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 APPELLEE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA

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INTRODUCTION

The decision below is a straightforward application of this Court's decision in *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), to the facts as found by the Circuit Court after a trial. *See*, *e.g.*, JA 149 (opinion below): "the facts here are at least as compelling as the facts in *Norfolk Presbytery* [*v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974) ("*Norfolk*")] and *Green* and therefore require this Court to reach a similar judgment."

The principal issues presented by The Falls Church's ("TFC's") appeal are (1) whether the Circuit Court correctly applied *Green*, and if so whether that decision contravenes the federal and Virginia Constitutions; and (2) whether a local church can belong to a hierarchical church for nearly two centuries; accept, conform to, and be bound by its rules; and then unilaterally renounce those rules and thereby absolve itself of its longstanding commitments as a part of the general church, with the obligations as well as benefits and privileges that such membership entails.

TFC begins its arguments with the assumption that it is the owner of the properties in question, and it reasons in a circle from that premise to the conclusion that the judgment works a "forfeiture" of those properties (TFC Brief at 34, 35-37). TFC is wrong. The issue is neither "forfeiture" nor "use restrictions" (*id*. at 16-18). The issue is whether the Circuit Court erred by holding that Diocese of Virginia ("the Diocese") and The Episcopal Church

("the Church" or "TEC") have contractual, proprietary, or trust interests in those properties. That holding was not in error, as discussed below.

The Diocese also joins in the arguments presented in TEC's Brief.

FACTS

A reader of TFC's brief might think that it is an independent (or congregational) church, with a congregational polity. It is not. As this Court stated in *Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 14, 694 S.E.2d 555, 558 (2010) ("*Truro*"), "[i]t is not disputed that the entities involved in this litigation are part of a hierarchical church."[1] Further,

> [t]he highest governing body of TEC is the triennial General Convention, which adopts TEC's constitution and canons to which the dioceses must give an "unqualified accession." Each diocese in turn is governed by a Bishop and Annual Council that adopts the constitution and canons for the diocese. Each congregation within a diocese in turn is bound by the national and diocesan constitutions and canons.

Id. at 15, 694 S.E.2d at 559.

One of the duties of an Episcopal Bishop is to visit the churches in his or her Diocese. *See* JA 5751, 7095-97. The visiting Bishop presides at the Holy Eucharist and at "Initiatory Rites" (confirmation and reception), which only a Bishop may perform. JA 135, 5751, 7179-80. He examines the

[1] This Court described the differences between hierarchical and congregational churches in *Reid v. Gholson*, 229 Va. 179, 188-89 & n.13, 327 S.E.2d 107, 112-13 & n.13 (1985).

church's records and inspects its property. JA 135, 5733 (Canon III.9.5(b)(5)), 5751 (Canon III.18.4), 7180-81. Diocesan Bishops or their delegates installed rectors at TFC (*see* JA 4489, 4691); and bishops of TEC and the Diocese participated in numerous ordinary and special occasions. *See*, *e.g.*, JA 2544, 4559, 4732-33, 6403-04, 6409, 6661-62, 6675, 6859.

Every rector (pastor) or other clergy serving an Episcopal church has been educated according to the doctrines and discipline of the Episcopal Church, ordained by an Episcopal Bishop, and has "'declared an oath of conformity with the Church's rules.'" JA 127; *see* JA 130, 136-37, 138, 5663. The process leading to ordination is lengthy and detailed, and it is managed and controlled by the Diocese almost from the beginning. The process is described in detail in testimony at JA 7132-47 and summarized in the opinion below at JA 135 (describing "the Bishop's control over the entire process of ordination, from 'aspirant' to 'postulant' to 'candidate' to 'deacon' and, finally, to 'priest'" as one "of the ways that a local Episcopal church is subject to the denominational hierarchy").

The Church and the Diocese regulate and exercise authority over local churches in numerous respects. Among other things, churches must obtain consents of the local congregation and/or Diocesan authorities to incur debt above a stated threshold or to encumber or alienate most real

property. JA 5693, 5714, 5852, 7160-64, 7167-68. They must elect vestries (local governing bodies) and wardens (vestry officers). JA 5703, 5846-48. They must submit annual parochial reports. JA 5691, 5854, 7154. They must adhere to certain business practices, including insuring property and conducting annual audits. JA 5692-93, 5850-51, 7155-58. They must participate in the Church Pension Fund for their clergy. JA 5694-95, 7171. Their clergy must obtain authorization from the Diocesan Bishop for various things, including to remarry a person who has been divorced or to allow a lay person to deliver the sacrament of communion. JA 5710, 5716, 7172-76. TFC understood and obeyed those rules.

TFC's history dates to approximately 1732. It was part of the colonial Truro Parish and later Fairfax Parish. Its rector was "one of the leaders in the effort to transform the Anglican parishes in Virginia into a new diocese and to initiate a Protestant Episcopal Church in the United States of America as the successor to the Church of England in the new nation.'" JA 106 n.48 (opinion below), quoting JA 2650. By 1798, however, TFC "was no longer functioning as an Episcopal congregation." It "was admitted to the Diocese as a separate and distinct church" in 1836. It suffered substantial disruption and building damage as a result of the Civil War, but it was formally reorganized and a vestry was elected on November 27, 1873. It has existed continually since then. JA 63, 106-07 (opinion below).

The relationship between TFC and the Diocese is described further in the opinion below at JA 137-39 and in the Argument, *infra*.

ASSIGNMENT OF CROSS-ERROR

The Circuit Court erred by holding that Va. Code § 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.

ARGUMENT

Standard of Review. The standard of review applicable to each of TFC's assignments of error and to the Diocese's assignment of cross-error is *de novo*, for legal error.

I. The Circuit Court correctly followed and applied this Court's decision in *Green v. Lewis*. (Assignments of Error 1, 2)

In *Green* this Court defined the "neutral principles of law" doctrine, adopted in *Norfolk*, as follows: "In determining whether [a general] Church has a proprietary interest in [local church] property, we look [1] to our own statutes, [2] to the language of the deed conveying the property, [3] to the constitution of the general church, and [4] to the dealings between the parties." 221 Va. at 555, 272 S.E.2d at 185-86. The Circuit Court faithfully followed those instructions, as this Court mandated in its *Truro* decision, 280 Va. at 29, 694 S.E.2d at 567-68. *See* JA 74-80, 92-149.

A. The "constitution" of the general church – both of TEC and of the Diocese – provides that properties held by local congregations are held in trust for TEC and the Diocese (JA 5693, 5852) and include numerous other provisions which demonstrate the general church's interests in and control over local church properties. Much like the A.M.E. Zion Discipline at issue in *Green*, TEC Canons I.7.3 and II.6.2 (JA 5693, 5714) and Diocesan Canon 15 (JA 5852), require Diocesan approval for most property transfers. Diocesan Canon 14 (JA 5852) requires the Diocese's approval of debt above a certain level. Clergy and local church leaders must take oaths to abide by the Church's rules ("the Doctrine, Discipline, and Worship of the Episcopal Church"). JA 5663; *see* JA 5847. (Numerous witnesses, including TFC's rector and two other CANA clergy, testified that the "discipline" of the Church is found in its Constitution and Canons and *Book of Common Prayer*. JA 7121-22, 7877-78, 8159, 8345, 8390-91, 8480-81, 8505, 8510-11. *See* JA 131 n.71 (opinion below); JA 5812 (TEC Canon defining "[t]he Discipline of the Church").) Other pertinent provisions are described in the opinion below at JA 128-35.

Arguments that the Circuit Court erred by considering church canon laws, which pervade TFC's Brief and the Becket Fund's *amicus* brief, ignore *Green*. Those arguments also disregard this Court's holding, in this case, that "the CANA Congregations established that they were previously

'attached' to TEC and the Diocese" "*because they were required to conform to the constitution and canons of TEC and the Diocese*." *Truro*, 280 Va. at 27, 694 S.E.2d at 566 (emphasis added).[2]

That is the law of the case, and it has long been the law of Virginia. *See*, *e.g.*, *Reid v. Gholson*, 229 Va. 179, 188-89, 327 S.E.2d 107, 113 (1985) ("One who becomes a member of [a hierarchical] church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals"); *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301, 320 (1856) ("'To constitute a member of any church, two points at least are essential …, a profession of its faith and a submission to its government'") (citation omitted). Indeed, TFC's rector testified that Episcopal parishes are bound by the laws of TEC and the Diocese (the Constitutions and Canons) "unless they call us to do something that goes against the teachings of Christ." JA 6977-79. No witness testified to a belief that any provision of the Constitution and Canons of either TEC or the Diocese goes against the teachings of Christ. *See*, *e.g.*, JA 8261-62 (TFC witness Thomas Wilson).

The relationships established by the laws of a hierarchical church are contractual in nature, as recognized in *Norfolk*, *Green*, and numerous other cases. Church canons are no different in this respect from the rules of

[2] TFC argued below that the "constitution" of a general church does not include its canons. It has abandoned and waived that argument on appeal.

other voluntary associations. *See*, *e.g.*, *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958) (constitution and by-laws of 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"); *Linn v. Carson*, 73 Va. (32 Gratt.) 170, 183-84 (1879), holding that the Methodist Episcopal Church's book of discipline constituted a contract between a local church and its members.

Pages 26-27 of TFC's brief attempt to distinguish its governing documents from certain selected features of the governing documents of other churches. The distinctions are inconsequential in light of the unequivocal declarations of TFC's 1982 and 1999 Vestry Manuals that "The Falls Church is subject to the constitution and canons of the national church … and of the Diocese." JA 6630, 6694.

