Record No. _____

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

PETITION FOR APPEAL

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STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

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GLOSSARY

Diocese	The Protestant Episcopal Church in the Diocese of Virginia
Op.	January 12, 2012, Letter Opinion of the Court regarding complaints filed by the Protestant Episcopal Church in the United States of America and the Protestant Episcopal Church in the Diocese of Virginia and the amended counterclaims filed by the CANA Congregations
Proposed Findings	CANA Congregations' (Corrected) Proposed Findings of Fact for their Opening Post-Trial Brief (filed Aug. 12, 2011)
TEC	The Protestant Episcopal Church in the United States of America
TFC	The Falls Church
Tr.	Transcript of 22-day Trial in *In re: Multi-Circuit Episcopal Church Property Litigation* (conducted between April 25, 2011, and June 7, 2011).
8/19/08 Op.	August 19, 2008, Letter Opinion Regarding ECUSA/ Diocese's Assertion that 57-9 is Unconstitutional Because it Violates the Contracts Clause
12/19/08 Op.	December 19, 2008, Letter Opinion on Remaining 57-9 Issues
8/12/11 Br.	CANA Congregations' Corrected 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

This petition concerns the trial court's failure to resolve this church property dispute by "'application of neutral principles of law'"—principles "'developed for use in *all* property disputes.'" *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 504, 201 S.E.2d 752, 756 (1974). In reversing an earlier judgment in this case, this Court cited *Norfolk* and *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980), and charged the trial court to decide "the control and ownership of the property … under principles of real property and contract law." *Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 29, 694 S.E.2d 555, 567 (2010). Rather than follow such principles, the trial court justified transferring title to plaintiffs based principally on internal *church canons* that have no role in secular disputes. Review is needed to rectify that error—which affects real and personal property of The Falls Church worth $30 million—and to guide resolution of future cases.

Unlike in *Green*, where the denomination was "the grantee" and its "contractual" right "ha[d] its genesis in the … deed" (221 Va. at 555, 556, 272 S.E.2d at 186), plaintiffs admit that "[n]either the Diocese nor [TEC] is specifically named as a grantee as such in any [TFC deed]." Tr. 31. Title to the property here has always been held solely by the vestry or trustees of TFC—which appointed the trustees and paid for construction and up-

keep. And unlike the deeds of other churches in the case below—which subjected use of their property "to the Constitution, canons & regulations of the Protestant Episcopal Church" (Op. 65)—*none* of TFC's deeds mentions either the denomination or its canons. Indeed, one deed predates plaintiffs' existence, and several deeds do not refer to anything "Episcopal."

The trial court's reasoning in awarding plaintiffs roughly $4 million of TFC's personal property is equally troubling. In contrast to *Green*, where the local church was required to contribute to the denomination (221 Va. at 551, 272 S.E.2d at 183), TFC alone decided what if anything to donate to plaintiffs. TFC withheld or restricted gifts in its discretion, without the need for permission—facts wholly inconsistent with denominational ownership.

Even more disturbing, the trial court ignored undisputed proof that, for many years, TFC's members, for religious reasons, donated on the express condition that their gifts *not* be forwarded to plaintiffs. Rather than honor donor 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." Op. 111. The court even ordered TFC to turn over funds given *after* TFC voted to disaffiliate, reasoning that, until plaintiffs sued, the donors were still giving to an "Episcopal" entity. *Id*.

As evidenced by the Attorney General's brief, this clearly violated Vir-

ginia law, which protects donors' right to restrict the uses of their gifts. Reading §57-10 to allow courts to override donor intent violates both Va. Code §57-1 and core religious liberty principles embodied in the U.S. and Virginia Constitutions. *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 affiliated churches simply by passing internal canons—without being identified on deeds, paying mortgages, or assuming other burdens of ownership—the ruling grants denominations unilateral power to override civil law protecting affiliated churches. No other Virginia entity has such sweeping power over others' property. Thus, the ruling violates religious neutrality and Virginia's ban on "confer[ring] any peculiar privileges or advantages on any sect or denomination." Va. Const. art. I, §16. Second, the ruling violates the Contracts Clause, as it applies state law to give *retroactive* effect to plaintiffs' canons, and thus awards them property that TFC acquired even before joining the denomination.

In sum, the ruling below misread Virginia law in a manner with implications for all churches having denominational affiliations. Churches reading *Norfolk* or *Green* and learning that Virginia applies "neutral principles" would have no inkling that property ownership might turn on church canons passed without their express consent and without notice that such canons

had legal, as opposed to spiritual, consequences. Under neutral principles, the enforceability of canons should turn not on a judicial assessment that a denomination is hierarchical, but 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). Courts applying neutral principles need not "defer to the resolution of … the hierarchical church," or to its "laws and regulations." *Id*. at 597, 609. Review is needed to make that clear.

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. Final Order 13; 8/12/11 Br. 1-153; 9/16/11 Br. 1-76; 10/18/11 Br. 1-83; 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. Final Order 13; 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. Final Order 13; 8/12/11 Br. 20-22, 135-40; 9/16/11 Br. 5, 16; 10/18/11 Br. 25-28.

4. The trial court erred in awarding plaintiffs TFC's unconsecrated real property, which is exempt from plaintiffs' canons. 9/16/11 Br. 29-32.

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.

