V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:	)	
Multi-Circuit Episcopal Church	)	**Civil Case Numbers:**
Litigation	)	CL 2007-248724,
	)	CL 2007-1625,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1238,
	)	CL 2007-5250,
	)	CL 2007-5364,
	)	CL 2007-5683,
	)	CL 2007-5682,
	)	CL 2007-5684, and
	)	CL 2007-5902.

CANA CONGREGATIONS'
POST-TRIAL OPPOSITION BRIEF

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INTRODUCTION

TEC and the Diocese profess adherence to neutral principles of "real property and contract law" (*Truro Church*, 280 Va. at 29), but their opening briefs are most notable for their failure to engage those principles. In reality, the legal theory they press is deference to hierarchy.

As to real property law, plaintiffs admit that, in contrast to *Green*, "[n]either the Diocese nor the Episcopal Church is specifically named as a grantee as such in any of [the deeds]." Tr. 31:13-16. Accordingly, plaintiffs are left to argue that a deed's "use [of] the word 'Episcopal' in identifying the grantee" itself precludes the grantee from changing denominations. Diocese Br. 27. Under longstanding Virginia Supreme Court precedent, however, restraints on alienation are disfavored (*Scott v. Walker*, 274 Va. 209, 218 (2007)), and deeds will not be read to restrict the use of property to worship under a particular denomination's authority absent explicit language to that effect. *See id*.; *Green*, 221 Va. at 553 ("[t]he 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, or an independent church"). Thus, affiliates of general associations may change their name and disaffiliate with their property, so long as "[t]he property [i]s not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the orders and regulations of the [general association]." *Davis*, 1886 WL 2979, *4. Only two of the 42 deeds here even arguably contain such language. And as to the ten parcels conveyed by deeds that do not even identify "Episcopal" grantees—including two conveyed before TEC existed—plaintiffs admit that "[their] case is not as strong." Diocese Br. 27.

Plaintiffs likewise fail to engage neutral principles of contract law. "[F]orming a contract requires mutual assent and the communication of that assent." Letter Op. at 10 (Aug. 19, 2008) (quotation omitted); *see Jones*, 443 U.S. at 606 ("the *parties* can ensure, if *they* so desire, that the

faction loyal to the hierarchical church will retain the church property" (emphasis added)). Plaintiffs' contract theory, by contrast, rests on their unilateral adoption of church canons. Unlike the constitutional provisions in *Green*, plaintiffs' canons provide no means for a congregation to express consent (or lack thereof) to a denominational property interest. Further, plaintiffs ignore the uniform testimony that the Congregations did *not* agree to any such interest.

Plaintiffs' contract claims also run afoul of the requirements of consideration and mutual remedies, which their property-related canons fail to satisfy. Setting aside whether such difficulties render plaintiffs' canons unenforceable as a whole, an otherwise valid contract may contain particular provisions that are unenforceable for failure to satisfy specific civil law mandates. For instance, an otherwise legal loan may specify an interest rate for late payments that violates state usury laws. So too with canons. Whether "civil courts will be bound to give effect" to a particular canon depends upon whether it reflects "the result indicated by *the parties*" and is "embodied in ... *legally cognizable form*." *Jones*, 443 U.S. at 606 (emphasis added).

Plaintiffs' property-related canons fail this test. For starters, the only canons that actually speak to property *ownership* are facially invalid. Those canons not only contravene Virginia's longstanding ban on denominational trusts; they would be invalid even absent that ban, as putative *beneficiaries* may not assert trust interests in properties titled in others' names. *E.g.*, *Leonard v. Counts*, 221 Va. 582, 588 (1980); *Peal v. Luther*, 199 Va. 35, 37 (1957). Plaintiffs' anti-alienation and debt canons fare no better. Read as plaintiffs' suggest, those canons would work a contractual forfeiture of the CANA Congregations' properties. But the canons neither bar disaffiliation nor assert any claim of ownership, and a contract will not be read to result in a forfeiture of property unless it "give[s] the right of forfeiture in terms so clear and explicit as to leave no room for any other construction." *Wickline*, 205 Va. at 169.

Indeed, even where the language of an association's rule *is* clear, the Virginia Supreme Court has held that courts may not enforce associational rules that effectively "fine [members]" or "encumber[] their property." *Gillman*, 223 Va. at 765. A "mere voluntary association" cannot take actions purporting "to transfer the title to the property [of members] … from those in whom it was at that time vested"; such actions are "functions of sovereign power." *Davis*, 1886 WL 2979, at *4. Plaintiffs ignore this authority, which confirms that "the validity of association regulations" is not only "limited by general law," but subject to a "test of reasonableness" that rules effecting a forfeiture of property flunk. *Gillman*, 223 Va. at 763, 767.

Unable to cite Virginia cases supporting the alleged supremacy of their canons, plaintiffs cite scores of cases from other jurisdictions. Most of these cases, however, apply a deference-to-hierarchy approach that *Norfolk* specifically rejected, and the balance either hinge on statues that give effect to denominational trust clauses or on express congregational commitments to subject their property to denominational control. By contrast, when those factors are absent, courts in other jurisdictions following "neutral principles" have ruled in favor of the local congregation.

Aware that their canons do not create enforceable interests under a true "neutral principles" analysis, plaintiffs offer an "alternative" path to a ruling in their favor—what they call the "identity approach" to church property. TEC Br. 2; Diocese Br. 42, 44. Under this approach, ownership turns on one question—"Who is the local church?"—which purportedly must be resolved in plaintiffs' favor, since "a local entity's affiliation with a larger, hierarchical organization is an essential defining characteristic of the local entity's identity." TEC Br. 1. Plaintiffs seek support for this theory in "[v]enerable Virginia authority" (Diocese Br. 44), such as *Brooke*, *Hoskinson*, and *Finley*. TEC Br. 47-49. But they have grossly mischaracterized Virginia law.

Setting aside that plaintiffs "have no standing to object to [any] property transfer" if they

are "unable to establish a proprietary interest" (*Norfolk*, 214 Va. at 503), Virginia has never adopted the "identity approach." Under that approach, a denomination could shift ownership to the loyalist wing simply by declaring the majority wing of a congregation "inactive"—thus circumventing the entire framework of *Norfolk* and *Green*. That is not the law in Virginia. Indeed, "the position of the Presbytery" in *Norfolk* "[was] that Grace Covenant Church, as a congregation, has otherwise ceased to exist; they don't exist anymore." DX-PRAEC-006-0027 (Joint App. in *Norfolk*). But the Court rejected that notion, ruling that Virginia courts need not defer to "the ecclesiastical law of the general church." 214 Va. at 503.

To be sure, the Court in *Finley*, *Hoskinson*, *Brooke*, and similar cases had to determine which wing of a congregation was made up of members of a particular denomination. But that was because *the deeds* at issue contained restrictions that expressly limited use of the properties to worship under a specific denomination's auspices. The Court answered the question of "Who … are the beneficiaries entitled to the trust estate?" under "the deed in question"—by "[l]ooking to the deed alone." *Finley*, 87 Va. at 104; *see also Boxwell*, 79 Va. at 407 ("[l]ooking to the deed alone"); *Hoskinson*, 73 Va. at 431 ("[l]ooking to the deed alone"); *accord Brooke*, 54 Va. at 315 (analyzing which congregational wing comprised "members of the Methodist Episcopal church, in the sense in which the term is used in the deed"). But as we have shown, only two of the 42 deeds at issue here contains arguably similar language.

In summary, plaintiffs have failed to make their case under "principles of real property and contract law," and their "identity approach" should be recognized for what it is—deference to hierarchy. Under Virginia law, courts must resolve church property disputes based on "'neutral principles of law, developed for use in all property disputes.'" *Norfolk*, 214 Va. at 504 (quotation omitted). Those principles require a ruling in favor of the CANA Congregations.

ARGUMENT

I. The Episcopal Church And The Diocese Have Failed To Carry Their Burden Of Establishing A Proprietary Interest Under *Norfolk* And *Green*.

A. TEC and the Diocese have failed to establish a proprietary interest based on the relevant state statutes.

Plaintiffs' discussion of Virginia statutes is relevant for what it omits. They invoke § 57-7.1 and admit that denominational trusts were invalid until 1993, but ignore that the statute "is declaratory of existing law." They invoke § 57-15, but nowhere acknowledge that, "[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*" under that statute. *Norfolk*, 214 Va. at 503 (emphasis added). They say the properties here have been "abandoned," but do not discuss the language in § 57-15(A) establishing the standard for abandonment. They invoke § 57-16.1, but fail to address the fact that, unlike other parts of Title 57, that provision does not refer to rules of the "diocese" or "denomination." They neglect to discuss § 1-248, applied in *Gillman*, which confirms that voluntary associations are subject to generally applicable law, and may not enact rules that alter members' property rights or flunk the rule of reason. They also fail to take account of the fact that, under basic rules of statutory interpretation and the Contracts Clause, Virginia statutes may not be applied retroactively to disturb vested property rights. We discuss plaintiffs' statutory arguments in turn.

1. Va. Code § 57-15

Each plaintiff's discussion of the statutory prong of *Norfolk* and *Green* is only one page long (Diocese Br. 27-28; TEC Br. 36), but both plaintiffs invoke § 57-15, which the Court applied in those cases. Citing *Norfolk*, plaintiffs say that "'[i]n the case of a super-congregational church, … Code § 57-15 requires a showing that [a] property conveyance is the wish of the constituted authorities of the general church.'" Diocese Br. 28 (quoting 214 Va. at 505); *accord*

TEC Br. 36. What neither plaintiff acknowledges, however, is that the general church's approval is required *only* if it can first "establish a proprietary interest in the property." *Norfolk*, 214 Va. at 503. This in turn requires the denomination to carry "the burden of proving a violation by the [congregation] of either 'the express language of the deeds or a contractual obligation to the general church.'" *Green*, 221 Va. at 555 (quoting *Norfolk*, 214 Va. at 507). "If … the [denomination] is unable to establish a proprietary interest in the property, it will have no standing to object to [any] property transfer" under § 57-15. *Norfolk*, 214 Va. at 503.

In other words, § 57-15 "support[s] recognition of the [alleged] interest of the Diocese and the Church" (Diocese Br. 27) only if they can establish a proprietary interest under the other *Norfolk/Green* factors. This accords with the text of § 57-15, which refers to the approval of the congregation, diocese, denomination, or relevant "constituted authorities" in the *disjunctive*, and thus confirms that—absent a proprietary interest in the denomination—only congregational approval is required. As we have elsewhere shown, TEC and the Diocese are unable to carry their burden under *Norfolk* and *Green*. *See* CANA Opening Br. 9-123.

2. Va. Code § 57-16.1

Plaintiffs also rely on Va. Code § 57-16.1, which governs the incorporation of churches. In particular, they cite the reference in § 57-16.1 to incorporating "for any purpose authorized and permitted by the laws, rules, or ecclesiastic polity of the church or body." *See* Diocese Br. 27; TEC Br. 55. An examination of this statute, however, confirms that it does not support plaintiffs' assertion of a proprietary interest.

First, in contrast to the surrounding provisions of Title 57, § 57-16.1 does not reference "denominations" or "dioceses," much less require their approval of any decision to incorporate or of the corporate articles. *Cf., e.g.*, Va. Code § 57-16A (authorizing ownership by ecclesiastical officers when provided for by "the laws, rules or ecclesiastic polity of any church or religious

sect, society or denomination"); *id.* § 57-15 (referring to "evidence … 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 [church property]"); *id.* § 57-14 (authorizing courts to approve certain sales of property where "the governing body of the church diocese or the congregation has given its assent"). It is therefore evident that § 57-16.1's reference to the rules of the "church or body" that is incorporating refers to the rules of *that* entity, not of the diocese or denomination. *Industrial Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353 (2002) ("[W]hen the General Assembly includes specific language in one section of an act, but omits that language from another section, we presume that the exclusion of the language was intentional."); *Lillard v. Fairfax Cty. Airport Auth.*, 208 Va. 8, 13 (1967) ("statutes *in pari materia* . . . are not to be considered as isolated fragments of law, but as a whole").

Second, even assuming, *arguendo*, that § 57-16.1 subjected the CANA Congregations to the rules of TEC and the Diocese, nothing in their constitutions or canons bars congregations from incorporating or subjects their adoption (or amendment) of corporate articles to denominational approval. This stands in contrast to both TEC's own prior rules and the rules of other TEC dioceses. In the early 1900s, for example, TEC adopted a canon, Canon 25, governing affiliated "Religious Communities" (not parishes or congregations) that provided as follows: "It shall be provided in the Constitution of a religious community that real estate and endowments belonging to the community shall be held in trust for the community as a body in communion with this Church." Apostles Ex. 372.0002 (Canon 25 § VI). The canon further provided that "no change in the Rule or Constitution [of the affiliated entity] shall be made without [the Bishop's] approval." *Id.* (Canon 25 § I). When adopting the Dennis Canon, however, TEC did not include

any language requiring congregational recognition of a trust interest or subjecting the governing documents of congregations to denominational approval. The same is true of Diocese Canon 15.1.

Similarly, the current canons of the Diocese of Dallas provide that "[a]ny parish, mission or Diocesan Institution which desires to incorporate … may do so upon compliance with the following requirements":

> (a) The Articles of Incorporation must expressly provide that such corporation is subject to, and its powers and rights shall be exercised in accordance with, the Constitution and Canons of the Episcopal Church in the United States of America and the Constitution and Canons of this Diocese.
>
> (b) Such corporation shall not hold title to real estate acquired for the use of the Church in the Diocese, which title must be vested and dealt with in accordance with the provisions of Article 13 of the Constitution of the Diocese.
>
> (c) The proposed Articles of Incorporation and Bylaws of such corporation, and any amendments thereto, shall, prior to filing or adoption, be submitted to the Chancellor of the Diocese for his approval as being in conformity with these provisions.

Apostles Ex. 365.0037 (Canon 36.1). The relevant canon goes on to state that "[t]hose in charge of the affairs of any corporation, organized by any Parish, Mission or Diocesan Institution, shall review its Articles of Incorporation and Bylaws and bring them into conformity with provisions of this Canon, if inconsistent therewith." Apostles Ex. 365.0037 (Canon 36.2).

The constitutions and canons of other dioceses contain similar provisions. *E.g.*, Apostles Ex. 321.0027 (proposed articles must be approved in writing by the Diocese and "any proposed amendments … shall not be effective (including repeal in whole or in part) without the prior written approval of the Ecclesiastical Authority"); Apostles Ex. 318.013 (requiring that articles of incorporation not be amended without written consent of the Ecclesiastical Authority); *In re Church of St. James the Less*, 888 A.2d 795, 807-08 (Pa. 2005) (discussing a similar provision of the Episcopal Diocese of Pennsylvania); *Bishop and Diocese of Colo. v. Mote*, 716 P.2d 85, 106

(Colo. 1986) (Diocese of Colorado). Moreover, as other courts have recognized, where "nothing in the [congregation's] by-laws or the Constitutions and Canons of the ECUSA or Diocese requires third-party approval for amendments to the congregation's corporate charter," congregations are free to amend their articles and thereby to "sever[] the corporation's legal ties to [TEC] and the Diocese." *All Saints Parish Waccamaw v. Protestant Episcopal Church*, 685 S.E.2d 163, 174-75 (S.C. 2009). Indeed, plaintiffs' expert, Professor Mullin, admitted that there is "[n]o canon that expressly bars disaffiliation," and that "the only restriction on disaffiliation is indirect, namely if a congregation doesn't attend the Diocesan Convention, it could be changed to mission status"—steps not taken here. Tr. 1276:4-16.

Third, plaintiffs omit from their quotation of § 57-16.1 the language that immediately follows their excerpt: Church corporations may hold property for any purpose permitted by the relevant church rules "*and not prohibited by the law of the Commonwealth*." (Emphasis added.) But as we have shown, Virginia law prohibits holding property in trust for denominations. CANA Opening Br. 14-16. Thus, any argument that the corporate articles for the CANA Congregations are invalid because they do not specify that the Congregations' property is held in trust for plaintiffs, pursuant to their canons, would be unavailing.

Fourth, the fact that denominations may not invoke § 57-15 without first showing that they possess a proprietary interest (*Green*, 221 Va. at 225; *Norfolk*, 214 Va. at 507) strongly suggests that § 57-16.1 should be read to contain the same requirement. Sections 57-15 and 57-16.1 are neighboring provisions of the same Title in the Code, addressing related topics. Unlike § 57-16.1, moreover, § 57-15 actually contains language concerning diocesan and denominational authorities. Accordingly, given that § 57-15 requires a threshold showing of a proprietary interest to invoke the statute, it would make little sense to read § 57-16.1 as granting denominations an

automatic proprietary interest in congregational property. This is particularly so where the denomination's rules do nothing to restrict incorporation or to subject the congregation's adoption or amendment of governing documents to denominational approval.

For all of these reasons, § 57-16.1 does not grant the denomination a proprietary interest.

3. Va. Code § 57-7.1

Faced with the inapplicability of §§ 57-15 and 57-16.1, plaintiffs retreat to § 57-7.1. Diocese Br. 38-42; TEC Br.36. But this Court has twice held that § 57-7.1 does not apply, and plaintiffs provide no reason to revisit those rulings. *See* CANA Opening Br. 14-16. Moreover, even if Virginia law had begun recognizing denominational trusts in 1993, plaintiffs have not satisfied the requirements to establish such a trust. CANA Opening Br. 16-20. They also ignore the fact that, if the law had then changed, it could not be applied retroactively to alter ownership rights in properties conveyed to the CANA Congregations before the statute's effective date. CANA Opening Br. 20-22, 135-141.

a. Plaintiffs acknowledge, as they must, that "[b]efore 1993, Virginia statutes did not validate trusts for general churches." Diocese Br. 39; *accord* TEC Br. 2 (discussing *Norfolk* and the "then-existing bar on denominational trusts"), TEC Br. 25 n.3 ("the law has since changed"); TEC Br. 36 (adopting the Diocese's argument).[1] Thus, their argument depends on the law having changed in 1993.