TFC argues that it is not bound contractually by canons enacted after it became a separate church in the Diocese in 1836. TFC Brief at 7, 12, 41-42. It advocates a rule that would be impossible to administer, under which each church is governed only by canons in place when it joined the Diocese and each church would be subject to different, often archaic rules. That is why, looking to the future, the Diocese's Constitution provided in 1836 that every "parish" (local church) would "be benefited and bound … by every rule and canon which *shall be framed*, by any Convention acting

under this constitution, for the government of this church in ecclesiastical concerns." JA 5900, 5905 (emphasis added). And before this lawsuit, TFC never claimed that it was not bound by later-enacted canons.[3]

TFC's attacks on TEC's and the Diocese's "trust" canons (TFC Brief at 7, 13 & n.6, 24, 30, 33, 38, 41-42) are irrelevant. The Circuit Court held (we believe incorrectly – *see* Assignment of Cross-Error) that denominational trusts are not recognized in Virginia, and it accorded only "limited significance" to those canons. JA 128 n.68. *See also* JA 133 n.72.[4]

TFC would have the Court believe that the decision below was based primarily (if not entirely) on church canon law. *See* TFC Brief at 1, 3-4, 5, 12-13, 14-15, 23-24, 25-26, 28-30, 33, 35-42, 50. The canon laws of the Diocese and the Church are an important consideration, to be sure, but they are only one element in the trial court's analysis. Nor did the court

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[3] That also answers TFC's argument that the trial court violated the Contract Clauses of the federal and state Constitutions "by retroactively applying laws and canons not in force when TFC acquired its initial property or when it joined the denomination." TFC Brief at 41. There is no constitutional prohibition on joining a hierarchical church and agreeing to be bound by its rules, both present and future, and the Circuit Court cited a whole panoply of "laws and canons."

[4] JA 2195 and 2222, cited in TFC Brief at 13 n.6 and 34, is not "the official version of [TEC's] canons," *id*. It is a scholarly annotation, whose substance has been rejected in relevant respects by a nearly unbroken line of judicial decisions throughout the country. *See* Brief for Appellee-Cross-Appellant TEC at 5-11, 24-26. The official version of TEC's canons is at JA 5649-5825.

hold that "TFC's course of dealing created a contract," *id*. at 33. The decision was based on all four factors identified in *Green*. *See* JA 92-149. And the Circuit Court found, based on those factors, that "it is *overwhelmingly evident* – that TEC and the Diocese have contractual and proprietary interests in the real and personal property of each of these seven churches. Simply put, the facts here are at least as compelling as the facts in *Norfolk Presbytery* and *Green* and therefore require this Court to reach a similar judgment." JA 149 (emphasis added).

B. The dealings between the parties: The opinion below includes extensive findings of fact regarding the dealings between the parties. *See* JA 106-07, 137-39. *See also* JA 147, citing "almost 140 pages of detailed, documented indications of active [Diocesan] involvement and participation in the life of these churches, and the understanding and acceptance of those churches that they were part of a hierarchical denomination and subject to its laws," in the Diocese's Post-Trial Opening Brief (filed August 5, 2011) at 56-194 (pages 56-79 apply specifically to TFC), and concluding that "the Court finds far more persuasive TEC's and the Diocese's presentation on the course of dealings between the parties."

The dealings between the parties in this case fit squarely within, and indeed went well beyond, the scope of the dealings that the Court described in *Green* and support the general church's claims, just as in *Green*:

In *Green*, the "pastors of Lee Chapel ha[d] been installed by the Annual Conference and their appointment accepted by the local congregation." 221 Va. at 550, 272 S.E.2d at 182. TFC's pastors were ordained as Episcopal priests by Episcopal bishops and swore oaths of fidelity to the Doctrine, Discipline, and Worship of the Episcopal Church. JA 138 (opinion below), 5663. The Circuit Court found that "the Diocese has been involved in the selection of one or more of [TFC's] Rectors," JA 138; and that Diocesan Bishops vetoed employment of clergy at TFC at least twice, and it complied, JA 139. The evidence also established that TFC repeatedly requested Diocesan Bishops' permission or approval to hire clergy. *See*, *e.g.*, JA 2591-92, 4387, 4577, 6386, 6398-a, 6422. *See also* JA 4558.

In *Green*, "[t]he church … functioned as an A.M.E. Zion Church until October 1977. It became and was an integral part of the super-congregational or hierarchical structure of the A.M.E. Zion Church." 221 Va. at 553, 272 S.E.2d at 184. The same is true here: throughout most of its history, and since the creation of TEC and the Diocese (in the wake of the Revolution and disestablishment of the Church of England in Virginia), TFC has functioned as an Episcopal church and as part of the structure of the Diocese. A TFC party admission (a 1983 grant application) states,

> "On Easter Monday, 1785, the Fairfax parish vestry, meeting at The Falls Church, declared itself conformants to the 'Doctrine, Discipline and Worship of the Protestant Episcopal Church.' Since

> then The Falls Church has been a church of the Protestant Episcopal Church in the United States of America, the Diocese of Virginia."

JA 106 n.48 (opinion below), quoting JA 2650-51. *See also* JA 137-39.

> **In *Green*,**
>
> [t]he general church … provided the organization and structure which is necessary if a church is to function and to fulfill its mission. A Sunday School was organized, and its materials were furnished by the general church. Hymnals and other literature were provided. Baptisms, marriages, and funerals were conducted from the church's Discipline….
>
> ….
>
> …. All religious services and ceremonies conducted by the pastors of that church have followed its Discipline. The literature used by the church and by the Sunday School came from the publishing house of the A.M.E. Zion Church.

221 Va. at 553, 555, 272 S.E.2d at 184-85, 186. The same is true here, with minor exceptions. Diocesan Bishops, or other bishops at their invitation, performed the services for which a bishop is essential: consecrating church facilities, ordaining clergy, and confirming or receiving members. TFC used Episcopal hymnals, and its Sunday School used materials provided by the general church. TFC's religious services and ceremonies (including baptisms, confirmations, marriages, and funerals) used TEC's *Book of Common Prayer*, as mandated by TEC's Constitution and Canons, JA 5664, 5711-13. *See* JA 138-39 (opinion below); *see also*, *e.g.*, JA 4541, 4560, 4580, 4592, 4597, 6692, 7781, 7920.

In *Green*, "since 1875 … the name, customs, and policies of the A.M.E. Zion Church have been used in such a way that Lee Chapel is known, recognized, and accepted to be an A.M.E. Zion Church." 221 Va. at 555, 272 S.E.2d at 186. TFC similarly used the name, customs, and policies of the TEC in such a way that it was known both to its members and to the community at large as an Episcopal church. JA 137 (opinion below); *see*, *e.g.*, JA 8019; TFC letterheads at JA 4609 (1965), 6808 (1977), 6810 (1987), 6815 (1998), 6816 (2006); Annual Reports at JA 4731 (1982), 4752 (1991), 4756 (1997); documentation of signs describing TFC as an "Episcopal" church, JA 4460 (1940), 4533 (1954), 6392 (1968); Orders appointing trustees, JA 2477 (1994), 5327 (1851); Petition of Church Trustees, JA 2481 (1996).

In *Green*, "[t]he various conferences to which the membership of Lee Chapel's congregation sent delegates were all organized and held under the direction of the A.M.E. Zion Church." 221 Va. at 555, 272 S.E.2d at 186. TFC likewise has sent delegates to the Annual Councils of the Diocese since 1785, including every year since 1876. JA 138, 139, 6964.

In *Green*, "the members of Lee Chapel, by payment of their assessments and in numerous other supportive ways, contributed to this state, national, and international ecclesiastical organization, and they presumably benefitted from the association, spiritually and otherwise." 221

Va. at 553-54, 272 S.E.2d at 185. The same is true here, of course; but in addition, there is abundant evidence that TFC *actually* benefitted, both "spiritually and otherwise," from its "association" with the Diocese and TEC. In this case, that need not be merely presumed. It is a fact, proven by undisputed evidence. *See* JA 135-36 (opinion below); *infra* at 29 & n.16.

In *Green*, this Court concluded:

> It is reasonable to assume that those who constituted the original membership of Lee Chapel, and who established the church in the manner directed by the grantors in the deed, and those members who followed thereafter, united themselves to a hierarchical church, the A.M.E. Zion Church, with the understanding and implied consent that they and their church would be governed by and would adhere to the Discipline of the general church. And para. 437(1) of the Discipline requires that all property transfers be approved by the bishop.
>
> ….
>
> We find from the language of the deed involved, the Discipline of the A.M.E. Zion Church, and the relationship which has existed between the central church and the congregation over a long period of years, that the A.M.E. Zion Church does have a proprietary interest in the property of Lee Chapel, and that its interest in the church property cannot be eliminated by the unilateral action of the congregation. The Discipline of the A.M.E. Zion Church requires that all property transfers be approved by the bishop of the district of the Annual Conference, and such approval has not been given.

221 Va. at 555-56, 272 S.E.2d at 186. The same conclusion necessarily follows here, under similar facts. But the case for enforcing the Diocese's and the Church's proprietary interests is even stronger here than in *Green*.

TFC recognized the authority of the Constitutions and Canons of TEC and the Diocese and conformed to their requirements:

(1) It followed the canons of the Church and the Diocese with respect to property, requesting Diocesan consent when required. *E.g.*, JA 138 (opinion below), 2427-28, 4524, 6830-31, 7785-87, 7979-81. *See also*, *e.g.*, JA 2439 (Bishop's consent, with conditions), 2480 (requesting confirmation that Diocesan consent was not required for an exchange of land), 6716 (requesting confirmation that consent was not required for a purchase of land and a mortgage).

