Record No. 120919

In the Supreme Court of Virginia

The Falls Church (also known as The Church at the Falls – The Falls Church),

Defendant-Appellant,

v.

The Protestant Episcopal Church in the United States of America

and

The Protestant Episcopal Church in the Diocese of Virginia,

Plaintiffs-Appellees.

BRIEF OF RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OFAPPELLEES

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CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

BOOKS

SUMMARY OF INTEREST OF THE *AMICI*

The *amici* sponsoring this brief are a diverse group of national, regional, and state denominational entities and religious communities. They join as *amici* in this case to reinforce that affirming the decision of the Circuit Court, on the grounds that it is consistent with this Court's holdings *Norfolk Presbytery v. Bollinger,* 214 Va. 500, 201 S.E.2d 752 (1974) and *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), is vital not merely to the Episcopal Church and its Virginia Diocese, but equally to the two other Episcopal dioceses in Virginia, as well as United Methodist, Presbyterian and Lutheran denominations whose mission and ministry is being implemented through literally thousands of local churches throughout the Commonwealth.[1] In addition, the *amici* are united in affirming that the time has come for Virgina to streamline Circuit Court resolution of church property disputes by eliminating Virginia's outmoded antipathy toward trusts in favor of denominational churches.

The *amici* stand together on these issues because they recognize that the choices each has made on matters of ecclesiastical "polity" –

[1] The undersigned *amici* file this brief pursuant to Virginia Supreme Court Rule 5:30(b)(2), which permits the filing of briefs *amicus curiae* without leave of court when the "filing is accompanied by the written consent of all counsel." Written consent of counsel is attached in an addendum to this brief, at A-10, *et seq*.

including rules regarding property and internal church governance – are not simply matters of "administrative" convenience or of purely "material" concern. Rather, each of the *amici* understands that such "rules" are an outgrowth of religious beliefs – as doctrinally-rooted expressions of how their members are to relate to one another and the world in ministry.

Among the *amici* are entities representing a relatively diverse array of denominations that are frequently classified as "hierarchical" or "connectional," as distinct from "congregational," where local autonomy is understood to be the dominant organizing principle. The rules adopted by each of the amici reflect the self-understandings of each particular group of believers, and are rooted in their diverse interpretations of Scripture over centuries. That they call themselves Episcopalians, Methodists, Lutherans, or Presbyterians reflects a personal and fundamentally faith-based choice to be in a covenantal and communal relationship with others who share their respective beliefs and commitments.[2]

The *amici* rooted in the Methodist tradition have long used trust provisions in their governing documents—provisions which the U.S. Supreme Court has identified as a model for protecting denominational

[2] A more detailed statement of the interests of all of the *amici* is appended as an Addendum to this Brief.

interests in local church property. *See Jones v. Wolf*, 443 U.S. 595, 600-601 (1979) (discussing *Carnes v. Smith*, 236 Ga. 30, 222 S. E. 2d 322, cert. denied, 429 U.S. 868 (1976), in which Georgia's Supreme Court applied neutral principles of state law to enforce express trust provisions included in the United Methodist *Book of Discipline*). Indeed, Methodism's founder, John Wesley, first caused trust clauses to be inserted in the deeds of all local church properties more than 250 years ago. He did so as a means of reinforcing the *doctrinally rooted* practice of having bishops, not congregations, control the appointment of pastors. John Leo Topolewski, *Mr. Wesley's Trust Clause: Methodism in the Vernacular*, in METHODIST HISTORY, vol. XXXVII, no. 3, pp. 144-45 (Yrigoyen, Jr., Charles, ed. 1999). For Wesley, maintaining the bishops' prerogative to appoint pastors, rather than having pastors serve wholly at the congregation's discretion, was essential the continued vitality of the core Methodist principles of "connectionalism" and "itineracy." *Id*. Wesley reasoned that, if local church trustees had unfettered control of the church property, that control would effectively extend to the pulpit as well, giving the local church the ability to exclude the bishop's pastoral appointments.

The Presbyterian Church – though its polity is quite different in many respects from the church governance structure employed in the Methodist

and Anglican traditions – has long been at the forefront of the effort to gain civil court respect for trust clauses and related provisions designed to preserve the Presbyterian faith community's common interest in local church property. Indeed, the Presbyterian Church was the denomination at the heart of the three landmark U.S. Supreme Court cases in this area of the law: *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* ("*Hull*"), 393 U.S. 440 (1969); and *Jones v. Wolf*, *supra*.

Meanwhile, the *amici* associated with the Evangelical Lutheran Church in America would not describe themselves either as a hierarchical church in the Roman Catholic tradition, or as a congregational church in the Anabaptist tradition. Rather, the ELCA understands itself as a church in which local congregations, synods operating at a regional level, and related ELCA organizations are "*interdependent* partners sharing responsibly in God's mission." *ELCA Constitution*, Chapter 5 (Principles of Organization), § 5.01 (emphasis added). The ELCA Constitution defines this interdependence in the following terms:

> This church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. *Each part, while fully the*

> *church, recognizes that it is not the whole church* and therefore lives in a partnership relationship with the others.

Id., Chapter 8 (*Relationships*), § 8.11 (emphasis added).

For Lutherans, this partnership among all parts of the denomination is neither civil nor legal in nature (*Id*. § 8.17), but represents instead a "covenantal" relationship that binds them all together as "one body" that constitutes the church. Furthermore, to reinforce that interdependence, the ELCA Constitution provides that congregations are not free to leave the denomination on their own volition. Instead, if a congregation wishes to leave the ELCA, it must follow a detailed procedure which is set forth in both the denomination's and the congregation's constitutions. *Id*., Chapter 9 (*Congregations*) §§ 9.22 and 9.62; Model Congregation Constitution Chapters 6 & 7.

ASSIGNMENTS OF CROSS-ERROR

The Circuit Court erred by holding that Va. Code Ann. § 57-7.1 does not validate trusts for the benefit of a hierarchical church and by rejecting a constitutional challenge to that interpretation. Preserved in, *e.g.*, the Diocese's Post-Trial Opening Brief (filed Aug. 5, 2011) at 38-42.

QUESTIONS PRESENTED

A. Does the Free Exercise Clause of the First Amendment oblige Virginia to recognize trusts in favor of denominational institutions on a local church's property?

B. Did the Circuit Court correctly hold that the Episcopal Church and the Virginia Diocese held interests in the property of The Falls Church that The Falls Church could not expunge by the simple expedient of withdrawing from the Episcopal Church and uniting with another denomination?

STATEMENT OF THE CASE

The *Amici* adopt and incorporate by reference the Statement of the Case set forth in the Briefs of the Appellees.

ARGUMENT

Standard of Review. The standard of review applicable to each of the appellant's assignments of error, as well as to the appellees' assignments of cross-error is *de novo*, for legal error.

