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 FOR APPELLANT THE FALLS CHURCH

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ASSIGNMENTS OF ERROR 4

STATEMENT OF THE CASE AND PROCEEDINGS BELOW 5

STATEMENT OF FACTS... 6

A. The Falls Church and its real property....................................... 6

B. The Falls Church's personal property and financial independence 10

C. The Falls Church's autonomy in the selection of clergy, operation of its services and outreach, and governance 11

D. TEC, the Diocese, and their internal church canons 12

ARGUMENT.. 14

Standard of Review 14

I. Under "neutral principles of law, developed for use in all property disputes," TFC owns all of its real property. Assignment #1............ 14

A. The trial court neglected neutral principles. Assignment #1. ... 15

1. The trial court contravened neutral principles of real property law. 16

Deed interpretation 16

Dominion 20

2. The trial court also contravened neutral rules governing contract formation and enforceability. 22

a. TFC never affirmatively agreed to grant plaintiffs contractual rights in its property. 23

b. Plaintiffs' canons lack a mutual remedy. 28

c. Plaintiffs' canons lack valid consideration. 30

d. The trial court erred in relying on "course of dealing" evidence to find a contract to exist. 30

e. Even if the canons otherwise created a contract, Virginia law bars association rules that purport to encumber or forfeit members' property. 35

3. A genuine neutral principles approach does not compel enforcement of denominational rules that do not satisfy the neutral requirements of civil law. 37

B. Enforcing church canons unconstitutionally grants plaintiffs property rights enjoyed by no other entity. Assignment #2. 39

II. The trial court divested TFC of property by retroactively applying statutes and canons passed after the conveyances at issue, in violation of state law and the Contracts Clause. Assignment #3. 41

III. The trial court erred in ruling that plaintiffs have a proprietary interest in TFC's unconsecrated real property, which TFC was free to buy, sell, or mortgage in its sole discretion. Assignment #4. 43

IV. The trial court erred in divesting TFC of its personal property despite undisputed proof of TFC's total dominion over that property —including the right to withhold donations from plaintiffs—and of TFC's donors' contrary intent. Assignment ## 5 & 6........................ 44

A. TFC had total dominion over its personal property, and its donations to plaintiffs were voluntary. Assignment #5. 45

B. Section 57-10 cannot trump donor intent. Assignment #5. 46

C. The trial court erred in awarding plaintiffs more relief than they requested. Assignment #6. 48

CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

VIRGINIA CASES

Berner v. Mills,
265 Va. 408 (2003) 43

Davis v. Mayo,
82 Va. 97 (1886) 36

Davis v. Wickline,
205 Va. 166 (1964) 34

Delta Star, Inc. v. Michael's Carpet World,
276 Va. 524 (2008) 31, 33

Diocese of Southwest Va. v. Buhrman,
5 Va. Cir. 497 (Clifton Forge 1977) 25

Diocese of Sw. Va. v. Wyckoff,
(Amherst Co. Nov. 16, 1979) 18

Finley v. Brent,
87 Va. 103 (1890) 43

Gottlieb v. Economy Stores,
199 Va. 848 (1958) 36

Green v. Lewis,
221 Va. 547 (1980) 1-2, 15-16, 19-20, 23, 31-33, 41, 44-45

Jenkins v. Bay House Assocs.,
266 Va. 39 (2003) 49

Jeter v. Commonwealth,
44 Va. App. 733 (2005) 46

Jones v. Peacock,
267 Va. 16 (2004) 27

Leonard v. Counts,
221 Va. 582 (1980)..24

McGehee v. Edwards,
268 Va. 15 (2004)..42

Norfolk Presbytery v. Bollinger,
214 Va. 500 (1974)..............................1, 15-16, 26, 33, 38, 40, 45-46, 51

Phillips v. Mazyck,
273 Va. 630 (2007)..24

Protestant Episcopal Church v. Truro Church,
280 Va. 6 (2010)...1, 4-5, 14, 51

Quatannens v. Tyrrell,
268 Va. 360 (2004)..20-21

Scott v. Walker,
274 Va. 209 (2007)..16-18

Seward v. New York Life Ins. Co.,
154 Va. 154 (1930)..30

Shirley v. Shirley,
259 Va. 513 (2000)..33

Unit Owners' Ass'n v. Gillman,
223 Va. 752 (1982)..36-37

Vinton v. Roanoke,
195 Va. 881 (1954)..28, 30

OTHER STATE CASES

All Saints Parish Waccamaw v. Protestant Episcopal Church,
685 S.E.2d 163 (S.C. 2009) 24, 39

Arkansas Annual Conf. of AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc.,
291 S.W.3d 562 (Ark. 2009)...19

Arkansas Presbytery v. Hudson,
40 S.W.3d 301 (Ark. 2001) 39, 42

Bjorkman v. Protestant Episcopal Church,
759 S.W.2d 583 (Ky. 1988) 35

Carrollton Presbyterian Church v. Presbytery of South La.,
77 So.3d 975 (La. Ct. App. 2011) 39

Foss v. Dykstra,
342 N.W.2d 220 (S.D. 1983) 19, 35

Heartland Presbytery v. Gashland Presbyterian Church,
364 S.W.3d 575 (Mo. Ct. App. 2012) 39

Hope Presbyterian Church v. Presbyterian Church (U.S.A.),
2012 WL 5956177 (Or. Nov. 29, 2012) 39

In re Church of St. James the Less,
888 A.2d. 795 (Pa. 2005) 26

John Crane, Inc. v. Hardick,
732 S.W.2d 1 (Va. 2012) 14

Presbytery of Beaver-Butler v. Middlesex Presbyterian Church,
489 A.2d 1317 (Pa. 1985) 19, 35

Presbytery of Ohio Valley, Inc. v. OPC, Inc.,
973 N.E.2d 1099 (Ind. 2012) 38

York v. First Presbyterian Church,
474 N.E.2d 716 (Ill. App. 1984) 35

FEDERAL CASES

Board of Educ. v. Grumet,
512 U.S. 687 (1994) 40

Church of God in Christ, Inc. v. Graham,
54 F.3d 522 (8th Cir. 1995) 39

Employment Div. v. Smith,
494 U.S. 872 (1990) 40

Everson v. Board of Educ.,
330 U.S. 1 (1947) 3, 48

Jones v. Wolf,
443 U.S. 595 (1979) 4, 24, 28, 33, 38, 40

Larkin v. Grendel's Den,
459 U.S. 116 (1982) 40

Presbyterian Church v. Hull Church,
393 U.S. 440 (1969) 29

Thomas v. Review Bd.,
450 U.S. 707 (1981) 28

VIRGINIA STATUTES AND CONSTITUTIONAL PROVISIONS

Va. Code § 1-248 36

Va. Code § 2.2-507.1 .... 3, 49

Va. Code § 57-1 .... 3, 5, 48

Va. Code § 57-4 49

Va. Code § 57-7.1 .... 24, 47

Va. Code § 57-9(A) 5

Va. Code § 57-10 .... 2, 5, 45-48

Va. Code § 57-15 .... 15, 42-43, 46

Va. Code § 57-16(A) 18

Va. Const. Article I, § 11 43

Va. Const. Article I, § 16 .... 3, 39-40

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment I 3, 28, 39, 48

U.S. Const. Article I, § 10 43

OTHER STATE STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

Cal. Corp. Code § 9142(c)(2) 37

N.Y. McKinney's Relig. Corp. Law § 42-a 37

OTHER AUTHORITIES

6 Am. Jur. 2d, *Associations & Clubs* § 6 36

4A *Michie's Jurisprudence*, Contracts § 2 (2007) 28

4A *Michie's Jurisprudence*, Contracts § 34 (2007) 30

Restatement (Second) of Contracts § 23 26

West's Encyclopedia of American Law (2d ed. 2005) 20

GLOSSARY

Diocese	The Protestant Episcopal Church in the Diocese of Virginia
Diocese Opp.	Brief in Opposition and Assignment of Cross-Error of the Protestant Episcopal Church in the Diocese of Virginia
TEC	The Protestant Episcopal Church in the United States of America
TEC Opp.	Brief in Opposition and Assignment of Cross-Error of the Protestant Episcopal Church in the United States of America
TFC or Church	The Falls Church
8/12/11 Br.	CANA Congregations' Corrected Opening Post-Trial Brief (filed Aug. 12, 2011)
8/12/11 Proposed Findings	CANA Congregations' (Corrected) Proposed Findings of Fact for their Opening Post-Trial Brief (filed Aug. 12, 2011)
9/16/11 Br.	CANA Congregations' Post-Trial Opposition Brief (filed Sept. 16, 2011)
10/18/11 Br.	CANA Congregations' Corrected Post-Trial Reply Brief (filed Oct. 18, 2011)
2/22/12 Br.	CANA Congregations Motion for Partial Reconsideration of Personal Property Ruling (filed Feb. 22, 2012)

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of the trial court's decision to divest The Falls Church ("TFC") of ownership of $30 million of real and personal property. In reversing an earlier judgment, this Court cited *Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Green v. Lewis*, 221 Va. 547 (1980), and charged the trial court to decide the question of ownership "under principles of real property and contract law." *Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 29 (2010). Those decisions require "'application of neutral principles of law'"—rules "'developed for use in *all* property disputes.'" *Norfolk*, 214 Va. at 504. Yet the trial court relied not on neutral indicia of ownership—such as deed language or who paid or cared for the property—but rather on internal church canons that have no role in secular cases and fail to satisfy Virginia property or contract law. That was reversible error.

In contrast to *Green*, where the denomination was "the grantee" and its "contractual" right "ha[d] its genesis in the … deed" (221 Va. at 555, 556), plaintiffs here—The Episcopal Church ("TEC") and its local Diocese—admit that "[n]either [plaintiff] is specifically named as a grantee as such in any [TFC] deeds." A7033. Title to the property at issue has always been held solely by TFC's vestry or trustees. TFC paid for construction and upkeep. And unlike several deeds of other churches defending the lawsuit

below—which subjected the use of their property "to the Constitution, canons & regulations of the Protestant Episcopal Church" (A110)—*none* of TFC's 11 deeds refers to either the denomination or its canons.

