany of earlier canons, each of which codified, in different ways, the principle that local Episcopal church property is dedicated to and must remain in the use of Episcopalians and the Church.⁹

⁸ The Church adopts the Diocese’s argument on this point.

⁹ The conclusion that the Church’s Constitutional and canonical provisions governing local church property must be enforced is also mandated by the First Amendment. *See Jones*, 443 U.S. at 606 (hierarchical church can “ensure . . . that the faction loyal to the hierarchical church will retain the church property” by having its governing documents “recite an express trust in favor of the denominational church”).

B. The “Dealings Between the Parties” Support a Finding that the Church and the Diocese Have a Contractual Interest in Keeping Local Church Property in The Episcopal Church.

In *Green*, the Supreme Court reviewed evidence of the “dealings between the parties” – including evidence that for 100 years the local church had consistently used the “name, customs, and policies” of the denomination; was “known, recognized, and accepted” as a church of that denomination; had worshiped according to the denomination’s plan for worship and used its Sunday School materials; and had sent delegates to conferences of the denomination, 221 Va. at 555, 272 S.E.2d at 186 – and then concluded, as noted above, that the local church was “governed by . . . the Discipline of the general church.” *Id.* at 556, 272 S.E.2d at 186. The Court also noted that such evidence showed that the local church “became and was an integral part of the” hierarchical church. *Id.* at 553, 272 S.E.2d at 184.

As summarized *supra* at 15-18, and more comprehensively in the brief of the Diocese, the extensive evidence in the present case of the dealings between the parties – that is, the dealings between each of the seven local churches and their leaders, on the one hand, and the Church and the Diocese, on the other – overwhelmingly shows that the local churches were an “integral part” of the Diocese and the Church, and that they were “governed by” the Constitutions and canons of the Church and the Diocese. Thus, each of seven churches became a local church of the Diocese and the Church in accordance with the rules of the Diocese; the governing documents or vestry manuals of each church acknowledged the binding nature of the Church’s and the Diocese’s rules; at least six of the seven churches has had property consecrated by an Episcopal bishop; the churches’ vestry members have promised, as required by Diocesan canon, to uphold the rules of the Church; clergy at the seven churches have made the Declaration of Conformity required by the Church’s Constitution and Prayer Book; each church has involved

the Diocese in the selection of rectors, pursuant to Church canons; each church has been regularly represented at the Diocese's Annual Council and submitted canonically-required parochial reports; clergy of each church have participated in the Church Pension Fund; and, perhaps most directly evidencing their recognition of the larger Church's control over local church property, each of the seven churches has sought diocesan consent for the encumbrance or alienation of real property or for the taking on of debt. *See id.* These facts are at least as strong as those presented in *Green* (where there was no evidence, for example, that the local church had sought permission from the larger church to alienate or encumber its property or incur debt), and clearly support a finding in favor of the Church and the Diocese here.

C. The Deeds Support a Finding that the Church and the Diocese Have a Contractual Interest in Keeping Local Church Property in The Episcopal Church.

There is no dispute in this case that real property at issue here is held by trustees for the benefit of the seven local churches. However, as the Supreme Court held in *Norfolk Presbytery v. Bollinger*, deeds are not dispositive in these cases. In *Norfolk Presbytery*, the congregation of a local Presbyterian church attempted to withdraw the church from the Presbyterian denomination and convey its real estate to a separate entity. 214 Va. at 501, 201 S.E.2d at 753-54. The property was held by trustees for the benefit of the local church (not the larger denomination). *Id.* As the Virginia Code requires court permission for conveyances of church property, *see* Va. Code § 57-15; *Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 754-55, the local church sought such permission, which the court granted, on the basis that the conveyance was the "wish of the congregation." *Id.* at 501, 201 S.E.2d at 754. The Presbytery (the regional governing body of the hierarchical church), which was opposed to the conveyance, moved to intervene, which motion was denied. *Id.* at 501-02, 201 S.E.2d at 753-54. On appeal, the Supreme Court reversed, holding that, even though the local church held title to the property, the

Presbytery was entitled to an opportunity to prove that it had a “contractual interest” in that property; and if it made such a showing, then the conveyance was violative of those rights. *Id.* at 503, 201 S.E.2d at 755. Because of the procedural posture of the case, the Court had no occasion to consider whether such interest had been established.

In the present case, the deed or deeds to one or more parcels of the real property of each of the seven churches in evidence show as the grantee a local “Episcopal” church. *See supra* at 16. The *Buhrman* court found such language persuasive. There, the deeds were made to local trustees ““for the erection of a church building to be used as a place of worship by the Episcopal Congregation of Clifton Forge Parish,”” and to ““Trustees of St. Andrew’s Episcopal Church of Clifton Forge, Virginia.”” 5 Va. Cir. at 503. Although it might have been argued, as the CANA Congregations suggest here, that the deeds were intended for a particular congregation, whether or not affiliated with the Church, and that the use of the term “Episcopal” in the deeds was merely descriptive of the congregation at the time, Judge Stephenson found the deed language alone to be dispositive in favor of the larger church:

“It is evident 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. 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.” 5 Va. Cir. at 503.

As in *Buhrman*, the deeds in this case support a conclusion that local church property must be held by local Episcopalians.¹⁰

¹⁰ The deed at issue in *Green* was “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, 272 S.E.2d at 182. Under the law in effect at the time such a deed would have been construed as a conveyance for the benefit of a local church, as conveyances to denominations were not yet

D. Virginia Statutes Support a Finding that the Church and the Diocese Have a Contractual Interest in Keeping Local Church Property in The Episcopal Church.