(2) It organized itself as required by canon, by electing vestries, who elected wardens, in all respects as required by canons. *E.g.*, JA 138 (opinion below), 4335, 4368, 4380, 4385 (rejecting a proposed resolution governing vestry terms after a retired rector objected to it as "uncanonical"), 4390, 4454-55, 4470, 4527, 4571, 4600, 4602, 4637-39, 6677.

(3) It recognized the authority of the Bishops of the Diocese and received official episcopal visitations, which included services of confirmation and reception, on numerous occasions over the years – including every year from 1934 to 2005. JA 138, 139 (opinion below); *see*

JA 6963-64.[5]

(4) It submitted annual parochial reports. JA 106, 138 (opinion below); *see* JA 5907, 4780-5043. It contributed financially to the support of the Diocese,[6] and it contributed to the Church Pension Fund on behalf of its clergy as required by TEC Canon I.8 (JA 5694-95). JA 138.

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[5] TFC claims that a bishop cannot visit a church without an invitation by the rector. TFC Brief at 21. It is mistaken. Bishop Jones testified only that "[t]echnically, a bishop cannot … force his way into a meeting of the vestry without an invitation by the rector." JA 7184, cited in TFC Brief at 21. Bishops' official visitations are required by TEC Canon III.18.4, JA 5751. *See also* JA 5733, 8155-56.

[6] TFC stresses that its financial donations to the Diocese were "voluntary." TFC Brief at 2, 10, 45. Until 1957, however, those donations were mandatory. *See* JA 6128, 7312-13. TFC also argues that the prior mandatory system was not enforceable. TFC Brief at 10 n.2. This case deals with relationships within a church, which are characterized by mutual trust, devotion, piety, the "bonds of affection" (*see*, *e.g.*, JA 3113), and mutual commitment to a common cause, which has its ultimate accomplishment in a world beyond this one. It should be no surprise that no heavy tools of enforcement were forged for use against churches which occasionally found themselves in such financial difficulty that they were unable to meet their obligations to the general church.

"A proprietary interest or a contractual obligation does not necessarily depend upon a monetary investment." *Green*, 221 Va. at 556, 272 S.E.2d at 186. *See* JA 146-47 (opinion below). Financial relations, discussed in TFC's Brief at 8-9, 22, therefore are irrelevant. Nevertheless, TFC's attempt to belittle and minimize the Diocese's financial assistance, TFC Brief at 8, cannot stand without correction. Diocesan support for clergy and building maintenance effectively kept TFC afloat throughout the late 19th and into the 20th Centuries. The Diocese's historical expert testified, without contradiction, that diocesan assistance "was significant to [TFC's] existence," explaining that "before and after the Civil War … this was a rural congregation, and they were struggling to pay the salaries." JA 7486-87. *See* JA 7482-86. *See also* JA 5944, 5946, 5948, 5950, 5952,

(footnote continued)

(5) It provided in its Vestry Manuals and other official pronouncements that it was bound and governed by canon law. JA 138 (opinion below); *see* JA 6630, 6694, quoted *supra* at 8.

(6) Its Vestry members took oaths to "conform" or "yield [a] hearty assent and approbation to the doctrine(s), worship and discipline" of The Episcopal Church. JA 85 n.23, 138, 139 (opinion below); *see*, *e.g.*, JA 2537, 2567-68, 4336, 4345, 4374, 4381, 4453, 4506, 4508, 4531, 4587, 4642, 4671, 6383, 6405, 6578. *See also* JA 6377, 7784, 8031.

TFC argues that its Vestries' solemn avowals of a "hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church" must be ignored because the oath "includes a commitment to biblical authority." TFC Brief at 27-28. It is wrong. *Jones v. Wolf*, 443 U.S. 595, 604 (1979), does not hold that civil courts must disregard documents that contain religious terminology. The Court instead observed that "[t]he neutral-principles method, at least as it has evolved in Georgia, *requires* a

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5954, 6420 (the Rev. R.T. Brown); JA 5916-17, 5923-24, 5928, 5935, 5937-38 (the Rev. William F. Lockwood); JA 5985-88, 5993-96, 6095-96, 6099, 6104, 6107, 6109, 6874-75, 6877-78 (the Rev. R. A. Castleman); JA 5998-99, 6002-04, 6007-09 (the Rev. John McGill); JA 6020-22, 6024-25, 6029, 6034-37, 6053-55, 6062, 6067, 6200, 6869-70 (the Rev. George S. Somerville); JA 6083, 6085, 6087, 6089, 6838 (col. 1), 6840 (col. 3), 6871-73 (the Rev. A.G. Grinnan); JA 6209 (rector's moving expenses); JA 6099a, 6105 (parish house); JA 6198-99 ("[f]or roof & other repairs"); JA 4518 (support for an assistant to the rector).

civil court to examine certain religious documents" and held that civil courts must scrutinize such documents "in *purely secular terms*" and may not "*rely on* religious precepts." *Id*. at 604 (emphases added).[7]

* * * *

In sum, the dealings between the parties fit squarely within, and indeed went well beyond, the scope of the dealings that the Court described in *Green*, 221 Va. at 550, 553-54, 555, 272 S.E.2d at 182, 184-85, 186. Indeed, as one of its pillars testified, TFC was "part of the club and part of the Episcopal Church" (JA 7981) for many years. It was bound by the rules of the "club," knew it, and abided by those rules. As this Court concluded in *Green*, TFC and its leaders and members "united themselves to a hierarchical 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.

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[7] TFC understood the point earlier in this litigation. *See* JA 9069-70:

> No doubt TEC and the Diocese would like to invoke the religious terminology in these documents as a basis for asking the Court to ignore their secular legal significance…. But many of the documents contain admissions or other acknowledgements that there is a division in the denomination, and they may not be excluded simply because they also contain references to theological concepts and principles. The Court is capable of seeing the difference, as *Jones* and other decisions confirm. [Footnotes omitted.]

C. The Circuit Court correctly considered evidence of the dealings between the parties.[8] TFC interprets *Green* as holding that "'course of dealing' evidence" is relevant only where the church's governing documents make it so. *See* TFC Brief at 31-32; *see also id*. at 15-16. Nothing in *Green* supports that argument, and the analysis in that case is inconsistent with it. "The problem with this argument is that the Virginia Supreme Court never said this; nor did it even imply this; and its review of the evidence does not suggest it is the case." JA 89 (opinion below).

TFC's argument relies on the fact that some of the dealings between the parties described in *Green* are similar to those listed in ¶ 434 of the A.M.E. Zion Church Discipline. *See Green*, 221 Va. at 554 n.2, 272 S.E.2d at 185 n.2; TFC Brief at 31. There are several holes in that argument:

- First and foremost, the *Green* Court said *nothing* relating or comparing the provisions of ¶ 434 of the A.M.E. Zion Discipline to its analysis of the dealings between the parties.

- Second, the text at page 554 of the *Green* opinion, to which footnote 2 (on which TFC relies, *see* TFC Brief at 31, 32) is appended, addresses a completely different issue. It has nothing to do with "course of dealing" and

[8] The Circuit Court also "emphasized, however, that even if the Court did not consider the 'course of dealing' evidence in the instant case, it would not change the Court's ultimate conclusion." JA 101 n.39.

does not refer to the provisions on which TFC relies. The issue was the absence of a trust clause in the Lee Chapel *deed*, which was contrary to "¶ 433 of the Discipline which requires that a trust clause be incorporated in all conveyances of churches and parsonages to the A.M.E. Zion Church." *Green*, 221 Va. at 554, 272 S.E.2d at 184. The Court responded (in part) by noting that "¶ 434 of the Discipline expressly waives the requirement of a specific trust provision clause in deeds and conveyances executed prior to the adoption of the current Discipline." *Id*. The Court then quoted ¶ 434, Sec. 2 of the Discipline, in full, in its footnote 2.

- Third, the Court's discussion of the dealings between the parties included numerous matters that had nothing to do with ¶ 434 of the Discipline, including the local church's participation as "an integral part of the supercongregational or hierarchical structure" of the general church, by sending delegates to "various conferences … organized and held under the direction of the A.M.E. Zion Church" and otherwise; its use of Sunday School materials, hymnals, and other literature furnished by the general church; its conduct of religious services from the Discipline; financial relationships between the general and local churches ("[t]he church owe[d] no funds, assessments or other monies to the A.M.E. Zion Church or its Annual Conference"); the local church's and its members' support of the general church, by "payment of their assessments and in numerous other

supportive ways"; and the "presum[ed]" spiritual and other benefits to the local church resulting from the association. *See* 221 Va. at 550, 553-555, 272 S.E.2d at 182, 184-85, 186. None of those matters is mentioned in ¶ 434 of the Discipline; but they were all pertinent to the Court's evaluation of the dealings between the parties. They are pertinent here as well.

TFC identifies only three points derived from the Discipline (*see* TFC Brief at 32); and one of those – the language of the deed – is not a course of dealing issue but a separate element of this Court's four-part neutral principles test. If the Court's reason for reviewing the dealings between the parties had been to determine whether the conditions set out in ¶ 434 had been satisfied, it would have said so *and* it would not have considered other evidence of the dealings between the parties. But the Court reviewed a broad range of evidence of that nature, to determine the relationship between the local and the general church. And the Court did not determine whether the specific provision in the Discipline had been complied with. It concluded instead that "the original membership of Lee Chapel … and those members who followed thereafter, united themselves to a hierarchical 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.