I. The Free Exercise Clause Obliges Virginia to Recognize Denominational Trusts on Local Church Property

In 1974, this Court held that "there is no constitutional prohibition against the resolution of church property disputes by civil courts, provided that the decision does not depend on inquiry into questions of faith or doctrine." *Norfolk Presbytery v. Bollinger,* 214 Va. 500, 503, 201 S.E.2d 752, 755 (1974). To ensure that civil courts stayed out of the "theological thicket," moreover, the Court required that church property "disputes be adjudicated according to 'neutral principles of law, developed for use in all property disputes[.]'" *Id.* at 214 Va. at 504, 201 S.E. 2d at 756, *quoting Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* ("*Hull*"), 393 U.S. 440, 449 (1969). But there was one caveat – one particular neutral principle of state law that, the Court held, hierarchical denominations were disqualified from invoking. Specifically, inasmuch as "express trusts for supercongregational churches are invalid under Virginia law," and "no implied trusts for such denominations may be upheld" either, a hierarchical denomination could

prevail only if it proved that it had otherwise acquired "a *proprietary* interest in the property of [local church] which could not be eliminated by unilateral action of the congregation." *Norfolk Presbytery*, 214 Va. at 507, 201 S.E.2d at 758 (emphasis added).

The time has come for Virginia to discard its unique rule that hierarchical denominations – alone among voluntary associations, religious or otherwise – are ineligible to protect their interest in property using trusts. As explained below, the reasons that animated the *Norfolk Presbytery* court's caveat are no longer operative, and subsequent binding precedent from the United States Supreme Court flatly prohibits such a discriminatory approach to resolving church property disputes.

A. When Applying Neutral Principles Of Law To Resolve Church Property Disputes, Virginia Courts Must Give Effect To Express Trust Clauses Recited In A Denomination's Governing Documents

This court's 1974 decision in *Norfolk Presbytery* preceded the U.S. Supreme Court's landmark decision five years later in *Jones v. Wolf*, 443 U.S. 595 (1979). Picking up on the "neutral principles" theme mentioned roughly a decade earlier in *Hull* and in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970), the Supreme Court held in *Jones* that it was constitutionally permissible for civil courts to apply "neutral principles of law" in resolving

church property disputes. That is, state courts need not reflexively defer to a denomination's position on the matter, *Jones*, 443 U.S. at 597, but rather, in keeping with the approach applied in *Norfolk Presbytery*, the *Jones* court held that a trial court may consider state statutes, deeds, local church charters, and general church constitutions – taking care to examine all these documents "in purely secular terms" – and applying "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 603.

Furthermore, the Supreme Court explained in *Jones* that the "neutral principles approach has the "peculiar genius" of allowing the parties to establish and plainly articulate *in advance* – i.e., *before* the dispute arises – their respective rights to church property in the event of a schism, thereby enhancing the prospect of reaching a result that conforms to the parties' intent and reducing the risk of entangling civil courts in fundamentally religious matters. *Id.* at 603, 606. The same rationale, moreover, served as the majority's primary response to Justice Powell's dissent, which argued that judicial deference to the denomination's own resolution of the dispute was essential to preserving free exercise rights. *Id.* at 616-17 (Powell, J., dissenting). In the following passage, the *Jones* majority

explained why it was that those free exercise rights would not be "frustrated" by thoughtful application of neutral principles of state law:

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

Id. at 606 (emphasis added).

In this context, then, it can be seen that the *Jones* court's validation of the constitutionality of the neutral principles approach presupposed – indeed, explicitly mandated – that civil courts must enforce the "result indicated by the parties" "before the dispute erupts," including when that has been accomplished by amending "*the constitution of the general church . . . to recite an express trust in favor of the denominational church*." Thus, Virginia's adoption of the neutral principles approach, when combined with the mandate of *Jones*, obliges Virginia courts, at a minimum, to give effect to express trust clauses included in a denomination's governing documents before the dispute arose.

The directive that civil courts "give effect" to trust provisions in general church constitutions was neither novel nor incidental. On the contrary, it was tied to foundational principles of religious autonomy, self-governance, and civil non-interference with religious affairs dating back over a century. In *Watson v. Jones*, the U.S. Supreme Court approvingly affirmed the basic autonomy of religious organizations:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

80 U.S. (13 Wall.) 679, 728-29 (1871).

Moreover, these principles gained constitutional dimension in *Kedroff v. St. Nicholas Cathedral*, which described the *Watson* opinion as "radiat[ing] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to

decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 344 U.S. 94, 116 (1952). More recently, the principle of religious autonomy was reaffirmed in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, where a unanimous court relied on both *Watson* and *Kedroff* for the proposition of civil non-interference with church government. 132 S. Ct. 694, 704-05 (2012).

Amici therefore respectfully urge the Court to take this opportunity to conform Virginia's position on the law regarding express or implied trusts by embracing the neutral principles approach as it was circumscribed in *Jones v. Wolf*, so as to ensure harmony with the free exercise rights of all religious associations, not just some of them, and thereby dispense with a discriminatory approach that, far from being "neutral," serves only to distort the law, thereby promoting divisive and draining disputes that could be resolved far more efficiently by giving effect to express trust provisions of precisely the type the U.S. Supreme Court understood to be dispositive.

B Virginia's Rule Against Trusts In Favor Of Denominational Churches Has Been Undermined By Recent Changes In The Law

The *Norfolk Presbytery* court's statement of Virginia's perspective on trusts in favor of hierarchical churches has been undermined and, indeed,

abrogated by more recent decisions. The Court in *Norfolk Presbytery* grounded its conclusion on the trust issue on four legal premises. First, that Virginia was from its founding committed to the separation of church and state. 214 Va. at 505, 201 S.E.2d at 757. Second, that Virginia's Constitution prohibited the General Assembly from "incorporating any church or religious denomination," though it could "secure the title to church property to an extent to be limited by law." *Id.* (internal citations and quotation marks omitted). Third, that trusts made for indefinite beneficiaries such as unincorporated bodies were invalid unless expressly validated by statute. *Id.* Fourth and finally, that the relevant statute in that case did not expressly allow for such trusts in favor of "supercongregational" churches. *Id.* 214 Va. at 506-07, 201 S.E.2d at 757-58.

The second link in that chain of reasoning has been broken.[3] In *Falwell v. Miller*, the section of Virginia's constitution prohibiting the General Assembly from allowing the incorporation of churches was held to violate the plaintiffs' First Amendment free exercise rights. 203 F. Supp. 2d 624,

[3] *Amici* support and incorporate by reference the position of the Diocese and Episcopal Church that Va. Code Ann. § 57-7.1 should, in fact, be interpreted as expressly authorizing trusts in favor of hierarchical churches, which implicates the fourth premise of *Norfolk Presbytery*'s reasoning.

632 (W.D. Va. 2002). The Virginia code and constitution were later amended, and Virginia churches and denominations may now incorporate. *See* Va. Code Ann. § 57-16.1; *see also* Va. Const. art. IV, § 14 (former limitation on incorporating churches or denominations removed); Va. Code Ann. §§ 57-8, 57-10, 57-15.

Furthermore, Virginia law now allows charitable and non-charitable trusts with indefinite beneficiaries. *See* Va. Code Ann. §§ 64.2-723, 64.2-727. Thus, inasmuch as Virginia churches may now incorporate freely, and the limitation against trusts has in any event been relaxed, principal underpinnings of the rule against denominational trusts have been removed and can no longer be used to justify that discriminatory caveat to the application of neutral principles of law in the resolution of church property disputes.

C. Refusing to Recognize Trusts In Favor Of Hierarchical Denominations Violates The Free Exercise Clause By Discriminating Against and Between Churches

Even putting aside *Jones v. Wolf* and similar precedent involving church property disputes, Virginia's rule against trusts for the benefit of hierarchical denominations cannot withstand scrutiny under binding precedent applying the Free Exercise Clause of the First Amendment. The Supreme Court is emphatic that a state may not burden religious practice –

and church's adoption of rules for self-governance plainly qualifies as protected religious practice[4] – unless:

> (1) the burden or interference is the incidental effect of a law that is both "neutral" and "generally applicable," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("*Lukumi*"); or
>
> (2) the law is "justified by a compelling governmental interest" and is "narrowly tailored to advance that interest." *Id.* at 531-32.