[1] At least fourteen Virginia Supreme Court decisions confirm that denominational trusts are not valid in Virginia. *See Gallego's Ex'rs. v. Attorney General*, 30 Va. 450, 461-62 (1832); *Brooke v. Shacklett*, 54 Va. 301, 312-13 (1856); *Hoskinson v. Pusey*, 73 Va. 428, 431 (1879); *Boxwell v. Affleck*, 79 Va. 402, 407 (1884); *Davis v. Mayo*, 82 Va. 97, 102 (1886); *Finley v. Brent*, 87 Va. 103, 106 (1890); *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 560 (1897); *Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 561 (1905); *Moore v. Perkins*, 169 Va. 175, 179-81 (1937); *Maguire v. Lloyd*, 193 Va. 138, 144 (1951); *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555; *Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985); *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc*., 249 Va. 144, 152 (1995).

Remarkably, however, notwithstanding several pages of analysis of § 57-7.1, plaintiffs nowhere mention the statute's language that "this act is declaratory of existing law." 1993 Acts, ch. 370. *See* Five Questions Op. 13-14. That language is every bit as much a part of the statute as the phrases that plaintiffs take pains to discuss. *Travelers Prop. Cas. Co. v. Ely*, 276 Va. 339, 345 (2008) ("every provision in or part of a statute shall be given effect if possible"). And it forecloses the notion that § 57-7.1 overruled 180 years of Virginia Supreme Court precedent barring denominational trusts.

Plaintiffs suggest that this Court's earlier rulings concerning § 57-7.1 are foreclosed by the fact that both § 57-7.1 and § 57-14 now refer to property held by trustees for church dioceses. But as we explained in our opening brief (at 15 & n.5), *some* property, such as ecclesiastical residences, *can* be held in trust for a diocese, and that has been true since 1962, when the prior statute (§ 57-7) was still in effect. *See Norfolk*, 214 Va. at 506-07 (§ 57-7 was expanded to cover residences conveyed to benefit a "diocese," but "not … beyond this"). Accordingly, plaintiffs are wrong to suggest that the Court's reading of § 57-7.1 "render[s] meaningless" the law's reference to "dioceses." Diocese Br. 40. That aspect of then-existing law, like every other aspect, was preserved by the adoption of § 57-7.1. At the same time, however, the statute's language that "this act is declaratory of existing law" confirms that § 57-7.1 does not validate *all* diocesan trusts, and plaintiffs' reading would render *that* language a nullity.

b. In any event, even if denominational trusts were now enforceable in Virginia, plaintiffs have not satisfied the rules for creating them. Nothing in § 57-7.1 purports to displace "neutral principles" of Virginia trust law—rules "developed for use in all property disputes" (*Norfolk*, 214 Va. at 504) and embodying "objective, well-established concepts … familiar to lawyers and judges." *Jones*, 443 U.S. at 603. Plaintiffs have not complied with those principles. We devel-

oped this point in our opening brief (at 16-20), and will not repeat it here. But it suffices to note that plaintiffs' alleged trust interest cannot be reconciled with (1) the requirement of Virginia law (and that of other states discussed below) that only the party with title may create a trust interest in property; (2) the fact that the court petitions and orders, like the deeds, name no beneficiaries except the Congregations; or (3) the law's requirement that there be a "conveyance" (§ 57-7.1), which plaintiffs expressly disclaimed having received in (successfully) opposing our demurrers. Br. in Opp. to Demurrers (7/13/07) at 23 (plaintiffs "do not allege a 'conveyance' (or a contract to convey)"). Accordingly, § 57-7.1 would be of no help to plaintiffs even if it applied.

c. Plaintiffs' non-compliance with generally applicable trust law requirements also disposes of their argument that this Court's reading of § 57-7.1 violates the Constitution. Diocese Br. 41-42; TEC Br. 32 n.8. Even judged by the standard articulated in their own brief, § 57-7.1 "discriminates unconstitutionally" only if it "den[ies] *the same rights* to non-local religious groups" including "hierarchical churches" that are enjoyed by "local religious entities" and "secular entities." Diocese Br. 41 (emphasis added). But plaintiffs are not asking for "the same rights" as other entities. They are asking for *more favorable* treatment—the right to unilaterally declare a trust in property to which they lack title, where no one has conveyed any interest to them and no deed or court petition reflects the alleged trust. *See* CANA Opening Br. 16-18.

Unlike the plaintiffs in *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002)—which invalidated Virginia's longtime ban on the incorporation of churches—plaintiffs are not seeking a right available to others. Nor are they are similarly situated to secular associations who might assert a trust interest in their members' property. As noted, for a congregation to become a beneficiary of an express trust in real property, it must either hold title to the property or be named as a beneficiary in the deed in a conveyance reflecting the intent of the *settlor*. See CANA Opening

Br. 16-18. Plaintiffs can prove neither element. They seek to establish a beneficial interest in land owned by others, simply by unilaterally passing canons.

The suggestion that it constitutes "discrimination" against denominations for the Commonwealth to decline to recognize such a "trust" is frankly absurd. "[A]ny notion of discrimination assumes a comparison of substantially similar entities." *GMC v. Tracy*, 519 U.S. 278, 298-99 (1997). In fact, it is the recognition of such a "trust" that would be discriminatory—against congregations. If it became law, plaintiffs' theory would grant denominations both the "unilateral and absolute power" to designate themselves as beneficial owners of others' property (*Larkin v. Grendel's Den, Inc*., 459 U.S. 116, 117, 127 (1982)), and the "peculiar privilege" of establishing property rights by means not available to anyone else in Virginia (Va. Const. art. I, § 16). That would be unconstitutional. *See* CANA Opening Br. 123-30.

Furthermore, statutory distinctions not designed to disadvantage particular faiths need only be "rationally related to [a] legitimate purpose" (*Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987)), and plaintiffs ignore legitimate reasons for Virginia's rule. For example, a rule barring additional entities from asserting a beneficial interest in congregational property serves the interest of avoiding clouds on title to local real estate. The General Assembly may reasonably have thought that prospective buyers, or those injured on the property, should be able to rely on the terms of the deed, without regard to unrecorded canons. Or the General Assembly may have thought that the interest of clarity of title warranted a rule that would avoid disputes among different types of beneficiaries. Alternatively, as this Court earlier held, the "General Assembly may have wished to create a presumption in favor of ownership at the local level, because of its recognition that property [held in trust] is generally managed from the local level, or it may have believed that a presumption of local majority ownership was appropriate given that

most (if not all) funding for local churches, even in denominations, comes from the local level." JA 4165. The facts here certainly bear out those assumptions. CANA Opening Br. 89-98, 102-14. Regardless, the bar on denominational trusts serves neutral and secular objectives. Nor is the Diocese burdened by this rule, since it can put title in an officer under Va. Code § 57-16—as it routinely does. Letter Op. on Constitutionality of Va. Code § 57-9(A) at 32 (June 27, 2008).

Citing *Jones v. Wolf*, plaintiffs say that "[t]he conclusion that the Church's Constitutional and canonical provisions governing local church property must be enforced is mandated by the First Amendment." TEC Br. 32 n.9; Diocese Br. 41-42. But even apart from their failure to amend their "*constitutions*"—which would have given congregations the legally required notice and time to disaffiliate before the amendments took effect—plaintiffs are distorting *Jones*. What *Jones* actually says is: "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). That neither party includes the italicized language in quoting *Jones* is telling: plaintiffs are unable to show *either* that their canons reflect the intent of "the parties" (plural) *or* that the unilateral trust asserted in those canons is otherwise "embodied in some legally cognizable form." Moreover, *Jones* sharply rejected the view that civil courts "must defer to the resolution of an authoritative tribunal of the hierarchical church" or to its "laws and regulations." *Id*. at 597, 609. The Virginia Supreme Court did the same in *Norfolk*. 214 Va. at 504.

In any event, since plaintiffs have not complied with the neutral secular requirements for establishing a trust, this Court ultimately does not need to decide whether it would be unconstitutional to bar such trusts. Plaintiffs support avoidance of constitutional issues where possible. Diocese Br. 41 (arguing that "questions" involving whether the statute "would discriminate unconstitutionally" "should be avoided"); *see also, e.g.*, *Bell v. Commonwealth*, 264 Va. 172, 203

(2002) (courts should avoid "unnecessary adjudication of a constitutional issue"). Accordingly, we urge the Court to make specific findings on this issue, and to rule that, even under their own reading of § 57-7.1, plaintiffs have failed to establish a valid denominational trust.

4. Va. Code § 1-248

That Virginia does not permit voluntary associations to assert ownership over members' property by passing a rule—let alone without publicly recording the asserted interest in the deeds—is especially clear in light of Va. Code § 1-248, the predecessor of which was applied in *Unit Owners' Ass'n v. Gillman*, 223 Va. 752 (1982).[2] That statute confirms that, even where Virginia associations have been granted "wide powers" by the legislature, "these powers are limited by general law," including a "test of reasonableness" on "the validity of association regulations." *Id*. at 763, 767. Associational rules that "fine [members]" or "encumber[] their property" fail that test. *Id*. at 765. And the claimed effect of the plaintiffs' canons on the CANA Congregations is far more severe than that of the association's rules in *Gillman*, which imposed only $25 daily fines. CANA Opening Br. 78-79.

Plaintiffs' discussion of Virginia statutes ignores this area of law. But as *Gillman* confirms, associational rules that effectively work a forfeiture of property require express statutory authorization, and even then are subject to limitations under Virginia law. Those limitations do not permit plaintiffs to create a proprietary interest by passing canons. *See also Davis*, 1886 WL 2979, *4 ("a mere voluntary association, possesses no judicial powers, and can confer none on its officers," and therefore cannot attempt "to transfer the title to the property in controversy from those in whom it was at that time vested" or otherwise affect members' "rights of property").

[2] Va. Code § 1-248, then codified at § 1-13.17, "provides that '[w]hen … any … number of persons[] are authorized to make … bylaws, rules, regulations … it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this State.'" *Gillman*, 223 Va. at 763 (elipses in original).

5. Retroactivity

Finally, we emphasize that, even if the provisions of Title 57 that plaintiffs invoke were applicable, they could not be applied retroactively to strip the CANA Congregations of property rights that were vested under deeds that pre-date any applicable statute. This is so under both settled rules of statutory interpretation (CANA Opening Br. 20-22) and settled Contracts Clause and due process precedent (*id*. at 135-41), as even plaintiffs have acknowledged. *See* Br. in Opp. to Demurrers and Pleas in Bar at 29 (filed July 13, 2007) ("it would be unconstitutional to interpret or apply [Virginia statutory law] to alter existing rights and obligations or trusts established in governing deeds"). We will not repeat our arguments here, but plaintiffs' statutory analysis fails to take account of the limitations on retroactive application of statutes, which further foreclose their position as to a large majority of the properties at issue. Indeed, one of plaintiffs' authorities, *Diocese of Sw. Va. of the Protestant Episcopal Church v. Wyckoff*, Op. (Amherst Cty. Nov. 16, 1979), recognized that a Virginia statute may be rendered inapplicable by "constitutional infirm[ities] of applying it to the deeds in question which predate the passage of the statute." *Id*. at 6. So too here.

B. The deeds at issue strongly favor the CANA Congregations, and references to "Episcopal" are insufficient to create a proprietary interest in The Episcopal Church or the Diocese.

1. As plaintiffs acknowledge, many of the deeds at issue make no reference to any "Episcopal" entity whatsoever, and "plaintiffs' case is not as strong with respect to deeds that do not use the word 'Episcopal' in identifying the grantee." Diocese Br. 27.[3] Even as to the remaining parcels, however, deed language referring to a congregation as "Episcopal" is not sufficient to require forfeiture of the deeded property upon disaffiliation from the denomination. CANA

[3] As plaintiffs acknowledge (Diocese Br. 27 & n.9), nine deeds meet this description: five conveying property to The Falls Church, one to Apostles, one to St. Margaret's, and two to Truro.

Opening Br. 22-25, 33-39. As the Virginia Supreme Court held in *Davis v. Mayo*—which plaintiffs nowhere discuss—local affiliates of general associations are free to change their name and to disaffiliate with their property so long as "[t]he property was not conveyed upon condition that the beneficiaries in the deed should retain the then name of their division, or that they should associate themselves with, or become subject to, the orders and regulations of the [general association], or any other body." 1886 WL 2979, at *5.

Plaintiffs effectively read the deeds' references to "Episcopal" congregations as creating restrictive covenants or restraints on alienation. Virginia law, however, requires far more explicit language to create such restrictions. CANA Opening Br. 38; *see also Foss v. Dykstra*, 342 N.W.2d 220, 223 (S.D. 1983) (congregation's change of name to match denomination with which it was affiliated did not give the denomination a trust interest). Moreover, that such language was readily available becomes even clearer when one reviews the myriad deeds in the record that *do* contain explicit use restrictions or reverter clauses—deeds that, in some cases, convey property to congregations from the Diocese itself. CANA Opening Br. 26-33.

It is telling that other Virginia denominations and other Dioceses outside Virginia have not been content to rely on bare references in deeds to the "Episcopal," "Methodist," "Presbyterian," or "Lutheran" identity of the congregation. They have insisted that their congregations include specific use restrictions in the deeds. *See* CANA Opening Br. 29-32; Apostles Ex. 368.0013-14 (Diocese of Texas canon specifying how title to property shall be held); Apostles Ex. 319.0035-36 (Diocese of Michigan canon with similar instruction). As shown by the routine practices of these Virginia denominations and other TEC dioceses, had the deed grantors or the CANA Congregations wished to convey proprietary interests to plaintiffs, "it would have been easy to say so" in the deeds. *Scott v. Walker*, 274 Va. 209, 218 (2007). Yet plaintiffs do not ex-

plain why they failed to take steps here that they and other denominations routinely take to secure enforceable interests in congregational properties. In fact, their brief treatment of the deeds does not address *any* "principles of real property … law," as required by the Supreme Court (*Truro Church*, 280 Va. at 28), much less the substantial precedent requiring unequivocal deed language to establish a restrictive covenant or restraint on alienation.

2. Without analysis, plaintiffs assert that deed language conveying property "to trustees for 'Episcopal' churches" renders many of the deeds here "legally indistinguishable" from the deed in *Green*. Diocese Br. 26; *accord* TEC Br. 4. But in *Green* "the A.M.E. Zion Church [was] the grantee in the deed" (221 Va. at 555), and plaintiffs admit that "[n]either the Diocese nor the Episcopal Church is specifically named as a grantee in any of [the deeds here]." Tr. 31:13-16. That alone warrants a different outcome.

Even setting aside this difference, however, plaintiffs fail to acknowledge that the deed in *Green* restricted the property's use to worship under the A.M.E. Zion Church's auspices. CANA Opening Br. 23-24; *Green*, 221 Va. at 553 ("[t]he 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, or an independent church"); *id.* at 555 ("Here the A.M.E. Zion Church is the grantee in the deed, the property having been conveyed to trustees of that church to establish an A.M.E. Zion Church thereon."); *id*. at 549. And as we have shown, there is a critical difference between deeds that merely describe a congregation as affiliated with a particular denomination and deeds that limit use of property to worship under a denomination's control. *See also Wyckoff* Op. at 2-3, 7 (relying principally on a deed restriction conveying property "to erect a new brick church for the use and benefit of the Protestant Episcopal Church," "upon this special trust and this special confidence, however, that they

the said (grantees) … shall and will forever have and hold the said piece or parcel of land with all the improvements and appurtenances thereunto belonging for the use and benefit of the Protestant Episcopal Church as they the said (grantees) … shall deem most likely to promote the interest of the said church," in ruling for a minority wing of an Episcopal congregation).

The deeds here therefore look nothing like the deed in *Green* (or *Wyckoff*). None of them names TEC or the Diocese as grantee; nine of them, including two in which the Diocese itself was the grantor, make no reference at all to any "Episcopal" entity; and only two of the remaining 33 deeds even arguably contain language that sounds anything like a use restriction. *See* CANA Opening Br. 33 n.24. Further, insofar as there is any ambiguity in the deeds, they must be read to favor the legal title holders—the CANA Congregations. *Matthews v. W. T. Freeman Co., Inc.*, 191 Va. 385, 395 (1950).

3. Rather than address governing Virginia Supreme Court precedent, plaintiffs cite a bare assertion from a circuit court decision (*Buhrman*) to the effect that there is but one "reasonable interpretation" of deeds referring to an "Episcopal" congregation. Diocese Br. 26; TEC Br. 35. But that decision is neither binding nor persuasive. It cited no Virginia authority in support of its reading of the deeds, and it did not address the Virginia cases discussed above—which establish that far more is required to create a use restriction.[4] In addition, one of the deeds in *Buhrman* contained language restricting the property to "use[] as a place of worship by the Episcopal Congregation of Clifton Forge Parish"; and "the members of the mission church" there, as a canonical condition of elevation to "a Parish of the Church in the Diocese," signed a written petition in which they did "solemnly promise and declare that the said Parish shall be forever held under the

[4] Underscoring the court's error on this point, *Buhrman* approvingly cited a passage from *Watson v. Jones* that the Virginia Supreme Court expressly *rejected* in *Norfolk*. *Compare Buhrman*, 1977 WL 191134, at *3, *with Norfolk*, 214 Va. at 504 (rejecting reliance on the same passage).

Ecclesiastical Authority of the Diocese of Southwestern Virginia and in conformity with the Constitution and Canons of the Diocese." Apostles Ex. 298.0003 (Complaint ¶ 6), 298.0008 (Complaint Ex. A, "statement of conformity with Canon 13, Section," signed by 63 individuals including the vicar). *See* CANA Opening Br. 51-52. Despite plaintiffs' early prediction that "the evidence in this case will reflect similar commitments" (Br. in Opp. to Demurrers and Pleas in Bar 10 n.6 (filed July 13, 2007)), there is no such agreement here.

4. Plaintiffs' failure to identify any proprietary interest based on the deeds distinguishes *Green* and itself should dispose of the notion that plaintiffs have a claim. *See Green*, 221 Va. at 556 ("the contractual obligation which the A.M.E. Zion Church assumed has its genesis in the 1875 deed"); *see also Finley*, 87 Va. at 104 ("[l]ooking to the deed alone"); *Boxwell*, 79 Va. at 407 ("[l]ooking to the deed alone"); *Hoskinson*, 73 Va. at 431 ("[l]ooking to the deed alone"); *accord Brooke*, 54 Va. at 310-20. As discussed below, however, the other *Norfolk-Green* factors favor the CANA Congregations as well.