The dealings between the parties are relevant for the same reasons

here. TFC's attempt to dismiss "course of dealing" evidence as irrelevant is an effort to make *Green* stand for something radically different from what it says. The argument must be rejected.[9]

D. Statutes: The Circuit Court observed that "'[i]n the case of a super-congregational church,'" Va. Code § 57-15[10] "'requires a showing that the property conveyance is the wish of the constituted authorities of the general church.'" JA 100, quoting *Norfolk*, 214 Va. at 503, 201 S.E.2d at 755 (emphasis in opinion omitted).[11]

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[9] TFC also suggests that the Circuit Court cited "course of dealing" evidence "to find a contract *to exist*." TFC Brief at 30. Elsewhere it tries to leave the impression that the Circuit Court based its finding of a contractual and proprietary relationship solely on national and diocesan canons. *See id*. at 1, 3-4, 5, 12-13, 14-15, 23-24, 25-26, 28-30, 33, 35-42, 50. Neither suggestion is accurate. The court based its findings and conclusions on all four of the neutral principles factors identified in *Green*.

[10] Section 57-15 provides, in part: "Upon evidence being produced before the court that *it is the wish of the congregation, or church or religious denomination or society, or branch or division thereof, or the constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese*, to sell, exchange, encumber, extend encumbrances, make a gift of, or improve the property or settle boundaries by agreement, the court shall make such order as may be proper …." (Emphasis added in opinion below, at JA 99.)

[11] The Circuit Court observed that TFC expressed a similar understanding of § 57-15 earlier in the case. In a brief filed on August 31, 2007, the CANA Congregations argued that "'Section 57-15's requirement of denominational approval … applies in cases such as *Norfolk Presbytery* and *Green*, where one or more congregations break away from a supercongregational church … without joining any branch.'" In other words, "in a case involving a supercongregational church (as here), where

(footnote continued)

The court also relied on Va. Code § 57-16.1. Section 57-16.1 allows church corporations (such as TFC, *see* JA 5047-51) to acquire and hold, improve, mortgage, sell, or convey real or personal property "in accordance with [the] law, rules, and ecclesiastic polity" of the "church or religious body" and in accordance with the law of the Commonwealth. *Id*. As stated in the opinion below, "the phrase 'church or religious body' includes a denomination or diocese." JA 104. In addition, when a local church "is part of a hierarchical denomination, the 'laws, rules, or ecclesiastic polity of the church or body' necessarily include and incorporate the rules, laws, and polity of the denomination of which they are a constituent member." *Id*. Thus,

> when a local church that incorporates is a constituent member of a supercongregational church, § 57-16.1 in effect provides that it cannot acquire, encumber, or dispose of its real or personal property except in accordance with the laws, rules, and polity of the denomination and diocese to which the local church belongs.

Id.

E. Deeds: The Circuit Court found as a fact, after reviewing the historical context of each of the eleven deeds, that

> "under these circumstances, any reasonable grantor would have understood that property conveyed to a local Episcopal church at that time could not be removed from the denomination without the

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§ 57-9 has been determined to be inapplicable (as here), the requirement of denominational approval applies." JA 101 n.40 (citation omitted).

> larger church's consent, and that the local church to which he or she was conveying property was bound to use, maintain, and control the property in accordance with the Church's and the Diocese's rules and ensure that property it acquired be used for the mission of The Episcopal Church and for no other denomination."

JA 128 (citation omitted).[12] TFC does not challenge that finding on appeal.

Seven of the eleven deeds to property at issue refer to the grantee as "Episcopal." TFC Brief at 9; *see* opinion below at JA 107-08. "And even as to those deeds that do not use the word Episcopal, the deeds were to trustees of 'a local church that was at the time of the conveyance indisputably an Episcopal church.'" *Id*. at JA 123 (citation omitted).[13] The court below agreed with Judge (later Justice) Stephenson's reasoning in *Diocese of Southwestern Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va.

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[12] The court's reference to "that time" is ambiguous, but it was quoting a TEC brief which referred specifically to the period from 1986 to 2006. Given TFC's agreement in 1836 to be "bound … by every rule and canon which shall be framed, by any Convention acting under [the Diocesan] constitution" (JA 5900, 5905, *quoted supra* at 8-9), however, the dates of enactment of the canons discussed in the opinion at JA 126-28 are arguably relevant in evaluating grantors' intent but irrelevant in holding that TFC is bound by those canons, whenever enacted.

[13] The one exception is a deed given in 1746, before the Revolution led to separation of the Episcopal Church from the Church of England. The Episcopal Church is the successor to the Church of England in this country, and indeed TFC was one of the founders of both the Episcopal Church and the Diocese. *See* page 4, *supra*. The Circuit Court found that the 1746 deed was neutral on the issue of grantor's intent but agreed with TEC that the property "'became subject to the Church's and the Diocese's governing documents, under *Green*, by virtue of the totality of the relationship between the local church and the Church and the Diocese.'" JA 126 n.66.

Cir. 497, 503 (Clifton Forge 1977), *pet. refused*, Rec. No. 780347 (Va. June 15, 1978), that a reference in a deed to the Episcopal character of a church indicates "'that the designated *cestui que trust* in each deed was a unit or component of The Protestant Episcopal Church ….'" JA 123. *See also* JA 125: "These deeds explicitly deed property to trustees on behalf of constituent members of the *Episcopal* denomination. The CANA Congregations are not constituent members of the *Episcopal* denomination."

TFC argues that the decision below violates neutral principles of real property law because the property deeds contain no use restrictions or restrictive covenants. TFC Brief at 16-18. They attack a straw man. This litigation presents a dispute over who owns or controls church property after a local majority's decision to leave, not a controversy over what an undisputed owner may do with the property. *See Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237, 254 (Ga. 2011) ("*Savannah II*"), *cert. dismissed*, 132 S.Ct. 2439 (2012):

> CCS and the dissent characterize this dispute as the Episcopal Church trying to take Christ Church's property. We disagree with that view of the record and the law. The First Amendment allows CCS and its members to leave the Episcopal Church and worship as they please …, but it does not allow them to take with them property that has for generations been accumulated and held by a constituent church of the Protestant Episcopal Church in the United States of America.

See also JA 122-23 (opinion below), rejecting Congregations' argument that the judgment requires "forfeiture" of properties owned by the Congregations – an argument that TFC repeats on appeal, *see* TFC Brief at 34, 35-37. That argument assumes the conclusion (*i.e.*, that the local church owns the property, free of denominational interests).[14]

TFC argues that in *Green*, "'[t]he grantors conveyed the property to "Trustees of the A.M.E. Church of Zion"'" … – not to 'Trustees of Lee Chapel.'" TFC Brief at 19; *see also id*. at 1. It ignores what it knows and has argued many times, that at the time of both the deed and the decision in *Green*, general churches could not hold either legal title or beneficial interests in property in Virginia. *See*, *e.g.*, *id*. at 7-8, 41-42; JA 8341-42 (Congregations' expert witness); *Norfolk*, 214 Va. at 506, 201 S.E.2d at 757; *Brooke*, 54 Va. at 309. As explained at length in *Brooke*, such a deed was construed as granting the property for the benefit of the local congregation. TFC's distinction fails.

F. Miscellaneous neutral principles issues: TFC argues that the

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[14] *Unit Owners Ass'n v. Gillman*, 223 Va. 752, 292 S.E.2d 378 (1982), which TFC argues at pages 35-37, therefore is irrelevant. The issue is not "forfeiture" of property but who is the rightful owner of that property.

Gillman also is irrelevant because it is a condominium association case. "The entire condominium concept, and all pertaining to it, is … a statutory creation." 223 Va. at 762, 292 S.E.2d at 383. A church is not a statutory creation and does not depend on statutory authorization to make its rules.

record does not support the Circuit Court's finding that the Diocese "exercised 'dominion' over TFC's property." TFC Brief at 20. It is wrong. The general church's only source of dominion over local property in *Green* was its "require[ment] that all property transfers be approved by the bishop." 221 Va. at 556, 272 S.E.2d at 186. The general church here has the same requirement (aside from unconsecrated property) – and many others. As the Circuit Court explained, canons requiring Diocesan consent to encumber or alienate real property or incur debt "give the Diocese 'right[s] customarily associated with ownership,' 'dominion,' and 'control,' i.e., the right to prevent property from being sold or encumbered." JA 134 n.73, quoting *Green*, 221 Va. at 555, 272 S.E.2d at 186. *See also* JA 136-37.

TFC relies on "traditional concepts of contract law." TFC Brief at 22-30. But *Green* does not parse the contractual interests of the general church in terms of offer, acceptance, consideration, mutuality, conditions precedent or subsequent, or other traditional aspects of the law of contracts involving parties other than churches. The Circuit Court correctly held that conventional contract law principles do not apply to church property cases. Local churches are units of the hierarchy and take their very identity from association with the larger church. They are not independent entities negotiating a commercial agreement at arm's length, which is the context in which such traditional contract principles typically arise.