NATURE 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 earlier recognized this "division," but held the churches had not met the "branch" element of Va. Code §57-9(A). 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, 694 S.E.2d at 567.

On remand, the trial court denied the churches' request for a jury and conducted a bench trial. In January, 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 of contrary donor intent.

In February, the churches moved for partial reconsideration, showing that the court (1) violated donor intent as to funds given after 2003; (2) in awarding plaintiffs funds given after the churches voted to disaffiliate in late 2006, violated donor intent and granted plaintiffs more relief than they had sought; and (3) failed to enforce plaintiffs' earlier agreement to credit the churches for expenditures on maintenance during the suit.

The Attorney General of Virginia, invoking his authority over charitable assets, Va. Code §2.2-507.1(A), filed a brief supporting the donor intent points. The court nonetheless refused to reconsider any part of its ruling.

Final judgment was entered on March 1, 2012. A consent order correcting that order was entered on March 16, 2012. TFC timely noticed its appeal on March 29, 2012. The other churches settled.

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." Op. 60-61. TFC joined the denomination in 1836, long before plaintiffs' canons asserted any interest in member churches' property. Tr. 1044-48. TFC remained affiliated until 2006, when 90.4% of its members voted to join another denomination.

TFC is run by a lay vestry elected by TFC's baptized members. DX-FALLS-0356B. TFC's vestry or trustees have always held sole legal title to its property. TFC's original building sits on land purchased by the vestry in 1746. Op. 62. The 1746 deed grants that land to "[the] Vestry of Truro parish and their successors." DX-FALLS-0001, -0002. As the trial court held in an earlier ruling that plaintiffs did not appeal, "the vestry of the TFC is the legal successor of the vestry of Truro parish." 12/19/08 Op. 16.

Four TFC deeds—the 1746 deed and three that grant land to "Trustees of The Falls Church"—make no reference to *any* "Episcopal" entity. Op. 61-62. Of the other seven deeds, *none* refers to TEC or the Diocese. 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*.

Further, unlike the deeds of other churches below (Op. 65, 68), the deed in *Green*, and the deeds of myriad Virginia churches, *none* of TFC's 11 deeds restricts its property to use by Episcopalians or subject to plaintiffs' canons.

At no time during TFC's affiliation with plaintiffs did either plaintiff ever file any document—*e.g.*, a lien or trust agreement—in the county land records claiming rights in TFC's realty. Tr. 2404-06; DX-FALLS-0057. The only public notice of plaintiffs' claim was a *lis pendens* filed during this suit. Nor have plaintiffs ever asserted an interest in the property in public UCC filings (Apostles Ex. 389), or undertaken to pay any TFC mortgage.

B. The Falls Church's personalty and financial independence

TFC also had full control over its bank accounts. TFC alone decided what, if anything, to contribute to plaintiffs. As plaintiffs' witnesses put it: "there's no way for … the Diocese to extract a delinquent pledge from a congregation." Tr. 358. "It is a completely voluntary system." Tr. 698-99.

Nonetheless, TFC voluntarily gave plaintiffs $4.36 million from 1950 to 2003 ($8.82 million real dollars). DX-FALLS-0073C. This excludes $15.9 million ($26.6 million real dollars) that TFC spent on property improvements and $8.135 million ($12.9 million real dollars) spent on property maintenance during the same period—compared with $0 spent by plaintiffs. Tr. 2521-22, 2524, 2450-56, 2633-35; DX-FALLS-0073A; DX-FALLS-0073B.

Further, 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, therefore, to the national Church." Tr. 2949-50. And from 2003 forward, in response to members' religious objections, TFC announced a policy whereby those wishing to support plaintiffs needed to do so independently. Tr. 1483-84.

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

Plaintiffs are unincorporated voluntary associations whose claims rest principally on two sets of internal church canons.

First, plaintiffs cite "anti-alienation" canons that post-date TFC's affiliation and purport to bar sales of consecrated real property. These canons are not recorded in the land records or referenced in TFC's deeds, and do not apply to personal or unconsecrated real property. PX-COM-0003-027.

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." Op. 29. These canons too post-date the purchase of most of TFC's property, were never publicly recorded, are not referenced in TFC's deeds, and were passed *after Norfolk* and *Green* reaffirmed Virginia's ban on denominational trusts.

ARGUMENT

Standard of Review. Issues of law, such as whether plaintiffs had a cognizable interest in TFC's property, are reviewed de novo. *Bailey v. Town of Saltville*, 279 Va. 627, 633, 691 S.E.2d 491, 493 (2010). Factual findings are reviewed for clear error or lack of support. *County of Albemarle v. Keswick Club, L.P.*, 280 Va. 381, 389, 699 S.E.2d 491, 495 (2010).

I. Review is needed to clarify that Virginia courts must decide church property disputes by applying "neutral principles of law, developed for use in *all* property disputes." Assignment #1.

This Court previously charged the trial court to decide the ownership of TFC's property "under principles of real property and contract law." *Truro*, *supra*. In support, the Court cited *Norfolk*—which directed the courts to decide cases like this by "'application of neutral principles of law, developed for use in *all* property disputes,'" 214 Va. at 504, 201 S.E.2d at 756—and *Green*, which reaffirmed *Norfolk*. 221 Va. at 555, 272 S.E.2d at 185.