The trial court's decision to divest TFC of $4 million of personal property is equally troubling. Plaintiffs did not pay for this personal property, and they have no legal claim to any part of TFC's funds. Unlike in *Green*, where the congregation was *required* to provide funding to support the denomination (221 Va. at 551), the denomination's pledge system here was "completely voluntary." A7379-80. TFC alone decided what, if anything, to give to plaintiffs. It withheld or restricted gifts in its discretion, and in 2003 it cut off all giving to plaintiffs. These facts cannot be squared with the notion that plaintiffs owned or had dominion over TFC's funds.

Even more disturbing, the trial court ignored undisputed proof that, for many years, TFC's members donated on the express condition that their gifts *not* be forwarded to plaintiffs. Rather than honor the donors' intent, the court held that under Va. Code §57-10—a law plaintiffs never invoked in their complaints or at trial—"the personal property … follows the disposition of the real property." A156. It even divested TFC of funds given *after* TFC disaffiliated, reasoning that, until plaintiffs sued, the donors were still giving to an "Episcopal" entity. *Id*. This ruling violates both statutes protect-

ing donors' right to restrict their gifts (Va. Code §§ 57-1, 2.2-507.1) and the First Amendment. *Everson v. Board of Educ.*, 330 U.S. 1, 11-16 (1947).

The ruling below has other constitutional infirmities. First, by allowing denominations to transfer ownership of the property of affiliated churches simply by passing internal canons—without being named in deeds, paying the mortgage, or assuming other burdens of ownership—the ruling grants plaintiffs unilateral power to override the protections of civil law. No other private entity in Virginia has such sweeping power over others' property. The ruling thus violates the First Amendment and Virginia's ban on "confer[ring] any peculiar privileges or advantages on any sect or denomination." Va. Const. art. I, § 16. Second, in applying state law *retroactively*—to award plaintiffs property that TFC acquired both before plaintiffs' canons were adopted and even before TFC joined the denomination—the ruling violates the Contracts Clause of the federal and state constitutions.

In sum, the ruling below misread Virginia law. Churches reading *Norfolk* or *Green* and learning that Virginia applies "neutral principles" would have no inkling that property ownership might turn on internal church *canons* passed without their express consent. Under neutral principles, the enforceability of canons should turn on whether the canons are embodied in "legally cognizable form" under ordinary property and contract law. *Jones*

v. Wolf, 443 U.S. 595, 606 (1979). Indeed, the whole point of the neutral principles approach is to avoid compelling courts to "defer to the resolution of … the hierarchical church," or to its "laws and regulations." *Id*. at 597, 609. But that is precisely what the court below did, citing plaintiffs' "hierarchical" polity some *35 times* and their canons over *150 times*. In sum, the decision below cannot be reconciled with "principles of real property and contract law" (*Truro*, 280 Va. at 29), and must therefore be reversed.

ASSIGNMENTS OF ERROR

1. The trial court erred in enforcing canon law, rather than "principles of real property and contract law" used in all cases (*Truro*, *supra*), to award plaintiffs a proprietary interest in TFC's property and to extinguish TFC's interest in such property, even though TFC's own trustees held title and TFC paid for, improved, and maintained the property. A13, 8/12/11 Br. 1-153, 9/16/11 Br. 1-76, 10/18/11 Br. 1-83, 8/12/11 Proposed Findings 1-40.

2. The trial court's award of TFC's property to plaintiffs violates the Religion Clauses of the U.S. and Virginia Constitutions by enabling denominations to secure others' property by means available to no other Virginia entity. A13, 8/12/11 Br. 123-135, 10/18/11 Br. 71-75.

3. The trial court erred in finding that plaintiffs had proprietary interests in TFC's real property acquired before 1904, when the legislature first referenced denominational approval of church property transfers. A13, A9120-28, A9130-31, A9149-52.

4. The trial court erred in awarding plaintiffs TFC's unconsecrated realty, which is exempt from plaintiffs' canons. A9132-35, A7066, A7195-98, A7284-88, A7669, A7778, A7874, A7950-52, A8012-14, A8467-69.

5. The trial court erred in awarding TFC's personal property to plaintiffs—even though plaintiffs never had any control over TFC's funds or their use, and TFC's donors, for religious reasons, gave on the express condition that their gifts *not* be forwarded to plaintiffs—in violation of Va. Code

§57-1 and the Religion Clauses of the U.S. and Virginia Constitutions. 8/12/11 Br. 102-14, 9/16/11 Br. 54-56, 10/18/11 Br. 64-70, 2/22/12 Br. 1-16.

6. The trial court erred in awarding plaintiffs more relief than sought, including funds given after TFC disaffiliated and funds spent on maintenance, which plaintiffs stipulated TFC should keep. 2/22/12 Br. 16-24.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This case arises out of the decision of TFC and ten other churches to change their denominational affiliation after a split in TEC and the Diocese. This Court previously recognized this "division," but held that the churches had not met the "branch" element of Va. Code §57-9(A), which otherwise would have been "conclusive" of the ownership of their property. The Court thus revived plaintiffs' declaratory judgment claims to ownership of the churches' properties and directed the trial court to decide the case "under principles of real property and contract law." 280 Va. at 29.

On remand, the trial court denied the churches' request for a jury and conducted a bench trial. In January 2012, after post-trial briefing, the court ruled for plaintiffs on every disputed issue—and then some. Eschewing ordinary property and contract law, the court held that plaintiffs' canons and hierarchical nature gave them contract rights in *all* of TFC's real property. It also held that plaintiffs were entitled, under Va. Code §57-10, to nearly all of TFC's personalty—despite undisputed proof that those who gave to TFC did so on the condition that their gifts not be forwarded to either plaintiff.

In February 2012, the churches moved for partial reconsideration, demonstrating that the court (1) violated donor intent as to funds given after 2003; (2) in awarding plaintiffs funds given after the churches disaffiliated in late 2006, violated donor intent and granted plaintiffs more relief than they requested; and (3) failed to enforce plaintiffs' prior agreement to credit the churches for expenditures on upkeep during the lawsuit. The trial court's donor intent rulings were also challenged by the Attorney General. Yet the court refused to reconsider any part of its ruling. A8641-43.

A corrected Final Order was entered on March 16, 2012. TFC timely noticed its appeal on March 29, 2012. The other churches settled. On October 26, 2012, this Court granted TFC's appeal as to all assignments of error and denied plaintiffs' cross-assignment of error. A194-95.

STATEMENT OF FACTS

A. The Falls Church and its real property

TFC, a Virginia nonstock corporation, "was founded in … 1732," "prior to the creation of TEC" or "the Diocese." A105-06. TFC was initially part of the established Church of England, but became independent during the American Revolution. The formation of TEC and the Diocese in the late 1780s did not alter TFC's independence, as "elimination of denominational control over church property was one of the aspects of disestablishment

brought about by the Virginia legislature after the Revolution." A8277.

TFC affiliated with plaintiffs in 1836, long before their canons asserted a trust interest in local church property. A7519-20, A7523, A7531-35. As both sides' experts testified, there is no evidence that TFC ceded authority over its property to plaintiffs. A7497, A8276-77, A8285-86, A8295-96.[1]

As expert historical testimony explained, the late 18th and 19th centuries were marked by "concern about the potential power to be unleashed by the denominations and a strong effort to preserve the religious freedoms of the individual congregants." A8333. This effort "goes back to Madison[]," whose Memorial and Remonstrance "speaks about the effort to preserve religion as a point of individual conscience and that in order to do this, religion has to be individually oriented and locally maintained." A8333.

In fact, to safeguard congregational property from undue denominational control, the legislature barred denominational ownership of property.

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[1] The Diocese's canons then stated—concerning all "property now belonging or hereafter accruing to the Protestant Episcopal churches of the Diocese"—that "[t]he Vestries … , with the Minister, when there is one, shall hold … as trustees for the benefit of the congregation of said church." A5912a (1836-37 canons). After passage of the 1842 church property statute—which authorized trustees to hold property solely to benefit *congregations*—these canons were amended to expressly recognize the exclusive property rights of congregations and vestries, and to *disclaim* application of the canons to property held pursuant to the Act. A5919-20 (1848); A5932-33 (1850). The canons used such language into the 20th century. *E.g.*, A5979 (1888); A6049-50 (1904); *see* A8327-28, A8331-33, A7535.

As the Diocese lamented in a 19th century petition to the legislature, "no Christian denomination is capable of taking and holding property of the smallest amount. They can neither take what is given nor acquire by purchase." A5307, A5316 (transcription), A8321-22.

Thus, sole legal title to TFC's property has always been held by its vestry or trustees. And for 200 years, TFC has been run by a lay vestry elected by TFC's members. A5048-51. TFC's original building sits on land conveyed in 1746 to "[the] Vestry of Truro parish and their successors." A246-48. As the trial court held in a ruling that was not appealed, "the vestry of the TFC is the legal successor of the vestry of Truro parish." A186. TFC thus obtained its first property decades before plaintiffs even existed.

TFC remained responsible for maintaining its property after joining the denomination. Although Diocesan affiliates funded a few repairs and provided some modest clergy support in the late 19th and early 20th century, that assistance amounted to only a few thousand dollars and was a tiny proportion of what TFC itself spent on maintenance and contributions to the Diocese. For example, in 1922 TFC received $800 from a Diocesan fund, but that same year TFC gave $818 to the same fund. A6101-02. And from 1950 to 2003 alone, TFC gave $4.36 million to plaintiffs. A3025.

Neither plaintiff gave *any* funds to TFC's later expansion programs.

As it grew, TFC acquired more acreage and built new buildings. From 1950 to 2003, TFC spent over $15.9 million ($26.6 million in today's dollars) acquiring land and improving its property. During the same period, TFC spent $8.135 million ($12.9 million in today's dollars) on upkeep. By contrast, neither plaintiff contributed a dime. A2521-22, A2524, A2443-56, A2633-35, A3023-24. As the trial court held in an unappealed ruling, "TFC's vestry … for more than 150 years has governed the property in question, raised funds to upgrade the property, repaired the property, financed additions to the property and decided how the property was to be used." A185 n.10.