Here, any Virginia rule against trusts in favor of hierarchical denomination, by definition, is neither neutral nor generally applicable. Nor can any such rule survive strict scrutiny, because discriminating against and among religious associations is entirely unnecessary for Virginia to achieve its interest in peacefully resolving church property disputes.

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[4] As previously explained, the First Amendment gives all churches the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. Indeed, since the governance structures a church adopts are typically (as with the *amici*) expressive of deeply held religious commitments and theological beliefs, courts have long protected churches' internal governance decisions as "strictly ecclesiastical" matters protected from state interference by the Free Exercise Clause. *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 724 (1976).

1. The Rule Against Denominational Trusts Is Neither Neutral Nor Generally Applicable

Norfolk Presbytery's rule against enforcing trusts in favor of hierarchical denominations plainly discriminates against those denominations in favor of both secular associations and denominations that adopt a strictly congregational polity: "As express trusts *for supercongregational churches* are invalid under Virginia law no implied trusts for *such denominations* may be upheld. 214 Va. at 507, 201 S.E.2d at 758 (emphasis added). As such, it is neither neutral nor generally applicable.[5]

It should go without saying that the Free Exercise Clause "protect[s] religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment)). At a minimum, to be *neutral*, a law must not discriminate against religion or religious conduct on its face. *Lukumi*, 508 U.S. at 533. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the

[5] "Neutrality and general applicability are interrelated," and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. *See also id.* at 557 (Scalia, J., concurring) (emphasizing that neutrality and general applicability "are not only interrelated, . . . but substantially overlap").

language or context." *Id.* Likewise, a law is not generally applicable if it selectively "impose burdens only on conduct motivated by religious belief." *Id.* at 543.

Similarly, the government may not "impose special disabilities on the basis of religious views or religious status," *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990), and "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 533 (citing *McDaniel v. Paty*, 435 U.S. 618 (1978); *Cantwell v. Connecticut*, 310 U.S. 296, 302 (1940)). The government may not favor some religious groups over others. *Larson v. Valente*, 456 U.S. 228, 244-45 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. . . . This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause.").

Continuing any rule against trusts in favor of hierarchical churches is, if anything, even more defective than the rule against church corporations that was struck down in in *Falwell v. Miller*. In *Falwell*, the court found that there was "no doubt" that the Virginia Constitution's prohibition against granting "a charter of incorporation to any church or religious denomination" was plainly discriminatory, applying solely when the entity the applicant

was seeking to incorporate was a church. 203 F. Supp. 2d 624, 629-30 (W.D. Va. 2002). Accordingly, that law was held unconstitutional when it could not survive strict scrutiny. *Id.* at 632.

The rule that invalidates express and implied trusts for "supercongregational churches" is facially discriminatory, applying as it does solely to hierarchical denominations, and leaves all other religious associations and all secular associations entirely unburdened by any such restriction. By selectively restricting only on those denominations that, motivated by their religious beliefs, have chosen a hierarchical structure, Virginia's rule prohibits trusts, or not, solely by reference to religious practice, without a discernible secular meaning, and exacerbates the discrimination by preferring certain religious denominations over others. It does not affect secular associations or prevent independent congregations from obliging trustees to hold their property for the purposes they choose. Only trust clauses in favor of hierarchical churches are singled out for disapproval.

2. The Rule Against Denominational Trusts Does Not Survive Strict Scrutiny

Since the rule against denominational trusts is neither neutral nor generally applicable, it "must undergo the most rigorous of scrutiny" – meaning that the law can be sustained against constitutional challenge only

if it can be demonstrated to "advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (internal citations and quotation marks omitted).

The *amici* do not dispute that Virginia has an "obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones*, 443 U.S. at 602. That said, Virginia is fully capable of achieving that interest by the straightforward application of truly neutral property law and trust principles that bind all litigants equally, whether public or private, religious or secular. Instead, Virginia's current law of "proprietary interests" obliges courts to look beyond plainly stated express trust provisions of the sort that the *Jones* court said should be binding on civil courts and, if applied, could significantly simplify or streamline the resolution of many such disputes. In all other contexts where similar disputes case arise – such as those involving unaffiliated congregations, or congregations affiliated with denominations were congregational autonomy is the rule, or entirely secular associations – the courts of Virginia are duty-bound to apply "objective and well-established concepts of trust and property law" in resolving the controversy. This double standard, ostensibly in furtherance of the same goal, cannot survive strict scrutiny.

The law does not advance an interest of the highest order and does not do so in a narrowly tailored way. Virginia's prohibition against trusts in favor of hierarchical churches is an unconstitutional violation of the Free Exercise Clause of the First Amendment.

II. The Circuit Court's Decision is a Perfectly Constitutional (and Eminently Correct) Application of Neutral Principles of State Law, Even Without Reference to the Express Trust Provisions Included in the Episcopal Church's Governing Documents

In this portion of their brief, the *amici* religious organizations respond primarily to the arguments advanced in the *amicus* brief filed by the Becket Fund for Religious Liberty. The Becket Fund's submission is dominated by two themes. Its most common refrain is that the Episcopal Church's interest in local church property should be seen as the illegitimate byproduct of the denomination's "own *unilateral* declaration," *Becket Br.* at 7 (emphasis added), which Judge Bellows' was able to affirm only by ignoring neutral principles of property and contract law, and inventing instead his own "rule of unilateral denominational interests." The second and related theme is that civil court endorsement of such denominational unilateralism "interferes with the freedom of churches to choose their own polity by placing a thumb on the scale in favor of denominational control," impermissibly "entangl[ing] courts in religious questions by forcing [them] to interpret and enforce church law." *Id*.

For the reasons explained below, neither of these arguments withstands scrutiny.

A. The Terms of Any Denomination's Governing Documents Are Never "Unilaterally" Imposed on Local Churches; Their Enforcement Under Well-Recognized Principles of Contract Law is a Byproduct of Each Congregation's ***Consent*** to be Bound by the Rules of the Denomination with Which it Freely Chooses to Affiliate

There is no mistaking that "unilateralism" is the Becket Fund's dominant theme. The words "unilateral" and "unilaterally" appear no less than 19 times in the Fund's 38-page brief – all to leave the impression that the Episcopal Church's interest in local church property was imperiously "transfer[red] to itself . . . by its own unilateral declaration." *Becket Br.* at 7. *See Id*. at 1, 9, 16, 18-19, 26, 28-29, 31-36. Indeed, like a *mantra*, the Becket Fund pejoratively characterizes Judge Bellows' entire mode of analysis as adopting a "rule" or "regime" of "unilateral denominational interests." *Id*. at 18-19, 26, 31, 33-34.

The charge of unilateralism is meritless, as is any notion that Judge Bellows invented a "rule" to decide this case. In truth, the foundational principle at the core of Judge Bellows decision is among the most commonplace, decidedly neutral and eminently fair principles known to the common law. It is simply this: anyone who joins a voluntary association, religious or otherwise, is bound to follow the association's rules. It is no

more complicated than that, and it is the opposite of unilateralism. Rather, by joining a voluntary association, thereby taking advantage of all the privileges of membership, all members are ***deemed*** by law to have given their consent to the association's rules. Thus, in Virginia (as elsewhere) the "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." *Gottlieb v. Economy Stores*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958) (emphasis added). *See also Linn v. Carson*, 73 Va. (32 Gratt.) 170, 183-84 (1879) (the Methodist *Book of Discipline* constitutes a contract between a local church and its members).