Rather than heed the mandate, the trial court ruled principally on the basis of internal church canons that fail to satisfy contract or property law. The court further held that even absent express consent, and despite *Norfolk*'s *rejection* of the view "that those who unite themselves with a hierarchical church do so with an implied consent to its government" (214 Va. at 504, 201 S.E.2d at 755), plaintiffs' canons divested TFC of its property.

Review is needed to clarify that ordinary rules of "property and contract law" (*Truro*) apply to property disputes involving churches.

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

Since 1832, this Court has held 14 times that denominational trusts—which plaintiffs purport to impose unilaterally via their canons—are invalid.[1] Thus, to prove ownership of local church property, denominations bear the "burden of proving" a "proprietary interest" by showing "a violation by the [congregation] of either 'the express language of the deeds or a contractual obligation of the general church.'" *Green*, 221 Va. at 555, 272 S.E.2d at 185-86 (quoting *Norfolk*); *id*. (a "proprietary right" is "a right of one who exercises dominion over a thing or property"). "To this end the language of the deeds and the constitution of the general church should be considered … *in the application of neutral principles of law*." *Id*. (emphasis added). Courts also "look to [Virginia's] statutes" and—where appropriate—"the

[1] *E.g., Norfolk*, 214 Va. at 505-06, 201 S.E.2d at 757-58 (collecting cases); *Gallego's Ex'rs. v. Attorney General*, 30 Va. 450, 461-62 (1832); *Moore v. Perkins*, 169 Va. 175, 179-81, 192 S.E. 806 (1937); *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc*., 249 Va. 144, 152, 452 S.E.2d 847, 851-52 (1995). Plaintiffs concede that denominational trusts were invalid prior to 1993, but say §57-7.1 "reversed Virginia's historical [prohibition]" on such trusts. Tr. 53-54. As the trial court recognized, that is untenable. The act states that it is "declaratory of existing law" (Op. 48), and such a law cannot have reversed so many decisions of this Court. In any event, plaintiffs' trust claim is invalid because it relies not on the expressed intention of the *settlor*, but on a unilateral declaration by the would-be *beneficiary* of trusts in TFC's property. *See infra* at 18 n.6.

dealings between the parties." *Id*. No decision of this Court has found a denominational proprietary interest without finding that the denomination's interest "ha[d] its genesis in the … deed." *Id*. at 556, 272 S.E.2d at 186.

Property law. The trial court failed to apply normal "principles of real property and contract law." *Truro, supra*. As to property law, plaintiffs admit that "[n]either the Diocese nor the Episcopal Church is specifically named as a grantee as such in any [deed]." Tr. 31. In fact, four TFC deeds do not refer to *anything* "Episcopal"; one predates plaintiffs' existence; and *none* restricts TFC's property to use by an "Episcopal" entity or use in conformity with plaintiffs' canons. Nevertheless, the court read all of TFC's deeds to condition TFC's ownership on affiliation with plaintiffs—*i.e*., as a restrictive covenant or a restraint on alienation. Op. 78.

The trial court's ruling thus violated this Court's holdings that even "[a] declaration of the use to which the granted premises are to be applied does not ordinarily import a condition or limitation, but only in cases in which a reverter or forfeiture is expressly provided." *Roadcap v. County School Bd.*, 194 Va. 201, 206, 72 S.E.2d 250, 253 (1952); *accord Scott v. Walker*, 274 Va. 209, 213, 645 S.E.2d 278, 283 (2007) (collecting cases). This rule applies with extra force when, as here, "it would have been easy to say" that property may not be used for other purposes. *Id*. at 218, 645 S.E.2d at 283.

Other Virginia denominations heed this rule by insisting that grantors include reverter clauses or use restrictions in deeds. For example, the United Methodist Church constitution has a 40-page chapter on property mandating specific deed language restricting property use to members.[2] As land records across Virginia confirm, Methodist churches comply. Apostles Exs. 325, 328-29, 331-32, 336-37, 338, 343, 347, 357 (deeds).

Similarly, in the Presbyterian Church USA, local churches' deeds routinely restrict the premises to use by "[a] church belonging to the Presbytery … , subject to the Provisions of the Constitution of the Presbyterian Church (USA)." Apostles Ex. 327.003; *see* Apostles Exs. 324, 326, 348 (deeds). Other denominations—such as Lutheran (Apostles Exs. 335, 339), A.M.E. Zion (Apostles Ex. 356), Church of God (Apostles Exs. 349, 352-53, 344), and Baptist ones (Apostles Ex. 330)—secure property rights the same way.

Conveyances to Episcopal churches *other than TFC* also contain express use restrictions. For example, 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 Con-

[2] Apostles Ex. 308.0036 (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.").

stitution, canons & regulations of the Protestant Episcopal Church of the Diocese of Va." Op. 65. St. Stephen's deed too subjected its property "to the laws and canons" of "the Protestant Episcopal Church," for its members' "sole use and benefit." Op. 68. Later deeds signed by the Diocese contain similar restrictions. Apostles Exs. 333, 334.