As the Diocese sets out in its brief (which argument the Church adopts), Virginia Code Section 57-7.1 validates trusts for the benefit of denominational churches and therefore supports a finding that the Church and the Diocese have an interest in the local church property at issue in this case. In addition, at least one other statute supports the conclusion that a hierarchical church may have a contractual interest in the property of its local affiliates, and no statutes obstruct such a result. Virginia Code Section 57-15, requiring trustees holding church property to seek court approval for conveyances of that property, authorizes courts to approve such transactions as long as there is evidence showing “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.” Va. Code § 57-15(A). The Supreme Court in *Norfolk Presbytery* found that this language “contemplates that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve” a transfer of local church property, even when the title is held for the benefit of the local church entity. 214 Va. at 502, 201 S.E.2d at 755. The Court went further to conclude that, “[i]n the case of a super-congregational church, . . . Code § 57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church.” *Id.* at 503, 201 S.E.2d at 755 (emphasis added). Section 57-15, thus, clearly supports the notion that a hierarchical church may have a contractual interest in local church property.

recognized. *See, e.g., Brooke*, 54 Va. (13 Gratt.) at 314-18; *see also* Tr. 3629:9-3630:12. Accordingly, it is unclear whether the deed at issue in *Green* weighed any more favorably for the denomination than the deeds at issue here.

E. An Overwhelming Majority of Other State Courts Applying a “Neutral Principles” Test Such as That Adopted in *Green* Have Concluded that the Church and Its Dioceses Have an Interest in Local Episcopal Church Property.

Since at least the time of *Wyckoff* and *Buhrman*, courts around the country have entertained disputes over local Episcopal church property. Thus, courts in some 25 cases in 15 states with facts nearly identical in all significant respects to those presented here have almost unanimously concluded that local Episcopal church property must remain in the hands of loyal Episcopalians. *See*:

- California: *Episcopal Church Cases*, 198 P.3d at 70, 84 (“on this record,” “when defendants disaffiliated from the Episcopal Church, the local church property reverted to the general church”); *Huber v. Jackson*, 96 Cal. Rptr. 3d 346, 356 (Cal. Ct. App. 2009) (parish holds property “in trust for the Episcopal Church and the Los Angeles Diocese, and by disaffiliating from the church defendants and their new parish under another church have no right in the property”), *review denied*, No. S175401, 2009 Cal. LEXIS 9850 (Sept. 17, 2009), *cert. denied*, 78 U.S.L.W. 3498 (U.S. Mar. 1, 2010) (No. 09-708); *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 482, 486 (Cal. Ct. App. 2008) (“the Episcopal Church impressed a trust on local church property” and “[o]nce the defendants renounced their membership in the Episcopal Church, they could no longer serve as members of the vestry and directors of the Parish corporation”); *Episcopal Diocese of San Diego v. Rector, Wardens & Vestry of St. Anne’s Parish in Oceanside*, No. 37-2007-00068521-CU-MC-CTL, Judgment at 2 (Cal. Super. Ct. June 4, 2010) (parish property “is held in trust for The Episcopal Church and The Episcopal Diocese of San Diego”);
- Colorado: *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (enforcing “trust [that] has been imposed upon the real and personal property [of the parish] for the use of [The Episcopal Church]”); *Grace Church & St. Stephen’s v. Bishop & Diocese of Colo.*, No. 07 CV 1971, Order at 26 (Colo. Dist. Ct. Mar. 24, 2009) (“trust [in favor of The Episcopal Church] that has been created through past generations of members of [the parish] prohibits the departing parish members from taking the property with them”);
- Connecticut: *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish.*, 620 A.2d at 1292 (enforcing “trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [The Episcopal Church] in 1789”); *Episcopal Church in the Diocese of Conn. v. Gauss*, No. CV X06 08 4020456 S, Mem. of Decision at 21 (Conn. Super. Ct. Mar. 15, 2010) (finding “implied trust in the Parish property exists in [The Episcopal Church’s and the Diocese’s] favor”), *appeal pending*, Nos. SC18718 & 18719 (Conn.);

- Georgia: *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 55 (Ga. Ct. App. 2010) (“a trust over the property exists in favor of the National Episcopal Church and the Diocese of Georgia. When Christ Church disaffiliated from the National Episcopal Church, the local church property reverted to the control of the Bishop of the Diocese of Georgia for the uses and purposes of the National Episcopal Church”), *appeal pending*, No. SC10G1909 (Ga.);
- Massachusetts: *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 923 (Mass. App. Ct. 2003) (parish “holds its property in trust for the Diocese and [The Episcopal Church]”); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 933-34 (Mass. 1997) (dismissing complaint filed by representatives of disaffiliating parish seeking control of parish corporation);
- Michigan: *Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982) (“although the majority faction of a local congregation within a hierarchical church may secede, it may not take property with it”);
- Missouri: *Smith v. Church of the Good Shepherd*, No. 04CC-864, Judgment & Order at 4-5 (Mo. Cir. Ct. Oct. 12, 2004) (finding trust interest in favor of Church and Diocese in the light of anti-alienation and trust canons and local church charter acceding to Church’s rules);
- New Jersey: *Protestant Episcopal Church in the Diocese of N.J.*, 417 A.2d at 24–25 (parishioners “disaffiliated themselves from The ... Episcopal Church” which “automatically terminated their eligibility to hold office” as parish leaders in control of church property; “individual [parishioners] are free to disassociate themselves from [The Episcopal Church] and to affiliate themselves with another religious denomination.... The problem lies in [their] efforts to take the church property with them. This they may not do.”);
- New York: *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) (The Episcopal Church’s rules “clearly establish an express trust in favor of the Rochester Diocese and the National Church”); *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 250 A.D.2d 282, 288 (N.Y. App. Div. 1999) (enforcing “trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the ... Episcopal Church”); *Diocese of Cent. N.Y. v. Rector, Church Wardens, & Vestrymen of the Church of the Good Shepherd*, No. 2008-0980, 2009 N.Y. Slip. Op. 50023, at *2–3, 880 N.Y.S.2d 223 (Sup. Ct. Jan. 8, 2009) (enforcing The Episcopal Church’s trust interest in parish property); *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05, Mem. at 31 (N.Y. Sup. Ct. Mar. 12, 2008) (“all real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island”);