TFC acquired its property through 11 deeds, none of which conveys any interest to TEC or the Diocese. Four TFC deeds—the 1746 deed and three that grant land to "Trustees of The Falls Church"—do not include the word "Episcopal." A106-07. Of the other seven deeds, five grant property to "trustees of The Falls Church (Episcopal)," one to "Trustees for the Falls Church Episcopal Church," and one to "Trustees of the Episcopal Church, known and designated as the 'Falls Church.'" *Id*. And unlike several deeds of other churches below (A110, 113), the deed in *Green*, and the deeds of myriad Virginia churches (A322-429), *none* of TFC's 11 deeds restricts its property to use by Episcopalians or subjects its use to plaintiffs' canons.

In 2006, over 90% of TFC's members voted to join a new denomina-

tion. A8243-45. At no time during TFC's affiliation did plaintiffs file a document—*e.g.*, a lien or trust agreement—in the land records claiming rights in TFC's realty. A7879-81, A2499-2502. Nor have plaintiffs ever asserted an interest in the property in public UCC filings. A2351-52. The only public notice of plaintiffs' claim was a *lis pendens* filed during this suit. A238-45.

B. The Falls Church's personal property and financial independence

TFC also fully controlled its bank accounts. TFC alone chose what, if anything, to donate to plaintiffs. As plaintiffs' witness put it: "It is a completely voluntary system." A7379-80.[2] Yet from 1950 to 2003, TFC voluntarily gave plaintiffs $4.36 million ($8.82 million in today's dollars). A3025.

Initially these donations were unrestricted, but TFC began directing donations to specific programs as TFC's own donors restricted their gifts from being forwarded to plaintiffs. In the 1990s, "84 percent of [TFC's] congregants … checked the box that they did not want their tithe to go to the Diocese and [TEC]." A8202-03. And from 2003 forward, in response to its members' objections, TFC announced a policy under which those wishing to support plaintiffs needed to do so independently. A7867-68.

[2] The Diocese says: "Until 1957 … contributions were mandatory." Diocese Opp. 8 n.4. But as plaintiffs' expert admitted, even under the prior system "[t]here's no sanction if [churches] don't pay" and "the Diocese had no power to compel the contributions at the apportioned level." A7586-87.

C. The Falls Church's autonomy in the selection of clergy, operation of its services and outreach, and governance

Although TFC took an active part in Diocesan affairs, it retained control over its internal governance and operations. For example, TFC chose its own clergy and staff. In contrast to Methodist and Catholic churches (among others), in which local clergy are chosen by bishops, the Diocese's role in clergy hiring "is 'advisory,' i.e.[,] flexible at the discretion of the vestry." A6962. As a Diocesan witness admitted, "the vestry has control over that process." A7633-34. Nor was the Diocese involved in negotiating salaries or benefits, or in performance evaluations, for clergy or other staff; the vestry handled those issues. A7918-20, A8045-46, A7182.[3]

TFC's vestry also decided whether to incorporate TFC, and on what terms. A5047-51. Unlike other dioceses, plaintiffs do not require diocesan approval of the terms of corporate articles or unincorporated congregations' bylaws, or require that such documents accede to plaintiffs' authority.[4]

TFC also selected its own Sunday school curricula and forms of wor-

[3] TFC's rector, Rev. John Yates, "was approached by [TFC's] vestry" after "friends gave [his] name to [TFC's] search committee." A8044-45. His salary was determined "in discussions between [him]self and the vestry," which "evaluated [his] work." A8045-46. Only "sometime later," *after* he was hired, did he meet the bishop—and then only because the bishop "wanted to ask if [TFC] would make a significant financial contribution," which it did. *Id.*

[4] *Cf*. A652 (Los Angeles); A578 (Arizona); A514-15 (Michigan); A733 (Colorado); A749, A755 (Ohio); A474 (Texas); A476 (W. Missouri).

ship; secured licenses for its music; designed and operated its own ministries and youth programs; and commissioned its own missionaries. A7181-82, A7205, A7921-22, A8151, A7899-900, A7838-39.

D. TEC, the Diocese, and their internal church canons

Plaintiffs are unincorporated voluntary associations whose constitutions assert no interest in congregational property. Plaintiffs' claims instead rest principally on internal church canons adopted at church conventions.

First, plaintiffs cite "consent" canons that purport to limit the amount of property-related debt that congregations may incur, and to bar sales of consecrated real property, without Diocesan consent.[5] These canons post-date TFC's affiliation, do not claim ownership or legal dominion, and do not restrict disaffiliation—a point plaintiffs' expert admitted. A7714. Nor are the canons embodied in a legally cognizable form, as they are neither set forth in a writing signed by TFC nor recorded in the land records or TFC's deeds. A5852. Further, these canons have limited scope, as they do not address unconsecrated real property or any type of personal property.

Prior to this suit, the Diocese did not ascribe legal significance to the canons. As late as 1914, the Diocese admitted that "the Colonial Churches of the Diocese," including TFC, "belong absolutely to the parish in which

[5] "Consecrated" property is real property that is formally dedicated to divine worship; "unconsecrated" property is other church realty. A7285-86.

they are located" and are "cared for by the well organized congregations which own them." A6081. More recently, a Diocesan official explained that consent provisions like those found in the consent canons reflect a spiritual rather than legal commitment: "The requirements of various consents … are means by which we affirm that the Church is one body, sharing one baptism, proclaiming one faith in our one Lord who is God and Father of all." A6218. TFC had a similar understanding. A8041-43, A8119, A8153.

Second, plaintiffs invoke TEC's 1979 "Dennis Canon" and the Diocese's 1983 Canon 15.1, which purport to place congregational property "in trust for [TEC] and the Diocese." A74. These canons likewise post-date the purchase of most of TFC's property, are not set forth in a writing signed by TFC, are not publicly recorded, and are not referenced in TFC's deeds. A8047-48, A8109-10. Further, the canons—which reflect a unilateral effort by the denomination to impose a trust on local property—were passed *after* *Norfolk* and *Green* reaffirmed Virginia's ban on such trusts.[6]

Plaintiffs cite these and other canons as evidence that they are "hierarchical" and exercised "dominion" over TFC's property. A136. It is undisputed, however, that TFC alone controlled who—including bishops and

[6] Plaintiffs now assert that the canons codify a trust that had always been implied, but TEC's own official annotated version of the canons admits that the Dennis Canon was *not* "declaratory of existing law." A2222.

other representatives of plaintiffs—could and could not enter its premises. A7184, A7896, A8112, A4333-34. As the trial court earlier explained, "[TEC] and the Diocese concede, as they must, that TFC did in fact manage and administer the property for the past 150 years and more." A186.

ARGUMENT

Standard of Review. The parties agree that "[t]he standard of review applicable to each of TFC's assignments of error is *de novo*, for legal error." Diocese Opp. 2. *John Crane, Inc. v. Hardick*, 732 S.W.2d 1, 2 (Va. 2012) (issues of law and mixed issues of law and fact are reviewed *de novo*). Under these standards, the ruling below must be reversed for multiple independent reasons. Most notably, the trial court ignored neutral principles of property and contract law—including rules governing deed interpretation, legal "dominion," contract formation and enforceability, and donor intent.

I. Under "neutral principles of law, developed for use in *all* property disputes," TFC owns all of its real property. Assignment #1.

This Court charged the trial court to decide the ownership of TFC's property "under principles of real property and contract law." *Truro*, *supra*. In support of that charge, this Court cited *Norfolk*—which directed courts to decide cases like this by "'application of neutral principles of law, developed for use in *all* property disputes'" (214 Va. at 504)—and *Green*, which reaffirmed *Norfolk*. But rather than heed this mandate, the trial court principally

relied on internal church canons that fail to satisfy property or contract law. According to the trial court, plaintiffs' "hierarchical" status—mentioned *35* times—gave their canons the force of law. A61-150. Indeed, the court cited plaintiffs' canons over *150* times. But this judicial deference to the "hierarchy" in divesting TFC of its property was error, as the idea "that those who unite themselves with a hierarchical church do so with an implied consent to its government" was expressly rejected in *Norfolk*. 214 Va. at 504.

A. The trial court neglected neutral principles. Assignment #1.

To establish ownership of TFC's property, plaintiffs bear the "burden of proving" a "proprietary interest" by showing "a violation by [TFC] of either 'the express language of the deeds or a contractual obligation of the general church.'" *Green*, 221 Va. at 555; *see also id*. (a proprietary right is "a right of one who exercises dominion"). "If [plaintiffs] [are] unable to establish a proprietary interest," they "have no standing to object to [any] property transfer" under Va. Code §57-15. *Norfolk*, 214 Va. at 503; *see* Addendum, *infra* (setting forth relevant statutory and constitutional provisions).

To assess whether plaintiffs have a proprietary right, "the language of the deeds and the constitution of the general church should be considered … in the application of neutral principles of law." *Id*. Courts also "look to [Virginia's] statutes" and—where called for by the denomination's constitu-

tion, as in *Green*—“the dealings between the parties.” 221 Va. at 555.

1. The trial court contravened neutral principles of real property law.

Deed interpretation. The trial court failed to apply ordinary “principles of real property law” in interpreting TFC’s deeds. Plaintiffs admit that “[n]either the Diocese nor [TEC] is specifically named as a grantee as such in any of [TFC’s] deeds.” A7033. In fact, one TFC deed predates plaintiffs’ existence; four TFC deeds do not refer to anything “Episcopal”; and *no* TFC deed mentions the denomination *or* its canons, much less restricts TFC’s property to use by “Episcopalians.” Yet the court read *all* of TFC’s deeds to *implicitly* condition TFC’s ownership on affiliation with plaintiffs. A123.

The trial court thus violated this Court’s repeated holdings that use restrictions “are not favored” and are “construed most strictly against the … persons seeking to enforce them,” *i.e.*, “in favor of the free use of property.” *Scott v. Walker*, 274 Va. 209, 213 (2007) (collecting cases). Absent “language expressly or by necessary implication prohibiting [a particular use of property],” deeds are not read to create a “restrictive covenant.” *Id*. at 218. Indeed, this is especially clear where, as here, “‘it would have been easy to say’” that the property at issue could not be used for other purposes. *Id*.