This routine use of reverters and use restrictions confirms that, if the grantor had so intended, "it would have been easy to say" (*Scott*, *supra*) that TFC's property was restricted to use by Episcopalians. Similarly, if at any time in its 280-year history TFC had actually consented to restrict use of its property or to give plaintiffs an interest therein, it easily could have asked the court to authorize TFC's trustees to record such actions.[3]

Without even discussing the foregoing precedent, the trial court simply reasoned that most deeds here "refer explicitly to the churches being *Episcopal* churches or make other reference to their *Episcopal* character," 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.'" Op. 78 (citation omitted). But TFC's original land was acquired before plaintiffs *existed* and nothing in *any* TFC deed restricts its

[3] TFC was familiar with such recordations, as it routinely transferred property, granted easements, and granted deeds of trust to secure debt. DX-FALLS-0016 through 0029; DX-FALLS-0030 through 0032; DX-FALLS-0046 through 0049; DX-FALLS-0052 through 0055.

property to use by Episcopalians. *Cf. Green*, 221 Va. at 553, 272 S.E.2d at 184 ("grantors conveyed the property to 'Trustees of the A.M.E. Church of Zion,'" "for the purpose of erecting an A.M.E. Church of Zion (to be known as Lee Chapel), not a church of some other denomination").[4]

Review is further warranted by the trial court's failure to apply neutral principles in ruling that plaintiffs exercised "dominion" over TFC's property. This Court equates "actual dominion" with "actual possession." *Quatannens v. Tyrrell*, 268 Va. 360, 366, 601 S.E.2d 616, 618 (2004). And the trial court earlier found—after a trial—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." 12/19/08 Op. 15 n.10 (not appealed).

It is undisputed that TFC alone decided who could enter the premises and on what terms. As plaintiffs' bishop put it: "If a bishop wants to meet with a vestry, [he] would … have to be invited." Tr. 318. Citing various facts—*e.g.*, that bishops visited TFC for confirmations or to examine the state of the church—the trial court found plaintiffs to have "dominion." Op.

[4] *See Finley*, 87 Va. 103, 104, 12 S.E. 228, 229 (1890) (ruling for minority faction where deed granted land "for the sole and exclusive use and benefit of religious congregations of regular orthodox Methodist Protestants" and "no other use or purpose whatever"); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1884) (summarizing similar cases decided based on "the deed alone").

93-94. But those facts do not add up to "dominion" under Virginia law.

To be sure, dominion also "may be accomplished 'by residence, cultivation, improvement, or other open, notorious and habitual acts of ownership.'" *Tyrrell*, 268 Va. at 366, 601 S.E.2d at 618. Here, however, TFC alone "chose the architecture" (Tr. 1119, 1452, 2454); incurred the costs of designing improvements (Tr. 1455-56, 2451); did "competitive bidding" and oversaw construction (Tr. 1455, 2454-55); and "work[ed] with the board of county supervisors" on zoning issues (*id*.). As plaintiffs' counsel put it, the "day-to-day responsibility" for "management, payment, and so forth related to the property" is handled by "the vestry and the local church." Tr. 964.

Plaintiffs undertook no obligation to pay for any of this; money flowed the other way. Indeed, TFC not only *voluntarily* gave plaintiffs $4.3 million from 1950 to 2006 ($8.8 million in real dollars) (Tr. 2525-26); it was also responsible for property upkeep and improvement for "as long as the records … show."[5] From 1991 to 2010 alone, TFC spent $6.4 million on maintenance. Tr. 2521-22; DX-FALLS-0073A-00001. Plaintiffs contributed $0.

Further, since 1950 TFC spent $15.9 million on improvements ($26.6 million in real dollars). Tr. 2524; DX-FALLS-0073B-000001. Neither plaintiff

[5] Tr. 2518-19 ("Q [W]ho's maintained the property … and performed necessary repairs? A The vestry. Q And the congregation? A And the congregation. Q How long has the congregation maintained the property? A As long as the records that I've been able to review show. Q 1873? A 1873.").

contributed a dime or assumed any debt. Tr. 2450-56, 2633-35, 1457-58; Tr. 2441-42, 1459. Nor did plaintiffs pay for casualty insurance or indemnify TFC's trustees. Rather, the Diocese indemnifies only trustees that *it* appoints and insures only property "over which *the Diocese* has control." PX-COM-0003-028, -029 (Canon 15.7) (emphasis added). Plaintiffs' own canons thus implicitly admit that they do *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.

Contract law. The trial court's dismissive treatment of "principles of … contract law" (*Truro*) also compels review. The court gave no reason for not "apply[ing] traditional concepts of contract law, such as the requirement of consideration, mutuality of remedies," "and so on," stating without analysis that it did not find the claims "meritorious." Op. 46, 47. That was error.

First, the trial court treated plaintiffs' unilateral canons as a contract, ignoring the absence of mutual assent or mutual remedy for breach. "[To form] an agreement, the parties must have a distinct intention common to both and without doubt or difference." *Smith v. Farrell*, 199 Va. 121, 128, 98 S.E.2d 3, 8 (1957) (citation omitted). Further, the U.S. Supreme Court views mutual assent as 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. *They* can modify the deeds or the corporate charter to include a right of reversion or trust." *Jones*, 443 U.S. at 606 (emphasis added). But rather than negotiate a *joint* agreement, as required by *contract* law, plaintiffs responded to *Jones* by passing canons *unilaterally* asserting a *trust* in property to which they lack title—ignoring *both* the mutuality requirement *and* Virginia's ban on such trusts.[6] And despite earlier noting that "a contract requires *mutual* assent and the communication of that assent" (8/19/08 Op. 10), the trial court refused to apply that rule here.