- Nevada: *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980) (enforcing “ecclesiastical authority’s decision as to identity of” the “loyal” congregation entitled to possess parish property);
- North Carolina: *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003) (The Episcopal Church’s rules “precluded the seceding vestry from taking control of the [parish] property”);
- Ohio: *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973, Omnibus Op. & Order at 15-16 (Ohio Ct. C.P. Cuyahoga Cnty. Apr. 15, 2011) (“the Dennis Canon governs the outcome of this litigation.... The real and personal property at issue is impressed with a trust in favor of the ECUSA and the Episcopal Diocese.”);
- Pennsylvania: *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) (parish “is bound by the express trust language in [The Episcopal Church’s canons] and therefore, its vestry and members are required to use its property for the benefit of the Diocese”);
- Tennessee: *Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens, & Vestrymen of St. Andrew’s Parish*, No. 09-2092-11, Summary Judgment Order at 10-11 (Tenn. Ch. Ct. Apr. 29, 2010) (parish real and personal property “is impressed with a trust in favor of the Diocese and The Episcopal Church”);
- Texas: *Masterson v. Diocese of Nw. Tex.*, 335 S.W.3d 880, 892 (Tex. Ct. App. 2011) (“the vote to disaffiliate was effective only as to those members who sought to withdraw from the Episcopal Church; it did not have the effect of withdrawing Good Shepherd itself from its union with the Episcopal Church, as the Former Parish Leaders presume”); *St. Francis on the Hill Church v. Episcopal Church*, No. 2008-4075, Final Summ. J. Order at 3 (Tex. Dist. Ct. Dec. 16, 2010) (parish’s real and personal property “is held and may be used only for the ministry and work of the Church and the Diocese”).¹¹

¹¹ *But see Bjorkman v. The Protestant Episcopal Church in the U.S. of the Diocese of Lexington*, 759 S.W.2d 583, 586-87 (Ky. 1988) (holding that no express trust exists in favor of The Episcopal Church and awarding property to disaffiliating parish); *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 685 S.E.2d 163, 174 (S.C. 2009) (holding “the Dennis Canons had no legal effect on the title to the congregation’s property” and awarding property to disaffiliating congregation).

The decision in *Bjorkman*, although one of the older in the panoply of Episcopal Church property cases, has not been followed by other courts. That case is distinguishable, because the court based its analysis in large part on its understanding that the Church “regarded [its anti-alienation canons] as insufficient to prevent alienation in the absence of some provision in civil law rendering it enforceable.” 759 S.W.2d at 586. It is clear from the simple fact that the Church has repeatedly and consistently – and successfully – relied on those very canons in

Most of these cases employed a four-factor “neutral principles” analysis closely resembling Virginia’s “contractual” approach. Although those cases concluded that the Church and/or one of its dioceses had a “trust” interest in the local church property at issue, none applied private trust law principles (there was no mention of “settlers,” for example). Rather, much like Virginia’s approach, these cases have looked for evidence showing the relationship between the local churches and the larger Church, and in particular evidence showing the “terms of the deal” between the parties. For example:

- In *Bishop & Diocese of Colorado*, 716 P.2d 85, the Supreme Court of Colorado adopted a “neutral principles” approach, reviewing the deeds, the governing documents of the local and the general church, and the relationship between the local and the general church. *Id.* at 96, 104-07. (The Court noted that there were no state statutes relevant to the case. *Id.* at 107-08). In that case, sometime in 1976 (and before the Church’s adoption of its 1979 Trust Canon), a majority of the congregation of a local Episcopal church withdrew from the Church and purported to take with them the church and its property. *Id.* at 87, 105. The “relevant deeds simply name[d] the

church property litigation that the court’s understanding was mistaken. Further, in a later case involving another denomination, the Supreme Court of Kentucky, finding that a minority faction remaining loyal to hierarchical denomination was entitled to local church property, distinguished *Bjorkman* because it involved no trust provision adopted by the general church. *Cumberland Presbytery of the Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 422 (Ky. 1992). Since the adoption of the 1979 Trust Canon, that is no longer the case.

South Carolina’s *All Saints* case is distinguishable from the present case because (1) although calling its approach one of “neutral principles,” that court did not apply a four-factor similar to Virginia’s or to any other four-factor “neutral principles” approach employed by any other court in the country, 685 S.E.2d at 171, and (2) there was no record evidence there that the parish submitted itself to the Church’s governance after 1979, unlike here. Notably, not a single decision in an Episcopal Church property dispute rendered after the *All Saints* decision has found in favor of the withdrawing congregation, and at least one court has expressly declined to follow it. *See Rector, Wardens & Vestrymen of Christ Church in Savannah*, 699 S.E.2d at 55.

grantee as St. Mary's Church," with "no reference . . . to [the Church] or its Colorado diocese." *Id.* at 104. Describing an analysis much like that set out by the Supreme Court of Virginia in *Norfolk Presbytery and Green*, the Supreme Court of Colorado stated that, in the light of the existing deeds, the Church and the Diocese had the "burden of presenting other evidence to establish that effective control over these properties is not reposed in the legal title holder, but rather that the local church property has been dedicated to the use and control of the general church." *Id.* The local church's articles of incorporation did "not contain an explicit declaration of a trust in favor of the general church," but described the church's corporate purpose as the administration of "the temporalities of the Protestant Episcopal Church in the Parish," and acceded to the Church's and the Diocese's Constitutions and canons, including canons restricting the alienation of church property and the incurring of debt. *Id.* at 104. In the view of the Supreme Court of Colorado, "[t]hese two clauses" in the local church's governing documents alone "strongly indicate[d] that the local church property was to be held for the benefit of the general church," and "show[e]d the extensive nature of the policy direction and property control to be exercised by the general church." *Id.* In addition, the Church's anti-alienation canon (Canon I.7(3)), its canons requiring that all local church buildings and their contents "be adequately insured" (Canon I.7(1)(h)) and forbidding the disposal of consecrated property without diocesan consent (Canon II.6(3)) "show[ed] the measure of control over local church property that is intended to be exercised by the general church." *Id.* at 105. The court's construction of those documents was "reinforced by the conduct of the relevant officials of the local and general church," *id.* at 104, which included evidence that (1) the rector and vestry of the local church had "'acknowledged their status as a local unit within the Episcopal Church and have accepted the benefits of that affiliation for more than 40 years,'" *id.*; (2) the rector and

members of the local church had “assumed an active role in diocesan affairs, particularly by sending representatives to the annual conventions of the diocese and by accepting appointments to various permanent bodies and positions within the diocese,” *id.* at 104-05; (3) the local church submitted required reports to the diocese, *id.* at 105; and (4) the local church officials “sought the permission of the diocese before attempting to encumber parish property.” *Id.* at 105. On the basis of these facts, the court concluded that “a trust has been imposed upon the real and personal property of St. Mary’s Church for the use of the general church,” and, accordingly, “the possibility of the withdrawal of property from the parish simply because a majority of the members of the parish decide to end their association with [the Church]” was “foreclose[d].” *Id.* at 108.