C. The Episcopal Church and the Diocese have failed to establish a proprietary interest based on their constitutions.

Plaintiffs' reliance on their constitutions and canons is equally unavailing. According to them, Virginia law provides that, "by virtue of its affiliation with the hierarchical denomination, the local church bec[omes] contractually bound by the denomination's governing documents." TEC Br. 22. But this sweeping statement is unsupportable. *First*, it is contrary to the holding of *Norfolk*, which rejected the view that congregations "who unite themselves with a hierarchical church do so with an implied consent to its government." 214 Va. at 504. *Second*, it ignores that the denomination's constitution in *Green* set forth specific steps by which a congregation could express consent to a denominational interest in property—steps that are not specified (let alone complied with) in the constitutions or canons here. CANA Opening Br. 81-88. *Third*, it fails to

acknowledge that, even assuming that an association's constitution *generally* constitutes a "contract," the enforceability of *specific* provisions depends on whether they comply with "principles of real property and contract law." *Truro Church*, 280 Va. at 29. As plaintiffs' own cases explain (TEC Br. 23), an association's constitution "constitutes a contract" and "will be enforced by the courts" only insofar as it is "not immoral *or* contrary to public policy *or* the law." *Gottlieb v. Economy Stores*, 199 Va. 848, 856 (1958) (emphasis added). The existence of such limitations is likewise compelled by *Gillman*, which held that "[an association's] powers are limited by general law" and cannot "exact forfeitures" (223 Va. at 763), and by *Davis*, which held that "a mere voluntary association" cannot take actions purporting "to transfer the title to the property [of members] … from those in whom it was at that time vested." 1886 WL 2979, at *4.

Plaintiffs' position would obviate the need to decide this case under neutral principles of "real property and contract law." *Truro Church*, 280 Va. at 29. It is tantamount to deference to hierarchy. To be sure, they pay lip service to "neutral principles," and to the fact that "Virginia has adopted a 'contractual' approach for resolving whether a hierarchical denomination has an interest in local church property." *E.g.*, TEC Br. 19, 2; Diocese Br. 2, 26, 37. But their briefs contain little analysis of contract law principles "developed for use in all property disputes." *Norfolk*, 214 Va. at 504.

For example, plaintiffs do not explain how the Congregations explicitly agreed to grant the denomination ownership interests in their properties (CANA Opening Br. 46-55), despite the fact that "forming a contract requires *mutual* assent *and* the communication of that assent." Letter Op. 10 (Aug. 19, 2008) (emphasis added; quotation omitted). Nor do plaintiffs analyze the requirements of consideration (CANA Opening Br. 55-58) or mutuality of remedy (*id*. at 58-67), the restrictions on reading contracts to work a forfeiture (*id*. at 76, 81), or the limitations that

Virginia law places on associational rules affecting property rights (*id*. at 76-81). To plaintiffs, it is *canons über alles*, regardless of the mandates of secular law. Moreover, they take this position despite repeated admissions by their General Convention that the canons "have no legal force" (Apostles Ex. 372.0004) and are "not sufficient to prevent [the] alienation" of property by disaffiliating congregations (Apostles Ex. 290.0007, 291.0006, 292.0008, 292.0012). *See* CANA Opening Br. 67-75. We discuss specific canons below, but first address plaintiffs' failure to adopt relevant *constitutional* provisions.

1. Despite their having adopted separate and distinct constitutions, TEC and the Diocese have not adopted constitutional provisions addressing congregational property.

Under governing precedent, only "the constitution of the general church," not its canons or bylaws, is legally relevant to property ownership. *Green*, 221 Va. at 555; *Norfolk*, 214 Va. at 507; *Jones*, 443 U.S. at 606. But while plaintiffs have constitutions, and while the constitutions of other denominations and other TEC dioceses address property (CANA Opening Br. 43-44), plaintiffs' constitutions do not. They are silent on that topic (CANA Opening Br. 39-44), and this alone confirms plaintiffs' lack of a proprietary interest under the third *Norfolk-Green* prong.

Plaintiffs respond by putting "constitution" in quotation marks when discussing their canons, and by saying "it would be improper for a civil court to assign levels or priority or importance to a church's governing documents." Diocese Br. 29; *see* TEC Br. 20 (referring generically to plaintiffs' "governing documents"). But canon law is not civil law. And requiring a denomination to put rules affecting property in its constitution ensures that those rules are found in its most foundational and defining document, reflecting the seriousness of an assertion of property rights and maximizing the likelihood of actual notice to third parties. Such a rule raises no constitutional concerns. *Jones*, 443 U.S. at 604-06. It is no more improper than it is for a state to require that a corporation list its registered agent in its corporate articles rather than bylaws.

See Va. Code § 13.1-619(A) ("The articles of incorporation shall set forth: … the name of [the corporation's] initial registered agent"). No one would seriously contend that such a requirement is satisfied by placing the required provisions in a corporation's bylaws.

Moreover, in TEC's and the Diocese's case, amending their constitutions would have ensured that congregations were given advance notice and a waiting period to consider the possible adoption of any rules affecting property. As applied here, therefore, the requirement would serve a basic secular procedural value of notice, and it cannot reasonably be viewed as interfering with the denomination's religious liberty. Indeed, plaintiffs extend the courtesy of notice to those affected by changes in their Pension Fund.[5] That they object to providing the same courtesy to congregations whose property they wish to transfer to themselves is nothing short of extraordinary, not to mention contrary to law. CANA Opening Br. 42 & n.32.

Noting that the constitution in *Green* was called "The Doctrines and Discipline," and that the Court in *Green* used a "lower case 'c'" to refer to the "constitution," the Diocese argues that this confirms that "the term was used generically." Diocese Br. 29. That is unconvincing. The constitution of the AME Zion Church *was* "The Doctrines and Discipline." Plaintiffs' constitutions, by contrast, *are not* their canons. The canons are distinct and subordinate documents, have distinct substantive provisions, and contain distinct processes for amendment. CANA Opening Br. 40-43. If the substance of plaintiffs' property-related canons was duly embodied in their constitutions, it would make no difference whether the constitution was called the "Discipline" or something else. But it is not. It is found only in their canons. Once again, therefore, plain-

[5] *See* PX-COM-0001-047 (Canon I.8.9) ("The General Convention reserves the power to alter or amend this Canon, but no such alteration or amendment shall be made until after the same shall have been communicated to the Trustees of The Church Pension Fund and such Trustees shall have had ample opportunity to be heard with respect thereto.").

tiffs' position reveals a troubling view that they cannot be bothered with requirements that other denominations—and even other TEC dioceses—routinely take steps to satisfy.

2. Plaintiffs' canons do not establish an enforceable proprietary interest in the CANA Congregations' properties.

Setting aside plaintiffs' failure to address property issues in their constitutions, the canons of TEC and the Diocese do not create proprietary interests in the CANA Congregations' properties. Plaintiffs' canons essentially fall into the following categories: canons purporting to establish a "trust" interest, canons addressing the alienation of property and incurrence of debt, canons regulating the conduct of vestries and rectors, canons providing for visitation by bishops, and canons that relate to "abandoned" church property. All of these canons suffer from the infirmities identified above (*see* CANA Opening Br. 46-81), in addition to a host of specific problems discussed below. We address them in turn.

a. Trust canons

1. Plaintiffs are fond of asserting that their "practice" has "*always* required that parish property be held and used for the mission of the Church and its dioceses and not diverted to other purposes." *E.g.*, TEC Br. 11; *id*. at 24 (asserting that this was true "from earliest times"); Diocese Br. 22 ("the earliest Canons of the Diocese exercised control over … property"). This view is, to put it mildly, incomplete and historically inaccurate.[6] For present purposes, however, we

[6] Plaintiffs' expert, Professor Bond, testified that he was not aware of any canons of TEC or the Diocese adopted at any time from 1798-1950 providing that vestries or trustees held congregational property for the benefit of, or in trust for, TEC or the Diocese. Tr. 1048:4-12. Moreover, it is undisputed that, both before and after the American Revolution, control over church property rested exclusively with parish vestries. Tr. 1007:2-1008:1 (Bond); 1010:13-1011:2 (Bond); 3498:16-3500:14 (Curtis); 3500:20-3501:7 (Curtis); 3506:3-20 (Curtis); 3510:3-3511:13 (Curtis). There is no evidence of any action by, or even any communication to or from, congregations or their vestries, or the Virginia legislature, to transfer control over congregational property to the Diocese. Tr. 1011:9-1012:4 (Bond); 1012:22-1013:3 (Bond); 1013:13-1014:3 (Bond). CANA Prof. Findings ¶¶45-53.

note that until 1979, no canon of TEC or the Diocese purported to assert ownership (beneficial or otherwise) of the property of member congregations. Further, TEC's General Convention has repudiated the view (held by some) that the Dennis Canon was "declaratory of existing law." Apostles Ex. 292.0012; *see* CANA Opening Br. 74. Nothing in the anti-alienation, debt, visita-

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Plaintiffs' claims that the Diocese controlled congregational property in the 18th and 19th centuries rest wholly on Professor Bond's testimony about the Diocese's canons from 1785 to 1799. In support, however, he could say only that "sometime between 1799 and 1805, the Convention does say that the General Convention and the Diocesan Convention make the laws for the Diocese." Tr. 1013:22-1014:21. That is also when plaintiffs say The Falls Church did not attend Diocesan conventions, "was not functioning as an Episcopal congregation," and appears to have been acting as a Methodist congregation. *See* DVA Br. at 56; Tr. 936:21-937:2 (Bond).

In any case, by 1799, all of the canonical provisions that the Diocese cites were, by the Diocese's own admission, a "dead letter." PX-COM-071-372 (Bishop Madison's 1799 Address to Convention) ("they have become a dead letter; ... there is scarcely a parish which conforms to them, or even knows the duties which they enjoin"). All such provisions were expressly repealed by 1815. Tr. 1019:16-1020:13 (Bond); PX-COM-071-397 (1815 Canon XIII).

Nothing in the Diocese's constitution or canons in effect in 1815, 1816, 1823, or 1836 provided that vestries held congregational property for the Diocese, Tr. 1032:16-1033:4 (Bond); 1036:18-22 (Bond), or that the Diocese had any interest in such property, Tr. 1045:2-14 (Bond). To the contrary, in 1837 the Diocese admitted that "the venerable edifice" of The Falls Church *belong*[*ed*] *to this congregation*." PX-COM-0073-014 (1837 Journal) (emphasis added).

Canon XVIII, the first Diocesan canon regarding property, adopted around the time of TFC's readmission, stated with regard to all property "now belonging or hereafter accruing to the Protestant Episcopal churches of the Diocese," that "[t]he vestries shall hold as trustees *for the benefit of the congregation of said church* for whose use the same were or shall hereafter have been purchased or otherwise obtained." PX-COM-0074-022 (emphasis added). *See also* Tr. 1045:15-1046:13, 1048:13-1048:19, 1053:3-1054:5 (Bond) (acknowledging that Canon XVIII contradicted his earlier testimony and showed that the vestries held property in trust for the benefit of the local church).

Following passage of the 1842 Virginia Act Concerning Church Property, the Diocesan canon was amended to expressly recognize the rights of congregations and vestries under the Act and to disclaim application of the canons to any property held by trustees pursuant to the Act. PX-COM-0084-043 to -044 (1848 Journal); PX-COM-0085-001 (1849 Journal reprinting 1842 Act Concerning Church Property); PX-COM-0086-069 to -070 (1850 Journal reprinting 1850 Act Concerning Church Property). This Canon remained substantively unchanged and continued to expressly recognize the exclusive rights of the vestries, or their appointed trustees, over congregational property until sometime in the 20th century. *E.g.*, PX-COM-0085-041-042 (1849 Canons); PX-COM-0086-068 (1850 Canons); PX-COM-0125-262 (1888 Canons); PX-COM-0131-223 to -224 (1894 Canon 17); PX-COM-001-149 (1904 Canons). *See also* Tr. 3552:11-3553:10 (Curtis); 3556:2-3557:1 (Curtis); 3557:12-3558:20 (Curtis); 1048:4-12 (Bond).

tion, vestry or rector, or abandonment canons asserted either a "trust" or any other specific proprietary interest in congregational property. In fact, although TEC previously had a canon asserting a "trust" in property of affiliated "religious communities,"[7] that canon did not apply to congregations. Tr. 1263:7-1267:8 (Mullin). Even Professor Mullin, who touted the denominational line that plaintiffs have always claimed an interest in parish property, acknowledged that (1) the anti-alienation canons contained no reference to any "trust," (2) the Dennis Canon was the first canonical attempt to assert an interest in *personal* property, and (3) plaintiffs' alleged trust interest was not "elucidated" as such or made "explicit" until 1979. Tr. 1230-32. In short, the pre-1979 canons on which plaintiffs rely relate to ownership, if at all, only *implicitly*.

2. When plaintiffs did adopt canons addressing property ownership, they were framed in terms that were flatly contrary to Virginia law—as canons purporting to create a denominational "trust" in all congregational property. Indeed, it is plaintiffs' position that *all* of the relevant canons, including those adopted in earlier periods, "are based on a trust concept." Tr. 1228:13-16 (Mullin). As discussed above, however, Virginia has never recognized denominational trusts, and even plaintiffs admit that this was so until 1993. Diocese Br. 39; TEC Br. 2, 25 n.3, 36. It is therefore common ground that, when plaintiffs adopted the Dennis Canon in 1979 and Diocesan Canon 15.1 in 1983, those canons purported to create an unlawful form of ownership.

As this Court has twice held, denominational trusts remain invalid in Virginia even today. *See* Letter Op. on the Court's Five Questions 11-14 (June 27, 2008); Letter Op. 12-16 (Aug. 19, 2008); CANA Opening Br. 14-16. Even if that were not so, however, plaintiffs have not satis-

[7] *See* Apostles Ex. 372.0002 (Canon 25, § VI) ("It shall be provided in the Constitution of a religious community that real estate and endowments belonging to the community shall be held in trust for the community as a body in communion with this Church."); *id*. (Canon 25 § I) ("no change in the Rule or Constitution [of the affiliated religious community] shall be made without [the Bishop's] approval").

fied the generally applicable rules for creating such a trust. CANA Opening Br. 16-20. Among other reasons, they may not assert a trust in property to which they lack title. As the South Carolina Supreme Court unanimously held in a recent case involving TEC, "[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*, 685 S.E.2d at 174; *accord Leonard v. Counts*, 221 Va. 582, 588 (1980) ("An express trust is based on the declared intention of the trustor."); *Arkansas Annual Conf. of AME Church, Inc. v. New Direction Praise and Worship Ctr., Inc*., 291 S.W.3d 562, 569 (Ark. 2009) (finding no denominational trust where "[n]either the National AME nor the Arkansas AME had an ownership interest in the property at the time of the conveyance, and neither was a party to the transaction"); *From the Heart Ministries, Inc. v. African Methodist Episcopal Zion Church*, 803 A.2d 548, 566 (Md. 2002) ("The creation of a trust depends upon the intention of the settlor."). Plaintiffs admittedly lack title here.

3. That plaintiffs' canons were adopted at a time when all parties agree that denominational trusts were illegal disposes of any notion that the CANA Congregations implicitly agreed to the canons by "continu[ing] to participate in the denomination." TEC Br. 24 (emphasis omitted). Even assuming that property interests could be transferred by silence or acquiescence (and they cannot), the Congregations were under no obligation to object to rules that were facially invalid. Nor have plaintiffs given any indication that, had the CANA Congregations simply objected to their trust canons, or objected sooner, plaintiffs would have recognized the Congregations' right to retain property titled in their names and paid for and maintained by their members. *See Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1324-25 (Pa. 1985) (involving a denomination's argument that even though the congregation disaffiliated

before a trust provision in the Book of Order became effective, the denomination nevertheless had a right to the congregation's property under other provisions of the Book of Order).

When TEC first adopted a canon asserting a "trust" in the property of affiliated "religious communities" (not congregations), that canon (Canon 25) went further than the Dennis Canon or Diocese Canon 15.1. Canon 25 not only declared a denominational trust; it directed that the trust "shall be provided [for] in the Constitution of a religious community," and that "no change in the Rule or Constitution [of the affiliated entity] shall be made without [the Bishop's] approval." Apostles Ex. 372.0002 (Canon 25 §§ VI, I). But as plaintiffs' official canon law reporter explained in a treatise published by the order of TEC's General Convention, even this canon was insufficient to create enforceable property rights: "It would seem to be the intention of this provision to secure the property of the Community from being alienated from the Church in case the Community should officially sever its connection with the Church. If that is the intention thereof, it is very imperfectly expressed, ***and in any event it could only have moral weight. However expressed in a canon it would have no legal force.***" Apostles Ex. 372.0004 (emphasis added).

Plaintiffs have held to this view even since the Dennis Canon was adopted. For example, "the General Convention directed the editing, updating, publication and sale" of the latest (1981) edition of the *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as The Episcopal Church*, and views it "as an authoritative expression of the meaning of the Constitution and Canons." Apostles Ex. 292.0006; CANA Opening Br. 73-75. As this source admits, "[t]he power of the General Convention over the disposition of real property is questionable, governed as it is by the law

of the state in which it is situated." Apostles Ex. 292.0008.[8] Further, the annotated canons state that, in a neutral principles jurisdiction, the Dennis Canon would not prevent "a majority faction in a parish" from "amend[ing] its parish charter to delete all references to the Episcopal Church, and thereafter [from] affiliat[ing] the parish—and its property—with a new ecclesiastical group." Apostles Ex. 292.0012. This admission is far more telling than plaintiffs' litigating position. And it applies equally to the various other canons that plaintiffs say create a proprietary interest—canons that do not even purport to address ownership. We now turn to those canons.

b. Anti-alienation and debt canons

Aware of the difficulties of relying on their trust canons, plaintiffs retreat to canons that regulate the terms under which congregations may take on debt and alienate certain consecrated property.[9] For a number of reasons, these canons do not create enforceable proprietary rights.

First, the canons do not purport to affect ownership, and it is a "well defined rule[]" that contracts are "construed strictly against forfeiture. The instrument must give the right of forfeiture in terms so clear and explicit as to leave no room for any other construction." *Wickline*, 205 Va. at 169; CANA Opening Br. 81 (collecting authorities). The anti-alienation and debt canons do not meet that standard. They neither bar disaffiliation nor assert any claim of ownership. *See* Tr. 1276:4-16 (Mullin) (admitting that "[n]o canon … expressly bars disaffiliation," and that "the only restriction on disaffiliation is indirect, namely if a congregation doesn't attend the Diocesan

[8] *Accord, e.g.*, *Sohier v. Trinity Church*, 109 Mass. 1, *23 (1871) ("[t]he canons of the Protestant Episcopal Church … do not affect the legal title to the property held by these defendants under the deeds above mentioned. Titles to property must be determined by the laws of the Commonwealth. The canons are matters of discipline, and cannot be enforced by legal process.").