The very same principle of contractual consent – not unilateralism – lies at heart of this Court's own prior rulings in church property cases, which are themselves in complete accord with the approach the U.S. Supreme Court demands to ensure compliance with the First Amendment. In the first instance, in its prior ruling in this very lawsuit, the Court recognized that all Episcopal congregations are "bound by the national and diocesan constitutions and canons." *Protestant Episcopal Church in Diocese of Virginia v. Truro Church,* 280 Va. 6, 15, 694 S.E.2d 555, 559 (2010). Even more to the point, the Court's ruling in the AME Zion Church's

favor in *Green v. Lewis* ultimately rested on the irrefutable reality that the local church had necessarily (albeit implicitly) ***consented*** to restrictive property provisions set forth in that denomination's *Book of Discipline*:

> 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 187 (emphasis added).

Finally, Virginia's consistent rulings that local churches are bound by the property rules adopted by the denominations they freely join are in full accord with the U.S. Supreme Court's longstanding precedent. Indeed, the Becket Fund's notion that enforcing a denomination's plainly stated property rules constitutes impermissible and slavish deference to the "unilateral" impositions of some imperious autocracy was thoroughly repudiated in *Watson v. Jones*, which serves as the veritable genesis of the U.S. Supreme Court's jurisprudence in this area.[6]

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[6] Nearly a century after *Watson* was decided, the Supreme Court cited that opinion as the place where the "principles limiting the role of civil courts in the resolution of religious controversies that incidentally affect civil rights were initially fashioned." *Serbian Orthodox Diocese v. Milivojevich,* 426 U. S. 696, 710 (1976).

Watson was decided well "before the First Amendment had been rendered applicable to the States through the Fourteenth Amendment," *id*., but the Supreme Court later recognized that the *Watson* court's language had "a clear constitutional ring." *Hull,* 393 U. S. at 449. Perhaps for this very reason, the *Watson* opinion is well-suited to demonstrating that the core principles of religious freedom are in perfect harmony with the longstanding common law principle that the members of any voluntary association, simply by joining the club, have necessarily consented to be bound by the association's rules. As the *Watson* court explained, "Religious 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 . . . ." 80 U.S. (13 Wall.) at 714. To the Supreme Court, there was no doubt this meant both (1) that religious associations were entitled to establish their own rules "for the ecclesiastical government of all the individual members, congregations, and officers," and (2) that "[a]ll who unite themselves to such a body do so with an implied ***consent*** to this government, and are ***bound*** to submit to it." *Id.* at 729 (emphasis added).

There was also no question in the *Watson* court's mind that an association's rules are binding on members even insofar as they apply to

property. Thus, the Court explained that "it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles," and furthermore that "it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use." *Id*. at 723. So, too, in both *Norfolk Presbytery* and *Green*, this Court enforced restrictive property provisions contained two different hierarchical denominations' governing documents – even while operating from the premise that trusts in favor of such denominations "are invalid under Virginia law." And it did so because, even apart from the trust language, it was inescapable that by joining the denominations in question, the local churches had effectively given their consent to the denominations' rules, including anti-alienation provisions that were plainly designed to prevent local church property from being diverted for uses inconsistent with the mission and ministry the denominations in question.

The Falls Church and the Becket Fund argue that Virginia contract law is of no avail to the Episcopal Church's position because The Falls Church received no "consideration" for the denomination's interest in local

church property. *See* Appellant's Br. at 30; Becket Fund Br. at 32. In the first instance, this crass argument is utterly dismissive of the spiritual benefit congregations and their parishioners seek and receive by aligning with a denomination. Indeed, for many Christians – including those represented by the *amici* – joining a denomination is tantamount (or even essential) to becoming part of the "Body of Christ," and any suggestion that congregations welcomed into such a union receive nothing of value in return is chilling.

Here, the record shows that The Falls Church freely chose to become part of the Episcopal Church, and of the Virginia Diocese in particular, and it must be ***presumed*** by Virginia's courts that The Falls Church congregation "benefitted from the association, spiritually and otherwise." *Green*, 221 Va. at 554, 272 S.E.2d at 185.[7] That was the approach this Court adopted in *Green*; it is an approach that conforms to common sense and can be applied works for secular and religious associations alike; and it avoids the constitutional infirmity that would plainly attend any attempt by

[7] See also *Green*, 221 Va. at 556, 272 S.E.2d at 187 ("The fact that the general church has made no loans or grants for the benefit of Lee Chapel and that, in fact, it may have refused to contribute to the remodeling program of the local church, is not dispositive. A proprietary interest or a contractual obligation does not necessarily depend upon a monetary investment.").

civil judges to "weigh" the "value" a local church receives from its affiliation with a larger church.

Lastly, even while recognizing that "disposition of a dispute of this nature does not depend on a determination as to whether the Diocese obtains more from a local church than the church obtains from the Diocese," Letter Op. at 90, Judge Bellows had little trouble identifying many concrete benefits that Falls Church obtained from its association with the Episcopal Church and the Virginia Diocese:

> Beyond any spiritual benefits a local church might receive, there are secular benefits like assistance in the recruitment of clergy, the provision of "supply priests" as temporary clergy at congregations, assistance in the preparation of parish profiles, investigating clergy recruited from other dioceses, the preparation of clergy compensation guidelines, the provision of help with the preparation of audits and parochial reports, serving as a resource for advice in areas like taxes and insurance, providing mandatory sexual misconduct training, providing educational programs, providing human resources assistance, providing the Church Pension Fund for a church's clergy, providing group health and dental insurance, providing investment management services through the Diocesan Trustees of the Funds, and providing loans to churches through the Diocesan Missionary Society.

Id. Thus, it matters not whether a court assigns "credit" for the spiritual blessings that a local church is seeking to secure by affiliating with a denomination of its choosing, or instead (like Judge Bellows) pauses to tally the more concrete ways in which a local church inevitably receives

material benefit by joining a larger church family. Under either analysis, the notion that such a relationship is a "one-way street" – leaving the congregation without any legally meaningful consideration – cannot withstand scrutiny.

In short, all relevant precedent stands opposed to the Becket Fund's attack that Judge Bellows "plac[ed] a thumb on the scale in favor of denominational control." Becket Br. at 19. In truth, the analysis Judge Bellows applied (1) was resolutely faithful to the analysis this Court and the U.S. Supreme Court have consistently applied in resolving church property disputes; and (2) is firmly grounded in the thoroughly neutral and incontestable principle of contract law that all who unite themselves to any voluntary association do so with the implied consent to its form of government.

B. A Congregation's Consent to its Denomination's Rules Is Not Confined to the Rules in Place at the Time it Joined the Denomination

The Falls Church makes much of the fact that property provisions included in Episcopal Church's governing documents changed over time, emphasizing especially that the express trust provisions were not adopted until the Denis Canon was promulgated in 1979. And the Becket Fund, in particular, argues that it "is no answer to say that the [later-adopted]

canons in this case were not 'unilateral' because The Falls Church, like all Episcopal parishes, was entitled to participate in the processes that led to their adoption." Becket Br. at 29. From the Becket Fund's perspective, the Denis Canon cannot be controlling because The Falls Church "has existed as a legally distinct entity since 1732, and there is no evidence that it ever ceded its authority over property to the Episcopal Church." *Id*.

