VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

Post-Trial Response Brief for The Episcopal Church and the Episcopal Diocese of Virginia

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SUMMARY OF THE CENTRAL FLAWS IN THE CONGREGATIONS' BRIEF

The CANA Congregations' Opening Post-Trial Brief employs the scattershot approach to legal argument, requiring a lengthy response. As will be demonstrated, their arguments overlook or ignore relevant evidence, overlook or mis-state applicable law, *assume* that they hold titles to the properties in question as a foundation of their *arguments* that they hold such titles, and attack straw men.

There is a well-developed body of church property law in Virginia; and it mandates a ruling in favor of TEC and the Diocese, as demonstrated by our opening briefs. And as shown in detail in the TEC Brief,[1] Virginia's church property law is consistent with the many cases decided in favor of the Episcopal Church and its dioceses elsewhere.

The Congregations acknowledge that the principal authority applicable to these cases is *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980); but their analytical method is entirely contrary to the approach that the Supreme Court employed in *Green* and this Court articulated at the beginning of the trial. The Congregations address separately each of the four elements of "neutral principles"; argue that none of those factors "solely" or "itself" (CANA Brief at 83, 87) demonstrates contractual or proprietary interests in local church properties; and then conclude that their mistaken approach proves that there are no such interests. In *Green*, however, the Court did not examine the four elements in isolation from one another. It found instead,

> from [1] the language of the deed involved, [2] the Discipline of the A.M.E. Zion Church, *and* [3] the relationship which has existed between the central church and the congregation over a long period of years, that the A.M.E. Zion Church does have a proprietary interest in the property of Lee Chapel, and that its interest in the church property cannot be eliminated by the unilateral action of the congregation.

[1] We refer to the opening briefs as the "Diocese Brief," "TEC Brief," "CANA Brief," and "TFC's Endowment Fund Brief."

221 Va. at 555-56, 272 S.E.2d at 186 (emphasis added).[2]

This Court explained the point at trial, when the Congregations employed the identical approach in their motion in limine to exclude most of plaintiffs' evidence of course of dealing:

> THE COURT: Isn't it possible that this is like, I don't know, Seurat, or the artist who does the pointillism? … [Y]ou could object to each point because that point doesn't establish a point, but the whole picture might…. [T]he Diocese and Episcopal Church are trying to present, essentially, a tapestry of evidence related to this, and you're saying that each of the individual components don't prove their point …. I think I'd be essentially short-circuiting this process if I was to rule as a matter of law that they weren't entitled to admit this material and present the evidence…. So the motion in limine is denied.

Tr. 155-57.

TEC and the Diocese are hierarchical. That is the law of the case. *See Protestant Episcopal Church in the Diocese of Virginia v. Truro Church*, 280 Va. 6, 12, 14-15, 694 S.E.2d 555, 558, 559 (2010). It is the law of every case that has ever considered the question. *See* TEC Brief at 22-23 n.2. It is not disputed here. And it is what the evidence proves.

A necessary corollary is that "[e]ach congregation within a diocese … is bound by the national and diocesan constitutions and canons." *Truro Church*, 280 Va. at 15, 694 S.E.2d at 559. That also is the law of the case, and it has long been Virginia law. *See, e.g.*, *Reid v. Gholson*, 229 Va. 179, 188-89, 327 S.E.2d 107, 113 (1985) ("One who becomes a member of such a church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals"); *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301, 320 (1856) ("To

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[2] The *Green* Court did not specifically mention statutes in concluding that the general church had a proprietary interest that could not be eliminated by unilateral action of the congregation. The Court did, however, reiterate its holdings in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 503, 201 S.E.2d 752, 755 (1974), that statutes are part of the analysis and regarding the effect of Va. Code § 57-15. *See Green*, 221 Va. at 553, 272 S.E.2d at 184, quoting *Norfolk Presbytery* ("in the case of a supercongregational church Code § 57-15 'requires a showing that the property conveyance is the wish of the constituted authorities of the general church'"). Other relevant statutes have been amended or enacted since *Green* was decided. *See* Diocese Brief at 27-28.

constitute a member of any church, two points at least are essential, without meaning to say that others are not so, a profession of its faith and a submission to its government") (citation omitted). *Green* adheres to this well-settled concept. *See* 221 Va. at 555-56, 272 S.E.2d at 186 (quoted *infra* at 10). And again, it is what the evidence proves.