[9] TEC Canon I.7.3 states that the property subject to the anti-alienation provision is subject to "regulations as may be prescribed by Canon of the Diocese." PX-COM-0001-045. Under Diocese Canon 15.2, only a congregation's transfer of "consecrated property" calls for "consent of the Bishop, acting with the advice and consent of the Standing Committee." PX-COM-0003-027.

Convention, it could be changed to mission status").[10] Indeed, even where the language of the rule *is* clear, civil courts in Virginia will not enforce associational rules that effectively "fine [members]" or "encumber[] their property." *Gillman*, 223 Va. at 765; *Davis*, 1886 WL 2979, at *4 ("a mere voluntary association" cannot take actions purporting "to transfer the title to the property [of members] … from those in whom it was at that time vested"; such actions are "functions of sovereign power"). As read by plaintiffs, the canons here impose much harsher consequences. CANA Opening Br. 78-81.

Second, as other courts have recognized, "[canonical] restrictions on transfer are of moral value *only* and without legal effect." *Bjorkman*, 759 S.W.2d at 586; *accord Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1325 (Pa. 1985). Plaintiffs have repeatedly recognized this outside of court. Upon adoption of the anti-alienation canons, TEC formally directed its dioceses to "take such measures as may be necessary, by State legislation, or by recommending such forms of devise or deed or subscription," to place congregational property under the denomination's control. Apostles Ex. 376.0002. As TEC recognized, canons are not enough; positive law or a deed is required. And as we have already explained, neither Virginia statutory law nor the deeds at issue support plaintiffs here.

Since adoption of the anti-alienation canons, TEC's General Convention and every edition of TEC's annotated edition of the constitution and canons, authored by designated canon law reporters, have admitted that the anti-alienation canons have no legal force. As the 1924 edition explained, the General Convention "recognized that while [adoption of the anti-alienation

[10] Moreover, as Professor Mullin explained, these canons were passed for the purpose of protecting the denomination's reputation from the potential reputational harm of debt default. Tr. 1193:17-1194:2 (Mullin) (noting that the original debt and anti-alienation canon (*see* TEC-04-00002 (Canon 21)) was passed to prevent a repeat of a post-Civil War "scandal" involving "a great boom in the building of large churches," where many "went bust and were put up for sale by sheriff[s]").

canons] was as far as the Convention could legislate in the matter, ***it was not sufficient to prevent … alienation***" "'***from those who profess and practice the doctrine, discipline, and worship of the Protestant Episcopal Church.'***" Apostles Ex. 290.0007 (emphasis added). The 1954 and 1981 editions of the official commentary on TEC's constitution and canons reiterated this view, acknowledging the "questionable" nature of "[t]he power of the General Convention over the disposition of real property" (Apostles Ex. 291.0006) and the supremacy of "[s]tate laws controlling the conveying and encumbering of real estate" (Apostles Ex. 292.0008).

Third, even if the canons were viewed as having some legal effect, other courts construing similar anti-alienation canons have held that they do not give the denomination a legally cognizable interest in the congregation's property or otherwise limit the congregation's right to keep its property upon disaffiliation. *York v. First Presbyterian Church of Anna*, 474 N.E.2d 716, 721 (Ill. App. 1984); *Foss v. Dykstra*, 342 N.W.2d 220, 223-24 (S.D. 1983); *Presbytery of Beaver-Butler*, 489 A.2d at 1324-25.

Fourth, in contrast to the constitutional provision restricting alienation of the property in *Green*, plaintiffs' canons set forth no specific means by which a congregation may express consent to be governed by a denominational property interest. *See Green*, 221 Va. at 554-55 & n.2; CANA Opening Br. 82-86. As we have shown, the Congregations here uniformly did *not* agree to grant any proprietary interest to plaintiffs. CANA Opening Br. 46-52. And given the absence of any language in the anti-alienation canon concerning ownership or the effect of disaffiliation on title, adherence to that canon cannot reasonably be viewed as showing something more than respect for church authorities, under rules designed to ensure uniformity and good stewardship by congregations remaining affiliated with the general church. *See also American Realty Trust v. Chase Manhattan Bank, N.A.*, 222 Va. 392, 403 (1981) ("ambiguous contractual provisions are

construed strictly against their author"). But in all events, even if the canons were clear, they would be unenforceable insofar as they "encumber[] [the Congregations'] property" (*Gillman*, 223 Va. at 765) or purport "to transfer title to [their] property." *Davis*, 1886 WL 2979, at *4.

c. The vestry and rector canons

Plaintiffs' other canons add nothing to their claim of a proprietary interest. TEC and the Diocese admit that the "day-to-day responsibility" for "management, payment, and so forth related to the property" are handled by "the vestry and the local church" (Tr. 964 (J. Heslinga)), and that "the use of local church property … has always been committed to the local churches." Tr. 1057 (statement of M. Kostel). Indeed, the Dennis Canon itself states that, absent disaffiliation, the asserted trust "shall in no way limit the power and authority of the … Congregation otherwise existing over [its] property." PX-COM-0001-045. Nonetheless, citing canons addressing the duties of vestries and rectors, the Diocese portrays the myriad responsibilities that the CANA Congregations exercised over their properties as having been carried out at the denomination's behest—as an exercise of authority delegated from the Diocese, which they say bore ultimate responsibility for the Congregations' actions.[11] This view is not grounded in reality.

First, as a historical matter, the vestries of parishes and congregations exercised the same broad authority before the denomination was formed as they exercise today. *See supra* n.6. "[P]arishes existed before there was a General Convention of the Episcopal Church" or "a Prot-

[11] *E.g.*, Diocese Br. 16 ("The Diocese long has chosen to delegate much day-to-day authority to vestries and clergy. … The Diocese's earliest rules delegated specific property-related responsibilities to wardens and other local officials and required reports to the Bishop"); Diocese Br. 95 ("a rector and vestry have considerable delegated powers, but the hierarchical church—specifically, the Bishop as Ecclesiastical Authority—remains the resource that decides serious conflicts and the only authority capable of involuntarily changing local church leadership"); Diocese Br. 111 n.37 ("the canons provide that local Episcopal leadership, as agents of the Church, have responsibility for the day-to-day use and maintenance of property"); Tr. 964 (Heslinga: "the Constitution and Canons also clearly delegate day-to-day responsibility, management, payment, and so forth related to the property to the vestry and the local church.").

estant Episcopal Diocese of Virginia." Tr. 1280:12-22, 1281:4-9 (Mullin). "[I]t was parishes who came together to form the Diocese of Virginia, not the other way around" (Tr. 1281:4-12 (Mullin)), and vestries have always been elected by, and acted for, congregations—not the denomination. *See* TEC Br. 29 ("Church Canon 1.14.2 makes local church vestries the 'agents and legal representatives *of the* [*local church*] in all matters concerning *its* corporate property'") (emphasis added; bracketed language in original).[12]

Given that vestries are designated by the parish, had the same duties before the denomination's existence, and in fact initiated the formation of the denomination, it makes little sense to think of them as exercising authority "delegated" by plaintiffs. Not surprisingly, Professor Bond admitted that there is no evidence that the parishes that formed the Diocese delegated or ceded their authority over property to the Diocese. Tr. 1010:13-1011:22. Professor Curtis's testimony is to the same effect. Tr. 3500:15-3502:14, 3510:3-3511:22, 3520:13-3521:4.

Second, plaintiffs' argument proves too much. If the vestries of Episcopal congregations were the "agents" of TEC and the Diocese, then it would necessarily follow that those denominational entities were legally bound by the vestries' actions. *E.g.*, *East Augusta Mut. Fire Ins. Co. v. Hite*, 219 Va. 677, 680 (1979) ("A principal is bound by the acts of his agent within the scope of the agent's ostensible or apparent authority.").[13] For example, if an Episcopal vestry entered a contract, then plaintiffs would be liable for any breach. If an Episcopal vestry took on a debt, then plaintiffs would be liable for any default. But as the record confirms, these scenarios have no basis in the factual record. When the CANA Congregations mortgaged their properties, the

[12] Testifying as the 4:3(b)(6) designee of TEC and the Diocese, Mr. Beers did not agree that the vestry are the "agents" of TEC. DX-CANA-2011-0009-00027 and 00028.

[13] *See also* 1A Michie's Jurisprudence, *Agency* § 19, at 762 (2004) ("All the acts of an agent in the discharge of his duties and within the scope of his authority, whether that authority is express, implied, or apparent, are obligatory upon the principal, and no ratification or assent on the latter's part is necessary to give them validity.").

Congregations alone took responsibility to repay their lenders. When the Congregations contracted with vendors and builders and the like, the Congregations alone were on the hook to hold up their end of the deal. There is no evidence that TEC or the Diocese *ever* acknowledged, much less bore, the responsibility for the Congregations' actions that a principal would be expected to bear. Had the Congregations sought indemnification from plaintiffs in the event of some (hypothetical) default on a debt or contract, plaintiffs would have responded that that any liability was the Congregations' responsibility—and that an "individual parish" lacks the "ability to force the Diocese to abide by the constitution and canons." DX-CANA2011-0009-00029 (Beers).

In short, plaintiffs' argument that the CANA Congregations' vestries constitute "agents" of the denomination cannot be squared with either Virginia agency law or the record. Both the initiative for and execution of virtually every undertaking of the Congregations came from the local level, not the denomination. That plaintiffs even attempt to advance this argument thus reveals, once again, that they want the benefits of property ownership without the responsibilities thereof—the sweet without the bitter.

A closer analogy would be that of the relationship between a franchisor and a franchisee. Under a standard franchise agreement, a franchisor licenses the use of various intellectual property (*e.g.*, trademarks and logos) to a franchisee, under terms that require the franchisee to adhere to the franchisor's manner of doing business.[14] Such relationships may well be characterized by a significant degree of control by the franchisor, which seeks to preserve uniformity among its

[14] *See* Va. Code § 13.1-559(A) (defining a "franchise" as a business that "is granted the right to engage in the business of offering, selling or distributing goods or services at retail under a marketing plan or system prescribed in substantial part by a franchisor" where the operation of the business "is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate").

franchisees' operations and ultimately to protect its brand.[15] For example, a fast food franchisor such as McDonalds may dictate the restaurant's accounting practices, layout, menu, promotions, prices, employee uniforms, employee training, and placement of the golden arches.

Absent "control over the day-to-day operation," however, such "rules of operation" do not make the franchisee an "agent" of the franchisor. *Holiday Inns*, 216 Va. at 495.[16] Certainly, if the franchisee fails to do business in the prescribed manner, it may be found in breach of the franchise agreement and enjoined from continuing to operate in any manner that suggests an affiliation with the franchise. *E.g.*, 62B Am. Jur. 2d, *Private Franchise Contracts* § 246 (2011) (franchisors may be entitled to injunctions "restraining the franchisee from using the franchisor's name, forms, training materials or advertising materials referring to or containing the franchi-

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[15] *Id.*; *Murphy v. Holiday Inns, Inc.*, 216 Va. 490, 495 (1975) (describing a franchise agreement as serving to "achieve system-wide standardization of business identity, uniformity of commercial service, and optimum public good will," by "regulat[ing] the architectural style of the buildings and the type and style of furnishings and equipment," among other things); *Dudley v. 4-McCAR-T, Inc.*, 2011 WL 1742184, *1 (W.D. Va. May 4, 2011) (a McDonalds "franchise agreement requires that [the franchisee] follow certain procedures relating to operational practices, inventory control, bookkeeping and accounting, and management and advertising policies").

[16] In *Holiday Inns*, a motel guest argued that the franchisee that operated the motel was the agent of Holiday Inns, Inc., citing the facts that the franchisee had to (1) "construct its motel according to [the franchisor's] plans, specifications, feasibility studies, and locations"; (2) employ the chain's "trade name, signs, and other symbols"; (3) pay "a continuing fee" to the franchisor "for use of [its licensed intellectual property] and for national advertising"; (4) "solicit applications for credit cards for the benefit of other [franchisees]"; (5) "protect and promote the trade name and not engage in any competitive motel business or associate itself with any trade association designed to establish standards for motels"; (6) not "raise funds by sale of corporate stock or dispose of a controlling interest in its motel without [the franchisor's] approval"; (7) provide standardized "training to [the] manager, housekeeper, and restaurant manager" at its expense; (8) "not employ a person contemporaneously engaged in a competitive motel or hotel business"; (9) "conduct its business under the 'system'"; (10) "observe the rules of operation"; (11) "make quarterly reports to the [franchisor] concerning operations"; and (12) "submit to periodic inspections of facilities and procedures conducted by [the franchisor's] representatives." 216 Va. at 493-94. Although "both parties agreed to [these] regulatory rules of operation," the rules "did not give defendant control over the day-to-day operation of [the] motel" or the "power to control daily maintenance of the premises." *Id.* at 495. Accordingly, "the regulatory provisions of the franchise contract did not constitute control within the definition of agency." *Id.*

sor's name, logos, trademarks, trade names or service marks"). But the franchisor's exercise of certain control over the franchisee does not mean that a disaffiliating franchisee will forfeit any land it purchased with its own money in furtherance of the franchise relationship.

So too here. Plaintiffs have a measure of control over the Episcopal "brand." Insofar as congregations and their representatives agree to hold themselves out as faithful members of TEC and the Diocese, plaintiffs may pass reasonable rules to ensure that those congregations preach "the company message" and fly the denominational "flag." They may also take steps to exclude (excommunicate) those who fail to do so. But the congregations are not plaintiffs' "agents," and the power of TEC and the Diocese is not unlimited. They may not pass rules asserting ownership of property to which they made no substantial financial contribution, or assert a trust interest in property titled in the Congregations' name. Those matters are governed by "real property and contract law" (*Truro Church*, 280 Va. at 29), which plaintiffs have failed to satisfy.

d. Visitation canon

Plaintiffs seek further support for their claim to have "'control' over local church assets" in the "visitation canon," under which their bishops visit congregations to perform ordinations, receptions, dedications, and confirmations. TEC Br. 26. The notion that such visitations constitute an exercise of "dominion" or establish a "proprietary interest," however, finds no support in "neutral principles of law" (*Norfolk*, 214 Va. at 504)—as evidenced by plaintiffs' failure to cite any case holding as much. *Contra Quatannens,* 268 Va. at 366 (equating "absolute dominion" with "actual possession," which "might be accomplished 'by residence, cultivation, improvement, or other open, notorious and habitual acts of ownership'").

Nor is that surprising. The purpose of visitations is spiritual. Bishops conduct services of confirmation, ordination, and dedication pursuant to the *Book of Common Prayer*—"a thoroughly religious book" that contains "the rites for Episcopal services," "prayers and collects for

different periods in the church calendar," "baptismal rituals and marriage services and all 150 psalms," and "the fundamental religious beliefs of the church." Tr. 1289:4-1290:9-13 (Mullin). To be sure, Bishop Jones stated that, when visiting congregations, he would often stroll around the property and "have *access* to the parish register" and "parish records." Tr. 314:19 (emphasis added). But there is no evidence that the bishop actually took time to inspect the financial or maintenance records, much less with regularity, or that he conducted more than a cursory viewing of the premises.

There are nearly 200 congregations in the Diocese (PX-COM-0246-049 to -052), and an individual bishop has to visit some "60 more congregations" over "about 40 to 42 Sundays" to "complete the calendar." Tr. 206:18-22 (Bp. Jones). This leaves little time for property oversight. Although the bishop might "go in the kitchen to thank the people preparing the reception" or "comment on the condition of the property, especially to compliment on the good work," he would not "carry a checklist" (Tr. 349:5-6, 315:4-6)—as would be expected of one fulfilling actual property management duties. Indeed, had the Congregations understood that the bishop's compliments were serving to create a proprietary interest, they might well have chosen to leave the grass long and the windows in need of washing before his visit. *Cf.* Tr. 3156:6-3157:4 (Harper) (explaining that the congregation was not "unwelcoming" to the bishop, but that such visits were not eagerly anticipated, or an occasion where "the congregation got excited and made sure the grounds were cleaned up and everybody wore their Sunday best"). It would frankly be perverse for a civil court to hold that such visits had significance for purposes of "real property and contract law." *Truro Church*, 280 Va. at 29. *See Jones*, 443 U.S. at 602 ("religious doctrine and practice" and aspects of a denomination's "ritual and liturgy of worship" must receive "no consideration" in determining property ownership).

In any event, the evidence at trial showed that bishops visit a congregation only at the latter's invitation. Tr. 2697:13-19 (J. Yates) ("Q How did that come about that the bishop came? A Well, normally the vestry and I would issue an invitation to the bishop to visit. Q Did the bishop of the Diocese ever come without an invitation? A No."). As Rev. Jones of St. Paul's testified, Bishop Jones acknowledged to him that "[the] rector had control of [congregational] property and could admit or deny anyone access to the church or to worship of the church, including a bishop." Tr. 1874:13-1875:13 (Rev. Jones); *see also id*. at 1875:13 (noting that Bishop Jones "repeated that and affirmed that"). Further, as Bishop Jones himself acknowledged at trial, "[i]f a bishop wants to meet with a vestry, [he] would … have to be invited." Tr. 318:9-15 (Bp. Jones). As he stated, the relationship is generally "open and cordial," but "[t]echnically, a bishop cannot intrude on a meeting of the vestry and force his way into a meeting of the vestry without an invitation by the rector." *Id*. Such facts are wholly inconsistent with the notion that plaintiffs have a proprietary interest in the Congregations' properties. The "visitation canon" thus provides no support for plaintiffs' case.

e. Abandonment canon

Finally, TEC and the Diocese rely on canons that address whether property is deemed "abandoned" by the denomination. Diocese Br. 45-46; TEC Br. 58-59. But whether a property is abandoned for internal ecclesiastical purposes and whether it is abandoned for civil law purposes are two different inquiries, and plaintiffs make no attempt to show abandonment under the standard set forth in Va. Code § 57-15(A).