Other Virginia denominations heed this rule by insisting that grantors draft deeds with use restrictions. For example, the United Methodist Church

constitution mandates specific deed language restricting property use to its members,[7] and Methodist churches across Virginia comply. A351-52, A369, A372, A383, A387-88, A403, A410, A417, A465 (deeds). Likewise, in the Presbyterian Church USA, local churches' deeds frequently restrict the property to use "subject to the Provisions of the Constitution of the Presbyterian Church (USA)." A367, A349, A420, A354 (deeds). Other denominations do the same. A396 (Lutheran deed), A452 (AME Zion deed), A428, A435, A413-15 (Church of God deeds), A379-80 (Baptist deed).

Similar express use restrictions appear in conveyances to Episcopal churches *other than TFC*. A deed to Truro Church "forever" conditioned the grant "upon the following purposes, uses, trusts & conditions *& none other* … for the use of the members & congregation of the Protestant Episcopal Church of the Diocese of Va. worshipping … subject to the Constitution, canons & regulations of the Protestant Episcopal Church of the Diocese." A110. St. Stephen's main deed likewise subjected its property "to the laws and canons" of "the Protestant Episcopal Church," for its members' "sole use and benefit." A113. Such use restrictions even appear in

[7] A2305 (requiring "all written instruments of conveyance" to restrict use "as a place of divine worship of the United Methodist ministry and members of the United Methodist Church; subject to the Discipline, usage, and ministerial appointments of said Church").

deeds in which *the Diocese* conveyed land to local churches. A390-95.

In short, "it would have been easy to say" (*Scott*, *supra*) that TFC's property was restricted to use by Episcopalians.[8] Similarly, if at any time during its history TFC had actually consented to grant plaintiffs a property interest, the parties easily could have asked the court to record such an interest.[9] And this is to say nothing of the option of placing title in a bishop's name—an option that the Diocese used 29 times, including for local church property. A4020-23; *see* A4304¶5 (Catholic practice); Va. Code §57-16(A).

Ignoring the precedent above, the trial court lumped TFC's deeds together with the other churches' deeds—reasoning that the deeds "refer explicitly to the churches being *Episcopal* churches," and that "those deeds that do not use the word Episcopal were to trustees of 'a local church that was at the time of the conveyance indisputably an Episcopal church.'" A123. But that is factually incorrect: TFC's original property was acquired decades before plaintiffs *existed*. It is also legally irrelevant: As several state supreme courts have held, deed language referring to a local church's

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[8] *Cf. also Diocese of Sw. Va. v. Wyckoff*, Op. 2-3, 7 (Amherst Co. Nov. 16, 1979) (deed conveyed land to grantees "to erect a new brick church for the use and benefit of the Protestant Episcopal Church" and to "forever have and hold the said piece or parcel of land … for [said church's] use").

[9] The parties frequently reflected third-party interests in court orders or land records. A270-75, A307-12, A2376-426, A2440-78, A2481-98, A6171c-71j.

polity or affiliation does not create denominational rights.[10]

TFC's deeds also differ from the deed in *Green* in at least three critical ways. *First*, under the "express language" of the deed in *Green*, "[t]he grantors conveyed the property to 'Trustees of the A.M.E. Church of Zion'" (221 Va. at 553, 555)—not to "Trustees of Lee Chapel." The Court thus concluded that "the A.M.E. Zion Church [was] the grantee." *Id*. at 555. Not so here. As plaintiffs admit, "[n]either the Diocese nor [TEC] is specifically named as a grantee as such in any [TFC deed]." A7033. Indeed, no TFC deed refers to *either* the denomination or its canons. A246-319.

Second, the deed in *Green* restricted the property to "the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination, or an independent church." 221 Va. at 553. This restriction weighed heavily in *Green*'s analysis. *Id*.[11] And rightly

[10] *Arkansas Annual Conf. of AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc*., 291 S.W.3d 562, 569 (Ark. 2009) (holding that a deed reflecting the grantor's intent "to create a trust for *Sand Hill AME Church*" did not suggest "the intention of creating a trust in favor of either the National AME or the Arkansas AME"); *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1324-25 (Pa. 1985) (conveyance to "Middlesex Presbyterian Church" vested title "exclusively in [the local church]"); *Foss v. Dykstra*, 342 N.W.2d 220, 223 (S.D. 1983) (conveyance to "Ebenezer Presbyterian Church of Lennox" created no denominational rights; nor did a change of name to match denomination).

[11] *See also id*. at 555 ("the property ha[s] been conveyed to trustees of that church to establish an A.M.E. Zion Church thereon"); *id*. at 549 ("[t]he real

so. Such language has long been recognized as the natural way to restrict the use of property to members of a specific denomination. *Supra* at 16-18.

Third, as to TFC's original 1746 deed, it cannot be said (as did the trial court) that "those deeds that do not use the word Episcopal were to trustees of 'a local church that was at the time of the conveyance indisputably an Episcopal church.'" A123. TEC and the Diocese did not yet exist. And as the trial court held in an earlier ruling that plaintiffs did not appeal, "there is a clear record of admissions by [TEC] and the Diocese recognizing TFC's ownership of this [original] property." A186.

Dominion. The trial court also failed to apply neutral principles in ruling that plaintiffs exercised "dominion" over TFC's property. Dominion may be "accomplished 'by residence, cultivation, improvement, or other open notorious and habitual acts of ownership.'" *Quatannens v. Tyrrell*, 268 Va. 360, 366 (2004) (dominion was proven by significant improvements to, and exclusive use of, property); *see* 4 West's Encyclopedia of American Law 281 (2d ed. 2005) ("To exercise dominion over land is to openly indicate absolute possession and control."). Plaintiffs cannot meet this standard.

The trial court earlier found—after a trial, in a ruling to which plaintiffs

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estate involved consists of a one acre lot … conveyed by deed … to the Trustees of the African Methodist Episcopal Church of Zion for the purpose of erecting an A.M.E. Church of Zion to be known as Lee Chapel").

did not assign error in the first appeal—that "TFC's vestry … for more than 150 years has governed the property in question, raised funds to upgrade the property, repaired the property, financed additions to the property and decided how the property was to be used." A185 n.10. The later trial further confirmed that TFC "chose the architecture" for improvements (A7606, A7836, A7913); did "competitive bidding"; oversaw and paid for construction (A7839-40, A7910, A7913-14); and "deal[t] with the … city" on land use issues (A7837). Only TFC exercised possession and control.

Ignoring TFC's extensive improvements and exclusive use, the trial court cited various facts—*e.g.*, that bishops visited TFC for confirmations or to examine the state of the church—as proof that plaintiffs exercised "*pervasive* dominion, management, and control." A136. But those facts do not add up to dominion under Virginia law. *Tyrrell*, *supra*. It is undisputed that TFC alone managed the property, including deciding who could enter the premises and on what terms. A7184, A7896, A8111-13, A4333-34. As plaintiffs' counsel put it, "day-to-day responsibility" for "management, payment, and so forth related to the property" is handled by "the vestry and the local church." A7488. And plaintiffs' bishop testified that even visits by bishops required "an invitation by the rector." A7184; *accord* A7896, A8112.

Plaintiffs assumed none of the burdens of ownership of the property

over which they claim dominion. In fact, the money flowed the other way. TFC not only willingly gave plaintiffs $4.3 million from 1950 to 2003 (A7962-63); it was also responsible for the property's upkeep and improvement for "as long as the records … show."[12] From 1991 to 2010 alone, TFC spent $6.4 million on maintenance. A7958-59, A3023. And since 1950, TFC spent $15.9 million on improvements. A7961, A3024. Plaintiffs did not contribute a dime (A7841-43, A7900-01, A7909-10, A8048-50), or publicly notify third parties of any interest in the property. A7879-81, A2351-52.

Nor did plaintiffs pay for casualty insurance or appoint or indemnify TFC's trustees. A2417-20, A7943-44, A8431. Rather, per its own canons, the Diocese indemnifies only trustees that *it* appoints and insures only property "over which *the Diocese* has control." A5853-56 (emphasis added). Plaintiffs' canons thus confirm that they did *not* control TFC's property.

In sum, it was TFC that bought, mortgaged, paid for, designed, built, improved, maintained, zoned, leased, managed, insured, and possessed the property. No neutral view of "dominion" supports the ruling below.

2. The trial court also contravened neutral rules governing contract formation and enforceability.

The trial court's dismissive treatment of contract law also compels re-

[12] A7955-56 (Q How long has the congregation maintained the property? A As long as the records that I've been able to review show. … 1873.").

versal. As the Diocese notes, the court "held that conventional contract law principles do not apply to church property cases." Opp. 14. Yet the court gave no reason for not "apply[ing] traditional concepts of contract law," stating only that TFC's position was not "meritorious." A98-92. That was error. Whether TFC breached a "contractual obligation" must be "considered … in the application of neutral principles of law." *Green*, 221 Va. at 555.

Plaintiffs can point to no ordinary signed agreement to support their claim. And unlike in *Green*—where the A.M.E. Zion constitution set out detailed means whereby congregations could consent to grant the denomination property—plaintiffs' *constitutions* are *silent* as to local church property.

Plaintiffs are thus resigned to arguing that their *canons*—adopted unilaterally and put in effect immediately—create a contract akin to the "rules of secular voluntary associations." Diocese Opp. 4. As explained below, however, several neutral principles of contract law foreclose that view.

a. TFC never affirmatively agreed to grant plaintiffs contractual rights in its property.

In treating plaintiffs' unilaterally adopted canons as a contract, the trial court's first error was ignoring the absence of mutual assent. To form a contract, it is "'essential'" that "'the parties have a distinct intention common to both and without doubt or difference.'" *Phillips v. Mazyck*, 273 Va. 630, 636 (2007) (citations omitted). And as the U.S. Supreme Court explained

in *Jones*, mutual assent is critical to neutral principles analysis: "[T]he *parties* can ensure, if *they* so desire, that the faction loyal to the hierarchical church will retain the church property." 443 U.S. at 606 (emphasis added).

Rather than negotiate a *joint* agreement, as required by *contract* law, plaintiffs responded to *Jones* by passing canons *unilaterally* claiming a *trust* in property to which they lack title—ignoring both the requirement of mutuality and Virginia's ban on such trusts.[13] And while the trial court earlier recognized that "'a contract requires *mutual* assent and the communication of that assent'" (A173), it refused to apply that rule here. *See Mazcyk*, 273 Va. at 636 ("an agreement" is judged "'exclusively from those *expressions* of [the parties'] intentions which are *communicated*'" (citations omitted)).