TFC's repeated plea that it never agreed expressly or in writing to be contractually bound by denominational canons (*see* TFC Brief at 7, 12, 23, 24-26) is unavailing. "In order for an agreement to be binding, the parties must have assented to its terms. This assent, however, need not be communicated by express words but may be inferred from the conduct of the parties." *Bankers Credit Service of Vermont v. Dorsch*, 231 Va. 273, 275, 343 S.E.2d 339, 341 (1986). *See also*, *e.g.*, *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 407, 404 S.E.2d 216, 218-19 (1991) (affirming finding of an implied-in-fact contract based on "the ongoing [close working] relationship between Catlett and [Fauquier County]") (alteration in original). *Cf.* Restatement (Second) of Contracts § 22(2) ("A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined").[15]

The statements of subjection to the Constitutions and Canons in TFC's Vestry Manuals satisfy any need for an express writing. TFC's assent to be bound by the laws of the Church is thoroughly documented by the opinion below; it "presumably benefitted from the association, spiritually

[15] TFC cites *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524, 666 S.E.2d 331 (2008). *Delta Star* was "governed by the Uniform Commercial Code – Sales, Code §§ 8.2-101 *et seq*. (the UCC)." *Id*. at 526, 666 S.E.2d at 332. The UCC does not apply here.

and otherwise" (*Green*, 221 Va. at 554, 272 S.E.2d at 185) – and thus received consideration, if that is relevant; and the record shows that that it benefitted, both spiritually and temporally (*see* opinion below, JA 135-36).[16] Further, national and Diocesan Canons are *not* enacted "unilateral[ly]" (TFC Brief at 3, 13, 23-24, 36, 39, 40, 49) but in a representative process that includes each local church. *See* JA 5831-32 (Diocesan Constitution, Arts. I, III); JA 5657-58 (TEC Constitution, Art. I). TFC has been represented at Diocesan Annual Councils since 1785, including every year since 1876. JA 6964. Thus "the parties" did ensure that the Church would retain the properties, as specified in *Jones v. Wolf*, 443 U.S. at 606 (*see* TFC Brief at 23-24), by enacting Canons through canonical and democratic processes. *Cf*. *Savannah II*, 718 S.E.2d at 254 n.17 ("it appears incorrect to characterize the Dennis Canon [TEC Canon I.7.4, JA 5693] as the

[16] TFC has admitted that it "received some spiritual benefits from being part of the denomination" (CANA Congregations' Corrected Post-Trial Reply Brief (filed Oct. 18, 2011) at 69), including "spiritual input from denominational bishops" (CANA Congregations' Corrected Opening Post-Trial Brief (filed Aug. 12, 2011) at 89). *See also*, *e.g.*, JA 8153 (TFC's Rector "looked to the bishop as a spiritual shepherd"); JA 4596, 4687, 4691, 4751 (col. 2). Its "secular" benefits include assistance in recruitment of clergy, including "supply priests" who fill in from time to time; investigations of clergy recruited from other dioceses; assistance with taxes, insurance, pensions, and web site hosting; the Church Pension Fund, for individual clergy (and lay employees, at the local church's option); investment management services through the Diocesan Trustees of the Funds; loans through the Diocesan Missionary Society; and educational programs and human resources assistance – among many others. *See* JA 135-36.

'unilateral imposition of a trust provision' …. The canon was enacted through the process of representative government to which Christ Church had adhered and in which Christ Church was represented").[17]

TFC's "mutual remedy" argument (TFC Brief at 28-30) likewise fails to take account of controlling case law. The facts of this case are no different in this respect from those in *Green*. *See id*., 221 Va. at 551-52, 272 S.E.2d at 183-84. In *C.G. Blake Co. v. Smith*, 147 Va. 960, 971, 133 S.E. 685, 688 (1926), this Court quoted 6 R.C.L. 686, "as correct a statement of the prevailing law in this country as can be cited":

> It has been said that a contract implies mutual obligations. If by mutuality of obligation is meant, as some courts have suggested, that there must be an undertaking on one side and a consideration on the other, the necessity for its existence cannot be questioned.

[17] TFC also states that canons take effect "immediately," as if that were significant. TFC Brief at 23. But TFC remained a part of the Diocese for 23 years after the most recent enactment of any canon at issue, without a word of protest or objection prior to its secession. *Cf*., *e.g.*, *In re Church of St. James the Less*, 833 A.2d 319, 324-25 (Pa. Commw. 2003), ***aff'd in relevant part***, 888 A.2d 795 (Pa. 2005) (church "waited twenty years after the adoption of the Dennis canon to take action inconsistent with it"); *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 53 (Ga. App. 2010) ("*Savannah I*"), ***aff'd***, *Savannah II* ("Christ Church failed to take any steps to disavow the canon or attempted [*sic*] to remove itself from the reach of the Dennis Canon in the more than 30 years since the National Episcopal Church adopted the express trust provision"); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) ("We find it significant … that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision").

> But if, as other courts have said, mutuality of obligation means that a contract must be binding on both parties so that an action may be maintained by one against the other, the statement that mutuality of obligation is essential to every contract is too broad….

See also Sea-Land Service, Inc. v. O'Neal, 224 Va. 343, 350, 297 S.E.2d 647, 651 (1982):

> [W]here one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable .... [U]pon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration which renders the promise obligatory. [Citation omitted.]

Here, each party made numerous promises, over a period of many years; and each party performed, prior to TFC's voluntary secession. TFC's promises were embodied in, *inter alia*, its vestry oaths and manuals; its 1785 declaration of conformity "to the 'Doctrine, Discipline and Worship of the Protestant Episcopal Church'" (JA 2650-51); and its 1836 application for and acceptance of admission to membership in a Diocese whose Constitution provided that every "parish" (local church) would "be benefited and bound … by every rule and canon which shall be framed … for the government of this church in ecclesiastical concerns" (JA 5900, 5905). *See* JA 106 & n.48, 131, 137-39. The Diocese's promises included, among many others, its canons providing for visitations by bishops and for government by an Annual Council representing each of its member churches. And each party performed as promised for many years.

TFC relies on *Town of Vinton v. City of Roanoke*, 195 Va. 881, 80 S.E.2d 608 (1954). *See* TFC Brief at 28, 30. *Vinton* addressed a covenant in a 1914 deed, to provide all the water necessary to supply the Town's demands at a rate of 5¢ per thousand gallons. The covenant "lack[ed] mutality [*sic*] of promises, in that it purports to bind [the grantor] to furnish all water necessary to supply the demands of the Town, but does not bind the Town to take any amount of water." *Id*. at 896, 80 S.E.2d at 617. It was only in that context that the Court referred to "absolute mutality [*sic*] of engagement"; but the defect in *Vinton* was not the inability of either party to enforce the covenant, as TFC suggests. It was the lack of mutuality of promise, which was the *reason* that the Town could not enforce the agreement. Here there is mutuality of both promises and performances.[18]

TFC argues repeatedly that "neutral principles of law" are "developed for use in *all* property disputes." TFC Brief at 1, 14, 50 (emphasis added in TFC Brief; internal quotation marks omitted). This Court has explained how neutral principles of Virginia law apply to church property disputes, in *Norfolk* and *Green*. In the CANA Congregations' Reply Brief Pursuant to the

[18] TFC also cites 4A Mich. Jur. Contracts § 2 at 404, which in turn cites a pair of West Virginia cases and a single Virginia case (*Reston Recreation Center Associates v. Reston Property Investors Ltd. Partnership*, 238 Va. 419, 384 S.E.2d 607 (1989), which states that the Court cannot enforce agreements to negotiate). None of those authorities is controlling here.

Court's June 6, 2008 Order (filed June 26, 2008), TFC explained that the phrase "neutral principles of law, developed for use in *all* property disputes" "simply means that the *principle* must be capable of application in all property disputes – *i.e.*, without consideration of doctrinal issues." *Id*. at 2 (emphases in CANA brief). We agree.

TFC argues that in *Norfolk* this Court rejected "the idea 'that those who unite themselves with a hierarchical church do so with an implied consent to its government.'" TFC Brief at 15, 26, 50. But this is not a case of *implied* consent. TFC's consents are express – in the Constitution of the Diocese, by which it was bound, and in its own Vestry Manuals and oaths and other records. In all events, TFC overlooks the later holding in *Green*, 221 Va. at 555-56, 272 S.E.2d at 186, that the members of the local church "united themselves to a hierarchical 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." (Emphasis added.)[19] *See also*, *e.g.*, *Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 113, and *Brooke v. Shacklett*, 54 Va. at 320, quoted *supra* at 7. (There is no inconsistency between *Norfolk* and *Green*, *Reid* and *Brooke*. The Court in *Norfolk* did not "reject" the approach that it later adopted in *Green*. It

[19] TFC actually quotes from the same passage in its own Brief at 32, but without acknowledging the impact on its "implied consent" argument.

mentioned implied consent only in the context of its rejection of the "implied trust" doctrine of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *See Norfolk*, 214 Va. at 503-04, 201 S.E.2d at 755; JA 70 (opinion below).)

G. Constitutionality: TFC's constitutional argument is grounded in its illusions that the Circuit Court based its decision only on church canons and that the decision below gave plaintiffs "unilateral authority to override civil law" (TFC Brief at 39), instead of applying settled law as articulated in *Green*. TFC's real argument is that Virginia law as announced in *Green* is unconstitutional. It is wrong. The neutral principles doctrine in Virginia is nearly identical to the Georgia neutral principles doctrine that the U.S. Supreme Court approved in *Jones v. Wolf*, 443 U.S. 595. The only distinctions are that *Green* does not mention the local church's charter (Virginia churches could not incorporate when *Green* was decided) and that Georgia courts do not examine the dealings between the parties. Those differences do not render the Virginia rule unconstitutional.[20]

II. TFC's Assignment of Error 3 is waived and is without merit.

Assignment of Error 3 refers to 1904 legislation, "when the legislature

[20] *Larkin v. Grendel's Den, Inc*., 459 U.S. 116 (1982), cited in TFC's Brief at 39, involved a legislative delegation of zoning authority to private, nongovernmental entities. 459 U.S. at 122. *See also id*. at 125 (statute "conferr[ed] upon churches a veto power over governmental licensing authority"). There was no contractual or consensual aspect to that delegation and no issue of property rights. *Larkin* is irrelevant here.

first referenced denominational approval of church property transfers." TFC Brief at 4. None of the citations provided as preserving that argument, and nothing in the record below, points to that legislation. The asserted error therefore is waived.