The Church's and the Diocese's governing documents include numerous rules guaranteeing that local church property will be possessed and controlled by Episcopalians and used for the mission of the Church and no other denomination. *See* TEC Brief at 25-32.

The churches in question are, and since their founding they always have been, part of a hierarchical church. They conducted themselves in that fashion. The Congregations now wish they were independent, however, and so they try to present the churches as congregational churches.[3] They are not and never have been. As set out in our opening briefs, the leaders and congregations of the local churches at issue accepted, assented to, and enjoyed the benefits of the rules enacted by TEC and the Diocese, in some cases for periods of well over a century. They repeatedly manifested an understanding that they were bound by the Canons of Diocesan and the Church and voted to follow them as particular issues arose, including with respect to property in particular. *See* Diocese Brief at 57-58, 59-64, and 75-77 (TFC); 81-87, 99, 104-06, and 108-09 (Truro); 115-18 (St. Paul's); 127-29, 133-35, and 137-38 (St. Stephen's); 143-48, 154-56, and 158-60 (St. Margaret's); 161-62, 164-68, and 170 (Apostles); 174-75, 177-83, 187, and 193 (Epiphany). The churches were well aware of the Diocese's property canons – they were given pre-Council notice when Diocese Canon 15 was adopted in its present form in 1983, as has long

[3] *Cf. Masterson v. Diocese of Northwest Texas*, 335 S.W.3d 880, 889 (Tex. App. 2011), *appeal pending* ("By arguing that the trial court was required to give effect to the majority's vote to withdraw Good Shepherd from the Episcopal Church and the Diocese …, the Former Parish Leaders are implicitly invoking the deference rule in combination with the assertion that Good Shepherd is a congregational church under the sole control of a majority of its members").

been Diocesan practice for canonical changes. *See infra* at 33.[4] They participated in Annual Council in that year and many others, including decades in which the Constitution of the Diocese explicitly stated that a parish sending a lay delegate to Annual Council "signified its ratification" and would make a parish "benefited and bound … by every rule and canon which shall be framed" by the Annual Council under the Diocese's Constitution. Diocese Brief at 18 & Ex. A. And they referred to and followed the property canons after 1983, as reflected in the factual portions of the Diocese Brief cited in this paragraph. These churches participated actively in the governance of the Diocese, but they never protested or sought to change the property and other Canons that their representatives helped enact.

Under *Green*, the tapestry of facts established by the evidence in this case requires the conclusion that the Church and the Diocese have contractual and proprietary interests in the properties at issue. Like nearly every court in the nation to have confronted these disputes, this Court should conclude that the local church property must remain in the Church and the Diocese.

The Congregations fail to come to grips with these uncontradicted facts in their opening brief, instead relying predominantly on the trial testimony and professed "understandings" of local leaders. That testimony provides no basis to avoid the Canons. Moreover, that testimony often cannot be reconciled with the records of the churches before they began acting in anticipation of litigation, and the Congregations' witnesses failed to do so. *See, e.g.*,

[4] The churches also received notice immediately after General Convention in 1979 that the Dennis Canon had been enacted. The October 1979 issue of the Diocese's *Virginia Churchman* newspaper included an article on adoption of the Dennis Canon, stating, *inter alia*, that "Parishes that break away from the Episcopal Church have no right to church property, the Convention declared in a resolution amending the canons of the Church." PX-COM-273-016. The *Virginia Churchman* was the predecessor to the *Virginia Episcopalian*, and it has been the Diocese's practice for decades to mail it to all Episcopal households of which the Diocese is aware. *See, e.g.*, Tr. 661-62; PX-COM-227-155; PX-COM-250-123; PX-COM-268-354. That included these churches. *See, e.g.*, Tr. 587-88, 808, 821-22, 3157, 3951-52.