- In *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish*, 620 A.2d 1280, a local Episcopal parish purported to withdraw from the Church and its Diocese of Connecticut and remove the parish property to another denomination. *Id.* at 1281. The question presented was whether the local church property, undisputedly held in the name of the local parish, was held in trust for the general church. *Id.* at 1281-82, 1284, 1289. The Supreme Court of Connecticut, describing its analysis as a “contractual approach,” stated that courts must “determine whether members of a parish within a hierarchical church organization have agreed to be bound by the higher ecclesiastical authority within the church” by examining “the polity of the church,” “its constitution and canons,” and “the historical . . . relationship between the local church and the general church.” *Id.* at 1284-85. (The court cited no applicable statute.) The court examined the Constitutions and canons of the Church and the Diocese, noting the general “hierarchical” nature of the Church, and focusing on the Church’s rules governing parishes’ business affairs (including the keeping of account records and the requirement of audits), requiring parochial reports, and

requiring diocesan consent for the alienation or encumbrance of real property, and concluded that these documents “strongly reflect the polity of the church as one in which the parish is the local manifestation of [the Church] to be used for its ministry and mission.” *Id.* at 1286 & n.13. The parish’s articles of incorporation “identified it with the Episcopal Church” and described the parish’s purpose as “supporting the worship of God according to the doctrine and discipline of [the Church].” *Id.* at 1289. The parish also had buildings consecrated over the years, and complied with canons requiring diocesan consent for relocation of the church and for alienation of property. *Id.* at 1289-90, 1292. Further, the parish “ha[d] acknowledged its role in [the Church] and the Diocese in numerous other ways,” including by presenting annual reports to the Diocese, sending representatives to the annual Diocesan Convention, and contributing financially to the Diocese. *Id.* at 1292. On the basis of these facts, the court concluded that the local church “had agreed, as a condition to their formation as [an] ecclesiastical organization[] affiliated with the Diocese and [the Church], to use and hold [its] property only for the greater purposes of the church.” *Id.* Accordingly, the court found a “legally enforceable trust in favor of the general church in the property claimed by [the local congregation].” *Id.* at 1293.

- In *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 699 S.E.2d 45, the Court of Appeals of Georgia applied a “neutral principles” approach “to determine whether the National Episcopal Church or Christ Church controls the local property.” *Id.* at 48. The original parcel of land, originally given to Christ Church by the colonial legislature in 1758, which grant was confirmed in 1789 by an action of the newly-formed Georgia legislature that also incorporated the parish, was undisputedly held by the local church, as were other parcels acquired later. *Id.* at 47, 48. A state statute, providing that church property is to be held “according to the mode of church government or rules of discipline exercised by” the church,

was viewed by the court as “support[ing] the existence of a trust over Christ Church property” in favor of the general church. *Id.* at 49, 50. Reviewing the church’s historical property canons, the court noted that the Church “has always required parish property to be held and used for the mission of the National Episcopal Church and its dioceses.” *Id.* at 51. Further, the parish had “held itself out as a parish of the Diocese of Georgia” and been a “full participant in the affairs” of the Church throughout its history, by sending representatives to diocesan conventions, filling leadership roles in the diocese, and sponsoring legislation requiring accession to the rules of the larger church. *Id.* And, the parish “benefitted from its connection to the National Episcopal Church in a myriad of ways, including using the [Church’s] prayer book, electing clergy educated and trained under the [Church’s] governance, and participating in the [Church’s] pension program.” *Id.* Thus, the court concluded, “Christ Church acceded to the [Church’s] implied trust” when it joined the Diocese of Georgia in 1823, and again when it amended its corporate charter in 1918 to expressly accede to the governance of the Church and the Diocese. *Id.* Accordingly, “an implied trust over Christ Church property existed in favor of the National Episcopal Church.” *Id.* at 52. As a separate ground for its decision, the court also found that the parish had acceded to the Church’s 1979 Trust Canon by re-recording its corporate charter (including the language acceding to the Church) in 1981 and by seeking diocesan consent for alienation of property and incurring indebtedness after 1979, which the court concluded evidenced an express trust in the parish’s property in favor of the general church. *Id.* at 52-53.

- In *Episcopal Diocese of Rochester*, 899 N.E.2d 920, “serious theological disputes” had arisen between the Episcopal Diocese of Rochester and one of its local churches. *Id.* at 921. The Diocese declared the local church to be “extinct” and determined that the local assets should be transferred to the Diocese. *Id.* at 921-22. The local church, however, maintained that it held

legal title to the property “free and clear” of any claims by the Diocese or the Church. *Id.* at 922. The Court of Appeals of New York found “nothing in the deeds that establishes an express trust in favor of” the Diocese or the Church. *Id.* at 924. Although the local church originally incorporated as a mission of the Diocese in 1927, the church’s corporate charter “[did] not indicate that the church property is to be held in trust for the benefit of either the . . . Diocese or the . . . Church.” *Id.* at 921, 924. In its petition to the diocese for “parish” status, the local church agreed “to abide by and conform to” the Constitution and canons of the diocese. *Id.* at 921. Although a state statute acknowledged that local church property could be held in trust for the Church, *see id.* at 923 n.7, the court determined that no statute “conclusively establish[es] a trust in favor of the . . . Diocese or . . . Church.” *Id.* at 924. Of the Church’s and the Diocese’s governing documents, the court focused only on the Church’s 1979 Trust Canon and the identical canon adopted by the Rochester Diocese. *Id.* at 922-23 & nn.5 & 6. The court concluded that the governing documents of the Church were “dispositive”: “[T]he [Church’s and Diocese’s Trust] Canons clearly establish an express trust in favor of the . . . Diocese and the . . . Church, and [the local church] agreed to abide by this express trust either upon incorporation [as a mission] in 1927 or upon recognition as a parish in spiritual union with the . . . Diocese in 1947.” *Id.* at 925. Thus, the Diocese was entitled to the local church property. *Id.* at 925.