We discuss this issue in our opening brief (at 150-53), and plaintiffs do not take account of the law supporting our position. For present purposes, however, we note that they cite no Virginia case permitting denominations to declare *contested* property "abandoned"; and that if their position were the law, denominations could circumvent their burden of proving a proprietary in-

terest in congregational property under *Norfolk* and *Green* simply by unilaterally declaring such property abandoned. That would be deference-to-hierarchy with a vengeance, and it finds no support in Virginia law. *Contra Norfolk*, 214 Va. at 504 (rejecting a deference approach in favor of neutral principles of law). Indeed, in *Norfolk*, "the position of the Presbytery [was] that Grace Covenant Church, as a congregation, has otherwise ceased to exist; they don't exist anymore."[17] But the Court there rejected the denomination's claim that the Court was required to effectuate an ecclesiastical court's determination as to whether the congregation could disaffiliate with its property. *Norfolk*, 214 Va. at 503; *see* CANA Opening Br. 142. In addition, other courts have rejected the notion that a denomination's right under its constitution to declare property abandoned or to dissolve a congregation gives the denomination an ownership interest in the congregation's property. *E.g. Foss v. Dykstra*, 342 N.W.2d 220, 223-24 (S.D. 1983).

3. The Virginia Supreme Court has not "already held" that the subject provisions of plaintiffs' constitutions and canons are enforceable.

Aware that their constitutions and canons do not establish enforceable interests under neutral principles of law, plaintiffs maintain that the Virginia Supreme Court has *already* resolved the enforceability of their canons. Citing a passing comment from the Court's opinion on the § 57-9 issues, they say the Court "has *already held* that the churches 'were required to conform to the constitution and canons'"—and that the Court's general statement in this connection

[17] DX-PRAEC-006-0027 (Joint App. in *Norfolk*); *see* DX-PRAEC-003-0006, DX-PRAEC-003-0008 (Appellant's Br. in *Norfolk* (contending that the congregation's "attempt to declare itself a separate and autonomous congregation was contrary to the laws and procedures of the church," and that such issues had to be determined by "the first Ecclesiastical Court having direct jurisdiction over Covenant")); DC-PRAEC-005-0017 (Appellant's Reply Br. in *Norfolk* (same)).

is the governing "law of the case." Diocese Br. 34, 28 (quoting *Truro Church*, 280 Va. at 27) (emphasis added); *accord id*. at 22; TEC Br. 21.[18] This argument is untenable.

If the language that plaintiffs invoke had the significance that they claim, it would be difficult to make sense of the Supreme Court's remand or its directive that this Court "resolve this dispute under principles of real property and contract law." *Truro Church*, 280 Va. at 29. As plaintiffs note, their constitutions and canons "were already matters of record" in the § 57-9 appeal. Diocese Br. 3. Accordingly, if the Supreme Court believed that plaintiffs' canons disposed of the question of ownership under civil law, the Court presumably would have ended the case, as it did in *Green*, rather than remanding it for trial.

Moreover, any analysis of "contract law" typically includes an examination of whether the parties agreed to be bound, whether the contract is supported by consideration, and whether the contract has sufficient mutual remedies for breach to be enforceable. If the Supreme Court intended to dispense with such inquiries, one would have expected it to say so. Instead, it specifically remanded the case for a determination whether plaintiffs can claim a contractual interest in the Congregations' property under neutral principles of contract law.

In addition, that the CANA Congregations may generally have been required to conform to the constitutions and canons does not mean that particular canons purporting to assert an interest in the subject properties (*e.g.*, the Dennis Canon) are enforceable. Setting aside whether the entire contract is void for, say, lack of consideration or mutuality, specific contractual provisions still must comply with neutral requirements of secular law. For example, an otherwise valid con-

[18] The statement cited by plaintiffs (Diocese Br. 34) was made in the context of the Supreme Court's discussion of whether the Congregations were "attached" to TEC and the Diocese for purposes of § 57-9—an issue that has never been disputed. 280 Va. at 27 (noting that the issue was not in dispute); Letter Op. on the Applicability of Va. Code § 57-9(A) (Apr. 3, 2008) ("The parties concede that the CANA Congregations were attached to the Diocese and ECUSA for purposes of 57-9(A)."). Thus, the statement was unnecessary to the Court's analysis.

tract may specify an interest rate for late payments that violates state usury laws. Similarly, a clause in a lease stating that the lessee's declaration of bankruptcy entitles the landlord to immediate possession may be unenforceable under federal bankruptcy law. In both cases, the contract may be "binding" in general, but that does not resolve the enforceability of particular provisions.

So too with canons. Whether a specific canon is enforceable in civil court depends on whether it satisfies the neutral requirements of secular law. For example, if plaintiffs passed a canon requiring each affiliated congregation to place a large sign identifying itself within a certain distance from the street, whether a congregation was "required to conform" would depend on whether the sign complied with state and local setback, signage, and visibility requirements. Likewise, whether particular canons asserting denominational ownership of valuable congregational property are enforceable depends on whether they otherwise comply with the law governing "real property and contract" claims. *Truro Church*, 280 Va. at 29.[19] As plaintiffs' own authority acknowledges (TEC Br. 23), "the constitution and by-laws adopted by a voluntary association constitutes a contract between the members" and "will be enforced by the courts"—but only "if not immoral *or* contrary to public policy *or* the law." *Gottlieb v. Economy Stores*, 199 Va. 848, 856 (1958) (emphasis added). Moreover, it is difficult to reconcile the view that canons trump civil law with *Norfolk*, which rejected the view that congregations "who unite themselves with a hierarchical church do so with an implied consent to its government." 214 Va. at 504.

[19] Even an acknowledged violation of church canon law would leave the question of whether a civil law remedy is available, and if so what remedy. For instance, that denominations may in certain circumstances call on the courts to support their decision to defrock their own clergy (*Milivojevich v. Serbian Orthodox Diocese*, 426 U.S. 696, 728 (1976), does not mean that they may divest such clergy of their pensions. Likewise, that plaintiffs may decide who constitutes the "true" congregation for *ecclesiastical* purposes does not mean that this determination will govern for purposes of determining the ownership of congregational property under *civil* law. That is one of the lessons of *Jones v. Wolf*. 443 U.S. at 607.

As the record now confirms, the Virginia Supreme Court appropriately declined to issue a ruling that would have disposed of this case based on the canons. The Supreme Court did not have sufficient evidence to address contractual issues of mutual assent, consideration, remedies, and enforceability. Further, it could not have known, for example, that plaintiffs' own canon law reporters have admitted that "a canon," "however expressed," has "no legal force" as a means of "secur[ing] the property of [an affiliated] Community from being alienated from the Church in case the Community should officially sever its connection with the Church." Apostles Ex. 372.0004. Nor could the Court have known that, according to TEC's chief legal officer, an "individual parish" lacks the "ability to force the Diocese to abide by the constitution and canons" (DX-CANA2011-0009-00029)—which renders the canons unenforceable under secular contract law. *Town of Vinton v. City of Roanoke*, 195 Va. 881, 896 (1954) ("there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement."). And the Court could not have known, based on the record before it, that plaintiffs' adoption of their property-related canons was not supported by any additional consideration, or that it violated the limitations on associational rules expounded in *Gillman* and *Davis*. In short, the canons cannot withstand the cold light of "real property and contract law." *Truro Church*, 280 Va. at 29.

D. Plaintiffs' "course of dealing" evidence is irrelevant under *Green* and under ordinary neutral principles of law, but in any event favors the CANA Congregations.

As explained in our opening brief (at 89-123), the CANA Congregations exercised dominion over their properties by purchasing, designing, building, improving, maintaining, mortgaging, zoning, leasing, managing, insuring, possessing, using, and worshiping at them. In recent years they gave more than ten million dollars to plaintiffs—withholding support in their discretion—and spent over ten million more on maintenance. And these are just their efforts that

directly concern management of the properties. They also chose their own clergy and staff. They selected their own Sunday school curricula, education materials, and forms of worship, often designing their own liturgies. They set their own service schedules. They secured copyrights and licenses for their worship music. They ran their own day schools. They designed and carried out their own ministries and outreach. They operated their own youth programs. And they commissioned their own missionaries—all of this with little or no involvement of TEC or the Diocese.

In short, the initiative for every undertaking of the CANA Congregations, and its execution, came from the local level, not denominational headquarters. Not surprisingly, therefore, plaintiffs admit that the "day-to-day responsibility" for "management, payment, and so forth related to the property" are handled by the "vestry and the local church." Tr. 964 (J. Heslinga). In this instance, plaintiffs are given to understatement.

The vast majority of plaintiffs' "course of dealing" evidence, by contrast, does not relate specifically to property ownership. It shows nothing more than that the parties functioned as a religious denomination. Use of TEC-ordained pastors; sometime use of TEC hymnals, Sunday school materials, liturgy publications, signs, and retreat centers (all purchased at standard rates); occasional visits by TEC bishops; filing annual reports; attending Annual Council; participating in pension or health insurance plans (often at added expense)—these are ordinary incidents of denominational activity. They are not the stuff of proprietary interests. Moreover, they are not relevant under *Green*, which weighed "course of dealing" evidence only because the denomina-

tion's constitution specified such factors as evidencing consent to a proprietary interest. CANA Opening Br. 81-88. No such consent provision is found in plaintiffs' constitutions or canons.[20]

1. A "neutral principles" analysis does not give weight to "course of dealing" evidence unless specified by the denomination's constitution as a means of expressing consent to a proprietary interest.

In *Norfolk*, the Virginia Supreme Court rejected the position "that those who unite themselves with a hierarchical church do so with an implied consent to its government." 214 Va. at 504. Under the *Norfolk-Green* framework, therefore, plaintiffs have "the burden of proving a violation by the [congregation] of either 'the express language of the deeds or a contractual obligation to the general church.'" *Green*, 221 Va. at 555 (quoting *Norfolk*, 214 Va. at 507).

Applying this framework, *Green* considered "course of dealing" evidence related to pastors' "appoint[ment] by the bishops" and to "the name, customs, and policy" of the denomination only because specific constitutional provisions set forth those factors as governing whether there was congregational consent to a denominational proprietary interest. In fact, the Court's analysis tracked those aspects of the A.M.E. Zion Church's constitution nearly *verbatim*. CANA Opening Br. 86 (chart). Yet plaintiffs ignore this aspect of *Green*. They do not explain how it can otherwise be reconciled with either neutral principles generally—under which "course of dealing" evidence would not establish an enforceable contract[21]—or with *Norfolk*, which *Green* reaffirmed. 221 Va. at 553-55. Accordingly, plaintiffs have not established the relevance of the great majority of their "course of dealing" evidence.

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[20] Plaintiffs' own cases recognize that their rules 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, 808 (Pa. 2005) (TEC Br. 39).

[21] *E.g.*, *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524, 531 (2008) ("[T]he trial court erred in finding that the parties' course of conduct established the existence of an enforceable contract").

2. The "course of dealing" evidence of record overwhelmingly favors the CANA Congregations.

Even if relevant, however, the "course of dealing" evidence here would confirm that the CANA Congregations fulfilled the responsibilities "customarily associated with ownership, title, and possession." *Green*, 221 Va. at 555. As this Court already found concerning one Congregations, "it is the TFC[] vestry that 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." Letter Op. 15 n.10 (Dec. 19, 2008); *see also id.* at 16 ("ECUSA and the Diocese concede, as they must, that TFC did in fact manage and administer the property for the past 150 years and more"). The same is true of the other Congregations. They "exercise[d] dominion" over their properties (*Green*, 221 Va. at 555), funding their acquisition, improvement, and maintenance. They "manage[d] and control[led]," the properties (*id.*), deciding who would have access and under what terms. *See Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). All of the ordinary responsibilities of ownership were exercised not by TEC or the Diocese, but by the Congregations. That should end the course of dealing analysis. *Green*, 221 Va. at 555.

We discussed this evidence in detail in our opening brief (at 89-123), and plaintiffs fail to take account of much of it. Here, however, we address specific points that plaintiffs do raise.

a. Vestry declarations

Lacking specific evidence of congregational consent to a denominational property interest, plaintiffs resort to relying on declarations made by members of the Congregations' vestries. Diocese Br. 6, 24, 36; TEC Br. 16. They quote only an excerpt of these declarations—the portion where the vestry member "yield[s] a hearty assent and approbation to the doctrines, disci-

pline, and worship of The Episcopal Church." Diocese Br. 6, 24, 36. But it is instructive to read the declaration in its entirety:

> 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 (Diocese Const., Canon 11, § 8). As the context confirms, the first phrase in this declaration contains an explicit commitment to the authority of the Bible. Not surprisingly, the Congregations' witnesses testified that they understood the balance of the declaration—found in the very same sentence—to be subordinate to this commitment. *See* CANA Opening Br. 130-32.[22] In short, the declaration was a spiritual commitment, and the Congregations' vestry members reasonably understood it as such.

Plaintiffs accuse the CANA Congregations' witnesses of offering "self-serving denials" of the meaning of "discipline." Diocese Br. 36. The vestry declaration, however, nowhere refers to either the constitution or canons of TEC or the Diocese. Further, plaintiffs omit to note that the definition of "discipline" that they invoke, found in Canon IV.15, is expressly limited to its "use[] in this Title"—namely Title IV, which governs discipline of *clergy*.[23] There is no canon for discipline of vestry members, and no definition of "discipline" that applies to their conduct. On its face, therefore, this definition is inapplicable. And in any event, the definition itself says that "discipline" includes "the Rubrics and the Ordinal of the Book of Common Prayer," which

[22] *E.g.*, Tr. 1566:16-1569:8 (Julienne), 3936:20-3937:17 (Miller), 2431:13-2432:5 (Deiss), 1758:4-22 (Rev. Jones) (discussing analogous declaration by priest at ordination), 2626:8-2627:19 (Yates) (same).

[23] PX-COM-0001-162 ("Canon 15: Of Terminology Used in This Title"); PX-COM-0001-115 ("Title IV: Ecclesiastical Discipline"); *id*. at 0001-115 to -173 (Title IV canons setting forth "offenses for which bishops, priests, or deacons may be presented and tried" and the procedures for such trials).

are thoroughly spiritual materials. *See* CANA Opening Br. 132-33. Not surprisingly, plaintiffs' expert conceded that "[t]here is no bright line" that "separates" the Church's "doctrine and discipline"; they "overlap." Tr. 1294:22-1295:9 (Mullin).

Indeed, given the religious significance of the term "discipline," and the fact that the vestry declarations embody an express commitment to "the Holy Scriptures," this Court cannot interpret and apply the declarations without violating the First Amendment. *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"). It follows that the Court cannot rely upon them as a basis for imposing civil law obligations, or to support a finding that plaintiffs had a proprietary interest in the subject properties.

b. Congregational "governing documents"

Both TEC and the Diocese repeatedly assert that the CANA Congregations' "governing documents" state that the Congregations were bound by canon law. *E.g.*, Diocese Br. 36 (Congregations "provided specifically in governing documents and other official pronouncements that they were bound and governed by canon law"); TEC Br. 15. An examination of the record, however, shows that they are painting with too broad of a brush, failing to distinguish the circumstances of each Congregation. In each case, the Congregation either made no statement binding itself to the canons, did not include any such statement in a governing document, made no statement specific to property, or amended the statement prior to disaffiliation.

Furthermore, in no case did a CANA Congregation deliver to plaintiffs any document pledging fealty to plaintiffs' canons, let alone agreeing to grant the denomination a proprietary interest. Indeed, it appears that plaintiffs were unaware of the documents they now cite *until the Congregations produced them in discovery*. Thus, there is no basis to plaintiffs' suggestion that the documents were intended to memorialize any contractual commitment. *See Presbytery of*

Donegal v. Calhoun, 513 A.2d 531, 536-37 (Pa. Commw. 1986) (congregation was not bound by charter language when the language was self-imposed and not the result of any agreement with the denomination and when the denomination was not even aware of the provision). We discuss the relevant documents for each CANA Congregation in turn.

1. ***Apostles.*** TEC cites PX-APOST-005 as reflecting Apostles' acknowledgment that it is bound by the rules of TEC and the Diocese. TEC Br. 15-16. This document, however, is not a set of corporate articles, a constitution, or bylaws adopted by the congregation. Rather, the document is a vestry handbook, updated in 1998, and it says nothing about Apostles being bound by the canons in general, much less the Dennis Canon in particular. The most the handbook says is that it "is consistent with the canons of the Diocese of Virginia, while also reflecting the particular understanding of leadership we hold at Church of the Apostles, a diverse congregation of believers from all three historical streams of the Church—Catholic, Protestant and Pentecostal." PX-APOST-005-002. That does not support plaintiffs' claim of a proprietary interest.

2. ***The Falls Church.*** As to The Falls Church, TEC cites PX-FALLS-078-085, which again is not a set of articles or bylaws, but rather a 1999 vestry handbook. On page 85, this handbook states that The Falls Church is subject to the constitution and canons of the national church and the Diocese. Nothing in the handbook, however, indicates that it purports to bind the entire congregation, and no witness suggested that it rose to the level of a governing document. Further, the document does not address, much less acknowledge, any alleged property interest of the denomination in The Falls Church's property. Plaintiffs offered no evidence that they were even *aware* of this vestry handbook, much less that they relied upon it. Nor have they cited any authority suggesting that such a handbook can establish a legally cognizable property interest.

The actions of The Falls Church's vestry in 1990 further undermine the notion that this isolated sentence on the 85th page of a vestry handbook served to relinquish The Falls Church's property rights. Specifically, in July 1990, Bishop Lee sent a letter to The Falls Church's senior warden in which the bishop mentioned, in passing, the notion that The Falls Church's property was held in trust for the Diocese. DX-FALLS-0035-2. Far from endorsing that proposition (which is facially invalid under Virginia law), The Falls Church vestry sent a response to this "indirect[]" reference to "the status of our Church's property." DX-FALLS-0039-4. Through the senior warden, The Falls Church alluded to potential defenses the congregation could raise, such as "the effect of the eighteenth century conveyances to which our Church Trustees trace their title," which predated the "subsequently-adopted provisions of the Diocesan Canon," and urged the Bishop not to deal with this in a "legalistic way." DX-FALLS-0039-4. Tellingly, neither plaintiff mentions this exchange in its brief. But as then-vestry member William Deiss testified in answer to the Court's questioning, the vestry's written response reflected "a gentleman's way in Virginia to say no" to the Diocese's position. Tr. 2549:9-18. And as William Goodrich, who authored the letter, admitted in response to questioning from the Court, the letter informed the bishop of "legal issues that could possibly affect the enforceability or the applicability of the Diocesan Canon." Tr. 4352:5-19 (Goodrich).[24] Thus, The Falls Church cannot be said to have consented to any proprietary interest on behalf of the denomination.