Tr. 1994-2026 (the Rev. David Jones), 2113-16, 2118-23 (Murray Black (Epiphany)), 2587-92, 2610-11 (William Deiss (TFC)), 2998-3008 (Thomas Wilson (TFC)), 3161-67, 3169-72, 3176-78 (the Rev. David Harper), 3359-60 (Philip Rooney (Apostles)), 3749-50, 3766-86 (the Rev. Jeffrey Cerar), 4116-17 (the Rev. Neal Brown); and exhibits cited in the referenced testimonies. As discussed in the Diocese Brief at 34 & n.11, the witnesses' current, self-serving "understandings" of the rules of the Church deserve no weight in comparison with what the pre-litigation dealings between the parties show.[5]

The Congregations emphasize that the leaders of an Episcopal church have certain areas of autonomy (*see* CANA Brief at 13, 89-116), but they neglect to observe that such autonomy exists because the Church says so. The delegations of authority and responsibility to local leaders, and the areas of that autonomy, are specified by the rules of the Church. Local church leaders take oaths to adhere to the discipline of the Church, and in the case of clergy to follow the directions of their bishops as well.[6] "The Protestant Episcopal Church in the United States of America is a hierarchically structured organization which by virtue of its constitution and canons exercises pervasive control over its constituent parishes and missions." *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980) (cited below as *Graves*).

The Congregations are asserting essentially that they may be "part of the club and part of

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[5] In addition to their 160-page opening brief, the Congregations also filed Proposed Findings of Fact which are 142 pages and 911 paragraphs in length. We do not believe it would be a productive use of resources to file a point-by-point response, and the Diocese and TEC Briefs' well-documented factual discussions are their own response. We do not agree with many parts of the Proposed Findings (which contain legal conclusions, unnecessary and irrelevant material, and statements artfully drafted to minimize or evade uncontradicted evidence of the rules and polity of the Church and the Diocese and the dealings between the parties before the Congregations began planning to secede), but the essential facts nevertheless are not in dispute.

[6] *See* PX-COM-003-022 (Canon 11.8); PX-COM-001-015 (TEC Constitution, Art. VIII); TEC-37-296, -301, and TEC-38-525, -537 (1928 and 1979 Books of Common Prayer); Tr. 175, 177-78 (Bishop Jones), 2329-30 (the Rev. Robert Rauh).

the Episcopal Church" (Tr. 2544 (Deiss)), and governed and bound by the rules of the "club," for only so long as it suits their preferences, and that they can then thumb their collective noses at those rules when they choose to leave. That might be true for majorities of a congregational church; but as to a hierarchical church, their argument simply is not the law. *See* TEC Brief at 47-58.[7]

The Congregations also attempt (repeatedly, as if repetition would make it more credible) to portray the rules of the Church – the Constitutions and Canons – as the unilateral impositions of a dictatorial Diocese or Church. *See* CANA Brief at 1, 2-3, 4-5, 10, 12, 14, 39, 45, 46-52, 78-79, 124-30, 133-34, 154. That is patently false. The Church and the Diocese enact their rules through bodies that include representatives of the lower units of the hierarchy. Six of the churches (*i.e.*, all but Epiphany, which dates only from 1986) participated in the Annual Council which enacted Diocesan Canon 15.1 in 1983, as well as prior Annual Councils that enacted other property canons. *See* Diocese Brief Ex. A. Over many decades, delegates from these churches have been members of the Diocese's Annual Council committee that reviews and recommends changes to the Constitution and Canons. *See, e.g.*, Diocese Brief at 102, 136-37. These churches also were represented by the Diocesan deputation at the General Convention which enacted the "Dennis Canon" in 1979. *See, e.g.*, PX-COM-218-032 - 033. The same is true of other canons.

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[7] *See also, e.g., Rector, Wardens and Vestrymen of Christ Church in Savannah* v. *Bishop of the Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 54-55 (Ga. App. 2010), *cert. granted*, 2011 Ga. LEXIS 53 (2011) ("Christ Church cannot amend its way out of an already existing trust. Changes to corporate documents cannot sever the strands of the trust that attached to parish property"); *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05 (N.Y. Sup. March 12, 2008), slip op at 29-30 (rejecting local church's claims that it is free to withdraw from Episcopal Church and diocese, affiliate with another religious denomination, and retain property, relying on both a statute of incorporation and the church's "conduct and interaction with the Diocese and Episcopal Church" as establishing "the parish's membership in the Protestant Episcopal Church and its acceptance of the hierarchical church's principles and policies including its Constitution, Canons, and Diocesan Canons").