But this is not how the law operates. In *Reid v. Gholson*, 229 Va. 179, 327 S.E.2d 107 (1985), this Court held not only that those who join a religious denomination are bound by the denomination's "internal rules and the decisions of its tribunals," *id*., 229 Va. at 188-89, 327 S.E.2d at 113, but further that those rules are will inevitably change over time and remain binding nonetheless:

> Hierarchical churches may, and customarily do, establish their own rules for discipline and internal government. They may, and frequently do, establish internal tribunals to decide internal disputes arising in matters of discipline and internal government. These tribunals may be guided by a body of internally-developed canon or ecclesiastical law, *sometimes developed over a period of centuries*.

Id. at 188-189, 327 S.E.2d at 113 (citation omitted) (emphasis added).

And for this very reason, it should not be in the least surprising that the U.S. Supreme Court held in *Jones v. Wolf* that the decisive rules are not those in place at the time local church first joins the denomination, nor

those in place at the time each parcel may have been acquired. Rather, the rules that will govern resolution of the dispute are those in place *at the time the dispute arises and the congregation elects to withdraw*:

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

Jones, 443 U.S. at 606 (emphasis added).

In this very passage, the U.S. Supreme Court invited denominations such as the amici – to the extent they had not already done so – to amend their governing documents so as to express, in clear terms, that all local church property must be held for the benefit of the denomination as a whole. In the same breath, moreover, the Court made clear that such amendments would be binding on civil courts if made "[a]t any time before the dispute erupts," which is entirely consistent with the reality that the rules of religious organizations – like those of all voluntary associations – will change over time and remain binding on the membership nonetheless.

Maryland's highest court rejected such "timing" arguments in *Polen v. Cox*, 259 Md. 25, 267 A.2d 201 (1970). In that case, a congregation

withdrew from the Church of God denomination when the denomination's rules were changed to eliminate racial segregation within the church's governance structure. The property rules in place at the time provided that local church property would pass to the control of the denomination if a congregation withdrew. Under these circumstances, the court explained that a congregation could not evade the result dictated by the property provisions in place at the time the dispute arose:

> Certainly when deciding to affiliate with the Church of God, the . . . congregation may have placed a great deal of value on the segregated church structure . . . . However, by agreeing to be bound by the [denomination's constitution], it should have been apparent that a majority vote at the General Assembly level might change any doctrinal or governmental practice and that if such change was so unpalatable as to cause withdrawal, the property would revert to the control of the national body.

Id., 259 Md. at 37, 267 A.2d at 207.

Similarly, in common-sense terms, the *Polen* court identified the course a congregation must follow to avoid a finding that it has consented to a change in the denomination's rules governing local church property:

> It would of course be a different matter if at the time they affiliated, the Minutes had provided for retention of the property by the local church upon withdrawal, and then the General Assembly changed the Minutes to provide the opposite. If upon the change in the Minutes, the Church withdrew, then implied consent to the change would not be possible. However, this was not the situation in the present case. Without any indications that the local congregation did not consider

> themselves bound by the Minutes, we think an implied consent to the withdrawal provisions must be inferred.

Id.

In the case of The Falls Church, they had advance notice of the proposed enactment in 1983 of Diocesan Canon 15.1 and then participated directly in the Annual Council that actually adopted that canon. *See* JA 6326-43; JA 6193. Furthermore, the Diocess published notice of the Denis Canon to all congregations immediately after its enactment at the General Convention in 1979, announcing plainly in the October 1979 issue of the Diocese's *Virginia Churchman* that the Dennis Canon clarified that "Parishes that break away from the Episcopal Church have no right to church property." JA 6213. Far from objecting to the Denis Canon or corresponding changes at the diocese level, The Falls Church continued its whole-hearted participation in the Episcopal Chuch's polity for another quarter century, without giving any hint of an objection to the canon's clear terms.

C. The Circuit Court Did Not Resolve Any Religious Question or Undertake any Fundamentally Religious Inquiry

The Becket Fund's second main theme is nearly as repetitive as the first, but even more illusory. Side-by-side with virtually every reference to Judge Bellows' supposed "rule" of "unilateral denominational interest," the

Court is told that Judge Bellows' approach to the case "entangles civil courts in forbidden questions of 'religious doctrine, polity, and practice,' *Jones,* 443 U.S. at 603, by making property rights turn on the court's interpretation of canon law and internal church dealings." Becket Br. at 2. *See also id*. at 5 ("The Becket Fund is concerned that the trial court's decision . . . entangles courts in religious questions and unjustly interferes with the ability of churches to control their polities.")

Much of this is suggested merely by repeating First Amendment principles with which everyone agrees, including all of the undersigned *amici*. No one questions that civil "courts must 'scrutinize the [church] document in purely secular terms, and not . . . rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.'" *Id.* at 9 (quoting *Jones*, 443 U.S. at 604). Nor does anyone disagree that "States have no legitimate interest in 'internal church decision[s] that affect the faith and mission of the church itself.'" Becket Br. at 10, *quoting Hosanna-Tabor,* 132 S. Ct. at 707.

But simply reciting these principles does nothing to demonstrate that Judge Bellows came anywhere to close to violating them. He certainly did not do so by resting his decision, in part, on the explicit, plainly worded and readily discernible property provisions contained in the governing

documents of the Episcopal Church and the Virginia Diocese. Those provisions – including especially those that have long foreclosed property transfers without the Bishop's consent – are essentially identical to the restrictive property provisions in the AME Zion Church's Discipline that this Court held in *Green* were irrefutable evidence that the denomination had a proprietary interest in local church property, which could not be unilaterally expunged by the local church's members.

In short, as the Becket Fund's attorneys surely know, neither the U.S. Supreme Court, nor the Virginia Supreme Court, has adopted any rule that prefers one documentary source for property rights to the exclusion of any other. On the contrary, and as Judge Bellows appreciated, the leading cases are emphatic that a denomination's interest in local church property can be secured in a deed, *or* in a statute, *or* in the denomination's governing documents, *or* in the governing documents of the local church itself. Insofar as the dispute is between a denomination and its own members, any one of those sources can suffice as the basis for civil court resolution of the dispute. *See Jones*, 443 U.S. at 606; *Letter Op.* at 45 ("There is no suggestion in *Norfolk Presbytery* or *Green* that in the resolution of a church property dispute this Court should accord the deeds

'predominant' weight over, for example, the constitution of the general church.").

Nor is there any merit -- certainly not in this context – to the argument that Virginia's policy in favor of certainty of title counsels against civil court reliance on property provisions expressed in general church documents that are contractually binding on all members of a religious denomination. In cases like the instant one – as in *Norfolk Presbytery* and *Green* – the dispute centers solely on the relative rights of the very members of the religious association in question, not any outside third-party who asserts an interest in local church property and lacks knowledge or reason to know of the denomination's interest. Putting aside that the record in this case demonstrates that lenders and other real estate professionals are well-attuned to the potential for a denominational interest in local church property, and indeed often require proof or legal opinions that general church rules have been satisfied (JA 4583, 6863-64), there is no question that the association's own rules are fully dispositive in disputes among the association's own members.