- In *Episcopal Diocese of Ohio*, No. CV-08-654973, the congregations of five parishes in the Diocese of Ohio purported to remove their parishes and the parish property from the Diocese and the Church. *Om. Op. & Order* at 10. The Church, the Diocese, and each of the continuing Episcopal churches sued to regain control of the property. *Id.* at 1-2. Because the Church is “hierarchical,” Ohio law required the court to review the deeds, the local church’s articles of incorporation, and the denomination’s governing documents. *Id.* at 3. There was “copious

evidence of the five parishes' pledged and actual submission to the governance of the [Church],” including promises to conform to the Constitutions and canons of the Church and the Diocese and the seeking of diocesan permission to alienate or encumber property or to relocate the parish. *Id.* at 6-8. Noting the “heavy load of internal church documents and relevant case law” submitted by the plaintiffs, the Court of Common Pleas focused on the Church’s and the Diocese’s property rules, including the Church’s anti-alienation canons, rector’s canon, and 1979 Trust Canon. *Id.* at 4, 8-9. The court noted, “[i]t is tempting to conflate a litigation’s size with its complexity. This case presents that enticement. Nevertheless, despite the sheer volume of submissions from the parties – dozens of pages of cross-motions for summary judgment and supplemental authority, and thousands of pages of appendices – this case is straightforward.” *Id.* at 1. Applying the “neutral principles” analysis, the Court of Common Pleas concluded that the Church’s 1979 Trust Canon “govern[ed] the outcome of this litigation,” and therefore “the church property at issue, real and personal, is impressed with a trust in favor of the [Church] and the [Diocese].” *Id.* at 15, 21.

* * *

As the Supreme Court of California noted, although “[t]hese out-of-state decisions are not binding on this court, . . . [they are] persuasive, especially in the aggregate.” *Episcopal Church Cases*, 198 P.3d at 82. The same should hold here.

II. UNDER VIRGINIA’S “IDENTITY” APPROACH, LOYAL EPISCOPALIANS ARE IN ANY EVENT ENTITLED TO POSSESS AND CONTROL THE PROPERTY OF THE SEVEN LOCAL CHURCHES AT ISSUE HERE.

A. Virginia Law Requires that Local Church Property Affiliated with a Larger Denomination Must Remain with Loyalists to that Denomination.

Even if the Court should determine that the Church and the Diocese do not have a contractual or proprietary interest in the local church property at issue here, the property must remain in the control of continuing Episcopalians. Where one faction of a local church affiliated with a larger denomination decides to withdraw from the denomination, the Supreme Court of Virginia has consistently held that the congregants remaining loyal to the denomination – even if they comprise a minority of the congregation – are entitled to retain control of the church property. As we describe below, the Court has resolved three cases raising this very issue; and in each of these cases, as here, the local church property was undisputedly owned by the local church. The only question for the court in each instance, therefore, was: “Who is the local church?”

In *Brooke*, 54 Va. (13 Gratt.) 301, the denomination (the Methodist Episcopal Church) had undertaken to formally divide itself into two distinct denominations – the “Methodist Episcopal church” and the “Methodist Episcopal church south.” *Id.* at 323. According to the plan adopted by the denomination to effectuate the division, the local church whose property was at issue in the case became a part of the Methodist Episcopal church south. *Id.* at 327. However, some of the members of the local congregation wished to remain allied with the other denomination, the Methodist Episcopal church. The Court determined that “the members of the church adhering to the southern division” were entitled to the property “in exclusion of those who repudiate the authority of the Methodist Episcopal church south.” *Id.* This result, reasoned

the Court, followed the same principle that would adhere in the simpler circumstance where there had been no division in the denomination:

“If at any time before the division of the [denomination] a controversy had arisen among the members of the society at [that local] 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.*” *Id.* at 321 (emphases added).

This conclusion reflects the Court’s view that a local church’s affiliation with a larger denomination is an essential part of its identity. As the Court noted, “[t]he local society of which both parties litigant claim to be members, is not a separate and independent society or congregation making its own laws, but is one of a large number of local societies belonging (prior to [the denomination’s formal division]) to the Methodist Episcopal church in the United States.” *Id.* at 320.

Hoskinson, 73 Va. (32 Gratt.) 428, similarly presented a dispute stemming from the formal division of the Methodist Episcopal church. There, the local church whose property was at issue was assigned, pursuant to the denomination’s plan of division, to the Methodist Episcopal church. *Id.* at 433. Nevertheless, some years after the formal division occurred, a majority of the local congregation attempted to realign the local church, and its property, with the Methodist Episcopal church south, invoking the recently adopted “division” statute (current Va. Code § 57-9). *Id.* at 433-44. The Court forbade the realignment, concluding that the statute did not apply, and explained that if the property were to become aligned with the Methodist Episcopal church south, it would amount to a “shift” in the “title and use of the property without the consent and against the will of the minority [of the congregation].” *Id.* at 440. In other

words, in the absence of a statutory basis for removing the property from the original denomination, the “title and use” of the property belonged to the minority that remained loyal to that denomination.

In *Finley*, 87 Va. 103, 12 S.E. 228, the property at issue had been conveyed to trustees “for the use and benefit of the religious congregation of the Methodist Protestant Church at Heathsville.” 87 Va. at 104, 12 S.E. at 229. A majority of the congregation decided to withdraw from that denomination, and purported to take the church property with it. The Court concluded that the property was intended for “Methodist Protestants” only, “and for no other use or purpose whatever.” 87 Va. at 105, 12 S.E. at 229. “These Christians could change their religious faith, had the right to go to any denomination to which their belief or choice led, and they could take with them all property which belonged to them; but they were without power to change the character of the trust in question.” 87 Va. at 106, 12 S.E. at 229. Thus, in the Court’s view, the local church’s affiliation with the Methodist Protestant denomination was one of its defining characteristics, which could not be altered by a majority vote of the congregation.¹²

Accordingly, when faced with the question, “Who is the local church?” the Supreme Court of Virginia has consistently and repeatedly answered: “Those persons remaining loyal to the hierarchical denomination.”