[24] The exchange in full states:

> THE COURT: … [C]an you tell me, Mr. Goodrich, if this is a fair statement. When you put in the effect of the 18th century conveyances to which our church trustees trace their title and subsequently adopted provisions of the Diocesan canon, would it be fair to say that while you are not telling Bishop Lee where you come out on that issue, you weren't [*sic*] letting him know that there were legal issues that could possibly affect the enforceability or the applicability of the Diocesan Canon?
>
> THE WITNESS: I would agree with that, Your Honor. Tr. 4352:5-18.

3. *Truro*. Truro's acknowledgement that it is bound by the rules of the Diocese is supposedly found in bylaws adopted in 1986. PX-TRU-002-001. Yet nothing in the bylaws reflects a commitment by Truro to subordinate its property rights to the denomination. All that the cited page says is: "In accordance with the canons of the Diocese of Virginia, the Vestry shall consist of 18 persons, each of whom shall be elected for a term of 3 years."[25] In addition, the Diocese introduced no evidence suggesting that it knew of, much less relied on, this vague provision. Accordingly, this evidence does not support any finding of a proprietary interest.

Moreover, neither the Diocesan canons nor Truro's bylaws required Diocesan consent to amendments thereof. Truro was therefore free to amend them, and to eliminate reference to the canons. *See All Saints*, 685 S.E.2d at 174-75 (because "nothing in the [parish's] by-laws or the Constitutions and Canons of the ECUSA or Diocese require[d] third-party approval for amendments to the congregation's corporate charter," adoption of amended articles "effectively severed the corporation's legal ties to [TEC] and the Diocese"); *From the Heart Ministries*, 803 A.2d at 568-69 (although the congregation's initial charter described its purpose, in part, "to engage in any other lawful activity in accordance with the Discipline of the African Methodist Episcopal Zion Church," the congregation was free under corporate law to "amend[] its charter to delete that reference and to expand its corporate powers"); *cf. Smith v. Church of the Good Shepherd*, slip op. at 3-4 (congregation failed to comply with corporate articles requiring that any amendments be approved by Diocesan Standing Committee).

4. *St. Stephen's*. TEC cites St. Stephen's 2005 bylaws as reflecting an acknowledgment of the supremacy of its canons. PX-SSH-0004-001. But these bylaws were neither adopted by

[25] The Diocese also points to unrecorded Instruments of Donation as evidence of Truro's acceptance of a denominational interest in Truro's property. Diocese Br. 110-111. That argument is addressed below in Part I.D.2.e.

the Congregation nor sent to the Diocese (Tr. 3643:6-17; Tr. 3646:12-15), and they state only that the Congregation was organized under the constitution and canons of TEC and the Diocese. Moreover, St. Stephen's incorporated effective October 12, 2006 (DSTS Exs. 1, 2; Tr. 3641:4-14), after which, on December 9, 2006, the vestry adopted new bylaws (Tr. 3641:15-18) and again amended them on August 7, 2007 (DSTS Exs. 3, 4; Tr. 3641:15-3643:1). Neither the articles of incorporation nor the later bylaws proclaim that St. Stephen's or its property is subject to the denomination's canons.

5. ***St. Margaret's.*** St. Margaret's had a constitutional provision stating that the congregation was "guided and directed by the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia." PX-STMARG-002-001, -004. Nothing in this constitution, however, gave the denomination any interest in St. Margaret's property. Indeed, the constitution reflected the contrary, as it stated that St. Margaret's trustees would "[h]old legal title to any property belong to St. Margaret's Episcopal Church and under the control of the Vestry thereof" and "[s]erve as the legal representatives of St. Margaret's Episcopal Church in all such matters which civil law requires such representation." PX-STMARG-002-003.

In addition, in November 2006 St. Margaret's congregation voted "overwhelmingly" to repeal its constitution, and to approve incorporation by filing new articles of incorporation. DSTM Ex. 138; Tr. 4045:8-4047:2. Effective November 29, 2006, St. Margaret's was incorporated under the laws of the Commonwealth. DSTM Exs. 1; Tr. 3641:4-14; Tr. 4045:138. "Concurrently with incorporation," the vestry adopted new bylaws, which, together with the corporate articles, constitute St. Margaret's governing documents. Tr. 4047:3-8, DSTM Exs. 1-2.

6. ***St. Paul's.*** The St. Paul's congregation had bylaws in effect as of April 2005 that referenced the vestry as agents of the church, subject to the constitution and canons of TEC and the

Diocese. PX-STPAUL-0002-001. In August 2006, however, St. Paul's vestry adopted new bylaws. DSTP Ex. 4; Tr. 2214:18-22. On October 8, 2006, St. Paul's vestry adopted a resolution authorizing incorporation of the church (DSTP Ex. 282; Tr. 2213:17-2214:3), and effective November 16, 2006, St. Paul's was incorporated under the laws of the Commonwealth of Virginia. DSTP Ex. 1; Tr. 1765:1-12. Shortly after incorporation, on November 30, 2006, the vestry amended the new bylaws to reflect the incorporation (DSTP Ex. 5; Tr. 2214:19-21), and on December 18, 2006, upon the conclusion of the disaffiliation vote, it amended them again to remove the word "Episcopal" from the church's name. DSTP Ex. 6.

7. ***Epiphany*****.** In the case of Epiphany, plaintiffs point to bylaws, adopted in 2001, that reference property being held in trust for the Diocese. PX-EPIPH-002-003, -012. Setting aside the fact that such a bylaw is facially invalid in light of Virginia law on denominational trusts, there is no evidence that these bylaws were ever sent to, or received by, TEC or the Diocese. Tr. 3832:4-9, 14. Moreover, Epiphany was incorporated in early January 2007, prior to completing its congregational vote to disaffiliate (DCOE Ex. 498; Tr. 2287:5-21), and the next day replaced the 2001 bylaws with new ones that did not reference the canons or any trust interest (DCOE Ex. 526; Tr. 2288:18-20; Tr. 2289:1-5). Here too, because neither the Diocesan canons nor Epiphany's bylaws required Diocesan consent to amendment of the bylaws, Epiphany was free to change them. *All Saints*, 685 S.E.2d at 174-75; *From the Heart Ministries*, 803 A.2d at 568-69; *cf. Smith*, slip op. at 3-4 (congregation failed to comply with corporate articles requiring that any amendments be approved by Diocesan Standing Committee).[26]

[26] Plaintiffs' suggestion that the generalized reference in Epiphany's 2001 bylaws to the Diocese's asserted trust interest operates to create a proprietary interest in Epiphany property is also unpersuasive for the reason that the Diocese's own canons require, as a condition for the transfer of congregational property, that the congregation consent to such a transfer at a meeting called for that purpose after due notice. PX-COM-0003-027 (Canon 15, § 2). Epiphany's Rector testi-

c. Appointment of pastors

Among the course of dealing factors cited in *Green* was the denomination's designation of ministers for the congregation. 221 Va. at 553. As the evidence there demonstrated, "Pastors are appointed by the bishops, and … a local congregation could not refuse to accept a pastor." *Id*. at 549, 552. Here, by contrast, the CANA Congregations selected their own rectors and negotiated their salaries, as discussed in our opening brief (at 114-16). Aware of this difficulty, plaintiffs say this "is a trivial distinction at best, and it is not entirely accurate." Diocese Br. 31. Specifically, the Diocese points to canons that require vestries to give the Bishop advance notice of the persons they intend to select as rector, so the Bishop can determine whether he is "satisfied with the person so elected." Diocese Br. 31-32. This argument is unpersuasive.

The Diocese suggests that these canons gave the Bishop what amounted to a veto power, but in practice it was just a courtesy. As the Diocese's Secretary admitted, "the vestry has control over th[e] process" (Tr. 1183:16-1184:1 (Burt)); the Diocese's role is "is 'advisory'" (TRU 179.007). The CANA Congregations occasionally considered candidates recommended by the Bishop, or supplied him with copies of parish profiles. There is no evidence, however, that their vestries and search committees were not the drivers of the process and the ultimate decision makers. *E.g.*, Tr. 2284:16-2285:2 (Epiphany search committee contacted Robin Rauh to request interview). Notably, none of the rectors actually chosen by the Congregations' vestries was even interviewed, much less selected, by the bishop. To the contrary, John Yates, rector of The Falls Church, did not meet the bishop until several months *after* he had been hired. Tr. 2630:17-21 (J.

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fied that the notice he prepared of the meeting at which the 2001 bylaws were adopted made no reference whatever to the question of consent to transfer (DCOE Ex. 521), and that, if that had been the subject of the meeting, his notice would have so stated (Tr. 2331:15-Tr. 2335:7).

Yates). Even then, the purpose of the meeting was not to examine Rev. Yates' qualifications, but rather for the bishop to ask the congregation for money. Tr. 2630:17-2631:3 (J. Yates).

Plaintiffs are equally glib in characterizing their role in filling other clergy positions. For example, the Diocese notes that St. Margaret's, Apostles, and Epiphany began as missions, and that "the Diocesan Bishop assigns vicars to missions"—so as to leave the impression that the bishop appointed the vicars for these three churches. Diocese Br. 32. In reality, however, Apostles had no vicar (Tr. 3069:8), and the Truro vestry selected Bill Reardon, an assistant rector at Truro, to be the new vicar at Epiphany, a Truro church plant (Tr. 2074:3-12, 814:20-816:2). The Diocese also notes that it once assigned deacons to St. Paul's and Truro, without mentioning that these assignments took place in the 19th century. Tr. 990:6-11. In more recent years, by contrast, the Congregations have selected their own deacons. Tr. 4680:2-8.

In short, the CANA Congregations' control over their choice of clergy further distinguishes this case from *Green*.

d. Personal property

As detailed in our opening brief, the CANA Congregations gave more than $10 million to the Diocese in the 20-year period before the 2003 General Convention alone, and spent tens of millions more maintaining their properties—without help from the denomination. CANA Opening Br. 107 (Table A), 111 (Table B). Moreover, the Congregations withheld donations at will when they disagreed with the actions or direction of the denomination—facts that cannot be reconciled with the notion that the property was held in trust for TEC and the Diocese.

Faced with extensive evidence of one-sided financial contributions, plaintiffs attempt to characterize those donations as reflecting denominational control. For example, they suggest that, although the Diocese "chose[] to adopt a voluntary system" in "modern times," it formerly "set amounts of expected monetary contributions from parishes." Diocese Br. 19; *see also id*. at

24, 25 (the Congregations "conformed their conduct to th[e] requirements" of "the Constitution and Canons" in "numerous ways, including … [by] contribut[ing] financially to the support of the Diocese"). Setting aside that plaintiffs admit to having had a voluntary system for half a century, however, they are not fairly characterizing the record. As Professor Bond admitted, even the former contribution system was not mandatory:

> Q One of the other things you testified yesterday was that throughout much of the Diocese's history, the Diocese set the amounts that local churches were to contribute. You used the phrase that "those amounts were viewed as required," right?
>
> A Right.
>
> Q Now, there's no provision in the canons that made those amounts required, correct?
>
> A It's what they expect. There's no sanction if they don't pay them.
>
> Q So when you say "no sanction," I think the only thing that you mentioned was that you could get your name on the list of delinquent parishes from time to time, correct?
>
> A That's true.
>
> Q In fact, the Diocese had no power to compel the contributions at the apportioned level that they set, correct?
>
> A That's true.
>
> Q In fact, congregations across the Diocese fairly routinely didn't pay the apportioned or assessed amounts established by the Diocese, correct?
>
> A From time to time that does happen. I'm not sure how routine that is.
>
> Q Did you conduct research to assess how routine that was?
>
> A No, I did not. …

Tr. 1099:6-1100:10 (Bond). Plaintiffs' suggestion that the prior system of "expected monetary contributions" was mandatory is thus a verbal sleight of hand. As Professor Bond's admissions confirm, the Congregations' contributions to the denomination have always been voluntary.

Not content to mischaracterize the record on this point, plaintiffs proceed to mischaracterize *Green*. Citing a statement from that opinion that "[t]he church owe[d] no funds, assessments or other monies to the A.M.E. Zion Church or its Annual Conference" (221 Va. at 550),

plaintiffs attempt to create the impression that the congregation there (like the Congregations here) was not required to make contributions to the denomination. Diocese Br. 3. That is incorrect. The point of the statement was simply that, as of the lawsuit, the congregation was current in payment of its denominational assessments. 221 Va. at 550. Indeed, as the opinion later makes clear, the congregation disaffiliated in part because it "objected to the assessments which were levied and which the local congregation was required to meet," finding them "out of line" and "excessive." *Id*. at 551. The CANA Congregations cannot be criticized for such views. They voluntarily gave the denomination tens of millions of dollars, and withheld donations in their discretion. Such facts cannot be reconciled with the idea that the personal property at issue was held for the benefit of anyone other than the Congregations.

e. Truro instruments of donation

As a further basis for their alleged proprietary interest in Truro's property, plaintiffs point to two instruments of donation. One of these instruments, from 1934, commemorates the consecration of Truro's "Historic Chapel" after it was constructed; the other, from 1974, commemorates the consecration ceremony for the Main Sanctuary, originally built in 1959. *See* PX-TRU-003 & PX-TRU-004; *see also* PX-TRU-369 (Truro dedication program, dated April 16, 1974).

As explained in our opening brief, such documents are literally part of TEC's liturgy and have only symbolic significance. CANA Opening Br. 53-54. Indeed, we are aware of no authority holding that an instrument of donation is legally cognizable, and plaintiffs cite none. The two relevant decisions hold that an "instrument of donation" is a "religious instrument which pertains to ecclesiastical and spiritual matters" (*Church of Holy Comforter*, 628 N.Y.S.2d at 475)—an "unenforceable instrument," not a "conveyance." *Bjorkman*, 759 S.W.2d at 586. Rather than address these authorities, the Diocese argues that Truro Church either "gifted a property interest

or [sic] a use restriction." Diocese Br. 111. But for a host of reasons, neither argument is plausible or supported by Virginia law.

First, the instruments of donation do not comport with customary documents conveying an interest in land. Unlike deeds and easements, the documents are not notarized. Unlike deeds and easements, the instruments contain no legal description of the land and give no street address. Furthermore, the instruments do not explicitly identify which buildings are "donated" thereunder. They merely reference a "house of worship."

Second, the Diocese makes no argument, nor could it, that the instruments of donation are executed by the persons holding legal title to the property—the trustees of Truro Church. As described in *Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559, 49 S.E. 657, 658 (1905), the statute requiring appointment of church trustees to hold legal title:

> provides the method of appointment of trustees, upon the application of the proper authorities of the congregation, *in order to effect or promote the purpose of such conveyance, devise, or dedication, and that the legal title to such land shall, for that purpose and object, be vested in the trustees.*

Id. at 49 S.E. at 658. (emphasis added). Truro's trustees were the only persons with authority to convey or devise a legally effective interest in the property.[27] If the instruments were intended to be a legally cognizable "gift," as the Diocese now suggests, then the Diocese would have had to request that the trustees, rather than the rector or registar, sign them.

Third, if the Diocese truly believeed that the instruments represented an unrecorded deed, it begs the question of why they were not offered for recordation among the land records of Fair-

[27] As of 1934 and 1974, when the instruments of donation were executed, Virginia Code § 57-15, and its predecessors, required the trustees to file a petition in the circuit court to sell, exchange or encumber church property. The Code section was amended in 1983 to explicitly require a petition to be filed to "gift" church property. Because the only persons holding legal title to Truro Church's property did not sign the instruments of donation this Court need not determine whether the trustees would have nonetheless needed to file a petition with this Court in 1934 and 1974 to convey an interest in Truro Church's property by "gift."

fax County Circuit Court. Presumably the Diocese would have at least attempted to record the instruments, if it believed that there was even a remotely plausible argument that they constituted unrecorded deeds. Yet the Diocese never did so—even recently, when it filed a lis pendens against Truro's property.

Fourth, nothing within the language of the instruments manifests an intent to transfer title. While a "writing need not be in any particular form to constitute a deed," the document "must contain operative words manifesting an intent to transfer title." *Lim v. Choi*, 256 Va. 167, 172 (1998). The instruments here do not. At most, they speak of permitting the Bishop to have spiritual oversight over the "houses of worship"—nothing more.[28]

Fifth, the limited scope of the instruments is at odds with the notion of a gift. If Truro Church intended to give its property to the Diocese, it presumably would have included not just its "houses of worship," but also the adjoining buildings, most of which sit on discrete parcels. In fact, the "houses of worship" cover only a portion of two of Truro's thirteen parcels. In addition, if the Diocese viewed instruments as a means of securing an interest in a congregation's property, it presumably would have attempted to obtain such instruments from the other CANA

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[28] The Diocese's Rule 4:5(b)(6) designee, Henry W. Burt, could provide no answers as to the legal effect of the instruments of donation. *See* Dep. Tr. 104:1-18.

> Q Is it the Diocese's contention that this instrument of donation is a conveyance?
>
> A I don't know whether it was a conveyance or not.
>
> Q Well, is it the Diocese's position that they could have recorded this in this land records in Fairfax County?
>
> A I don't know the answer to that.
>
> Q Is it the Diocese's position that this instrument of donation in 1934 gave the Diocese the power to sell the property?
>
> A I don't know the answer to that either.

(Objections by counsel omitted).

Congregations. Yet there is no evidence that the Diocese even asked any of the other Congregations to execute an instrument of donation for their "houses of worship."

The notion that the instruments of donation are anything more than liturgical documents is also refuted by the contemporaneous documentary evidence. A review of the program for the "Dedication and Consecration" ceremony from April 28, 1974, shows that from beginning to end the consecration of the Main Sanctuary was nothing more than a religious ceremony. *See* PX-TRU-0369-001-024. As the program reveals, the ceremony focused solely on religious connotations. Absent from any portion of the event program is any reference or discussion of a transfer of legal title to the property from the trustees of Truro Church to the Diocese.

The Diocese suggests that the Truro vestry's certification that the building and land were free from "lien and other [sic] incumbrance" and "secured from danger of alienation" has some independent effect. The language, however, is explained by TEC's then-operative canons. As Professor Mullin explained, the reason that TEC passed a canon in 1868 related to local church debt was that some churches "went bust and were put up for sale by the Sheriff's." Tr. 1193:16-1194:1. Until the revision to the canon in the 1970s, "it was very clear that a church could not be consecrated until it was paid for, it was debt-free." Tr. 1195:20-22.[29] The language in the in-

29 Dr. Mullin's testimony on this point tracks White & Dykman which states:

> In presenting this new rite [Dedication and Consecration of the Church], the commission noted that it was anomalous to erect a building for divine worship and use it as such for many years, but not to consecrate the building as a church until the mortgage had been satisfied. In addition, it is clear from the commission's report (Prayer Book Studies 28) that the commission wanted to free the dedication service from the necessity of ownership and full control by the Episcopal Church.