Lastly, the amici are not aware of – nor has The Falls Church or the Becket Fund identified – a single factual finding that required Judge Bellows to undertake any fundamentally religious inquiry, let alone resolve

underlying religious question. Indeed, the undersigned *amici* are not aware of any significant finding of fact with which The Falls Church or the Becket Fund truly disagrees. As far as the amici can discern, The Falls Church and the Becket Fund do not contest any of the facts that, in the final analysis, are more than sufficient to sustain the Circuit Court's holding. Whether based on the express trust provisions, or solely on the numerous other restrictive property provisions contained in the Episcopal Church's governing documents, there is simply no contesting that, under the controlling and well-developed precedent of this Court and U.S. Supreme Court, the Episcopal Church perfected a legally enforceable interest in the property held by its local churches.

CONCLUSION

For the foregoing reasons, the *amici* urge the Court to eliminate Virginia's rule against denominational trusts, but otherwise to affirm the Circuit Court's decision in its entirety.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on January 22, 2013, pursuant to Va. S.Ct. Rules 5:17(i) and 5:26 and Va. Code Ann. § 1-210(B):

Electronic copies of this brief, in PDF format, are being transmitted to the Clerk of this Court, on CD-ROM, and served on counsel for the parties and *amici* at the email addresses stated below.

Fifteen printed copies of this brief are being transmitted by hand for filing in the office of the Clerk of this Court.

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ADDENDUM

DETAILED STATEMENT OF INTEREST OF THE *AMICI*

The *Amici* are well-suited to emphasize the points outlined in this brief. They are all associated with "hierarchical" or "connectional" denominations, many of which have included in their controlling documents express trust provisions that are identical to (in the case of the two other Episcopal dioceses) or substantially the same as (in the case of the Methodist and Presbyterian amici) the trust provisions the Episcopal Church and the Diocese of Virginia are seeking to enforce in this lawsuit.

The Episcopal Dioceses of Southern Virginia and Southwestern Virginia

From the standpoint of church polity and legal principle, the Episcopal Diocese of Southern Virginia and the Episcopal Diocese of Southwestern Virginia have essentially the same interest in this litigation as those being advanced by the Appellee Protestant Episcopal Church in the Diocese of Virginia. Thus, rulings made in this case – at least insofar as they refine the rules of decision for resolving such disputes in Virginia – will certainly have an impact on how such suits are resolved as and when they may arise within the diocese covered by these *amici*.

Amici Associated with The United Methodist Church

As indicated in the body of the brief, John Wesley, the founder of Methodism, caused trust clauses to be inserted in the deeds of all local church properties more than 250 years ago as a means of reinforcing the doctrinally rooted practice of having bishops, not congregations, control the appointment of pastors. John Leo Topolewski, *Mr. Wesley's Trust Clause: Methodism in the Vernacular*, in METHODIST HISTORY, vol. XXXVII, no. 3, pp. 144-45 (Yrigoyen, Jr., Charles, ed. 1999). For Wesley, if local church trustees had unfettered control of the church property, that control could extend to the pulpit as well, effectively giving the local church the ability to exclude the bishop's pastoral appointments, and thereby undermining the crucial Methodist principles of "connectionalism" and "itineracy.".

More specifically, the *amici* include the following Methodist entities:

1. **General Council on Finance and Administration of The United Methodist Church ("GCFA").**

The General Council on Finance and Administration of the United Methodist Church ("GCFA") is a national agency of The United Methodist Church. The United Methodist Church is one of the largest religious denominations in the United States with more than eight million members, 43,000 clergy, and 35,000 local churches. It also has more than a million members outside the United States and performs mission work in over

165 countries. Under United Methodist Church polity, GCFA is the national agency charged with protecting the legal interests of the denomination. In that role, GCFA is called upon to assist in protecting the denomination's property interests in civil courts. In particular, GCFA seeks to enforce the provisions of United Methodist ecclesial law requiring that all local church property be held in trust for the denomination as a whole.

2. **The Rt. Rev. Yung Chin Cho and Steven D. Brown, Bishop and Chancellor, respectively, of the Virginia Annual Conference of The United Methodist Church.**

Bishop Cho is the Presiding Bishop of the "Annual Conference" of The United Methodist Church that oversees all local United Methodist congregations in Virginia. The Virginia Conference includes approximately 1,200 United Methodist congregations, served by approximately 1,000 United Methodist clergy, making it one of the largest annual conferences in the denomination. As the episcopal leader of the Virginia Conference, Bishop Cho ministers to congregations whose members and clergy may be struggling with whether to remain part of the Conference or the denomination, and to ensure that, whatever their ultimate decision, the trust and related property provisions in the United Methodist *Book of Discipline* are respected and upheld. Mr. Brown, an attorney in Richmond, is the Conference's Chancellor, and is charged by the *Book of Discipline* to serve

as legal counsel to the Bishop and to protect the legal and property interests of the Conference.

Presbyterian *Amici*

In reliance upon the Supreme Court's holding in *Jones*, the Presbyterian Church (U.S.A.) and its related judicatories long ago amended their governing documents to include provisions to "ensure that . . . the faction loyal to the hierarchical church will retain the church property" in the event of a "division." *Jones,* 443 U.S. at 606. Having been assured by the U.S. Supreme Court that "civil courts will be bound to give effect" to such provisions, *id*., the Presbyterian *amici* are vitally interested in this Court's reconsideration of the pre-*Jones* holding that "trusts for supercongregational churches are invalid under Virginia law." *Norfolk Presbytery*, 214 Va. at 507, 201 S.E.2d at 758.

Given their longstanding support of the trust principles that bind local church and denomination, the Presbyterian *amici* include the following:

1. Gradye Parsons, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)

The Presbyterian Church (U.S.A.) ("PCUSA") is a national Christian denomination with nearly 2.3 million members in more than 11,200 congregations, organized into 173 presbyteries, under the jurisdiction of 16 synods. It is organized through an ascending series of organizations

known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. That said, the General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

2. Abingdon Presbytery of the Presbyterian Church (U.S.A.)

The Abingdon Presbytery is one of 173 presbyteries, each of which falls within the jurisdiction of one of 16 synods. The Abingdon Presbytery is in the synod of the Mid-Atlantic. The Presbytery encompasses 54 congregations, 48 ministers and 12 Commissioned Lay Pastors, all working in ministry in thirteen counties in southwestern Virginia. Abingdon Presbytery is faithful in defending the denomination's property ownership rules, understanding it to be central to Presbyterian Church Order that local churches hold their property in trust for the larger denomination as a whole.

3. The Rev. Dr. G. Wilson Gunn, Jr. (General Presbyter, National Capital Presbytery, PCUSA) and Elder Donald F. Bickhart (Stated Clerk, Presbytery of Eastern Virginia, PCUSA).

The Rev. Dr. Gunn is the senior administrative officer in the PCUSA's National Capital Presbytery. Elder Bickhart is the elected official responsible for carrying out ecclesiastical functions in the PCUSA's Presbytery of Eastern Virginia.

The National Capital Presbytery contains 109 congregations with 34,000 members. Fifty-one of those congregations are located in the Virginia counties of Loudoun, Fairfax, Arlington, Prince William and Fauquier. The National Capital Presbytery and its predecessor presbyteries have vigorously defended the principle of beneficial interest throughout their history, understanding it to be central to Presbyterian Church Order that local churches hold their property in trust for the larger denomination as a whole.