These cases are entirely consistent with the law governing secular associations, which similarly holds that the majority of the current membership of a local chapter of a national association may not unilaterally alter the national affiliation of the local chapter or divert its property to some other association:

¹² The Court also held that the recently-enacted division statute (current Va. Code § 57-9) provided no basis for transferring the property at issue to the dissident group. 87 Va. at 108, 12 S.E. at 230.

“When a person ceases to be a member of a voluntary beneficial association, his interest in its funds and property likewise ceases. This rule applies even where a number of members secede in a body, and although they constitute a majority and organize a new association. In such case, the remaining members, and only they, are entitled to the entire funds and property of the association” 10 C.J.S. *Beneficial Associations* § 38 (2011).

Thus, in *Phillips v. Widow’s Son Lodge No. 54*, 152 Va. 526, 147 S.E. 193 (1929), the Virginia Supreme Court rejected an attempt by a majority faction of a local lodge to sever the local lodge’s affiliation with the “Grand Lodge” and become affiliated with a different “Grand Lodge.” Affirming the trial court’s decree in favor of the loyal minority, the Court stated that the decree “which held that Widow’s Son Lodge No. 54 continued to function, even after [the majority vote to secede], that its loyal members continued to be affiliated as Lodge No. 54 with the old Grand Lodge, and that the title to the money and property remains with Widow’s Son Lodge No. 54, is clearly right in every respect. . . . By their revolutionary secession . . . , [the dissenting members’ rights to the property of the local lodge] have been forfeited.” 152 Va. at 532, 147 S.E. at 194.¹³

It was this “identity” principle of voluntary associations law that the U.S. Supreme Court invoked in *Watson v. Jones*, 80 U.S. 679. That case involved two factions of a local church that had historically been affiliated with the national Presbyterian Church: “The issue here . . . is a

¹³ See also, e.g., *Minor v. St. John’s Union Grand Lodge of Free & Accepted Ancient York Masons*, 130 S.W. 893, 896-97 (Tex. Civ. App. 1910) (attempt by dissident majority to withdraw local lodge from “Grand Lodge” and transfer local lodge’s property to another organization held improper because local lodge was “not an independent organization, existing solely for the benefit of its members, but . . . part and parcel of a larger organization”; remaining loyal members were “the true and lawful successors, under the laws of the order, of the original trustees of [the local lodge] to whom the property was conveyed” and were thus “entitled to hold the property for the use of [the] lodge”); *Henry v. Cox*, 159 N.E. 101, 102 (Ohio Ct. App. 1927) (vote by local branch of association, by majority of 3,500 to 18, to return its charter to state headquarters, rejected by court, which held that local organization continued to survive despite the vote; “majority may not say to the minority you cannot longer be [members] under the existing

separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church, and denying the right of the other to any such claim.” *Id.* at 717. The Court began its analysis by noting that “[r]eligious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.” *Id.* at 714. Then, in keeping with the “identity” principle in voluntary association law, the Court stated: “The property [at issue was] purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property.” *Id.* at 726. Accordingly, the faction that had “separated themselves wholly” from the Presbyterian Church by “deny[ing] its authority, denounc[ing] its action, and refus[ing] to abide by its judgments,” had “no right to the property, or to the use of it.” *Id.* at 734.¹⁴

The continuing validity of the “identity” approach was confirmed by the U.S. Supreme Court in 1979, in *Jones v. Wolf*. There, after approving Georgia’s employment of a four-factor “neutral principles of law” approach, the Court noted that, because there were loyalists to the denomination who laid claim to the local church property at issue there, if it were concluded that the hierarchical church had no enforceable interest in the property, Georgia courts would still

charter, and if you wish to continue to be [members], you must apply for and obtain a new charter, and form a new society or organization.”).

¹⁴ Although the Supreme Court of Virginia declined, in *Norfolk Presbytery v. Bollinger*, to apply the notion, expressed in *Watson*, that property of a local church affiliated with a hierarchical denomination is automatically impressed with an implied trust in favor of the denomination, *see* 214 Va. at 504, 201 S.E.2d at 756, the *Norfolk Presbytery* Court was not faced with, and did not address, the question of who is the true local congregation when two factions claim to be that. Nothing in Virginia law, or in the law of other states, suggests that the basic principle of the identity regarding local affiliates of national organizations has changed.

have to resolve the question of which persons were the “true” local congregation. 443 U.S. at 606-07.¹⁵ The Supreme Court of Colorado described this two-step process as follows: “If, after applying neutral principles of law, . . . rights of ownership or control [of local church property] are determined to be vested in the general church, there will be no need to assess how property of the local church is controlled. If, on the other hand, such an analysis results in a determination that ownership or control of the disputed property is vested in the local church, it then may be necessary to determine how control over that property is to be exercised. This is so because, as the United States Supreme Court recognized in *Jones v. Wolf*, determination of control of the local church in cases involving a dispute between contending groups within that church may be necessary to resolve internal differences concerning the use and disposition of the property of the local church.” *Bishop & Diocese of Colo.*, 716 P.2d at 99-100.

Both prior cases in Virginia that have resolved disputes over Episcopal church property have relied, at least in part, on the “identity” principle as a basis for ordering that the property be held by Episcopalians. In *Wyckoff*, a majority of the congregation of Ascension Episcopal Church in Amherst voted to renounce the local church’s allegiance to the Church and its Diocese of Southwestern Virginia, and to realign the local church with the Anglican Catholic Church. Op. at 3. A lawsuit was filed seeking a determination of which faction of the congregation – the

¹⁵ The Court in *Jones* held that Georgia could (but was not required to) adopt a “presumptive rule of majority representation” to determine which faction constituted the local congregation, although such a presumption would be constitutional only if it were “defeasible upon a showing that the identity of the local church is to be determined by some other means.” *Id.* at 607. (Such “other means” could include provisions “in the corporate charter or the constitution of the general church [stating] that the identity of the local church is to be established in some other way” or a provision “that the church property is held in trust for the general church and those who remain loyal.” *Id.* at 607-08.) As we have just seen, Virginia law does not apply a presumption of majority representation in order to identify the “true” congregation where there has been a split, but rather looks to which faction has remained connected with the original denomination.

majority who voted to withdraw from the Church or the minority who wished to remain – was entitled to the local church property. In discussing the effect of the disaffiliation vote, Judge Koontz stated: “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 . . . is that the protestant congregation of Ascension Episcopal Church, Amherst while perhaps reduced in number still existed as it had prior to the vote.” Op. at 4-5. Similarly, the majority vote to disaffiliate “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.” Op. at 7. Accordingly, the local church which continued to exist, populated by the remaining Episcopalian loyalists, was entitled to continue to hold the property it had always held. Op. at 8.