In addition, the arguments presented purportedly in support of that Assignment of Error (TFC Brief at 41-43) are almost entirely outside the scope of the Assignment, and therefore those arguments likewise are waived. (To the extent that the argument even mentions the 1904 legislation referenced in the Assignment of Error, it describes the Circuit Court's reasoning inaccurately. *Compare* TFC Brief at 42 (trial court held that 1904 amendment "retroactively validated plaintiffs' consent canons") *with* JA 100 n.36 (opinion below) (explaining that "[t]he evolution of the statute is, itself, significant," as this Court detailed in *Norfolk*, and saying nothing about retroactivity or "validat[ion]" of canons).

TFC's "retroactiv[ity]" argument is answered, however, at 8-9 & n.3, *supra*.

III. TFC's Assignment of Error 4 is waived and is without merit.

TFC's Petition for Appeal cited a single brief filed below as preserving its Assignment of Error 4. It now has expanded that single citation to a lengthy list of references to the distinction between consecrated and unconsecrated properties, in briefs and at the trial – several of which cite to

testimony elicited by *another* church with reference to *its* properties. *None* of those citations, however, points to an *argument* that the court should treat consecrated and unconsecrated properties differently, as TFC argues now. The nearest it came to such an argument was in the opening statement of the CANA Congregations' lead counsel at the trial, which stated only that the Diocese's Canon 15 "doesn't cover unconsecrated property." JA 7066.

In a colloquy with the court later during the trial, the Congregations' lead counsel noted that "the scope of the encumbrance requirement" is limited to consecrated property. JA 8468. The court responded that "this obviously is something that the parties are going to brief," JA 8469, but TFC never did. It neither asked for nor obtained a ruling on the issue and thus did not preserve it. *E.g.*, *Nusbaum v. Berlin*, 273 Va. 385, 406, 641 S.E.2d 494, 505 (2007); *Flippo v. CSC Associates*, *III, LLC*, 262 Va. 48, 60-61, 547 S.E.2d 216, 224 (2001). That Assignment therefore is waived.[21]

If the Court nevertheless reaches the issue, it should hold that there was no error. Unconsecrated property is not "exempt from plaintiff's canons,"

[21] TFC's Brief at 44 cites the opinion below at JA 134 and JA 136 as rulings on the issue presented by Assignment 4. They are not. JA 134 is simply a portion of the court's lengthy description of the Property Rules of TEC and the Diocese (JA 133), which in turn is just one aspect of the court's findings of fact regarding the Church's Constitution(s) and Canons (JA 128). JA 136 merely describes the different rules applicable to consecrated and unconsecrated properties.

as TFC's Assignment of Error asserts. It is "exempt" only from the canon that requires diocesan consent to sell or encumber real property. All other canons applicable to church property, and all of the other elements of the neutral principles test, apply;[22] and unconsecrated property "can only be sold in accordance with procedures established and authorized by the Diocese pursuant to authority granted the Diocese by TEC's Canons." JA 136. In light of the "overwhelmin[g]" quality of the Diocese's neutral principles case (JA 149), the Circuit Court correctly held that the one canonical distinction applicable to unconsecrated property is immaterial.

IV. Ownership of a church's personal property is governed by the same rules as its real property. (Assignment of Error 5)

TFC states no valid reason why ownership of a church's personal property should not be determined under the same rules as its real property, and there is none. *Green* involved both real and personal property, 221 Va. at 548-49, 272 S.E.2d at 181, and it makes no such distinction. Va. Code § 57-10 confirms that the same rules apply. *Green* requires consideration of "our own statutes," including § 57-10. The court and all parties understood that the decision would control both realty and personalty, and TFC never

[22] The Diocese's abandonment canon (Canon 15, § 3, JA 5853), for example, applies to unconsecrated as well as consecrated properties. The Diocese's Executive Board, pursuant to that canon, declared that TFC had abandoned all of the property at issue here. *See* JA 56-57, 6860-62.

suggested anything to the contrary until after it had lost on the merits.[23]

TFC's "donative intent" argument is answered by the Circuit Court's finding regarding grantors of real property, which applies equally to donors to TFC after 2003. *See* JA 128, quoted *supra* at 23-24.

TFC and its *amici* overstate the facts by averring that donations to TFC were made "on the express condition that their gifts *not* be forwarded to plaintiffs." *E.g.*, TFC Brief at 2, 4, 46. The evidence shows only that sometime in the late 1990's (*see* JA 8201), "84 percent of the congregants at that time checked the box that they did not want their tithe to go to the Diocese and, therefore, to the national Church," JA 8202-03; and that sometime in the 2003-2006 time frame, TFC "stopped giving money to the

[23] TFC did not preserve its argument that the Diocese "waived" § 57-10. TFC argued below – in its motion for reconsideration, after the decision on the merits – only that "it is questionable" that § 57-10 "applies independently of Va. Code § 57-9" and that § 57-10 does not "override the wishes of donors" who prefer not to contribute to a general church. It did not mention waiver, and it "assum[ed], *arguendo*, that § 57-10 provides an appropriate rule in cases of unrestricted donations to a congregation." CANA Congregations' Motion for Partial Reconsideration of Personal Property Ruling (filed Feb. 22, 2012) at 9. It also noted that only TEC "invoke[d]" § 57-10 and only in its final post-trial brief, *id*. at 9 & n.9, but it did not assign any legal consequence to that fact.

All parties relied on § 57-10 in proceedings before the first appeal. TFC itself cited § 57-10 in support of an argument that "title to a church's personal property follows the deeds to its real property." CANA Congregations' Memorandum in Support of Demurrers and Pleas in Bar (filed June 22, 2007) at 19. But there would be no error if the Circuit Court had applied § 57-10 *sua sponte*. *See*, *e.g.*, *Kemp v. Miller*, 166 Va. 661, 680, 186 S.E. 99, 106 (1936) (no error in instruction given by court on its own motion).

Diocese," JA 7866. Even after TFC stopped contributing to the general operating budget of the Diocese, however, it continued giving to other Diocesan activities that were "off budget." JA 8027-28, 8263-64.

TFC's evidence as to events in the late 1990's might raise a fact question as to the intentions of "84% of the congregants at that time," if that were a material issue. But those events are too remote in time to prove the intentions of all or any fraction of TEC's donors (or even its "congregants") in 2004, 2005, or 2006.[24] Further, proof of the intentions of "84% of the congregants" is not proof of the fraction of donations given by those 84% – TFC made no attempt to trace specific donations to those donors – and it ignores the near-certainty that some portion of TFC's revenues were not donated by its members or "congregants" (*see* JA 8176-77, 8184). And the church's policy of not contributing to the Diocese in the 2003-2006 time frame was "the vestry's decision." JA 7869. The trial court might have inferred that a majority of the congregation supported that decision, *if* TFC had presented the question for decision; but it did not.

In all events, the vestry's policy proves nothing regarding the

[24] TFC admitted that "[by the time each Congregation voted to disaffiliate in 2006 or early 2007, any funds in the Congregation's bank accounts consisted of funds contributed after the curtailment of donations …." CANA Congregations' Corrected Opening Post-Trial Brief at 159 (filed Aug. 12, 2011). The intentions of donors in the late 1990's therefore are irrelevant.

intentions of any individual donor, much less all of them. Intent is an intrinsically personal, factual issue. Only five of the donor *amici* (including two clergy) testified at trial, and none of them testified that they "gave [to TFC] on the explicit understanding that their donations would not go to the Diocese or TEC" (as stated in the Brief for Donors at 2). Donors' intent simply was not an made an issue by TFC's very able counsel at the trial, and the evidence does not prove that any (much less all) donors imposed express conditions on their donations.

The central premise of the Attorney General's and the Donors' *amicus* arguments appears to be that the judgment below "'compel[s TFC's donors] to furnish contributions of money for the propagation of opinions which [they] disbeliev[e].'" Attorney General's Brief at 8, 12, and Donors' Brief at 1, 14, quoting Va. Code § 57-1. *See also* TFC Brief at 47 (same). But the premise is false. No donors or members of the church are parties (other than its trustees, and only in their official capacity); the judgment does not run against any individuals, only the incorporated church (and its trustees, in that capacity only); and if TFC were to prevail on this issue, the funds would be returned to TFC and not to the donors.

TFC's *members* have not been "force[d]" or "'compelled'" to give (or to do) anything (TFC Brief at 46, 47), and its *amici*'s "religious freedom" arguments are inapposite. TFC's donors contributed to an Episcopal

church, which operated under the supervision of an Episcopal Bishop, and the donors knew that. *See* JA 156 (opinion below) ("Whatever may have been the level of discord and disenchantment with TEC and the Diocese, each of the seven churches in 2003, 2004, 2005, and through most of 2006 remained *Episcopal* churches, constituent members of the Diocese and TEC"). The judgment below requires the return of funds from TFC, not its members, to the mission of the Episcopal Church; and at least part of those funds will advance the mission of The Falls Church (Episcopal). *See* Tr. 1389-97 (May 4, 2011) (discussing genesis and activities of The Falls Church (Episcopal), which reorganized as a continuing Episcopal congregation after the congregation of appellant TFC voted to sever its ties with the Diocese and the Church); DX-FALLS-312 (The Falls Church (Episcopal) 2010 Annual Report); JA 152-53, 154 (opinion below).