The Presbytery of Eastern Virginia contains 63 congregations, with 17,824 members, located in the Southeastern and Eastern Shore parts of Virginia. Neither of these Presbyteries claims to speak for all Presbyterians within their bounds. Nor are their pronouncements binding on the membership of their congregations. However, their statements are

considered worthy of the respect and prayerful consideration of all the presbytery's members.

Lutheran *Amici*

The Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in the United States, with 4.7 million members organized into 10,470 congregations.[8] The ELCA is organized *neither as a hierarchical church* in the Roman Catholic tradition, *nor as a congregational church* in the Anabaptist tradition, but understands itself as a church in which the congregations, synods, and related organizations are "*interdependent* partners sharing responsibly in God's mission." *ELCA Constitution*, Chapter 5 (Principles of Organization), § 5.01 (emphasis added).

To reinforce the interdependence between local faith communities, regional synods, and the churchwide organization, the ELCA Constitution provides that congregations are not free to leave the denomination on their own volition. Instead, if a congregation wishes to leave the ELCA, it must follow a detailed procedure which is set forth in both the denomination's and the congregation's constitutions. *Id.*, Chapter 9 (*Congregations*)

[8] The ELCA is a member church in the World Lutheran Federation, a federation of Lutheran churches in 78 countries with a membership of over 68.3 million worldwide.

§§ 9.22 and 9.62; Model Congregation Constitution Chapters 6 & 7. This procedure explicitly applies to all congregations and requires:

- adoption of a resolution by a two-thirds (2/3) majority of the "Voting Members"[9] present at a legally called and conducted meeting;
- formal notification of the synodical bishop;
- a mandatory consultation period of at least 90 days;
- written notification by mail to all Voting Members of the congregation, and
- a second vote at a legally called and conducted meeting at which a two-thirds (2/3) majority of the voting members present approve leaving the ELCA.

The foregoing is the process an ELCA congregation must follow simply to secede; if it is joining a non-Lutheran church body *and also* desires to take its property with it, then that congregation must also receive synodical approval. (Similarly, synod council approval is required if the congregation was previously a member of the Lutheran Church in America

[9] ELCA polity recognizes four distinct types of membership in its congregations: (1) Baptized Members, (2) Confirmed Members, (3) Voting Members, and (4) Associate Members. ELCA MODEL CONSTITUTION CHAPTER 8 (*MEMBERSHIP*). Each classification has different requirements, but only "Voting Members" are entitled to vote on the question of a congregation leaving the ELCA. In addition—and in contrast to the secular standard imposed by Va. Code Ann. § 57-9—there is no age requirement to be a "Voting Member" in an ELCA congregation, and many Virginia congregations have Voting Members who are under the age of 18.

(a predecessor body of the ELCA), or if it was founded by the ELCA, regardless of the intended disposition of the church property.)[10]

Joining as *amici* sponsoring this brief, the Virginia and Metropolitan Washington, D.C. Synods are two of the 65 Synods in the ELCA. The Virginia Synod has 166 congregations located throughout most of Virginia. The Metropolitan Washington, D.C. Synod has 75 congregations, 35 of which are located in Arlington, Fairfax, Loudoun and Prince William counties, as well as the cities of Alexandria, Fairfax and Falls Church.

[10] The above-described ecclesiastical procedures reflect over 388 years of Lutheran history and tradition in America. Unlike many protestant denominations in the United States, the ELCA is the product of a slow unification of a large number of ethnic-based Lutheran denominations (e.g., Scandinavian, German, Slovak, Baltic), each with its own polity and traditions of self-governance, ranging from the very congregational-oriented Lutheran Free Church (Norwegian), to the more hierarchically structured Augustana Evangelical Lutheran Church (Swedish). For these churches to unite and thrive as a single denomination, many compromises and accommodations had to be made, many of which are reflected in the above-described policies and procedures regarding a congregation's termination of its relationship with the other expressions of the church.

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From: Johnson, Steffen N. <SJohnson@winston.com>
Sent: Friday, November 09, 2012 4:42 PM
To: Starnes, Thomas E.; Schaerr, Gene; Somerville, George A.; sjw@gg-law.com; Davenport, Brad (brad.davenport@troutmansanders.com); tro@gg-law.com; jjohnson@semmes.com; pfarquharson@semmes.com; EGetchell@oag.state.va.us; Kostel, Mary E. (mkostel@goodwinprocter.com); Beers, David Booth; Nichols, Andrew C.; tprout@semmes.com
Cc: Coleman, Brian A.; Plante, Claire M.
Subject: RE: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

Tom,

The Falls Church consents, per the prior email exchange reflecting the understanding that neither TFC nor TEC nor the Diocese will object to amicus filings on the other side's behalf in the Virginia Supreme Court.

Steffen

From: Starnes, Thomas E. [mailto:Thomas.Starnes@dbr.com]
Sent: Friday, November 09, 2012 2:00 PM
To: Johnson, Steffen N.; Schaerr, Gene; Somerville, George A.; sjw@gg-law.com; Davenport, Brad (brad.davenport@troutmansanders.com); tro@gg-law.com; jjohnson@semmes.com; pfarquharson@semmes.com; EGetchell@oag.state.va.us; Kostel, Mary E. (mkostel@goodwinprocter.com); Beers, David Booth; Nichols, Andrew C.; tprout@semmes.com
Cc: Coleman, Brian A.; Plante, Claire M.
Subject: RE: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

Counsel,

I have not heard from any Appellants yet (one way or the other), but am writing to include the Abingdon Presbytery of the Presbyterian Church (USA) in the group that seeks your clients' consent to the filing of a brief as *amici curiae* in support of the Appellees' petition for rehearing.

Thank you.

Tom Starnes

Thomas E. Starnes | DrinkerBiddle&ReathLLP
1500 K Street, NW | Washington DC 20005-1209
202.230.5192 (tel.) | 202.842.8465 (fax) | 202.415.4558 (cell)
thomas.starnes@dbr.com

From: Starnes, Thomas E.
Sent: Friday, November 09, 2012 10:03 AM
To: Steffen N. Johnson (sjohnson@winston.com); Gene C. Schaerr (gschaerr@winston.com); 'Somerville, George A.'; 'sjw@gg-law.com'; Davenport, Brad (brad.davenport@troutmansanders.com); 'tro@gg-law.com'; 'jjohnson@semmes.com'; 'pfarquharson@semmes.com'; 'EGetchell@oag.state.va.us'; Kostel, Mary E. (mkostel@goodwinprocter.com); Beers, David Booth; 'anichols@winston.com';

'tprout@semmes.com'
Cc: Coleman, Brian A.; Plante, Claire M.
Subject: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

Counsel,

I am writing to seek the consent of your clients to the filing today of a brief by the follow *amici curiae* in support of the Petition for Rehearing that Appellees' have filed today in the above-referenced appeal: *The Episcopal Diocese* of Southern Virginia, *The Episcopal Diocese* of Southwestern Virginia, the *General Council on Finance and Administration of The United Methodist Church, The Rt. Rev.* Young Jin Cho *(Bishop, Virginia Annual Conference of The United Methodist Church); Steven D. Brown (Chancellor, Virginia Annual Conference of The United Methodist Church).* Please let me know by return email if your client so consents.