Edwin A. White & Jackson A. Dykman, Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America otherwise known as the Episcopal Church, p. 481 (1981 ed.).

strument of donation is nothing more than a reflection of TEC's canons at the time, and does not provide any evidence of an intent to transfer legal title to Truro Church's property.

Finally, the Diocese incorrectly suggests that Truro Church viewed the instruments of donation as something more than spiritual documents, based on the notion that "Truro's 1974 Vestry spoke in secular terms when adopting the Instruments." Diocese Br., p. 112. This argument relies on a selective mix and match of distinct quotes from the Vestry Minutes. The Diocese begins with a selective quotation of the March 19, 1974, vestry minutes describing a "legal document" to be sent to the Bishop stating the church is "free of debt." DX-TRU170.0008. The following meeting, on April 2, 1974, the vestry minutes reflect "Plans for the consecration of the church were progressing. Our legal documents [sic] has been obtained." DX-TRU170.0010.

The "legal documents" referred to is the legal description of the property and the Deed of Partial Release executed on March 29, 1974, which released a portion of the property from the 1965 mortgage. *See* DX-TRU216. The Truro vestry certainly was not referring to the 1974 instrument of donation as a "legal document," as the first, and only, reference to the instrument in the vestry minutes did not appear until a later vestry meeting (on April 16, 1974), where it was reported that "Mr. Blankingship has received the 'Instrument of Donation' papers. The Vestry was asked to adopt these papers. This motion was made and carried." DX-TRU170.0011.

The vestry's consideration of the instrument took place nearly one month after the reference to obtaining "legal documents." By letter dated April 22, 1974, Mr. Blankingship sent a copy of not only the "instrument of donation," but also the "Deed of Partial Release pursuant to which the deed of trust (mortgage) has been released on the part of the land which the immedi-

ately surrounding the Church building." PX-TRU-0066-002.[30] Viewed in context, therefore, it is clear that the reference to "legal documents" in the vestry minutes has nothing to do with the 1974 instrument of donation and instead relates to the Deed of Partial Release—an actual legal document that touches on an interest in real property.

In short, this Court should join the only two reported decisions on this topic, which hold that TEC's "instruments of donation" are "unenforceable" ecclesiastical documents. *Bjorkman*, 759 S.W.2d at 586; *accord Church of the Holy Comforter*, 628 N.Y.S.2d at 475.

II. Plaintiffs' "Identity Approach" Mischaracterizes Virginia Law And Is An Effort To Advocate Adoption Of A Deference-To-Hierarchy Regime By Another Name.

In what they "stress" is an "alternative" argument, plaintiffs ask the Court to rule that the properties belong to the "continuing Episcopal congregations" (in the case of The Falls Church, St. Stephen's, St. Margaret's, and Epiphany) and the Diocese's Executive Board (in the case of Truro, St. Paul's, and Apostles). Diocese Br. 42-48; *accord* TEC Br. 47-59. Citing "[v]enerable Virginia authority" (Diocese Br. 44)—including *Brooke v. Shacklett*, 54 Va. 301 (1856), *Hoskinson v. Pusey*, 73 Va. 428 (1879), and *Finley v. Brent*, 87 Va. 103 (1890)—they assert that the "only question" is: "'Who is the local church?'" TEC Br. 47. This question must be answered in their favor, they say, because "a local entity's affiliation with a larger, hierarchical organization is an essential defining characteristic of the local entity's identity, and therefore property owned by that entity cannot be removed" without the denomination's consent. TEC Br. 1.

For at least three reasons, however, plaintiffs' argument finds no support in Virginia law. *First*, plaintiffs lack standing to raise it under *Norfolk* and *Green*, and a contrary conclusion

[30] The 1965 Deed of Trust originally covered the remaining portions of the Simpson parcel conveyed to Trustees of Zion Episcopal Church in 1882. The 1965 Deed of Trust was not released as to the remaining portions of the Simpson parcel until 1982. *See* DX-TRU273 (noting certificate of satisfaction given on January 11, 1982).

would allow them to circumvent the *Norfolk-Green* framework. *Second*, the argument rests on a gross mischaracterization of the holdings of *Brooke*, *Hoskinson*, and *Finley*, which turned solely on the deeds. *Third*, the Virginia Supreme Court rejected the argument—and the deference-to-hierarchy rationale on which it is based—in *Norfolk*. We develop these points below.

A. Absent a proprietary interest under *Norfolk* and *Green*, TEC and the Diocese lack standing to press their "identity" theory.

Although plaintiffs' discussion of the *Norfolk-Green* framework does not acknowledge it, the Court there held that "[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*" by the defendant congregation. *Norfolk*, 214 Va. at 503 (emphasis added). Thus, if plaintiffs fail to establish a proprietary interest under *Norfolk* and *Green*, this case is over and judgment must be entered for the CANA Congregations. *Norfolk*, 214 Va. at 503; *Green*, 221 Va. at 555; *Andrews v. American Health & Life Ins. Co.*, 236 Va. 221, 226 (1988) ("Standing to maintain an action is a preliminary jurisdictional issue"); *see also* CANA Opening Br. 141-42.

Plaintiffs' Virginia authorities are not to the contrary. As this Court earlier recognized, "the warring parties in *Brooke*, *Hoskinson*, and *Finley* were in fact all members of specific local congregations. In none of these cases was the denomination or diocese an actual party to the dispute." Letter Op. 15 (Aug. 19, 2008). In fact, "[n]o 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." *Id.* at 16 (quotation omitted); *accord* DX-FALLS-0413-000002, 0413A-0001 (transcription); Tr. 3546:11-20 (Curtis). Thus, plaintiffs' cases do not establish a denomination's standing to assert interests of (often hypothetical) minority factions of congregations where the denomination has not proven its own interest in the property. Indeed, a contrary ruling would permit denominations to do an end-run on their burden of proof

under *Norfolk* and *Green*, simply by declaring property "abandoned" or recognizing the dissenting wing as the "active" church, without regard to neutral legal principles. CANA Opening Br. 153. That is not consistent with the law of Virginia.

B. Plaintiffs' argument misrepresents the holdings of *Brooke*, *Hoskinson*, and *Finley*, which turned on "the deed alone."

If the Court had jurisdiction to address plaintiffs' "identity" theory, however, Virginia law would not support it on the merits. Even conceding the "venerable" authority (Diocese Br. 42) of decisions such as *Brooke*, *Hoskinson*, and *Finley*, plaintiffs have not fairly represented the holdings and rationale of those cases. To be sure, the Court there had to decide which wing of a congregation was worshipping under particular denominational auspices. But that was because *the deed* contained a use restriction that expressly limited the use of the subject property to worship under those terms. *Brooke*, 54 Va. at 310-20; *Hoskinson*, 73 Va. at 431; *Finley*, 87 Va. at 107. Absent such a use restriction, the cases would have come out the other way. *Davis*, 1886 WL 2979, at *5.

In *Finley*, for example, the Court ruled for the minority faction of a Methodist Protestant congregation—a faction that voted against reaffiliation—because the deed conveyed the property "for the sole and exclusive use and benefit of religious congregations of regular orthodox Methodist Protestants" and "for no other use or purpose whatever." 87 Va. at 104. Citing *Brooke*, *Hoskinson*, and *Boxwell v. Affleck*, 79 Va. 402 (1884), the Court explained: "Who, then, are the *cestuis que trustent* ***under the deed in question?"***—"The beneficiaries entitled to the trust estate. ***Looking to the deed alone***, the answer would be those who are members of the congregation or local society, and, as such members of the Methodist Protestant Church." *Id*. at 107 (emphasis added); *id*. at 108-09 ("The terms of the deed must be followed, and its trusts enforced, as they are created, and the beneficiaries thereunder can be none other, than the deed provides for.").

Hoskinson and *Boxwell* contain identical analysis (*Boxwell*, 79 Va. at 407 ("[l]ooking to the deed alone"); *Hoskinson*, 73 Va. at 431 ("[l]ooking to the deed alone")), and rely on *Brooke*, which is the leading case. Indeed, the Court in *Brooke* conducted a painstaking analysis of "[t]he deed under consideration," which conveyed property subject to three trust clauses: (1) requiring that the beneficiaries build "a house or place of worship for the use of the members of the Methodist Episcopal church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conferences in the United States of America"; (2) requiring the beneficiaries to "forever hereafter, permit such ministers and preachers belonging to said church [MEC] … to preach and expound God's holy word therein"; and (3) providing elaborate rules requiring the trustees to be "members of the [MEC] church," and directing that any surplus from any sale of the property be used to benefit the local society of MEC members. 54 Va. at 302-03. It was based on these deed provisions, restricting the property to use by the members of MEC, that the Court held: "the house or place of worship to be erected is to be for the use of the *members* of the Methodist Episcopal church, &c.; and as the members of the local society are necessarily members of the Methodist Episcopal church, ***in the sense in which the term is used in the deed***." *Id*. at 315 (emphasis added). Contrary to plaintiffs' suggestion, therefore, the Court did not analyze the members' "identity" apart from the terms of the deeds.[31]

As explained in our opening brief, absent use restrictions such as those found in the deeds in *Finley*, *Hoskinson*, and *Brooke*, a congregation's denominational affiliation will not preclude it from retaining its property upon disaffiliation. CANA Opening Br. 33-38, 143-44. Restrictive covenants and restraints on alienation are strongly disfavored by law. Thus, where the property

[31] The Court permitted the majority wing to disaffiliate, notwithstanding the deed's provisions, because the denomination had lawfully divided. 54 Va. at 323-27.

of a local affiliate of a general association "was not conveyed upon condition that the beneficiaries in the deed should retain the[ir] then name … or that they should associate themselves with, or become subject to, the orders and regulations of the [general association], or any other body," "they [a]re left free to change the name of their division whenever they might see fit," and to disaffiliate with their property. *Davis*, 1886 WL 2979, at *5.

C. *Norfolk* rejected both the view that the civil courts should determine church property ownership based on the identity of the congregation as determined by the denomination, and the deference-to-hierarchy rationale on which that view is based.

Plaintiffs' "identity approach" is nothing more than deference-to-hierarchy by another name. Simply by declaring a disaffiliating congregation "inactive," denominations could transfer ownership to loyal factions of former affiliates without having to satisfy any of the principles of *Green*, *Norfolk*, or "real property and contract law." *Truro Church*, 280 Va. at 29. To say the least, such a regime would be a strange way to implement decisions that adopted "neutral principles of law" as the governing rule—decisions that rejected the position "that those who unite themselves with a hierarchical church do so with an implied consent to its government." *Norfolk*, 214 Va. at 504.

Indeed, sounding much like plaintiffs here, "the position of the Presbytery" in *Norfolk* "[was] that Grace Covenant Church, as a congregation, has otherwise ceased to exist; they don't exist anymore."[32] But the Court specifically rejected the denomination's claim that it should defer to "the ecclesiastical law of the general church." 214 Va. at 503. The Court associated this view—and the notion that "[t]he decision of the tribunal established by the general church to re-

[32] DX-PRAEC-006-0027 (Joint App. in *Norfolk*); *see* DX-PRAEC-003-0006, DX-PRAEC-003-0008 (Appellant's Br. in *Norfolk* (contending that the congregation's "attempt to declare itself a separate and autonomous congregation was contrary to the laws and procedures of the church," and that such issues had to be determined by "the first Ecclesiastical Court having direct jurisdiction over Covenant")); DC-PRAEC-005-0017 (Appellant's Reply Br. in *Norfolk* (same)).

solve ecclesiastical disputes was … binding on local congregations and on civil courts"—with *Watson v. Jones*, 80 U.S. 679 (1871), which plaintiffs again invoke here. TEC Br. 1, 51-52. But as the Court in *Norfolk* recognized, "[it was] not bound by the rule of *Watson v. Jones*, … for that case rested on federal law." *Id*. at 504. "The First Amendment requires only that such disputes be adjudicated according to 'neutral principles of law, developed for use in all property disputes,' and which do not involve inquiry into religious faith or doctrine." *Id*. (quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969)).

Plaintiffs nonetheless insist that "a civil court may not second-guess or review the decisions of a religious institution regarding the identity of its members." Diocese Br. 42; *accord* TEC Br. 58. But even assuming that denominations may define their members for purposes of *ecclesiastical law*, civil courts need not defer to such determinations for purposes of *civil property law*. Remarkably, plaintiffs take their position without attempting to reconcile it with *Jones v. Wolf*. There the congregation's minority wing "earnestly submit[ted] that the question of which faction is the true representative of the [local] church is an ecclesiastical question that cannot be answered by a civil court"—"[a]t least" not "in a case involving a hierarchical church, like the PCUS, where a duly appointed church commission has determined which of the two factions represents the 'true congregation.'" 443 U.S. at 607. But that did not deter the Court from ruling against "the faction loyal to the hierarchical church." *Id*. at 606. So far as property ownership is concerned, civil courts need not "defer to the resolution of an authoritative tribunal of the hierarchical church," or to its "laws and regulations." *Id*. at 597, 609. So too here.[33]

[33] In support of their "identity" argument, plaintiffs also cite *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), and *Cha v. Korean Presbyterian Church*, 262 Va. 604 (2001). Diocese Br. 45. But as this Court has recognized, in *Milivojevich*, while "the issue as to who would hold the church property" was "underlying this property dispute," "'the case essentially involve[d] not a church property dispute, but a religious dispute." Letter Op. on the Constitu-

Plaintiffs also repeatedly invoke *Diocese of Sw. Va. of the Protestant Episcopal Church v. Wyckoff*, Op. (Amherst Cty. Nov. 16, 1979), where the diocesan bishop and the loyalist faction sued the departing faction to recover possession after a slim majority of the congregation voted to disaffiliate. Both sides claimed to be beneficial owners of the property under the deeds. Far from representing an affirmation of plaintiffs' position here, however, *Wyckoff* simply reflects the enforcement of deed language restricting use of property to a TEC-affiliated congregation.

Although the circuit court cited *Norfolk*, it did not frame the dispute in terms of whether the denomination had a proprietary or contractual interest. Rather, the issue was which of the competing factions had the superior claim to be beneficiaries under the deeds. *Id*. at 7. The court resolved the issue primarily by reference to the deed's language—a point neither plaintiff mentions in their briefs. Indeed, neither plaintiff even identifies the pertinent deed language.

There were two deeds in *Wyckoff*. In the first, an 1847 deed, the grantor had conveyed land "to erect a new brick church ***for the use and benefit of the Protestant Episcopal Church***," "***upon this special trust and this special confidence***, however, ***that they the said (grantees) … shall and will forever have and hold the said piece or parcel of land with all the improvements and appurtenances thereunto belonging for the use and benefit of the Protestant Episcopal Church as they the said (grantees) … shall deem most likely to promote the interest of the said church***." *Id*. at 2 (emphasis added). The second, an 1860 deed, conveyed the land "***for the same use and for the same purposes and upon the same conditions and upon the same trusts***" as set

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tionality of Va. Code § 57-9(A) at 16 (June 27, 2008) (quoting *Milivojevich*, 426 U.S. at 709). And *Cha*—a lawsuit by a minister alleging wrongful termination, tortuous interference with contract, and defamation by his church—did not even involve a dispute over church property, but rather the First Amendment's "ministerial exception," which protects church decisions about selection of clergy. *See* 262 Va. at 607, 611-12. This case does not implicate such concerns. And as *Jones* confirms, courts need to defer to denominational authorities for purposes of the civil law of church property, even where the issue is the identity of the congregation.

forth in the 1847 deed. *Id*. at 2-3 (emphasis added). Given this language, the court, following *Brooke v. Shacklett*, found that the deeds limited use and possession of the property to the faction that remained affiliated with the Episcopal Church. *Id*. at 7.

Although the court in *Wyckoff* discussed the diocese's canons, it did not do so for the purpose of determining whether the denomination had a contractual interest in the property. Rather, the court reviewed them to determine whether they permitted the congregation to alienate property that the grantor had dedicated to the use of the denomination. *Id*. at 6. The court similarly examined whether Va. Code § 57-9 would allow the disaffiliating congregation to claim title to the property despite the deed language, but found that the congregation had not met the voting standard set by the statute.[34] According to the court, the "net result" of the canons and statutes was that "title remained exactly where it was prior to the vote, that is, in the trustees for the benefit of the local protestant Episcopal congregation." *Id*. at 7.

Nothing in *Wyckoff* suggests that the loyalist faction would have prevailed absent the use restriction in the deeds. More importantly, nothing in *Wyckoff* indicates that the denomination would have prevailed had it, rather than the loyalist faction, been claiming title to the property. And as we have shown, only two of the deeds here even arguably contain use restrictions. Thus, if anything, *Wyckoff* confirms that plaintiffs' claims should be denied.[35]

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[34] The court also noted that Va. Code § 57-9 may have been inapplicable because of the "constitutional infirm[ities] of applying it to the deeds in question which predate the passage of the statute." *Id*. at 6.

[35] In support of their "identity approach," plaintiffs also invoke *Phillips v. Widow's Son Lodge No. 54*, 152 Va. 526 (1929), a benevolent association case involving only personal property—an endowment plan that provided insurance for individual members. But the disaffiliating local unincorporated lodge there, a "Colored" chapter of the Masons, came into existence only as a result of the charter issued by the national Grand Lodge under its Constitution; it "had no existence other than that granted by the said Grand Lodge." *Id*. at 528. Moreover, the Constitution also included an express reverter clause providing that when a chartered local lodge reorganized or ceased to exist, all of its property vested in the Grand Lodge in trust. *See id*. at 531-32. *See also*

III. Plaintiffs' Non-Virginia Authorities Arose In Deference-To-Hierarchy Jurisdictions, Relied On Trust Law Principles Not Applicable In Virginia, Involved Distinguishable Statutory Frameworks, Or Turned On Facts Not Present Here.