It is undisputed that TFC never affirmatively agreed to grant plaintiffs a proprietary interest. 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] that the Episcopal Church or the Diocese would have an ownership interest." Tr. 2632-33; Tr. 1294-95

[6] Even if denominational trusts were otherwise valid in Virginia, plaintiffs' canons would not establish one. Only the settlor—the party with title—may create an express trust in property. *E.g.*, *Leonard v. Counts*, 221 Va. 582, 588, 272 S.E.2d 190, 194 (1980) ("An express trust is based on the declared intention of the trustor."). As the South Carolina Supreme Court has held—in reasoning equally applicable in Virginia—"[i]t 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 or transfer legal title to one person for the benefit of another." *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 174 (S.C. 2009). As plaintiffs lack title, the "Dennis Canon" has "no legal effect" under trust law. *Id*.

(TFC never "affirmatively agreed to Diocese Canon 15" or the "Dennis Canon"); *cf.* Tr. 2560 (plaintiffs' counsel: "There's no record of who voted for and who voted against the passage of [plaintiffs' trust canon]."). TFC's business manager testified to the same effect, based on a review of TFC's records dating to the 1800s. Tr. 2546, 2615-16.

Rather than focus on any express consent by TFC, the trial court relied principally on the collective "course of dealings" of all of the churches—"vestry oaths, vestry minutes, vestry handbooks, local church constitutions"—as evidencing "the congregations' 'agreements, pledges, or representations'" to grant plaintiffs' proprietary rights. Op. 40 n.23; Op. 92-93. But the evidence as to TFC is distinct from that of the other churches below. *Compare* Op. 94 (TFC) *with* Op. 94-100 (other churches). To cite a few examples, unlike the other churches, TFC never (1) amended its bylaws to recognize plaintiffs as having proprietary interests in its property (Op. 99-100); (2) stated that "the diocese … is the real owner" of its property (Op. 98); or (3) executed "instruments of donation" pledging its buildings to plaintiffs and "relinquish[ing] all claim to any right of disposing of [them]" (Op. 95). The most that plaintiffs could cite was page 85 of a vestry handbook stating that TFC was subject to plaintiffs' constitution and canons. PX-FALLS-078-085. That does not convey a property interest under neutral law.

The trial court also relied on declarations taken by vestry members on taking office as a basis to divest TFC of its property. Op. 94. While those declarations referenced the "discipline" of plaintiffs, nothing suggested the declaration had legal, as opposed to spiritual, significance—much less that it bound *TFC* concerning *property*.[7] Further, given that the declaration began with a commitment to biblical authority, to which the balance of the declaration was subject, Tr. 2431-32, 2626-27, it would violate the First Amendment to hold that it created civil law duties or was breached. *Jones* 443 U.S. at 604 (courts "must take special care to scrutinize [church] document[s] in purely secular terms, and not to rely on religious precepts").

Second, "where 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, 888, 80 S.E.2d 608, 617 (1954) (citation omitted).[8] But as TEC's

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[7] The vestry declaration states in full: "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." PX-COM-0003-022.

[8] *Accord Capps v. Capps*, 216 Va. 378, 381, 219 S.E.2d 901, 903-04 (Va. 1975); 4A *Michie's Jurisprudence*, Contracts § 2, at 404 (2007) ("To be a

chief legal officer admitted, an "individual parish" such as TFC lacks the "ability to force the Diocese to abide by the constitution and canons." DX-CANA2011-0009-00029. Plaintiffs' experts said the same. Tr. 1297-98, 1110-11. Thus, plaintiffs had no legally enforceable duties. And a "contract" that only one side may enforce is unknown to Virginia law.

Third, plaintiffs' canons fail for lack of consideration, as they offered nothing in exchange for the interest they purported to unilaterally declare in TFC's property. "[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 therefor and unenforceable." *Seward v. New York Life Ins. Co*., 154 Va. 154, 168, 152 S.E. 346, 350 (1930). Here it is undisputed that, on adopting their anti-alienation canons, plaintiffs did no more to "perform" than they formerly did—in the words of their expert, plaintiffs kept "simply doing what has been done" before. Tr. 1193-94. Similarly, neither plaintiff "beg[a]n providing any services or benefits to [TFC] which were over and above services or benefit provided prior to [the trust canons adopted in 1979 and 1983]." Tr. 2695-96.

Fourth, having rejected "traditional concepts of contract law" (Op. 46), the trial court found proprietary rights via "course of dealing" evidence. Op.

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contract, [an agreement] must respect property or some object of value and confer rights which may be asserted in a court of justice.")

43-44. Yet it cited such evidence not to fill gaps in an undisputed contract, but to find a contract *to exist*. *E.g.*, Op. 44 (treating "'course of dealings' evidence as instructive to understanding … each parties' [*sic*] awareness of, and agreement to, the rules governing a supercongregational church"). 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, 666 S.E.2d 331, 335 (2008). It was also contrary to *Green*, where (1) the court's review of the course of dealing closely tracked the denomination's constitution, which set out specific means for churches to grant the denomination rights, and (2) "the contractual obligation which the [denomination] assumed ha[d] its genesis in the … deed." 221 Va. at 556, 272 S.E.2d at 186.