Best regards,

Tom Starnes

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1500 K Street, NW | Washington DC 20005-1209
202.230.5192 (tel.) | 202.842.8465 (fax) | 202.415.4558 (cell)
thomas.starnes@dbr.com

From: Somerville, George A. [mailto:george.somerville@troutmansanders.com]
Sent: Friday, November 09, 2012 9:20 AM
To: Starnes, Thomas E.; Loftis, Mark; Tayloe, Gordon B.; Webster, Samuel
Cc: Davenport, Brad; 'Henry Burt'
Subject: FW: Record No. 120919, The Falls Church (also known as The Church at the Falls - The Falls Church) v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

FYI ...

From: Somerville, George A.
Sent: Friday, November 09, 2012 9:18 AM
To: 'scvpfr@courts.state.va.us'
Cc: Scott Ward; 'tro@gg-law.com'; 'Gordon Coffee'; 'Gene C. Schaerr'; 'Steffen N. Johnson'; 'Andrew C. Nichols'; 'James A. Johnson'; 'Paul N. Farquharson'; 'Tyler O. Prout'; 'E. Duncan Getchell, Jr.'; Beers, David B.; Kostel2, Mary E.; Davenport, Brad; Zinsner, Mary C.; 'Henry Burt'
Subject: Record No. 120919, The Falls Church (also known as The Church at the Falls – The Falls Church) v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

Please find attached a Petition for Rehearing of the Court's order refusing assignment of cross-error, which is submitted pursuant to Rules 5:20 and 5:20A for filing in the referenced matter (*The Falls Church (also known as The Church at the Falls – The Falls Church) v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia*, Record No. 120919).

Copies of this message, including the attachment, are being provided to counsel for appellant and for the Attorney General of Virginia, *amicus curiae*, at the addresses indicated below:

Scott J. Ward (sjw@gg-law.com)
Timothy R. Obitts (tro@gg-law.com)
Gammon & Grange, P.C.
8280 Greensboro Drive, Seventh Floor
McLean, Virginia 22102

Gordon A. Coffee (gcoffee@winston.com)
Gene C. Schaerr (gschaerr@winston.com)
Steffen N. Johnson (sjohnson@winston.com)
Andrew C. Nichols (anichols@winston.com)
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006

James A. Johnson (jjohnson@semmes.com)
Paul N. Farquharson (pfarquharson@semmes.com)
Tyler O. Prout (tprout@semmes.com)
Semmes Bowen & Semmes, P.C.
25 South Charles Street, Suite 1400
Baltimore, Maryland 21201

and to:

E. Duncan Getchell, Jr. (EGetchell@oag.state.va.us)
Solicitor General of Virginia
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Respectfully submitted,
George A. Somerville
Counsel for The Protestant Episcopal Church in the Diocese of Virginia

George A. Somerville (VSB #22419)
Troutman Sanders LLP
PO Box 1122
Richmond, VA 23218-1122
phone: (804) 697-1291
direct fax: (804) 698-5149
George.Somerville@troutmansanders.com

Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) that may be addressed herein.

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Starnes, Thomas E.

From: Johnson, Steffen N. <SJohnson@winston.com>
Sent: Friday, November 09, 2012 4:39 PM
To: 'Somerville, George A.'
Cc: Coffee, Gordon A.; Kostel, Mary E.; Beers, David B.; Davenport, Brad; Starnes, Thomas E.
Subject: RE: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

Thanks, George. We can just give the consents individually, then, as requests come in. And I wasn't distinguishing between amicus filings in support of your rehearing petition and on the merits, so the agreement covers Tom's request. I'll send an email to the full distribution responding to that.

From: Somerville, George A. [mailto:george.somerville@troutmansanders.com]
Sent: Friday, November 09, 2012 4:35 PM
To: Johnson, Steffen N.
Cc: Coffee, Gordon A.; Kostel, Mary E.; Beers, David B.; Davenport, Brad; Starnes, Tom
Subject: RE: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia
Importance: High

Thanks, Steffen. The Diocese and TEC agree to your proposal, provided it is with the mutual understanding that your consent applies to Tom Starnes' *amicus* filing today as well as to briefs on the merits.

I'm indifferent to the mechanics. I see no need to file blanket consent letters, but neither do I object to it. The essential agenda item right now is for you to advise Tom that you consent to his filing today, so he can get it in without having to file a motion.

Thanks.

George Somerville

George A. Somerville
Troutman Sanders LLP
PO Box 1122
Richmond, VA 23218-1122
phone: (804) 697-1291
direct fax: (804) 698-5149
http://www.troutmansanders.com/george_somerville/

Click **here** for my vCard

"I feel sorry for the person who can't get genuinely excited about his work. Not only will he never be satisfied, but he will never achieve anything worthwhile." - Walter Chrysler

From: Johnson, Steffen N. [mailto:SJohnson@winston.com]
Sent: Friday, November 09, 2012 3:34 PM
To: Somerville, George A.; Kostel2, Mary E.
Cc: Coffee, Gordon A.
Subject: FW: Request for Consent to File Amicus Brief in Record No. 120919 (The Falls Church v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

George, Mary:

Are you amenable to an arrangement where we consent to amicus filings on behalf of TEC and the Diocese, and you consent to amicus filings on behalf of The Falls Church, in the Virginia Supreme Court? We could file blanket consent letters with the Court if you like.

Steffen

From: Starnes, Thomas E. [mailto:Thomas.Starnes@dbr.com]
Sent: Friday, November 09, 2012 2:00 PM
To: Johnson, Steffen N.; Schaerr, Gene; Somerville, George A.; sjw@gg-law.com; Davenport, Brad (brad.davenport@troutmansanders.com); tro@gg-law.com; jjohnson@semmes.com; pfarquharson@semmes.com; EGetchell@oag.state.va.us; Kostel, Mary E. (mkostel@goodwinprocter.com); Beers, David Booth; Nichols, Andrew C.; tprout@semmes.com
Cc: Coleman, Brian A.; Plante, Claire M.
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Thank you.

Tom Starnes

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Sent: Friday, November 09, 2012 10:03 AM
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appeal: *The Episcopal Diocese* of Southern Virginia, *The Episcopal Diocese* of Southwestern Virginia, the *General Council on Finance and Administration of The United Methodist Church, The Rt. Rev.* Young Jin Cho *(Bishop, Virginia Annual Conference of The United Methodist Church); Steven D. Brown (Chancellor, Virginia Annual Conference of The United Methodist Church).* Please let me know by return email if your client so consents.

Best regards,

Tom Starnes

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From: Somerville, George A. [mailto:george.somerville@troutmansanders.com]
Sent: Friday, November 09, 2012 9:20 AM
To: Starnes, Thomas E.; Loftis, Mark; Tayloe, Gordon B.; Webster, Samuel
Cc: Davenport, Brad; 'Henry Burt'
Subject: FW: Record No. 120919, The Falls Church (also known as The Church at the Falls - The Falls Church) v. The Protestant Episcopal Church in the United States of America and The Protestant Episcopal Church in the Diocese of Virginia

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Tyler O. Prout (tprout@semmes.com)
Semmes Bowen & Semmes, P.C.
25 South Charles Street, Suite 1400
Baltimore, Maryland 21201

and to:

E. Duncan Getchell, Jr. (EGetchell@oag.state.va.us)
Solicitor General of Virginia
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Respectfully submitted,
George A. Somerville
Counsel for The Protestant Episcopal Church in the Diocese of Virginia

George A. Somerville (VSB #22419)
Troutman Sanders LLP
PO Box 1122
Richmond, VA 23218-1122
phone: (804) 697-1291
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