TFC's donors contributed to a church that was "bound by the national and diocesan constitutions and canons." *Truro*, 280 Va. at 15, 694 S.E.2d at 559. A Diocesan Canon provides that "whenever any property, *real or personal*, formerly owned or used *by any congregation of the Episcopal Church in the Diocese of Virginia* … has ceased to be so occupied or used *by such congregation*, so that the same may be regarded as abandoned property," the Diocese's Executive Board "shall have the authority to declare such property abandoned and … to take charge and custody

thereof." JA 5853 (emphases added).[25] The Executive Board did just that, after TFC ceased to be an Episcopal Church. JA 6860-62. As Judge Stephenson stated in *Buhrman*, 5 Va. Cir. at 507, "it is most doubtful if that determination is subject to review by [a civil] court."

V. The Circuit Court only granted relief that plaintiffs requested. (Assignment of Error 6)

The Church and the Diocese did plead claims for all relief granted. *Cf*. *Jenkins v. Bay House Assocs.*, 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003) (quoted in TFC Brief at 49). The Diocese's Complaint asks for an order directing the trustees to convey and transfer legal title to TFC's real and personal property to the Bishop. JA 207. TEC's Complaint similarly requests an injunction requiring all defendants "to relinquish control of the real and personal property held by the parishes to the Diocesan Bishop." JA 232.

Pages 48-49 of TFC's Brief quote a statement by TEC's counsel at a hearing on September 19, 2008. That statement has nothing to do with this issue. Its context was a discussion of property subject to the Congregations' § 57-9 petitions, which were rejected by the *Truro* decision. The court had previously suspended discovery and ordered that the October 2008 trial

[25] TFC's statement that "nothing here put the donors on notice that plaintiffs could seize their restricted gifts" (TFC Brief at 48) is thus erroneous as a matter of law as well as an inaccurate and inflammatory description of the facts.

would be limited to issues related to those petitions. Order, Sept. 3, 2008.

TFC's Brief also cites the Diocese's October 14, 2011, post-trial brief (JA 9142). That brief quoted an Ohio case,[26] which did not even discuss the date of the "disaffiliation" – the issue that TFC argues in its brief. The Circuit Court made a reasoned and reasonable decision that the date of disaffiliation in this case was the date the Diocese filed suit, for "[a]fter this date, no contribution made, no donation made, no dues paid by a congregant, could reasonably have been made with the understanding that the money was going to *Episcopal* congregations." JA 157.

Finally, TFC relies on a statement by the Diocese's counsel at a discovery hearing on May 30, 2008. "[T]o the extent they have used those assets to pay for the property or to maintain the property, that's fine" is not a "stipulat[ion]" that TFC was entitled to a $2.6 million credit, as it argues. And the Circuit Court reasonably found that the maintenance costs at issue were the approximate equivalent of the property's rental value. *See* JA 157 n.85 (responding to maintenance costs argument by "not[ing] the obvious fact that the CANA Congregation[s] had the use of the property since that point in time as well"). Further, TFC requested a maintenance costs award only in its

[26] *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973 (Ohio Common Pleas, Cuyahoga Co., Sept. 29, 2011) (copy attached, pursuant to Rule 5:1(f)) (Addendum 2).

counterclaim. The Circuit Court struck TFC's evidence in support of the counterclaim. TFC has not assigned error to that ruling here.

VI. The Circuit Court erred by holding that Va. Code § 57-7.1 does not validate trusts for the benefit of a hierarchical church. (Assignment of Cross-Error)

In 1993 the General Assembly enacted Va. Code § 57-7.1 and repealed Code § 57-7.[27] This Court had construed § 57-7 as not validating trusts for the benefit of hierarchical churches, for reasons that do not apply to § 57-7.1. Section 57-7.1 provides, in language too plain to require interpretation, that "*[e]very* conveyance or transfer of real or personal property … to or *for the benefit of any* church, *church diocese*, religious congregation or religious society … shall be valid." (Emphases added.)

The Circuit Court held that § 57-7.1 "'did not change the policy in Virginia, which is that church property may be held by trustees for the local congregation, not for the general church.'" JA 93 (quoting a previous opinion). That was error, for several reasons.

First, § 57-7.1 should be interpreted in accordance with its plain language, which differs significantly from prior statutes (as described below). "Under basic rules of statutory construction, we consider the language of [a statute] to determine the General Assembly's intent …. When a statute's

[27] Section 57-7.1 and former § 57-7 are set out in full in Addendum 1.

language is plain and unambiguous, courts are bound by the plain meaning of that language." *Woods v. Mendez*, 265 Va. 68, 74-75, 574 S.E.2d 263, 267 (2003) (citations omitted). In addition, ascribing to the modern § 57-7.1 the interpretation of the former § 57-7 would impermissibly give no meaning to the repeal of § 57-7 or the changes embodied in § 57-7.1. *See*, *e.g.*, *Dale v. City of Newport News*, 243 Va. 48, 51, 412 S.E.2d 701, 702 (1992) (citing the "presumption that a substantive change in law was intended by an amendment to an existing statute").[28]

Second, the General Assembly has done away with every basis on which this Court's decisions interpreting prior statutes relied. For many years, beginning with *Brooke v. Shacklett*, 54 Va. 301, this Court construed

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[28] TFC argued below that the repeal of § 57-7 and enactment of § 57-7.1 changed nothing because the enacting Bill stated that § 57-7.1 was "declaratory of existing law." That phrase does not necessarily endorse prior cases. *See Bryson on Virginia Civil Procedure* § 12.02 n.14 (4th ed. 2005), explaining that 1992 Va. Acts, ch. 564 – which stated that it was "declaratory of existing law" – was enacted "to clarify the law in the light of Lee v. Lee," 12 Va. App. 512, 404 S.E.2d 736 (1991). In fact, ch. 564 effectively overruled *Lee v. Lee*.

The General Assembly is presumed to have acted "with full knowledge of the law as it affected the subject matter." *Commonwealth v. Bruhn*, 264 Va. 597, 602, 570 S.E.2d 866, 869 (2002). Cases decided after *Norfolk* (*e.g.*, *Jones v. Wolf*, 443 U.S. 595, and the *Wallace* and *Lukumi* cases cited *infra* at 48) have made clear that trusts for hierarchical churches must be recognized equally with those for other beneficiaries. By enacting a "declaratory" statute, § 57-7.1, the Assembly has conformed our statutes to constitutional standards by providing that allowable beneficiaries include hierarchical as well as local groups.

§ 57-7 and its predecessors as limited to validating trusts for local church groups. In *Moore v. Perkins*, 169 Va. 175, 178-82, 192 S.E. 806, 808-09 (1937), the Court stated four reasons for adhering to that construction: (1) the uses for which the statute allowed land to be held, "'from their very nature and the connection in which they are mentioned, must belong peculiarly to the local society'" (quoting *Brooke*, 54 Va. at 313); (2) subsequent amendments had not "material[ly] change[d] … the language of the first part of the statute"; (3) the statute referred to trusts controlled by "local functionaries"; and (4) separate statutes limited church property ownership to four acres of land in the city, 75 acres in the country, and $100,000 in personal property, negating any inference that the General Assembly intended to allow "denominational holdings." The *Norfolk* Court added (5) that the Constitution of Virginia then "prohibit[ed] … incorporating any church or religious denomination." *Id*. at 505, 201 S.E.2d at 757.

Each of those reasons is gone:

(1) The uses validated by the statute are no longer limited to those which "belong peculiarly to the local society." Section 57-7.1 provides that "*[e]very* conveyance or transfer of real or personal property … made to or for the benefit of *any* church, *church diocese*, religious congregation or religious society … shall be valid."

(2) The first part of § 57-7.1 is different from the former § 57-7 in a

number of material respects, most significantly in the removal of the former limitation of permissible uses for church dioceses ("as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church diocese" in § 57-7).

(3) Section 57-7.1 is not limited to trusts controlled by "local functionaries." The former language of limitation ("as a place for public worship, or as a burial place, or a residence for a minister," and so forth) is gone.

(4) Virginia's acreage limits on church property ownership (former § 57-12) have been repealed. 2003 Va. Acts ch. 813.

(5) The prohibition on incorporation of churches and denominations was held unconstitutional in *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002). The General Assembly responded by enacting Code § 57-16.1, which allows incorporation of churches and explicitly defers to a church's "laws, rules, or ecclesiastic polity," and the people of Virginia approved an amendment to the Constitution to delete the ban on incorporation.

Section 57-7.1 therefore should be construed as validating trusts for denominational churches. Such a trust is stated by TEC's Dennis Canon, TEC Canon I.7.4, JA 5693, and Diocesan Canon 15.1, JA 5852.

If § 57-7.1 does not allow church property to be held in trust for the Diocese, however, then it is unconstitutional. Article I, § 16 of the Constitution of Virginia provides that "all men are equally entitled to the free exercise of

religion, according to the dictates of conscience" and, further, that "the General Assembly shall not … confer any peculiar privileges or advantages on any sect or denomination." The Free Exercise Clause likewise "'protect[s] religious observers against unequal treatment.'" *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993) (citation omitted). *See also*, *e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (the First Amendment mandates that government "pursue a course of complete neutrality toward religion").

It is obvious and undisputed that property may be held in trust for local, congregational churches as well as for local, regional, and national secular entities. To deny the same right to hierarchical churches would discriminate unconstitutionally, based on religious and denominational distinctions, and violate the Constitutional mandate of complete governmental neutrality toward religion. Any construction of a statute that raises such questions should be avoided. *See*, *e.g.*, *L.F. v. Breit*, ___ Va. ___, ___ S.E.2d ___, Record No. 120158, slip op. at 16-17 (Va. Jan. 10, 2013). But if those issues are not avoided by construing § 57-7.1 according to its plain language, as discussed above, then it is unconstitutional and void.