Fifth, the trial court recognized that Virginia law "d[oes] not validate denominational trusts" (Op. 29 n.14), and thus that plaintiffs' trust canons are invalid. Yet it inexplicably held that "these canons could be considered in the context of that portion of the 'neutral principle[s] of law' analysis related to 'course of dealings' between the parties … and given such weight as the Court deems warranted." Op. 50. The court even held that, in allegedly failing to object to plaintiffs' assertions of such a *facially invalid* trust, TFC's course of dealing created a contract. Op. 94 (invoking Dioce-

san correspondence to TFC asserting a "trust" in its property as evidencing TFC's implicit consent to grant plaintiffs property rights, despite TFC's challenge to that assertion, *see* DX-FALLS-0234-00314 to 00316).

The trial court also relied on TFC's compliance with canons calling for Diocesan consent to encumbrances of consecrated property. But nothing in those canons alerted TFC that compliance would affect ownership. Tr. 1044-48. By analogy, a homeowner may be bound by neighborhood association rules requiring the association's consent before she can put up a fence. But neither the existence of such rules nor the homeowner's compliance enables the association to assert ownership of her house.

Further, the official version of the canons published under TEC's control itself recognizes that these canons "w[ere] not sufficient to prevent [the] alienation" of church property (Apostles Ex. 290.0007); canons "have no legal force" (Apostles Ex. 372.0004). Thus, as the Diocese admitted more than 40 years after the anti-alienation canons' adoption, the "Colonial Churches" including TFC "belong absolutely to the parish" and are "cared for by the well organized congregations *which own them*." PX-COM-0152-035 (emphasis added). As one Diocesan official recently put it: "[t]he 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 who is God and Father of all." PX-COM-0276-0103.

Sixth, the trial court ignored that even if the canons otherwise created a contract, "association regulations" are "limited by general law" and a "test of reasonableness" that bar "encumbering [members'] property" or effecting a "forfeiture" thereof. *Unit Owners' Ass'n v. Gillman*, 223 Va. 752, 767, 763, 765, 292 S.E.2d 378, 385, 383-84 (1982). Rules of a "voluntary association" cannot purport "to transfer the title to [members'] property"; that is a "function[] of sovereign power." *Davis v. Mayo*, 82 Va. 97, 103 (Va. 1886). The trial court's contrary ruling compels review.

B. Review is needed to clarify that civil enforcement of church canon law—which gives plaintiffs property rights enjoyed by no other entity—is unconstitutional. Assignment #2.

In enforcing internal church canons, the trial court granted plaintiffs unilateral power to override civil law—far greater power to create property rights than is enjoyed by any other Virginia entity, secular or religious. This violated the First Amendment and Article I, §16 of 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 bars 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 bars "confer[ring] any peculiar privileges or advantages on any sect or denomination" (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 505, 201 S.E.2d at 757.

By stripping churches of property via means available only to denominations, the ruling below flouts these principles. It grants denominations a "peculiar privilege" of creating property rights by extra-legal means. They alone hold "unilateral power" to designate themselves beneficial owners of others' property—regardless of whether their interests are embodied in "legally cognizable form." *Jones*, 443 U.S. at 606. Indeed, if the ruling below stands, then no Virginia church can join a denomination without risking loss of its property, as the denomination can always pass a rule asserting ownership. Such a legal regime would greatly discourage denominational affiliation, at the price of religious freedom. This Court should grant review.

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

The trial court also erred in divesting TFC of property by retroactively applying canons and laws 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 in TFC's property. 221 Va. at 555-56, 272 S.E.2d at 186. Nor can they point to a specific agreement by TFC to grant them a proprietary interest.

At trial, plaintiffs said their interests "arise when the congregation becomes part of the Diocese." Tr. 39. But TFC joined in 1836, when plaintiffs admit they had no property rights. As the Diocese lamented in an 1845 petition to the General Assembly, "no Christian denomination is capable of taking and holding property of the smallest amount." DX-FALLS-0413-0002, 0413A-0001; Tr. 3546. Plaintiffs also admit that "Virginia law did not give legal recognition to unincorporated associations" until well into the 1900s. 9/16/11 Br. 22 (citing Va. Code § 8.01-15, the first version of which took effect in 1919[9]). In short, as the trial court held in an earlier ruling that was not appealed, "[n]o 19th century Virginia case finds *any* denomination or diocese—entities that lacked legal standing and the ability to contract—

[9] Code of Virginia, Vol. 2, at 2679 (1919) (Section 6058, Suits by and against unincorporated associations and orders) ("[t]his section is new.").

to have had *any* enforceable interest in property"; "denominations were … without a 'legal existence.'" 8/19/08 Op. 13 (quotations omitted).

Notwithstanding its earlier ruling, the trial court pointed to TEC's anti-alienation canons, passed circa 1870, as the principal source of plaintiffs' alleged rights. Op. 88-89 & n.73, 55 n.36. But those canons cannot possibly have taken effect *before plaintiffs had legal standing to form contracts or hold property*. The court cited no authority holding that an interest that is null on creation can spring into existence years later if the law changes. *Cf. McGehee v. Edwards*, 268 Va. 15, 19, 597 S.E.2d 99, 102 (2004) (applying "the law in effect at the time the trust is executed"); 90 CJS Trusts §85 ("The law in effect at the time of the creation of the trust governs its validity"). As the Arkansas Supreme Court held in striking down a later-enacted denominational "trust" clause, the law does not "allow a grantor to impose a trust upon property previously conveyed"; "the parties to a conveyance have a right to rely upon the law as it was at th[e] time [of conveyance]." *Arkansas Presbytery* v. *Hudson*, 40 S.W.3d 301, 309-10 (Ark. 2001).