That refusal is critical, because it is undisputed that TFC never affirmatively agreed to grant plaintiffs proprietary rights. As TFC's rector testified without contradiction, neither "the [TFC] vestry [n]or the congregation" "ever adopt[ed] a resolution or sign[ed] a document" or otherwise "agree[d]

[13] Even if Va. Code §57-7.1 validated denominational trusts, plaintiffs' canons would not establish one, much less retroactively. Not surprisingly, only the settlor—the party with title—may create an express trust in property. *Leonard v. Counts*, 221 Va. 582, 588 (1980) ("An express trust is based on the declared intention of the trustor."). "It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another." *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 174 (S.C. 2009) (rejecting TEC's claim that the Dennis Canon was legally enforceable).

that the Episcopal Church or the Diocese would have an ownership interest." A8047-48; *see* A8108-09. TFC's business manager confirmed this, based on a review of TFC's records since the 1800s. A7983, A8037-38.

The absence of an agreement to convey property rights to plaintiffs here contrasts sharply with the actions of the congregation in *Diocese of Southwest Va. v. Buhrman*, 5 Va. Cir. 497 (Clifton Forge 1977). There, the congregation's vicar and 63 members signed a "promise … that the said Parish shall be forever held under the Ecclesiastical Authority of the Diocese … and in conformity with [its] Constitution and Canons." A2254, A2259. They also "stipulate[d] that all real estate consecrated as a church or chapel of which the said parish is or may become possessed, shall be secured against alienation from the Protestant Episcopal Church in the Diocese," "unless such alienation is in conformity with its Canons." A2259-60.

At the outset of this case, plaintiffs said: "We anticipate the evidence in this case will reflect similar commitments [to those in *Buhrman*]." A9060. But after six years of litigation, the evidence reflects no such agreement.

Absent such an agreement, the canons cannot justify the seizure of TFC's property. "It is essential to a bargain that each party manifest assent with reference to the manifestation of the other." *Restatement (Second) of Contracts* § 23. Thus, church canons may "not deprive the member of

vested property rights without the member's explicit consent." *In re Church of St. James the Less*, 888 A.2d. 795, 807 (Pa. 2005).[14] And this Court has rejected the view "that those who unite themselves with a hierarchical church do so with an implied consent to its government and take title to local church property subject to an implied trust." *Norfolk*, 214 Va. at 504.

Unable to identify any express consent by *TFC*, the trial court cited the collective "course of dealings" of all the churches in the lawsuit below—"vestry oaths, vestry minutes, vestry handbooks, local church constitutions"—as evidencing "the congregations' 'agreements, pledges, or representations'" to grant plaintiffs' property rights. A85 n.23, A137-38. But the evidence as to TFC is distinct. In contrast to other congregations:

- TFC never adopted bylaws (1) granting plaintiffs rights in all of its property, or (2) stating that, in the event of dissolution, "all property assets and funds" would revert to the Diocese (A144-45);
- TFC never stated publicly and in writing that "the diocese … is the real owner" of the congregation's property (A143); and
- TFC never executed formal "instruments of donation"—signed by its rector, a vestry register, and the bishop—that "relinquish[ed] all claim to any right of disposing of [its building]," and "certif[ied] … that said building and ground are secured from alienation from

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[14] *Id*. (ruling against the congregation because its property rights were not vested and its corporate articles (1) stated that its purpose was to worship "according to [TEC's] faith and discipline," (2) promised to hold its property "for the work of the [Diocese]" and, upon dissolution, to place its property in trust for the Diocese, and (3) prohibited amending its articles without diocesan consent, which was not obtained).

> those who profess the Doctrine, Discipline and Worship of the Said Church, except as provided by laws and canons applicable." A140. *See* A6904-09 (instruments of donation).

As to TFC, plaintiffs cite "vestry handbooks" stating that TFC was subject to plaintiffs' constitutions and canons. Diocese Opp. 7. Under neutral rules of contract law, however, such unilateral statements of *spiritual* affiliation do not convey a *legal* interest in realty worth millions of dollars. *Cf. Jones v. Peacock*, 267 Va. 16, 20 (2004) ("A contract involves a bilateral exchange, a meeting of the minds, and an understanding of obligations undertaken").

In divesting TFC of its property, the trial court also relied on declarations taken by vestry members upon taking office. A139. But while those declarations referred to plaintiffs' "discipline," nothing in the declarations suggested that they had legal, rather than spiritual, significance—let alone that they affected TFC's *property*.[15] And, because the declaration includes a commitment to the Bible's authority, to which the rest of the declaration is subject (A7890-91, A8041-42), it would violate the First Amendment to hold

[15]The full declaration states: "I do believe the Holy Scriptures of the Old and New Testament to be the Word of God, and to contain all things necessary to salvation; and I do yield my hearty assent and approbation to the doctrines, worship and discipline of The Episcopal Church; and I promise that I will faithfully execute the office of Vestry member of ____ Church, in Region ____, in the County (or City) of ____, according to my best knowledge and skill." A5847. The only definition of "discipline" in either plaintiff's canons is expressly limited to the title of TEC's canons governing *clergy* discipline. A5810 ("Canon 15: Of Terminology Used in This Title"); A5763 ("Title IV: Ecclesiastical Discipline"); A5763-5821 (clergy "offenses").

that any contract thereby formed was breached. *See Thomas v. Review Bd.*, 450 U.S. 707, 714-15 (1981) ("Courts are not arbiters of scriptur[e]"); *Jones*, 443 U.S. at 604 (review of documents must be "purely secular").

b. Plaintiffs' canons lack a mutual remedy.

The canons also fail the black-letter rule that a contract must provide mutual remedies. "[W]here the consideration for the promise of one party is the promise of the other party there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound or neither is bound." *Vinton v. Roanoke*, 195 Va. 881, 896 (1954) (citation omitted).[16] As confirmed by plaintiffs' own admissions, however, their canons fail that requirement.

There is no dispute that plaintiffs' own duties under their constitutions and canons, if any, are spiritual, and thus that the First Amendment bars courts from finding that plaintiffs failed to honor them. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 451 (1969). For instance, TEC's constitution defines TEC theologically—as a body committed to "propagating the historic Faith and Order as set forth in the Book of Common Prayer." A5657. The Book of Common Prayer, in turn, "is a thoroughly religious book" with "rites," "prayers," and plaintiffs' "fundamental religious beliefs." A7727-28.

[16] 4A *Michie's Jurisprudence*, Contracts § 2, 404 (2007) ("To be a contract, [an agreement] must … confer rights which may be asserted in … court").

Further, plaintiffs' expert admitted that "all [of TEC's] temporal and spiritual authority," even that found in the canons, is based on "[t]he scriptures and the creeds." A7772. A Diocesan official similarly explained:

> We are not affiliated to each other by contractual commitments that have a beginning and an end, escape and penalty clauses and the like. … The requirements of various consents, the testimonials and approvals, the mechanisms for order and discipline—all these are means by which we affirm that the Church is one body, sharing one baptism, proclaiming one faith in our one Lord … .

A6218. TFC's rector offered similar testimony. A8057.

Plaintiffs readily admit that their canons may not be enforced against *them*. As TEC's legal officer put it, an "individual parish" like TFC lacks any "ability to force the Diocese to abide by the constitution and canons"; TFC's only remedy is to try to *change* the canons "at the ballot box." A2374. Similarly, plaintiffs' experts admitted that TFC's "only recourse in th[e] situation [where TEC violates its canons] is to seek a change in the Constitution and Canons through [TEC's] internal processes." A7735-36; *accord* A7597-98.

But under the requirement of mutual remedies, if the canons imposed no enforceable legal duties on plaintiffs, the canons cannot be read to impose such duties on TFC. A contract is not binding if one party's lone remedy for breach is to try to "change" the contract at "the ballot box" (and then hope for no more breaches). Nor is a contract binding if the courts may not pass on one party's claim (here, TFC's (A8108)) that the contract was

breached. “Both parties must be bound or neither is bound.” *Vinton*, *supra*.

c. Plaintiffs’ canons lack valid consideration.

Plaintiffs’ canons also fail for lack of consideration. Even assuming, *arguendo*, the canons imposed legally cognizable duties, “a new promise, without other consideration than the performance of an existing contract in accordance with its terms, is a naked promise without legal consideration.” *Seward v. New York Life Ins. Co*., 154 Va. 154, 168 (1930). Similarly, “[a]n agreement by one to do what he or she is already legally bound to do is not a good consideration.” 4A *Michie’s Jurisprudence*, Contracts § 34, 449.

Here it is undisputed that, upon adopting their consent canons, plaintiffs—in the words of their expert—kept “simply doing what has been done” before. A7642-43. Similarly, upon adopting their trust canons, neither plaintiff “beg[a]n providing any services or benefits to [TFC] … over and above [those] provided prior to [then].” A8110-11. And since the canons are not supported by consideration, they fail to create an enforceable contract.

d. The trial court erred in relying on “course of dealing” evidence to find a contract to exist.

Having dismissed “traditional concepts of contract law” (A91-92), the trial court was left to find proprietary rights via “course of dealing” evidence. A88-89. Yet it cited such evidence not to fill gaps in an undisputed contract, but to find a contract *to exist*. *E.g.*, A89 (treating “‘course of dealings’

evidence as instructive to understanding … each parties' [*sic*] awareness of, and agreement to, the rules governing a supercongregational church"). Effectively, the court treated the parties' dealings as proof of an implied contract or trust. But this was contrary to Virginia law, under which "the parties' course of dealing cannot establish the existence of a contract." *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524, 531 (2008).

It was also contrary to *Green*, where "the contractual obligation which the [denomination] assumed ha[d] its genesis in the … deed." 221 Va. at 556. The Court there considered course-of-dealing evidence only because the denomination's *constitution* set out three specific steps, called "indications," that would evidence a congregation's "intent and desire" to be governed by a denominational proprietary interest. *Id*. at 554 & n.2. No such steps are set forth in plaintiffs' canons, much less their constitutions.