In *Buhrman*, a “substantial number” of the members of St. Andrew’s Episcopal Church of Clifton Forge withdrew from The Episcopal Church and purported to withdraw the local church and its property, as well. 5 Va. Cir. at 499 & n.2. The court quoted a case from Washington which stated:

“[W]e find that the appellants (members of a withdrawn congregation) rest their appeal upon a contention that they are the ‘record titleholders’ of the property and that no further inquiry need be made by the courts to determine the question of who is entitled to use and control the property. It should be noted at this point that the record title is in the church. *The appellants evidently conceive that they comprise the church; . . .*

“The appellants are not, as they contend, the record titleholders of the property. The record title is in The First Presbyterian Church of Seattle, a corporation which by its bylaws is subject to the discipline of the United Presbyterian Church and is governed by a [local governing board] which must act in accord with that discipline. The appellants have withdrawn from that church,

but according to the decision of the [denomination] . . . they had no right to withdraw from the church as a body and take with them the name of the church and its property. The pastor, the trustees, and the members of the [local governing board] who withdrew forfeited their right to govern the affairs of the church when they did so, according to the decision of the highest tribunal to which an appeal was taken, and consequently the appellants have no right to control the use of the property.” *Id.* at 504 (quoting *Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wn.2d 367, 485 P.2d 615, cert. denied 405 U.S. 996, 31 L. Ed. 2d 465, 92 S. Ct. 1246 (Wash. 1971) (emphases added).

Based on these principles and an interpretation of the “contractual” relationship between the local church and the Church and the Diocese, Judge Stephenson ordered that the local church property be returned to the remaining Episcopalians. 5 Va. Cir. at 508.

The overwhelming weight of case law from other states confirms that local Episcopal churches are prohibited from unilaterally disaffiliating from their dioceses and the Church and thereby removing local church property from the denomination. In the words of the Supreme Court of New Jersey, “[t]he individual defendants are free to disassociate themselves from [the parish] and The Protestant Episcopal Church and to affiliate themselves with another religious denomination. No court can interfere with or control such an exercise of conscience. The problem lies in defendants’ efforts to take the church property with them. This they may not do.” *Protestant Episcopal Church in the Diocese of N.J.*, 417 A.2d at 25; *see also Huber*, 96 Cal. Rptr. 3d at 360 (Episcopal parish “may not change its status unilaterally”); *New*, 84 Cal. Rptr. 3d at 470 (“[o]nce formed as an ecclesiastical entity, a parish may not unilaterally ‘disaffiliate’ from the Episcopal Church or the diocese by a vote of its current membership or any other means”); *St. James Church, Elmhurst*, Mem. at 31 (“vestry and membership of St. James may not unilaterally alter the status of St. James as an Episcopal church and parish of the Diocese”); *Tea.*, 610 P.2d at 184 (finding nothing in regulations of the church or state statutes indicating that local church could withdraw from general church and retain control of church

property); *Convention of the Protestant Episcopal Church in the Diocese of Tennessee*, Summ. J. at 10 (“[w]hile the disassociating individuals have an unquestioned right to form another voluntary religious association and to organize the governance of a new congregation in whatever way they deem appropriate, they no longer accede to the Constitution and Canons of The Episcopal Church and the Diocese and accordingly, they are not entitled to claim any ownership interest to any [local church] property”); *Masterson*, 335 S.W.3d at 892 (local church property “is subject to possession and control by the Continuing [i.e., loyal] Parish Leaders . . . and the parishioners aligned with them”); *St. Francis on the Hill Church*, Final Summ. J. at 2 (individuals remaining loyal to Episcopal Church entitled to retain local parish property).

In sum, where a split develops in a local church affiliated with a hierarchical denomination, Virginia courts, in concert with courts around the country, have consistently awarded the local church property to the persons remaining loyal to the denomination.

B. The CANA Congregations Concede They are Not Part of The Episcopal Church.

It is undisputed here that the CANA Congregations, and their members, do not belong to The Episcopal Church. Like the dissidents in *Wyckoff* and *Buhrman*, the members of the CANA Congregations have withdrawn from the Church and the Diocese, and by doing so have given up all rights they had in their capacity as Episcopalians. Moreover, as the “identity” cases make clear, those congregants who wished to leave the Church and the Diocese had no power to remove the local church entity from the Church or the Diocese. Nor could they, by incorporating the local churches, negate the local churches’ identity as integral parts of the Church and the Diocese or avoid their historical obligation to abide by the governance of those higher ecclesiastical bodies. *See* Va. Code § 57-16.1 (when local church affiliated with hierarchical

denomination incorporates, the incorporated local church continues to be required to hold its property in accordance with the “laws, rules, or ecclesiastic polity of” the denomination).¹⁶

Particularly instructive here is the case of *New*, 84 Cal. Rptr. 3d 464, in which the issue presented was not which faction of the local church was entitled to the church property, but who were the proper directors of the local church corporation. The corporate bylaws provided that the directors were the vestry. *Id.* at 472. The trial court applied California Corporations Code and concluded that the dissidents who claimed to be directors were rightfully in those positions, and their amendments to the corporation’s articles and bylaws were effective, because the Corporations Code had been complied with in those actions. The Court of Appeal reversed, stating that the trial court’s “fundamental mistake” was in “rely[ing] solely on California corporations law in a vacuum, without reference to the articles of incorporation and bylaws of the Parish corporation, as well as the constitution and canons of the Episcopal Church and San Diego Diocese.” *Id.* at 479.