The trial court noted that Va. Code §57-15 (reproduced in the Addendum) was amended in 1904, suggesting that the amendment retroactively validated plaintiffs' anti-alienation canons or alleged proprietary interests. Op. 55 n.36. But "retroactive laws are not favored, and … a statute is al-

ways construed to operate prospectively unless a contrary legislative intent is manifest." *Berner v. Mills*, 265 Va. 408, 413, 579 S.E.2d 159, 161 (2003). Nothing in §57-15 suggests that it applies retroactively, let alone to deprive vested property rights. 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 statute 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*, 87 Va. at 108-09, 12 S.E. at 230. Review is warranted.

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.

This Court should also review the trial court's ruling on TFC's "unconsecrated" realty. Even assuming *arguendo* the court rightly relied on church canons, it neglected key differences between the canons' treatment of consecrated and unconsecrated realty. As a result, it wrongfully awarded plaintiffs property (including a commercial mall) worth several million dollars.

"Consecrated" property is dedicated to divine worship; "unconsecrated" property is not. Tr. 533-34. TEC's canons specify diocesan approval of encumbrances or alienation of real property "except under such regulations as may be prescribed by Canon of the Diocese." PX-COM-0001-045. The

Diocese's canons limit this rule to "consecrated property." PX-COM-0003-027. Whereas the denomination's constitution in *Green* "require[d] that *all* property transfers be approved by the bishop" (221 Va. at 556 & n.3, 272 S.E.2d at 186 & n.3 (emphasis added)), TFC was free to buy, sell, or mortgage unconsecrated property at will, and did so. Tr. 2443-45, 2450-52; DX-FALLS-0016 through 0021B.

For consecrated property, the trial court held that plaintiffs' canonical interest in "prevent[ing] property from being sold" evidenced their "dominion." Op. 89 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. Op. 89. That no diocesan consent was necessary, the court reasoned, *itself* evidenced the denomination's "authority" and "procedures." Op. 91.

This turns the normal meaning of "dominion" on its head. Indeed, treating denominational authority—whether asserted or not—as dispositive means ownership hinges on denominational polity. This would effectively make Virginia an "implied trust" or "deference to hierarchy" jurisdiction. But *Norfolk* rejected "implied trust doctrine" and the view "that those who unite themselves with a hierarchical church do so with an implied consent to its government." 214 Va. at 504, 201 S.E.2d at 755-56.

IV. The trial court erred in awarding TFC's personal property to plaintiffs despite undisputed evidence of TFC's total dominion over that property—including the right to withhold all donations from plaintiffs—and contrary to the express religious preferences of TFC's donors. Assignment ## 5 & 6.

Contrary to this Court's remand instructions, the trial court did not require plaintiffs to prove an interest in TFC's personal property under property or contract law. Instead, it read Va. Code §57-10 to mean that "the personal property of [TFC] follows the disposition of the real property of [TFC]" and "must also be turned over to the Diocese." Op. 111. Review is warranted to rectify this error—which affects property worth $4 million, and violated not only the relevant statutory framework but also donor intent.

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. Unlike in *Green*—where "[the] congregation was required to meet" "assessments" (221 Va. at 551, 272 S.E.2d at 183)—plaintiffs here admit "there's no way for … the Diocese to extract a delinquent pledge from a congregation." Tr. 358. "It is a completely voluntary system of contributions" (Tr. 698-99) with "no enforcement mechanism." PX-STPAUL-0176-003. TFC thus withheld or restricted gifts at will, without the need for permission. Tr. 701, 2639-41. It is inconceivable that plaintiffs had "dominion" over TFC's funds under *Green*.

Yet the trial court ignored this evidence. In *one paragraph* of its 113-

page opinion, it invoked §57-10 *sua sponte* and declared: "[TFC's] personal property … follows the disposition of [its] real property." Op. 111.

Even if properly invoked, §57-10 at most creates a presumption that a church's personalty is held "upon the same trusts" as its realty. Addendum, *infra*.[10] But this Court's rulings bar denominational trusts. *Supra* at 11 n.1. Thus, *none* of TFC's property could be held in "trust" for plaintiffs—as the trial court elsewhere held. Op. 48-49. Further, nothing in §57-10 purports to relieve plaintiffs of their duty under the remand instructions to show proprietary rights in TFC's personalty. 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, 201 S.E.2d at 755.[11]

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

In all events, §57-10 could not justify awarding plaintiffs several million dollars of property given on the express condition that it *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.

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[10] Plaintiffs waived §57-10 by not invoking it until referencing it in just *one sentence* of the *last* of five post-trial briefs (10/14/12 TEC Br. 12). *See Jeter v. Commonweath*, 44 Va. App. 733, 740-41, 607 S.E.2d 734, 737 (2005) (refusing to consider authority cited for the first time in a reply brief).

[11] Prior to 2005, §57-10 applied only to *tangible* personal property. It was then expanded to other personalty, but should not be applied retroactively.