Jones v. Wolf, 443 U.S. 595, compels the same conclusion. The U.S. Supreme Court held in *Jones* that civil courts may resolve church property disputes by applying neutral principles of law. *Id*. at 604. Four dissenting

Justices argued that "whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself,'" to protect constitutionally-guaranteed free exercise rights. *Id*. at 604-05 (quoting the dissent, *id*. at 614); *see id*. at 605-06 (quoting the dissent, *id*. at 618).[29] The Court responded as follows:

> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion …. 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 (emphases added).[30] *Accord*, *id*. at 607-08. A church's ability to

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[29] "Normally, the dissent would not be of great significance …. But the majority responded," and "[t]he dissent is important to give context and meaning to [that] response." *Episcopal Church Cases*, 198 P.3d 66, 79-80 (Cal. 2009).

[30] TFC argues that plaintiffs' Canons are not "embodied in some legally cognizable form." TFC Brief at 12, 38. *Jones* does not permit that conclusion. *See* 443 U.S. at 604 ("[t]he neutral-principles method … requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms …"). It is only documents that require "'inquiry into religious doctrine'" that are not "legally cognizable." *See id*. at 603 (quoting *Maryland and Virginia Eldership v.*

(footnote continued)

overcome a "rule of majority representation," *id*. at 607, and "ensure … that the faction loyal to the hierarchical church will retain the church property," *id*. at 606, by amending its governing documents, thus was essential to the Court's conclusion that application of a "neutral principles" rule would not violate the First Amendment. To hold that church property disputes will be governed by "neutral principles," but that a civil court may disregard express trust provisions in the constitutions of general churches, would be both to defy the Court's holding that "the civil courts will be bound to give effect" to such provisions and to eviscerate the basis for its holding that the neutral principles approach does not "'inhibit' the free exercise of religion."

CONCLUSION

The decision below applied settled law to the facts as established by the evidence and found by the court. The judgment should be affirmed in all respects. The judgment also should be affirmed on the alternative ground that Va. Code § 57-7.1 validates the trust interests created by national and Diocesan Canons.

Church of God at Sharpsburg, Inc., 396 U.S. 367, 368, 370 (1970) (Brennan, J., concurring); *id*. at 604 (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976), and *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969)).

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 § 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 appellant 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 1

Va. Code § 57-7. What transfers for religious purposes valid. (Repl. Vol. 1969). (Repealed, 1993 Va. Acts, ch. 370)

Every conveyance, devise, or dedication shall be valid which, since the first day of January, seventeen hundred and seventy-seven, has been made, and every conveyance shall be valid which hereafter shall be made of land for the use or benefit of any religious congregation as a place for public worship, or as a burial place, or a residence for a minister, or for the use or benefit of any church diocese, church, or religious society, as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church diocese, church or religious society, and employed under its authority and about its business; and every conveyance shall be valid which may hereafter be made, or has heretofore been made, of land as a location for a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church or of land as a place of residence for the sexton of a church, provided such land lies adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant; or for use in furtherance of the affairs of any church diocese, and the land shall be held for such uses or benefit and for such purposes, and not otherwise. And no gift, grant, or bequest hereafter made to such church diocese, church or religious congregation, or the trustees thereof, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such gift, grant, or bequest in any case where lawful trustees of such church diocese, church or congregation are in existence, or the church diocese, or the congregation is capable of securing the appointment of such trustees upon application as prescribed in the following section (§ 57-8); but such gift, grant, or bequest shall be valid, subject to the limitation of § 57-12; provided, that whenever the objects of any such trust shall be undefined or so uncertain as not to admit of specific enforcement by the chancery courts of the Commonwealth, then such gift, grant, or bequest shall inure and pass to the trustees of the beneficiary church diocese or congregation, to be by them held, managed, and the principal or income appropriated for the religious and benevolent uses of the church diocese or congregation, as such trustees may determine, by and with the approval of the vestry, board of deacons, board of stewards, or other authorities which, under the rules or usages of such church diocese, church

or congregation, have charge of the administration of the temporalities thereof.

Provided that any devise of property after January one, nineteen hundred fifty-three, for the use or benefit of any religious congregation, wherein no specific use or purpose is specified shall be valid. (Code 1919, § 38; 1954, c. 268; 1956, c. 611; 1962, c. 516.)

Va. Code § 57-7.1. What transfers for religious purposes valid.

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

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

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

(1993, c. 370; 2005, c. 772.)

ADDENDUM 2

Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration, No. CV-08-654973 (Ohio Common Pleas, Cuyahoga Co., Sept. 29, 2011)

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EPISCOPAL DIOCESE OF OHIO ET AL
Plaintiff

ANGLICAN CHURCH OF THE TRANSFIGURATION ET AL
Defendant

Case No: CV-08-654973

Judge: DEENA R CALABRESE

JOURNAL ENTRY

NOW PENDING BEFORE THE COURT IS PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT AS TO THE INTANGIBLE PERSONAL PROPERTY OWED BY DEFENDANTS ST. BARNABAS ANGLICAN CHURCH AND ST. LUKE'S ANGLICAN CHURCH. THE COURT FINDS PLAINTIFFS' ARGUMENTS WELL TAKEN, AND HEREBY GRANTS THE MOTION.

PLAINTIFFS COMPELLINGLY ARGUE THAT IN REACHING THE FIGURES THEY URGE THE COURT TO ADOPT AND INCLUDE IN ITS FINAL JUDGMENT ENTRY AND ORDER, THEY TOOK AT FACE VALUE THE FINANCIAL DATA THAT DEFENDANTS PROVIDED. THEY FURTHER ARGUE THAT THEY ARE WILLING TO ACCEPT LESS THAN THE SUMS THEY ARE ENTITLED. FOR EXAMPLE, PLAINTIFFS FORGO SUMS OBTAINED AFTER THE 2005 DISAFFILIATION, ARE WILLING TO ACCEPT THE CONSERVATIVE SUM OF $25,000 (RATHER THAN HIGHER VALUES REFLECTED IN THE 2005 BALANCE SHEETS) FOR ARTICLES SUBJECT TO DISPOSAL OR DEPRECIATION, AND DO NOT SEEK PREJUDGMENT INTEREST.

DEFENDANTS COUNTER THAT PLAINTIFFS' MOTION IS PREMATURE, GIVEN THE PENDENCY OF DEFENDANTS' OCCUPYING CLAIMANTS COUNTERCLAIMS. THIS ARGUMENT IS NOW MOOT. THE COURT HAS, BY JUDGMENT ENTRY THIS SAME DAY, GRANTED SUMMARY JUDGMENT TO PLAINTIFFS ON THOSE COUNTERCLAIMS.

DEFENDANTS FURTHER ARGUE THAT THE 2005 BALANCE SHEET FIGURES ARE SUBJECT TO REDUCTION BECAUSE OF SUBSEQUENT EXPENDITURES ON PROPERTY IMPROVEMENTS AND MAINTENANCE. FIRST, THIS ARGUMENT IS AT LEAST PARTLY FORECLOSED BY THE ABOVE-REFERENCED RULING REGARDING THE OCCUPYING CLAIMANTS COUNTERCLAIMS. SECOND, PLAINTIFFS CORRECTLY ASSERT THAT DEFENDANTS' ARGUMENT RELIES ON THE SUPPOSITION THAT MONEY ON HAND AT THE TIME OF THE 2005 DISAFFILIATION WAS THE EXCLUSIVE POOL OF CASH AVAILABLE FOR PARISH MAINTENANCE AND THE LIKE. IN SHORT, IT IGNORES REGULAR DONATIONS AND OTHER SOURCES OF INCOME FROM 2005 ONWARD.

DEFENDANTS ALSO PLACE SUBSTANTIAL EMPHASIS ON DONATION RESTRICTIONS FROM 2004 FORWARD (I.E., PARISHIONERS' DESIGNATIONS THAT DONATIONS MUST BE USED FOR THE PARISH ALONE, WITH NOTHING TURNED OVER TO THE DIOCESE OR THE EPISCOPAL CHURCH). THEY ARGUE THAT "CONSTRUING A TRUST ON THESE GIFTS VIOLATES THE CLEAR INTENT OF THE DONORS." DEFENDANTS' OPPOSITION AT 5.

PLAINTIFFS ARE CORRECT THAT THIS ARGUMENT IS FORECLOSED BY THE COURT'S OMNIBUS OPINION AND ORDER, WHICH FOUND AN EXPRESS TRUST IN FAVOR OF THE EPISCOPAL CHURCH AND THE DIOCESE ON ALL REAL AND PERSONAL PROPERTY OF THE PARISHES. AS PLAINTIFFS POINT OUT, THE SUPPOSEDLY RESTRICTED DONATIONS TENDERED BEFORE THE DISAFFILIATION WERE GIVEN TO EPISCOPAL PARISHES THAT ANSWERED TO THE DIOCESE, AND PLAINTIFFS DO NOT SEEK DONATIONS MADE AFTER THE DISAFFILIATION.

PLAINTIFFS' MOTION IS GRANTED. THE COURT'S FINAL JUDGMENT ENTRY AND ORDER WILL REFLECT THE PRECISE AMOUNTS OWED BY DEFENDANT ST. BARNABAS ANGLICAN CHURCH AND DEFENDANT ST. LUKE'S ANGLICAN CHURCH WITH RESPECT TO INTANGIBLE PERSONAL PROPERTY.

09/29/2011

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Judge Signature 09/29/2011

THE STATE OF OHIO } SS, I, GERALD E. FUERST, CLERK OF
Cuyahoga County } THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND COPIED FROM THE ORIGINAL
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 29th
DAY OF Sept A.D. 20 11
GERALD E. FUERST, Clerk
By , Deputy

09/29/2011

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GERALD E. FUERST, CLERK