The first constitutional "indication" of intent in *Green* was "the conveyance of the property to the trustees of the local African Methodist Episcopal Zion Church or any of its predecessors." *Id*. The second was "the acceptance of the pastorate of ministers appointed [by the denomination]." *Id*. And the third was "use of the name, customs, and policy of the African Methodist Episcopal Zion Church." *Id*. As shown by the following chart, this Court's conclusion that the congregation in *Green* consented to grant

the denomination property rights *precisely* tracked these indications:

THE A.M.E. ZION CONSTITUTION	THE *GREEN* COURT'S ANALYSIS
"[T]he intent and desire of the … congregations … is shown by any or all of the following indications: (a) the conveyance of the property to the trustees of the local African Methodist Episcopal Zion Church or any of its predecessors." 221 Va. at 554 n.2.	"The grantors conveyed the property to 'Trustees of the A.M.E. Church of Zion.' The conveyance was for the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination, or an independent church." 221 Va. at 553.
"(b) the use of the name, customs, and policy of the African Methodist Episcopal Zion Church in such a way as to be thus known to the community as a part of this denomination." *Id*. at 554 n.2;	"[W]e find that the name, customs, and policies of the A.M.E. Zion Church have been used in such a way that Lee Chapel is known, recognized, and accepted to be an A.M.E. Zion Church." *Id*. at 555.
"(c) the acceptance of the pastorate of ministers appointed by a bishop of the African Methodist Episcopal Zion Church." *Id*. at 554 n.2.	"Pastors are appointed by the bishops, and it was testified that a local congregation could not refuse to accept a pastor." *Id*. at 549.

Only against the backdrop of these specific constitutional provisions did *Green* view the parties' course of dealing as proof "that those … 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 … with the understanding and implied consent that they and their church would be governed by [the denomination's constitution]." *Id.* at 555-56. *Green* did not suggest that the parties' "course of dealing" could independently establish enforceable contract rights in local church property.

Further, it is untenable to read *Green* more broadly, to allow contract rights to be created when congregations take part in ordinary denominational activities. That would in effect overrule both the rule that "the parties' course of dealing cannot establish the existence of a contract" (*Delta Star*, *supra*) and *Norfolk*—which rejected implied trust theory. 214 Va. at 504.[17]

But the trial court's reasoning went even further astray than that. Inexplicably, the court recognized that Virginia "d[oes] not validate denominational trusts" (A74 n.14), but went on to hold that "[plaintiffs' trust] canons could be considered in the context of that portion of the 'neutral principle[s] of law' analysis related to 'course of dealings' … and given such weight as the Court deems warranted." A95. The court even held that, in allegedly *failing to object* to the assertion of a *facially invalid* trust, TFC's course of dealing created a contract. A139 (citing a Diocesan letter to TFC asserting a "trust" as proof that TFC implicitly consented to grant plaintiffs property rights, despite TFC's challenge to that assertion, A4713-15).

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[17] The ruling below also leaves churches and denominations with no practical guidance on whether their daily interactions convey property rights, contrary to the "public policy favoring certainty of title to real property." *Shirley v. Shirley*, 259 Va. 513, 519 (2000). This uncertainty results in costly suits paid for with limited funds that both sides would rather devote to mission. It also forces third parties—lenders, buyers, and tort claimants—to examine ownership under often-arcane church rules, even when the recorded title is clear. Yet "neutral principles" are supposed to entail "objective" analysis of "familiar" law. *Jones*, 443 U.S. at 603; *see* Becket Fund *Amicus* Br. 35-36.

The trial court also relied on TFC's compliance with canons calling for Diocesan consent to encumbrances of consecrated real property. But a contract will not be read to result in a forfeiture unless it "give[s] the right … in terms so clear and explicit as to leave no room for any other construction" (*Davis v. Wickline*, 205 Va. 166, 169 (1964)), and nothing in the consent canons alerted TFC that compliance would affect ownership.

By analogy, a homeowner may be bound by neighborhood association rules requiring the association's consent before she puts up a fence. But neither the existence of such rules nor the homeowner's compliance with them enables the association to assert ownership of her house. That is likely why many courts have held that "[canonical] restrictions on transfer are of moral value only and without legal effect." *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583, 586 (Ky. 1988). *Accord Presbytery of Beaver-Butler*, 489 A.2d at 1324-25; *Foss*, 342 N.W.2d at 223-24; *York v. First Presbyterian Church*, 474 N.E.2d 716, 721 (Ill. App. 1984).

Finally, it is telling that the official version of the canons published by TEC itself recognizes that the consent canons "w[ere] not sufficient to prevent [the] alienation" of church property (A2195) and "have no legal force" (A2347). Not surprisingly, decades after the canons' adoption circa 1870, the Diocese admitted that the "Colonial Churches" including TFC "belong

absolutely to the parish" and are "cared for by the well organized congregations which own them." A6081. And, as a Diocesan official more recently admitted: "We are not affiliated to each other by contractual commitments" with "escape and penalty clauses"; "[t]he requirements of various consents" in the canons are simply "means by which we affirm that the Church is one body." A6218. In sum, plaintiffs' consent canons do not create a contract.

e. Even if the canons otherwise created a contract, Virginia law bars association rules that purport to encumber or forfeit members' property.

Even if plaintiffs' canons generally bound TFC, the specific canons at issue would not be enforceable. "Binding" contracts can still have particular provisions that are illegal. For example, an otherwise valid loan agreement may not specify an interest rate that violates state usury laws.

So too with canons. "[A] voluntary association['s rules] … will be enforced" only "if not … contrary to public policy or the law." *Gottlieb v. Economy Stores*, 199 Va. 848, 856 (1958); *see* Va. Code §1-248. "[A]ssociation regulations" are "limited by general law" and a "test of reasonableness" that bar "encumber[ing] [members'] property" or effecting a "forfeiture" thereof. *Unit Owners' Ass'n v. Gillman*, 223 Va. 752, 763, 767, 765 (1982). And a "voluntary association" cannot attempt to "transfer the title to [members'] property"; that is a "function[] of sovereign power." *Davis v. Mayo*, 82 Va.

97, 103 (1886); 6 Am. Jur. 2d, *Associations & Clubs* § 6 ("rules cannot be enforced" to cause a member "to lose his rights in accumulated assets").

Gillman squarely bars plaintiffs from passing rules that encumber or forfeit member churches' property. There a condominium association fined its members and "encumber[ed] their property" for violating its rules. 223 Va. at 765. The relevant act gave the association "the right of assessment and the right to lien," and the association bylaws allowed it to "[l]evy fines." *Id*. at 759. The bylaws were "recorded with the master deed" and "accepted by [members] as binding." *Id*. at 757, 758. Still, the Court held that the association could not encumber its members' property. *Id*. at 763, 766. And despite the limited amount of the fines—$25/day—the Court held "that the [members] were being punished," in violation of state law. *Id*. at 766-67.

Plaintiffs' canons are far more extreme than the rules struck down in *Gillman*. The price that plaintiffs demand for disaffiliation is not a modest fine, but the loss of $30 million of property. Further, the statute in *Gillman* gave the association the right to a lien for unpaid assessments, but no law authorizes plaintiffs to unilaterally assert an interest in TFC's property.[18]

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[18] *Cf*. Cal. Corp. Code § 9142(c)(2) ("No assets of a religious corporation are or shall be deemed to be impressed with any trust … [u]nless … the articles or bylaws of the corporation, or the governing instruments of a … general church of which the corporation is a member, so expressly provide"); N.Y. McKinney's Relig. Corp. Law § 42-a (codifying TEC's canons).

Finally, the association's rules in *Gillman* were, by law, "recorded with the master deed," whereas *none* of TFC's deeds states that TFC's properties are subject to plaintiffs' canons. Thus, even if plaintiffs' canons otherwise formed a contract, Virginia law would bar enforcing them.

3. A genuine neutral principles approach does not compel enforcement of denominational rules that do not satisfy the neutral requirements of civil law.

The precedents of both this Court and the U.S. Supreme Court confirm that a genuine "neutral principles" analysis does not require enforcing church canons that do not satisfy civil law. When the congregation in *Norfolk* disaffiliated, for example, the denomination cited its internal rules, arguing "that Grace Covenant Church, as a congregation, has … ceased to exist." A5618. But the Court rejected the view that it had to enforce "the ecclesiastical law of the general church." 214 Va. at 503.

Similarly, the petitioners in *Jones* cited the denomination's internal regulations and its ecclesiastical court's determination that the minority wing of the congregation was the "true" church. 443 U.S. at 607. But as the Court held, that a group is the "true" church for *ecclesiastical* purposes does not govern ownership of church property under *civil* law. *Id*. at 607-09. Courts applying neutral principles need not "defer to the resolution of … the hierarchical church," or to its "laws and regulations." *Id*. at 597, 609.

By plaintiffs' lights, *Jones* "held" that "a religious denomination could guarantee that property of its local church units would remain in the denomination" by "mak[ing] its governing documents 'recite an express trust in favor of the denominational church,' and that 'civil courts will be bound to give effect' to such provisions." TEC Opp. 1 (citation omitted). But *Jones* added that "civil courts will be bound to give effect *to the result indicated by the parties, provided it is embodied in some legally cognizable form*." 443 U.S. at 606 (emphasis added). Plaintiffs omit this proviso from their brief.

Whether denominational rules are legally cognizable turns on whether they satisfy neutral state law.[19] Indeed, in the "authoritative expression of the meaning of [TEC's] Constitution and Canons"—published by "[TEC's]

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[19] *E.g., Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1107 n.8 (Ind. 2012) (*Jones* does not "*requir*[*e*] the imposition of a trust whenever the denominational church organization enshrines such language in its constitution"; "such a rule would result in *de facto* compulsory deference"); *All Saints*, 685 S.E.2d at 172, 174 (*Jones* "permits the application of property, corporate, and other forms of law to church disputes," under which TEC's canons lack "any legal effect"); *Arkansas Presbytery* v. *Hudson*, 40 S.W.3d 301, 309-10 (Ark. 2001) (*Jones* did not overturn "long held" state law barring "a grantor to impose a trust upon property previously conveyed"); *accord Church of God in Christ, Inc.* v. *Graham*, 54 F.3d 522, 525-26 (8th Cir. 1995); *Carrollton Presbyterian Church* v. *Presbytery of South La.*, 77 So.3d 975, 981 (La. Ct. App. 2011); *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 589 (Mo. Ct. App. 2012); *cf. Hope Presbyterian Church v. Presbyterian Church (U.S.A.)*, 2012 WL 5956177, *11 (Or. Nov. 29, 2012) (ruling for the denomination but recognizing that "the express trust provision in PCUSA's constitution cannot be dispositive"; any trust must be "'legally cognizable'" under state "trust laws").