The facts are undisputed. In the 1990s, due to religious differences with plaintiffs, TFC adopted a policy giving members the ability to designate that their donations would not be shared with plaintiffs. Tr. 3980-81, 2948-52. In response, "84 percent of [TFC's] congregants … checked the box that they did not want their tithe to go to the Diocese and, therefore, to the national Church." Tr. 2949-50. TFC conformed its giving accordingly.

By 2003, however, in response to 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. Tr. 1483-84. That policy stayed in effect through 2006 (and beyond). *Id*.

The trial court acknowledged both that TFC's donors objected to having any donations diverted to plaintiffs, and "that there came a point in time when it was absolutely clear that a contribution … [to TFC] was *not* a contribution to an *Episcopal* [entity]." Op. 111 & n.84. But the court's chosen "point in time" was 2007—years after TFC's members insisted that giving to plaintiffs cease and *after* they voted to disaffiliate. The court thus awarded TFC's funds and all property purchased therewith—accounts containing $2.7 million, and tangible property worth $1.3 to $1.7 million—to plaintiffs.

Nothing in §57-10 supports reading it to override donors' wishes. It refers to property given to a church "for its religious purposes"—meaning

general, versus "specific," purposes. *Cf*. §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 abide by the restriction, neither can they accept the gift.

Any doubt about §57-10 would be removed by Va. Code §57-1—which provides that "no man shall be compelled to … support any religious worship, place or ministry whatsoever"; "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical"—and by the First Amendment and Article 1, §16 of Virginia's Constitution. *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947) ("the First Amendment' and "the Virginia statute" were "intended to provide the same protection"). Indeed, compelled support of a religious denomination is a textbook Establishment Clause violation.[12]

The trial court viewed the wish of TFC's donors not to support plaintiffs as irrelevant, since they were giving to a church affiliated with plaintiffs. Op. 111 ("[TFC] in 2003, 2004, 2005, and through most of 2006 remained

[12] *Everson*, 330 U.S. at 11, 16 (objections to being forced "to pay ministers' salaries and to build and maintain churches and church property" animated the First Amendment); *Watson v. Jones*, 80 U.S. 679, 723 (1871) ("[I]t must be that [donors] can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters").

[an] *Episcopal* church[]"). 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 put the donors on notice that plaintiffs could seize their restricted gifts.

To the contrary, a Diocesan task force admitted that plaintiffs lacked the right to: (1) force church members to donate; (2) compel congregations to share donations; or (3) ignore donor restrictions. A memorandum written in 2004—one year after TFC cut off all unrestricted gifts to plaintiffs—recognized "the reality that many pledgers restricted gifts to their parishes to assure no money went to the diocese or General Church"; "[w]e either have to honor restrictions or give the money back." 2/22/12 Br. Exh. A at 4, 14. Yet the trial court let plaintiffs defy the restrictions here *without* giving the money back. That error calls out for review. But it gets worse.

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

The trial court gave plaintiffs even broader relief than they requested —both in forcing TFC to turn over money given *after* the vote (Op. 111-12), and in refusing TFC credit for funds spent on maintenance, even though plaintiffs had agreed to such a credit. As to the former, plaintiffs repeatedly expressed their "agreement that the money that [TFC] received due to con-

tributions 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." 9/19/08 Tr. 48. Their briefs too affirmed that they did not "'seek donations made after the disaffiliation.'" 10/14/11 Diocese Br. 68. The trial court's contrary ruling was error. "[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, 581 S.E.2d 510, 512 (2003).

As to maintenance costs, plaintiffs agreed early in the case that such costs were legitimate expenses for which TFC should receive a credit:

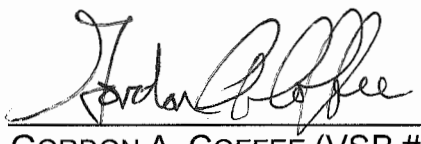
> [Plaintiffs' counsel] MS. ZINSNER: Your Honor, we're not interested in their current assets now, their weekly collections. But to the extent they had assets as of the date of the vote of disaffiliation and ***to the extent they have used those assets to pay for the property or to maintain the property, that's fine***. But to the extent they have used those assets as of the date of the disaffiliation to pay their rectors, to pay their lawyers, that is what we have an issue with.

5/30/08 Tr. 32 (emphasis added). Yet the trial court refused to reconsider this point without even addressing this concession, stating only that its prior opinion was correct. The court thus denied TFC a credit, amounting to $2.6 million, that plaintiffs had stipulated TFC should receive for maintaining the property during the litigation. These errors call out for review.

CONCLUSION

For the foregoing reasons, the petition for appeal should be granted.

Respectfully submitted,



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CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:17(i), I hereby certify that:

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I HEREBY CERTIFY that on this 1st day of June, 2012, copies of the foregoing Petition for Appeal were sent by electronic and first-class mail to all counsel named below. Counsel for appellant desire to state orally and in person to a panel of this Court why this petition should be granted:

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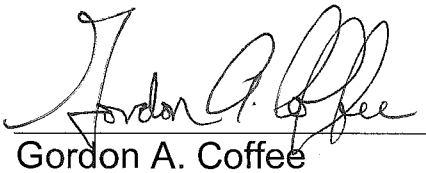

Gordon A. Coffee

STATUTORY AND CONSTITUTIONAL ADDENDUM

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 infallible, 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 opin-

ions 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 belief; 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 §57-7.1. What transfers for religious purposes valid.

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

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

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

Va. Code §57-10. 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 §57-15. 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.

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.