The Court then noted the following canons: (1) Church Canon I.17.8, requiring all officers (including vestry members) to perform their duties in accordance with Church and

¹⁶ It is well-established that the secular act of incorporation does not alter the relationship between an Episcopal parish and the larger church. Religious corporations are merely “permitted as a convenience to assist in the conduct of the temporalities of the church. Notwithstanding incorporation the ecclesiastical body is still all important. The corporation is a subordinate factor in the life and purposes of the church proper.” *Wheelock v. First Presbyterian Church of L.A.*, 51 P. 841, 843 (Cal. 1897). *See also Episcopal Diocese of Rochester*, 899 N.E.2d 920 (changes to corporate documents did not preclude holding that parish property held in trust for Church and the Diocese); *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish*, 620 A.2d 1280 (same); *Huber*, 96 Cal. Rptr. 3d at 357-58 (rejecting argument that religious corporation was separate from parish and existed outside Church and diocese), 361 (religious corporation subordinate to ecclesiastical body); *New*, 84 Cal. Rptr. 3d at 479 (religious corporation does not change the ecclesiastical status of congregation). Indeed, to find otherwise would risk First Amendment implications. *Cf. First Born Church of the Living God v. Hill*, 481 S.E.2d 221, 222 (Ga. 1997) (local church members have “no legal right [under Georgia corporations code] to wrest the governing of the Church from the [duly elected Church leaders]”).

Diocesan rules; (2) a Diocesan canon requiring vestry members to be “qualified electors” of the Church; (3) a Diocesan canon requiring wardens to be “communicant[s] in good standing” of the Church; and (4) a Diocesan canon providing that a parish may be dissolved only by the action of the bishop and Standing Committee. *Id.* at 480. In the light of these provisions, the court concluded that “when defendants resigned from the Episcopal Church, they were no longer empowered to act, and their actions in attempting to amend the bylaws and articles of incorporation were a nullity. They also *ceased being directors of the Parish corporation as they were not members in good standing of the Episcopal Church.*” *Id.* at 480 (emphasis added).

The court set out an additional reason why it was bound to find that the dissidents were no longer directors of the Parish corporation: Because it was required by the First Amendment to defer to the hierarchical church’s determination of the identity of its members. *Id.* at 482-85. “Bishop Mathes was the ecclesiastical authority over St. John’s Parish. The Bishop determined that by renouncing their membership in the Episcopal Church, defendants were no longer qualified to serve as members of the parish vestry and that the loyalist minority were the true members of the parish. Bishop Mathes called the loyalist members to a meeting and they elected a new vestry. As a matter of canon law, that vestry became the board of the parish corporation.” *Id.* at 485. “Thus,” the court continued, “we must defer to the acts of the representatives of the Episcopal Church in determining who were the true members of the church, and, under canon law, who were the lawful directors of the Parish corporation.” *Id.* In the present case, the Bishop has deposed the rectors who left the Church, and the Annual Council recognizes only continuing Episcopal churches and their members as representatives authorized to participate in Annual Council.

The CANA Congregations may pretend to be the same entities as the local Episcopal churches that historically inhabited the buildings at issue in this case, but settled law squarely rejects that notion. As a result, under Virginia’s “identity” principle, the CANA Congregations are not entitled to the local church property at issue in this case.

C. The Diocese of Virginia is the Appropriate Episcopal Church Entity to Recover Possession and Control of the Local Church Property at Issue Here.

The only remaining question under the “identity” analysis is which Episcopalians, or Episcopal entity, is entitled to possession and control of the local church property at issue here. If there were a dispute on this issue – for example, a dispute between two warring factions within a church, both of whom claim to be the true Episcopalians – this clearly would be a matter on which the court would be required to defer to the determination of the hierarchical church. *See Judicial Comm’n of PCA Korean Capital Presbytery*, 56 Va. Cir. at 51 (deferring to hierarchical church’s determination of which of two factions within local church entitled to control of church and its property); *see also Watson*, 80 U.S. at 727 (“whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest ... church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them”); *Serbian E. Orthodox Diocese*, 426 U.S. 696; *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

But there is no such dispute here (and if there were, the CANA Congregations would, as non-members of the Church, have no standing to take a position on the issue one way or the other). The Executive Board of the Diocese, acting pursuant to its ecclesiastical authority under Diocesan Canon 15.3, has declared each of the real properties at issue in this case to be

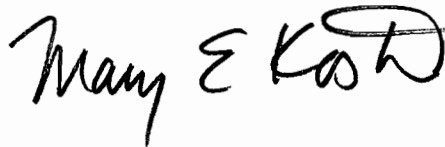
“abandoned,” and as a result the Board “[has] the authority to take charge and custody thereof.” Diocesan Canon 15.3. Virginia courts have consistently and repeatedly recognized and enforced the authority of the Diocese’s Executive Board to take control of local church property that the Board has declared “abandoned.” *See supra* at 14. The court should do the same here. As a result, the Executive Board is the appropriate entity to recover possession and control of the local church property at issue here.

In the alternative, the court may determine that the property at issue should be in the possession and control of the Episcopalians who are properly governing each of the seven local churches. As to the four churches with continuing Episcopal congregations (The Falls Church Episcopal, St. Margaret’s Episcopal Church, St. Stephen’s Episcopal Church, and Church of the Epiphany (Episcopal)), it is those congregations and their rectors and vestries who are entitled to possess and control the property. As to the three churches without current Episcopal congregations (Truro Episcopal Church, Church of the Apostles (Episcopal), and St. Paul’s Episcopal Church), these churches are deemed “inactive” under the diocesan canons. Diocesan Canon 9.3 (an “inactive church is defined as one in which there is no functioning Vestry or Vestry Committee”). All authority of “inactive” churches, in the Diocese of Virginia, “is assigned to the Executive Board.” *Id.* Accordingly, as to the three “inactive” churches, under this analysis the Executive Board is entitled to possession and control of all church property.

CONCLUSION

For the reasons stated herein, and in the brief of the Diocese which the Church adopts in its entirety, the Court should find in favor of the Church and the Diocese and award all real and personal property to the Executive Board of the Diocese. In the alternative, the Court should award the beneficial use of all property of the four churches where there are continuing Episcopal congregations to the Episcopal rectors and vestries of those churches, and convey all property of the three “inactive” churches to the Executive Board of the Diocese.

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