General Convention"—plaintiffs admit that the "'neutral principles of law' approach" "would appear to permit a majority faction in a parish to amend its parish charter to delete all references to [TEC], and thereafter to affiliate the parish—and its property—with a new ecclesiastical group." A2222; *see also* A2216, A2212-13. TFC effectively took this path in disaffiliating here.

B. Enforcing church canons unconstitutionally grants plaintiffs property rights enjoyed by no other entity. Assignment #2.

In enforcing the canons, the trial court granted plaintiffs unilateral authority to override civil law—a right held by no other entity, secular or religious. This violated the First Amendment and the Virginia Constitution.

"[B]oth the Free Exercise and the Establishment Clauses compel[] the State to pursue a course of neutrality toward religion." *Board of Educ. v. Grumet*, 512 U.S. 687, 696 (1994). The Free Exercise Clause proscribes laws that "impose special disabilities on the basis of … religious status" (*Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)); the Establishment Clause bars States from "vesting in the governing bodies of churches" any "unilateral and absolute" power over others' property (*Larkin v. Grendel's Den*, 459 U.S. 116, 117, 127 (1982)); and Virginia law prohibits "confer[ring] any peculiar privileges or advantages on any sect or denomination" (Va. Const. art. I, §16). In fact, in outlining why "Virginia has never adopted the implied trust doctrine to resolve church property disputes," this Court

cited "[t]he Constitutions of Virginia," which "reflect the determination of our citizens from early days to maintain the separation of church and state and to prevent the establishment of any religion." *Norfolk*, 214 Va. at 504.

By allowing denominations to strip local churches of their property, the ruling below flouts these principles. It grants denominations a "peculiar privilege" of creating property rights by extra-legal means. Denominations alone hold "unilateral power" to designate themselves as beneficial owners of others' property—regardless of whether the denomination's interests are embodied in "legally cognizable form," as *Jones* requires. 443 U.S. at 606.

Indeed, if the ruling below stands, no Virginia church can join a denomination without risking the loss of its property, as the denomination can always pass a rule asserting ownership without entering a binding contract or securing changes to the deeds. Such a legal regime—one that allows denominations to invoke their "hierarchical" polity to seize ownership of pre-existing property by unilateral acts—would undermine religious liberty. It would discourage churches from expanding their buildings, from acting in accordance with their conscience as to whether to remain members of their current denominations, and from joining denominations in the first place—all at the price of religious freedom. The ruling below must be reversed.

II. The trial court divested TFC of property by retroactively applying statutes and canons passed after the conveyances at issue, in violation of state law and the Contracts Clause. Assignment #3.

The trial court also erred in divesting TFC of property by retroactively applying laws and canons not in force when TFC acquired its initial property or when it joined the denomination. Unlike the denomination in *Green*, plaintiffs cannot point to any deed as the "genesis" of their alleged interest. 221 Va. at 555-56. Nor did TFC agree to grant them a proprietary interest.

At trial, plaintiffs said their interests "arise when the congregation becomes part of the Diocese." A7041. But TFC joined in the 1830s, when plaintiffs admittedly had no property rights. Their canons stated that local vestries and ministers held all "property belonging *or* hereafter accruing to [affiliated] churches … as trustees *for the benefit of the congregation*." A5912a (emphasis added). In 1845, the Diocese complained to the legislature that "no Christian denomination is capable of taking and holding property." A5307, A5316 (transcription). As the trial court stated in a ruling that was not appealed: "No 19th century Virginia case finds *any* denomination or diocese—entities that lacked legal standing and the ability to contract—to have had *any* enforceable interest in property." A179 (quotations omitted).

Despite this ruling, the trial court cited TEC's consent canons, passed circa 1870, as the main source of plaintiffs' alleged rights. A133-34 & n.73,

A100 & n.36. But those canons cannot possibly have taken effect *before plaintiffs could hold property*. The court cited no authority holding that an interest that is null on creation can spring into being years later if the law changes. *Contra McGehee v. Edwards*, 268 Va. 15, 19 (2004) (applying "the law in effect at the time the trust is executed"). It cannot. "[T]he parties to a conveyance have a right to rely upon the law as it was at th[e] time [of transfer]." *Arkansas Presbytery*, 40 S.W.3d at 309-10 (refusing to apply a later-enacted denominational "trust" clause to land "previously conveyed").

The trial court nevertheless relied on the fact that Va. Code §57-15 "was amended [in 1904] to require proof that the proposed conveyance was 'the wish of … [the] denomination,'" holding that this retroactively validated plaintiffs' consent canons. A100 n.36. But "retroactive laws are not favored"; "a statute is always construed to operate prospectively unless a contrary legislative intent is manifest." *Berner v. Mills*, 265 Va. 408, 413 (2003). And nothing in §57-15 suggests that it applies retroactively.

Nor could it. Under the Contracts Clause (U.S. Const. art. I, § 10; Va. Const. art. I, § 11), a congregation's deed is a "binding contract," and it is "beyond the legislative power" to apply a law to "deprive[] the cestuis que trusts named therein, and created by the trust, of their property rights," or to "convey[] the right to dispose of this property to others." *Finley v. Brent*, 87

Va. 103, 108-09 (1890). Indeed, plaintiffs themselves earlier argued, citing *Finley*, that "it would be unconstitutional to interpret or apply [Virginia statutes] to alter existing rights and obligations or trusts established in governing deeds." A9065. Yet that is exactly how the trial court applied §57-15.

When §57-15 was amended by the legislature in 1904, plaintiffs admittedly had no claim to TFC's property. It "belong[ed] absolutely" to TFC's congregation. *Supra* at 12, 35. Thus, the trial court's decision to strip TFC of its property on the basis of that statutory change was reversible error.

III. The trial court erred in ruling that plaintiffs have a proprietary interest in TFC's unconsecrated real property, which TFC was free to buy, sell, or mortgage in its sole discretion. Assignment #4.

Even assuming, *arguendo*, that the trial court rightly relied on church canons, it neglected key differences between the canons' treatment of consecrated and unconsecrated real estate. In so doing, it wrongfully awarded plaintiffs property (including a strip mall) worth several million dollars.

The distinction between consecrated and unconsecrated property is both simple and fundamental: "consecrated" property is dedicated to divine worship; "unconsecrated" property is not. A7285-86. TEC's consent canons require diocesan approval of encumbrances or alienation of realty "except under such regulations as may be prescribed by Canon of the Diocese." A5693. The Diocese limits this rule to "consecrated property."

A5852. Thus, while the denomination in *Green* "require[d] that all property transfers be approved by the bishop" (221 Va. at 556 & n.3), TFC was free, even under plaintiffs' canons, to transfer or mortgage unconsecrated property at will, and in fact did so. A7902-04, 7909-11, A2376-2396.

For consecrated property, the trial court held that plaintiffs' canonical interest in "prevent[ing] property from being sold" evidenced their "dominion." A134 n.73 (quotations omitted). But when it came to unconsecrated property, the trial court held it irrelevant that only "the consent of the congregation" is needed to buy, sell, or mortgage such property. A134. That no diocesan consent was necessary, the court reasoned, *itself* evidenced the denomination's "procedures" and "authority." A136.

This turns the normal meaning of "dominion" on its head. Indeed, treating denominational authority—whether or not asserted—as dispositive means ownership hinges on denominational polity. This would effectively make Virginia an "implied trust" or "deference to hierarchy" jurisdiction—an outcome that *Norfolk* rejected. 214 Va. at 504. Reversal is warranted.

IV. The trial court erred in divesting TFC of its personal property despite undisputed proof of TFC's total dominion over that property—including the right to withhold donations from plaintiffs—and of TFC's donors' contrary intent. Assignment ## 5 & 6.

Contrary to this Court's remand instructions, moreover, the trial court did not require plaintiffs to prove an interest in TFC's personalty under neu-

tral law. Instead, the court read Va. Code §57-10 to mean that "the personal property of [TFC] follows the disposition of the real property." A156. This error violated both the governing law and the intent of TFC donors.

A. TFC had total dominion over its personal property, and its donations to plaintiffs were voluntary. Assignment #5.

TFC had total discretion over its funds. In contrast to *Green*—where "[the] congregation was required to meet" "assessments" (221 Va. at 551) —plaintiffs here admit that "there's no way for … the Diocese to extract a delinquent pledge from a congregation." A7206. "It is a completely voluntary system of contributions" (A7379-80) with "no enforcement system." A6884. TFC thus withheld or restricted its gifts at will (A7382), foreclosing any suggestion that plaintiffs had "dominion" over its funds.

The trial court ignored this evidence. In *one paragraph* of its 113-page opinion, it invoked §57-10 and declared: "[TFC's] personal property … follows the disposition of [its] real property." A156. This too was incorrect. Indeed, prior to 2005, §57-10 applied only to "books or furniture," not funds.

Even where properly invoked, §57-10 at most creates a presumption that a church's personalty is held "upon the same trusts" as its realty.[20] Addendum, *infra*. But Virginia law bars denominational trusts. *Supra* at 24

[20] Plaintiffs waived reliance on §57-10 by not invoking it in their pleadings and referencing it in just *one sentence* of TEC's *last* post-trial reply brief (A9137). *See Jeter v. Commonwealth*, 44 Va. App. 733, 740-41 (2005).

n.13. Thus, *none* of TFC's property could be held in trust for plaintiffs—as the trial court elsewhere recognized. A93-94. And it only makes sense to read §57-10 like §57-15—under which, "[i]f … the [denomination] is unable to establish a proprietary interest in the property, it will have no standing to object to [any] property transfer." *Norfolk*, 214 Va. at 503.

B. Section 57-10 cannot trump donor intent. Assignment #5.

In all events, §57-10 could not justify awarding plaintiffs several million dollars given to TFC on the express condition that the money *not* go to plaintiffs. If upheld, the ruling below would force TFC's members to give $4 million to a denomination in violation of their consciences and settled law.