Plaintiffs' efforts to make a case for ownership under the law of out-of-state jurisdictions is no more convincing. According to TEC, "an overwhelming majority of other state courts applying a 'neutral principles' test such as that adopted in *Green* have concluded that the church and its dioceses have an interest in local Episcopal church property." TEC Br. 37. In all, TEC touts 25 cases from 15 states that they say "have almost unanimously concluded that local Episcopal church property must remain in the hands of loyal Episcopalians." *Id*. An examination of those cases, however, reveals that a majority of them followed a deference-to-hierarchy or *Watson v. Jones* implied trust approach, rather than the "neutral principles" articulated in *Norfolk* and *Green*. In the remainder, the court ruled for the denomination based on statutes or facts not present here. Consequently, not a single case cited by TEC is on point. By contrast, other courts employing "neutral principles" and addressing factual situations like those here have more often than not found in favor of the congregation.

First, eight of the fifteen jurisdictions identified by TEC did not, contrary to its assertions, even rely on "neutral principles" to resolve property disputes involving former Episcopal congregations. Those eight jurisdictions (New Jersey, Nevada, Michigan, Massachusetts, Connecticut, Texas, North Carolina, and Tennessee) instead followed in one form or another the *Watson v. Jones* implied trust/deference to hierarchy approach that the Virginia Supreme Court

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Bressler v. Am. Fed'n of Human Rights, 44 Fed. Appx. 303, 320-321 (10th Cir. 2002) (explaining holding in *Phillips*). Here, by contrast, each of the CANA congregations is a separate entity from, and did not come into existence as a result of any charter issued by, the Diocese or TEC, let alone a charter issued subject to an express reverter provision in the national or diocesan constitution. Nor did *Phillips* purport to overrule (or even discuss) *Davis v. Mayo*, which unlike *Phillips* involved real property governed by deed. *See* 1886 WL 2979, at *5.

specifically rejected in *Norfolk*. *See Norfolk*, 214 Va. at 504 (holding that Virginia courts are not bound by the *Watson v. Jones* implied trust doctrine).

For example, in *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980), the New Jersey Supreme Court stated: "In the absence of express trust provisions, we conclude that the hierarchical (*Watson*) approach should be utilized in church property disputes in this State. Only where no hierarchical control is involved, should the neutral principles of law principle be called into play." Similarly, in *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980), the Nevada Supreme Court, citing *Watson*, agreed that "the courts of this state should defer to the decision of responsible ecclesiastical authorities, under the internal discipline of the organization to which the local congregation has voluntarily subjected itself."[36] Since *Norfolk* rejected the argument that Virginia courts must defer

[36] *See also Episcopal Diocese of Mass v. DeVine*, 797 N.E.2d 916, 921-92 (Mass. App. 2003) (finding question of the right to use parish property "to be inappropriate for determination by application of neutral principles of law"); *Bennison v. Sharp*, 329 N.W.2d 466, 473 (Mich. Ct. App. 1982) ("The test of *Watson*, that a religious organization is but a subordinate part of a general church in which there are superior ecclesiastical tribunals with a more or less complete power of control, is plainly met here."); *Rectors, Wardens & Vestrymen of Trinity-St. Michael's Parish v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1284 (Conn. 1993) (applying hybrid *Watson* and *Jones* approach that includes inquiry into whether constitution, canons, and polity of trust support implicit trust in favor of denomination); *Masterson v. Diocese of Northwest Texas*, 335 S.W.3d 880, 888, 891-92 (Tex. App. 2011) (rejecting argument that a Texas court is required to follow the neutral principles approach and finding that under *Watson v. Jones*, court was required to defer to Bishop's pronouncement as to which vestry controlled property); *Daniel v. Wray*, 580 S.E.2d 711, 717 (N.C. App. 2003) (North Carolina follows rule where the parent body of a connectional church has the right to control the property of local affiliated churches).

The trial court in *Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens & Vestrymen of St. Andrew's Parish*, No. 09-2092-11, Summary Judgment Order (Tenn. Ch. Ct. Apr. 29, 2010), purported to be following neutral principles, but the authority it cited clarifies that Tennessee in reality follows an implied trust theory. *See Fairmount Presbyterian Church v. Presbytery of Holston*, 531 S.W.2d 301, 306 (Tenn. App. 1975) ("We prefer to rest our decision on the theory of implied trust (a 'neutral principle of law')"); *see also Emmanuel Churches of Christ v. Foster*, 2001 WL 327910, *2 (Tenn. App. Apr. 5, 2001) ("As a general proposition, when property is conveyed to a local church having a connectional relationship to a central organization, the property belongs to the central organization.").

to the pronouncements of ecclesiastical authorities, none of the cases from these eight jurisdictions has any relevance here.

Second, three of the remaining seven jurisdictions that TEC invokes have passed statutes that give effect to TEC's unilateral declaration of a trust interest in local congregational property. For example, in *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009), the California Supreme Court relied heavily on a California statute that allows denominations to assert a trust interest in congregational property. Under Cal. Corp. Code § 9142, "[n]o assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law … [u]nless, and only to the extent that, the articles or bylaws of the corporation, *or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide*." *Id*. at 81 (emphasis in original).[37] Not surprisingly, the court held that this statute "supports the conclusion that the property now belongs to the general church." *Id*.

Similarly, in *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 49 (Ga. Ct. App. 2010) (appeal pending), the court's decision was based in large part on a Georgia statute that the court construed as subjecting an Episcopal congregation's property to the rules of the denomination. *See also Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 923-24 and nn.7 and 8 (N.Y. 2008) (discussing N.Y. McKinney's Relig. Corp. Law § 42-a, which provides that "the vestry or trustees of any incorporated Protestant Episcopal parish or church" are "subject always to the trust in which all real and personal property is held for the Protestant Episcopal Church and the Diocese thereof in

[37] One justice, concurring and dissenting in part, challenged the notion that the decision was based on an application of neutral principles. In his view, TEC prevailed because the statute compelled California courts to give effect to the Dennis Canon. 198 P.3d at 85-86.

which the parish, mission or congregation is located");[38] *cf. First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 464 N.E.2d 454, 461 (N.Y. 1984) (in ruling for local congregation's, noting that New York statute subjecting local church property to denomination rules was inapplicable because the congregation was incorporated prior to statute's enactment and never brought itself within scope of statute). Plaintiffs can point to no similar Virginia statutes that would subject a congregation's property to a denomination's unilateral assertion of a trust interest.

Of the four remaining "neutral principles" jurisdictions, each ruled for TEC based on reasons not available here. Most notably, each of the four jurisdictions did not analyze whether the denomination had a proprietary or contractual interest in the local congregation's property. Because each jurisdiction recognizes denominational trusts, the issue instead was whether the Dennis Canon created such a trust. *See, e.g.*, *Bishop and Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) ("the facts specifically found by the trial court or otherwise uncontroverted establish that a trust has been imposed upon the real and personal property of St. Mary's Church for the use of the general church."); *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) ("we agree with the Commonwealth Court decision insofar as it found that St. James's property was subject to a trust interest in favor of the Diocese"). Here, by contrast, Virginia's

[38] Connecticut has a similar statute, which undergirds the implied trust theory that its courts follow. *See* Conn. Gen. Stat. § 33-265, providing in relevant part: "All ecclesiastical societies in this state, in communion with the Protestant Episcopal Church … shall have power to receive and hold … property … that has been or may be conveyed to them for maintaining religious worship according to the doctrine, discipline and worship of said church." Another Connecticut statute states that "[t]he manner of conducting the parish, the qualifications for membership of the parish and the manner of acquiring and terminating such membership … shall be such as are provided and prescribed by the constitution, canons and regulations of said Protestant Episcopal Church in this state." Conn. Gen. Stat. § 33-266.

prohibition on denominational trusts precludes reliance on any trust theory. And even if plaintiffs could press such a theory, they have not satisfied Virginia's rules for creating such a trust.

Each of these four cases is also distinguishable on the basis that the congregation there manifested explicit assent to diocesan control over their property. For example, in *St. James the Less*, the Pennsylvania Supreme Court held that the rules of an association such as TEC 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 (Pa. 2005). The Court found that standard satisfied because the congregation (1) adopted articles of incorporation declaring that its purpose was to worship God "according to the faith and discipline of [TEC]," and to hold its property "for the work of the [Diocese]", and (2) expressly agreed that, if it ever dissolved, its property would be placed in trust for the Diocese, and that any amendments to its articles would require Diocesan consent. *Id*. at 809-10.

By contrast, the Pennsylvania Supreme Court ruled against the denomination in a case more akin to this. In *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1324-25 (Pa. 1985), the court noted that the denomination did not expressly prohibit local congregations from disaffiliating and did not have an express trust clause in its constitution. More significantly, provisions from the denomination's Book of Order governing the congregation's use of its property—which were more comprehensive than the canons to which plaintiffs point—were deemed insufficient to give the denomination an interest in the congregation's property. *Id*. at 1325. Those provisions provided that: (1) the national church was to direct the use of the property in the event of a local congregation's dissolution; (2) local congregations were prohibited from alienating property without the denomination's consent; (3) the national church was empowered to take charge of a local congregation if it viewed the local church as managing its

affairs unwisely; (4) the national church had "exclusive authority over the uses to which the church buildings and property may be put"; and (5) local churches were limited to "deal[ing] with [their] property only as … authorized or directed with the [national church]." *St. James the Less*, 888 A.2d at 806 (explaining the Court's earlier ruling in *Presbytery of Beaver-Butler*). The court noted that the lower court's reliance on those provisions was misplaced, as "the overall intent of the [Book of Order] was to oversee the spiritual development of the member churches" and "the provisions mostly showed the national church's wishes"—which fell short of the clear evidence needed to create a trust. *Id*. at 807 n.26.

Two other courts addressing similar denominational rules agreed that they did not create an enforceable interest in congregational property. In *Foss v. Dykstra*, 342 N.W.2d 220, 223-24 (S.D. 1983), the denomination argued that it had an interest in congregational property by virtue of four constitutional provisions: (1) one giving ministers exclusive authority over local property; (2) one granting the Presbytery the power to appoint a commission to replace the authorities of a local congregation; (3) one empowering the Presbytery to dispose of local church property when the church is dissolved by order of the Presbytery; and (4) one prohibiting a local church from encumbering its property without permission from the Presbytery. The court disagreed, finding that "[a]lthough these provisions may limit a local church's use of the property while it is a member of the denomination, the language does not go far enough to constitute trust or reversionary terms such as the Supreme Court was seeking in *Jones* [*v. Wolf*]." *Id*. at 224-25.

An Illinois appellate court analyzing the same provisions reached a similar conclusion in *York v. First Presbyterian Church of Anna*, 474 N.E.2d 716, 721 (Ill. App. 1984). As the court there held, "the provisions do not confer title or right of control to the local property, nor can a

purely secular interpretation support any contention that those provisions operate to create some type of property interest in the general church." *Id.*

TEC also cites *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973, Omnibus Op. & Order (Ohio Ct. C.P. Cuyahoga Cnty, Apr. 15, 2011), a trial court decision. But not only did the congregation's corporate articles there provide that the purpose of the church was to worship "in conformity with the Constitution and Canons of the General Convention and the Diocese of Ohio," the congregation also filed a petition stating: "We do further represent that said parish shall hold all of its property as a trustee for the Episcopal Church and the Diocese of Ohio." *Id.* at 8; *see also Mote*, 716 P.2d at 106-107 (congregation's articles and bylaws showed intent to dedicate property to advance the work of the denomination). Similarly, in *Smith v. Church of the Good Shepherd*, No. 04-CC-864, Judgment & Order (Mo. Cir. Ct. Oct. 12, 2004), another trial court ruling, the articles of association stated that the congregation's "real property was to be held for the purposes and to the use of those who are in communion with and under the authority of the Protestant Episcopal Church." *Id.* at 4. Further, the articles provided that any amendments had to be approved in advance by the Diocesan Standing Committee (*id.* at 3), and TEC paid part of the purchase price of the property. *Id.* at 2; *see also Mote*, 716 P.2d at 106 (noting that diocesan canon prohibited amendment of a congregation's articles of incorporation without written consent of the bishop and chancellor).

By contrast, two Missouri trial courts applying neutral principles recently ruled *against* the Presbyterian Church in property disputes with local congregations. In *Heartland Presbytery v. Gashland Presbyterian Church*, No. 09-CY-12424, Judgment of Dismissal (Mo. Cir. Ct. Sept. 13, 2010), the court held that a trust provision in the denomination's Book of Order was insufficient to create a trust because it was not made or signed by the property's owner. *Id.* at 2. The

court further ruled that the congregation did not consent to the provision. *Id*. at 3. Although the local church received its property from the denomination, the latter did not reserve a trust in favor of itself in the deed, but instead conveyed the property outright, and the local church's articles of incorporation specified that it would take title in its own name. *Id*.

The court also rejected the argument that the local church's requests for denominational approval of loans and the sale of an easement created a denominational property interest. *Id*. at 4. As the court concluded: "Mere participation and cooperation in denominational affairs alone does not demonstrate a church's intent to be bound by a denominational trust clause." *Id*. The court further dismissed the notion that the congregation was contractually bound to the denomination's governing documents. *Id*. at 5. Although the local church's articles (1) indicated that the congregation was subject to the denomination, and (2) required that its bylaws not be inconsistent with the denomination's governing documents, the absence of any connectional language from the articles purposes clause left the congregation free to disaffiliate. *Id*. at 6.

Still more recently, in *Colonial Presbyterian Church v. Heartland Presbytery*, No. 1016-CV24909, Partial Judgment/Order (Mo. Cir. Ct. June 9, 2011), the court held that the trust clause in the denomination's Book of Order, having been drafted by the putative beneficiary (the denomination), rather than the putative grantor (the local church), did not comport with Missouri trust law. *Id*. at 3. Moreover, the trust clause was held to be too indefinite, as it did not describe the property with any particularity. *Id*. The same is true here.

The court further rejected the denomination's argument that provisions in the congregation's bylaws recognizing that the bylaws were subject to the denomination's constitution—and that the congregation's members were under the denomination's discipline—constituted consent to the trust clause in the Book of Order. *Id*. at 3-4. Nor was the court persuaded by the denomi-

nation's request for recognition of an implied or constructive trust. The denomination had not provided funds for the purchase or maintenance of the property, and the congregation had been financially independent. *Id*. at 5-6. Granting the denomination possession of the congregation's property under those circumstances, the court explained, would unjustly enrich it. *Id*. at 6.

IV. If The Episcopal Church And The Diocese Are Given Title To, And Possession Of, The CANA Congregations' Properties, the Congregations' Counterclaims Should Be Granted.

In its brief, the Diocese does not deny that the CANA Congregations not only donated more than $10 million to support the Diocese in the past 20 years, but also provided essentially all of the funding for the properties that the Diocese now wishes to confiscate. Nor does the Diocese deny that it is seeking to extinguish the interests of the Congregations in their properties and to put title thereto in the name of its bishop. Diocese Br. 48-49. The Diocese nevertheless insist that such a result is not unjust.

In support of that argument, the Diocese first implies that a determination that it has an interest in the Congregations' properties automatically entitles it to complete ownership. *Id*. But neither *Norfolk* nor *Green* so holds. Although the Court in *Green* held that the congregation could not extinguish the denomination's proprietary interest, it did not state that the denomination's interest extinguished the interest of the congregation. 221 Va. at 556. And the Court certainly did not say that the congregation's interest could be extinguished without compensating it for the improvements it had made to the property.

The Diocese further contends that forcing it to compensate the CANA Congregations for their financing of the acquisition and improvement of their property would contradict the statement in *Green* that the absence of any loans or gifts by the denomination to the congregation "is not dispositive." Diocese Br. 49 (quoting *Green*, 221 Va. at 556). But the Diocese is confusing two separate points. The Court in *Green* was noting that the denomination, as the grantee in the

deed, did not forfeit its proprietary interest merely because it refused to fund the congregation's remodeling program. Indeed, a denomination is not required to compensate a grantor as a condition of being named grantee in a deed or having the deed reflect a use restriction in the denomination's favor. But here, of course, plaintiffs are not seeking to vindicate any right as grantee of a deed or to enforce a deed restriction. They are seeking to have title changed and to evict the Congregations from the premises. Thus, while plaintiffs may not be required to pay to acquire a proprietary interest, nothing in *Green* absolves them of the duty to compensate the Congregations, should they wish to extinguish the Congregations' interest in the property.

The Diocese also challenges the evidence that the Congregations offered in support of their counterclaims. According to the Diocese, the appraisals that the Congregations introduced concerning the fair market value of their real property are irrelevant under *Little v. Cooke*, 274 Va. 697 (2007). Diocese Br. 52. But *Little* merely stands for the proposition that a plaintiff must prove damages for breach of fiduciary duty as of the date of the breach. *Id*. at 722. Since damages there were measured by the difference between the sales price under the improperly-executed contract for the sale of property and the fair market value of that property, the plaintiff needed to introduce an appraisal of the property as of the date of the contract. *Id*.

Here, by contrast, there is no breach to establish a valuation date. It is unclear in this case whether the appropriate valuation date would be the date of disaffiliation or a time closer to trial. Indeed, one could make the argument, as does the Diocese, that "the relevant date for valuation purposes … would be the date on which the Court decided in favor of TEC and the Diocese." Diocese Br. 52. However, appraisers generally do not offer prospective appraisals, and the CA-NA Congregations would have violated the discovery deadlines in this case if they had offered

appraisals on the eve of trial. The Congregations accordingly offered appraisals done around the time of disaffiliation, and ones prepared closer to trial but within the discovery timeframe.

Plaintiffs have done nothing to undermine the reliability of those appraisals, and they offer no competing appraisals of their own. Given the circumstances, the appraisals introduced at trial provide the most reliable evidence of the fair market value of the real property. If, however, the Court determines that post-trial appraisals are needed, the appropriate approach would be to reopen the record to allow the Congregations to secure and introduce such valuations, rather than denying them any relief at all, as urged by the Diocese.[39] And, of course, if the Court finds that plaintiffs lack a proprietary interest under *Norfolk* and *Green*—as it should—then it need not address this issue at all.

CONCLUSION

For the foregoing reasons, final judgment should be entered on behalf the CANA Congregations and plaintiffs' complaints should be dismissed. Alternatively, the CANA Congregations' counterclaims should be granted and the Congregations awarded an amount equal to the fair market value of the properties.

[39] Plaintiffs also attack the evidence introduced by the CANA Congregations regarding the value of their tangible personal property. Diocese Br. 53-54. The bulk of the personal property, however, consists of bank accounts, for which no valuation is required, and investment accounts, whose fair market value is computed daily by the investment firm. With respect to tangible property such as furniture and computers, there often is no readily ascertainable market value, as explained at trial. Consequently, the CANA Congregations elected to utilize replacement value. *See* Tr. 2172:11-2173:1.

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