In the 1990s, TFC's members began to insist that their pledges not be shared with plaintiffs. A8347-48; A8201-05. "84 percent of [TFC's] congregants … checked the box that they did not want their tithe to go to the Diocese" or "the national Church." A8202-03. TFC conformed its giving accordingly. And by 2003, hearing even greater concern from members, TFC announced that donations would go only to outreach approved by the vestry; those wishing to support plaintiffs had do so independently. A7867-68. That policy remained in effect through disaffiliation. *Id*.

The trial court acknowledged both that TFC's donors objected to supporting plaintiffs, and "that there came a point in time when it was absolute-

ly clear that a contribution … [to TFC] was *not* a contribution to an *Episcopal* [entity]." A156 & n.84. But the court's chosen "point in time" was 2007—four years after TFC's members insisted that giving to plaintiffs stop and months *after* they voted to disaffiliate. The court thus awarded TFC's funds and all property purchased with those funds—accounts worth $2.7 million, and tangible property worth $1.3 to $1.7 million—to plaintiffs. A9164-70.

Nothing in §57-10 supports overriding donor intent. It refers to property given to a church "for its religious purposes"—meaning general, versus "specific," purposes. *Cf*. Va. Code §57.7-1 (any "transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church … "). Those "purposes" are necessarily constrained by donors' restrictions. Churches need not accept restricted gifts. But if they cannot accept the restriction, they cannot accept the gift.

If there were any doubt about §57-10, it would be removed by §57-1—"no man shall be compelled to … support any religious worship, place or ministry whatsoever"—and by the U.S. and Virginia Constitutions. *Everson*, 330 U.S. at 13 ("the First Amendment" and "the Virginia statute" were "intended to provide the same protection"). Compelled financial support of a denomination is a textbook Establishment Clause violation. *Id*. at 11, 16.

The trial court found it irrelevant that TFC's donors objected to sup-

porting plaintiffs, since the donors were giving to an "Episcopal" church affiliated with plaintiffs. A156. But as §57-1 states, "even … forcing [a man] to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." And nothing here put the donors on notice that plaintiffs could seize their restricted gifts.

On the contrary, a Diocesan task force admitted that plaintiffs could not: (1) force members to donate; (2) compel congregations to share donations; or (3) ignore donor restrictions. As the task force's report explained, "many pledgers restricted gifts to their parishes to assure no money went to the diocese or [TEC]"; "[w]e either have to honor restrictions or give the money back." A6885, A6898. Yet the trial court awarded plaintiffs TFC's funds in violation of restrictions that plaintiffs admit must be honored. That was reversible error. *See also* Va. Code §§ 2.2-507.1, 57-4.

C. The trial court erred in awarding plaintiffs more relief than they requested. Assignment #6.

Worse, the trial court gave plaintiffs even broader relief than they requested—forcing TFC to turn over funds given *after* disaffiliation (A156-57), and refusing to give TFC credit for amounts spent on upkeep, despite plaintiffs' agreement to such a credit. As to the former, plaintiffs repeatedly "agree[d] that the money that [TFC] received due to contributions since the

time that [it] disaffiliated, and whatever purchases that [it] may have made with that, [TEC] and the Diocese haven't made a claim on that property." A6990; *accord* A9142 (brief). The trial court's contrary ruling was error, as a "court is not permitted to enter a decree … based on … a right not pleaded and claimed." *Jenkins v. Bay House Assocs.*, 266 Va. 39, 43 (2003).

As to maintenance costs, plaintiffs agreed early on that such costs were valid expenses entitling TFC to a credit: "[T]o the extent [TFC] had assets as of the date of the vote of disaffiliation and *to the extent they have used those assets to pay for the property or to maintain the property, that's fine*." A6985 (statement of plaintiffs' counsel) (emphasis added). Yet the trial court refused even to address this concession, stating only that it stood by its prior ruling. A8641-43. The court thus denied TFC a credit amounting to $2.6 million (A3023) that plaintiffs had stipulated TFC should receive. These errors likewise compel reversal.

CONCLUSION

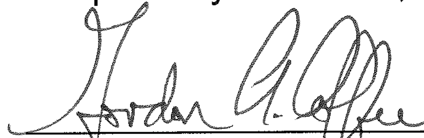
If the ruling below stands, no Virginia congregation can avoid having its property expropriated by an affiliated denomination. The denomination can always transfer ownership simply by passing unilateral rules at church conventions. It does not matter who holds title, what the donor of the property intended, who paid for and maintained the property, whether the de-

nomination's interest is publicly recorded, what the rules were when the congregation joined the denomination, whether the congregation then held title in its own name, or even whether the denomination then existed.

The trial court awarded $30 million of property to plaintiffs by applying internal church canons that were never embodied in any ordinary contract or recorded in any TFC deed. Effectively, the court applied implied trust theory by another name, granting plaintiffs all of the *benefits* of ownership and none of the *burdens*—like having to pay insurance costs or the mortgage, or facing liability for conduct or injuries occurring on the property. No other private entity in Virginia, secular or religious, enjoys that right.

The trial court cited plaintiffs' "hierarchical" polity some 35 times and their canons more than 150 times. Its decision ignores this Court's mandate to apply "principles of real property and contract law" (*Truro*)—principles "'developed for use in *all* property disputes'" (*Norfolk*). It also departs from Virginia's long tradition of religious freedom, and its "determination … to maintain the separation of church and state and to prevent the establishment of any religion." *Norfolk*, 214 Va. at 504. It was this tradition that led the Court in *Norfolk* to reject the idea "that those who unite themselves with a hierarchical church do so with an implied consent to its government." *Id*. Having departed from that tradition, the decision below must be reversed.

Respectfully submitted,



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December 12, 2012

CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:26, I hereby certify that:

This brief complies with the requirements of Rule 5:26.

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The Office of the Attorney General also has submitted its views as an amicus, pursuant to the Attorney General's common law and statutory authority to act on behalf of the Commonwealth with respect to charitable assets. The names, addresses, telephone numbers, facsimile numbers, email addresses, and Virginia bar numbers of the representatives of the Attorney General are:

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I HEREBY CERTIFY that on this 12th day of December, 2012, copies of the foregoing Brief for Appellant The Falls Church were sent by electronic and first-class mail to all counsel named below, and transmitted to the clerk of this Court via hand delivery.

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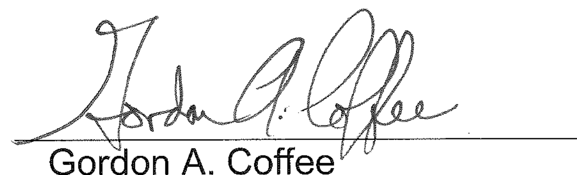

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STATUTORY AND CONSTITUTIONAL ADDENDUM

RELEVANT STATUTORY PROVISIONS

Va. Code §1-248. Supremacy of federal and state law.

The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.

Va. Code §2.2-507.1. Authority of Attorney General regarding charitable assets.

A. The assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust for the public for such purposes as are established by the governing documents of such charitable corporation, the gift or bequest made to such charitable corporation, or other applicable law. The Attorney General shall have the same authority to act on behalf of the public with respect to such assets as he has with respect to assets held by unincorporated charitable trusts and other charitable entities, including the authority to seek such judicial relief as may be necessary to protect the public interest in such assets.

B. Nothing contained in this section is intended to modify the standard of conduct applicable under existing law to the directors of charitable corporations incorporated in or doing any business in Virginia.

Va. Code §57-1. Act for religious freedom recited.

The General Assembly, on January 16, 1786, passed an act in the following words:

"Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infal-

lible, and as such endeavoring to impose them on others, have established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical, and even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors, for the instruction of mankind; that our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it; that though, indeed, those are criminal who do not withstand such temptation, yet, neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being of course judge of that tendency, will make his opinions the rules of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them:

"Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or be-

lief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

"And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies constituted with powers equal to our own, and that, therefore, to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind; and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

Va. Code § 57-4. Donations to vestries for charitable purposes.

Where, previous to January 30, 1806, any donation was made of money or any other thing, for a charitable purpose, and the donation was to be controlled or managed by a vestry, the governing body of the county, city or town, in which the charity was intended by the donor to be exercised, shall exercise the same powers, and perform the same duties, respecting the donation, that could or ought to have been exercised and performed by the vestry, if it had continued to exist and been a corporate body, and shall apply such money or other thing in such manner as may have been directed by the donor.

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 ex-

istence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57-8, is incorporated, has created a corporation pursuant to § 57-16.1, or has ecclesiastical officers pursuant to the provisions of § 57-16.

Va. Code §57-10 (current). How trustees to hold personal property.

When personal property shall be given or acquired for the benefit of an unincorporated church or religious body, to be used for its religious purposes, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts or, if the church has created a corporation pursuant to § 57-16.1, to be held by it as its land is held, and for the same purposes.

Va. Code §57-10 (prior to July 1, 2005).

When books or furniture shall be given or acquired for the benefit of such church diocese, religious congregation, church, or religious society, or branch or division thereof, to be used on such land in the ceremonies of public worship or at the residence of such bishop, or minister or clergyman, the same shall stand vested in the trustees having legal title to the land, to be held by them as the land is held, and upon the same trusts.

Va. Code §57-15. Proceedings by trustees or members for similar purposes, exception for certain transfers.

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

thereof, or that the same may be exchanged, encumbered, improved, or given as a gift, or that encumbrances thereon be extended, and in case of sale for the proper investment of the proceeds or for the settlement of such boundaries by agreement.

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

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

B. As an alternative to proceeding under subsection A, (i) the trustees of a church or religious body that incorporate may transfer the title to the real and personal property of the church or religious body held by them to the incorporated church or religious body; and (ii) the trustees of a church or religious body that do not incorporate under subdivision (i) hereof may transfer title to the real and personal property of the church or religious body held by them to a corporation created pursuant to § 57-16.1 without, in either instance, obtaining court permission if the transfer is authorized in accordance with the church's or religious body's polity. If no petition seeking to set such a transfer aside is filed within one year of the recordation of

the trustees' deed transferring title to the real estate, or the date of the transfer of any personal property, it shall be conclusively presumed that the transfer was made in accordance with the church's or religious body's polity insofar as a good faith purchaser or lender is concerned.

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

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

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Article I, §10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Virginia Constitution, Article I, §16. Free exercise of religion; no establishment of religion.

That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the

support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.

Virginia Constitution, Article I, §11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.