Thus "the parties" did ensure that the Church would retain the properties, as specified in *Jones v. Wolf*, 443 U.S. 595, 606 (1979) (*see* CANA Brief at 3, 133), by enacting Canons through canonical and democratic processes.

Nor is there any failure of "assent" to be governed by the Church's rules, for reasons discussed in the Diocese Brief and in the next paragraph; but in all events, the absence of congregational votes to "assent" to or "ratify" the canons of the Church (*see* CANA Brief at 3, 12, 45, 46-52) is immaterial. The Congregations did not vote to assent to or ratify ERISA or Virginia's church property laws, either; but they are bound by the laws of the United States and the Commonwealth by virtue of our representative form of government. So too in the Church. In *Calvary Presbyterian Church v. Presbytery of Lake Huron*, 384 N.W.2d 92 (Mich. App.), *appeal denied*, 1986 Mich. LEXIS 5776 (1986), for example, a local church argued that "since the members of this Presbyterian denomination have given the power to the Denomination, which governs in a representative fashion, it should not be considered a true hierarchy and allowed to adjudicate its own disputes internally." *Id.* at 94. The court disagreed:

> This analysis fails when we analogize to our own national government. It is certainly one in which power is granted to the government by the people, but once granted, that representative government then has whatever power the law gives it – unless and until the law is changed. The people cannot refuse to follow duly enacted laws or executive decisions because they feel the current government is not true to the tenets of the founding fathers or the current electorate. We can only work to replace, through election, the current members of government with those holding beliefs more acceptable to us, and hence willing to enact laws and policies more agreeable to us.

Id. at 94-95. That is as true in the Episcopal as it is in the Presbyterian denomination.

Further, there is no evidence that there was ever any suggestion, until this litigation, that churches are not bound by canons that their congregations do not vote to assent to or ratify; and

the very notion contradicts the fundamental concept of a hierarchical church. *Cf. Truro Church*.[8] The seven local churches assented, when they became part of the Church, to be bound by all Canons then existing or later enacted. They assented by obeying and conforming to the Canons, without objection, for decades. They assented by incorporating the Canons in various governing documents and other local instruments. And they assented by remaining in the Church, without so much as a peep of protest or objection, for more than two decades after the "Dennis Canon" and Diocesan Canon 15.1 (collectively, the "trust canons") were enacted.

Many of the Congregations' arguments assume the conclusion that they ask the Court to reach, *i.e.*, that the Congregations are the beneficial owners of the properties that they occupy and therefore that TEC and the Diocese are seeking a "forfeiture," a "conveyance," or "punishment" for separation from the institutions that fostered and cultivated them and of which they were a part. *See, e.g.*, CANA Brief at 4, 4-5, 12, 20-22, 44 & n.35, 46-52, 53, 55, 76-81, 97, 135-38, 140-41, 153-60. Those assumptions underlie and infect the Congregations' deed interpretations and many of their arguments, including those based on the federal and Virginia Constitutions. They even go so far as to claim that "[a]ll presumptions favor the legal title holders, which *plaintiffs concede* are the *CANA Congregations*." CANA Brief at 22 (emphases added, internal citation omitted).[9] That is absurd. TEC and the Diocese made no such concession, and the Congregations cite nothing to support their claim. The legal title holders are the trustees; they are trustees for *Episcopal churches*, *not* for *congregations* (groups of people);

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[8] *See also Episcopal Church Cases*, 198 P.3d 66, 80 (Cal. 2009) ("Requiring a particular method to change a church's constitution – such as requiring every parish in the country to ratify the change – *would* infringe on the free exercise rights of religious associations to govern themselves as they see fit").

[9] *See also* CANA Brief at 44 ("The effect of enforcing plaintiffs' canons would be to deprive the CANA Congregations of valuable property to which they hold title").

and legal title is not the issue.

The Congregations place much reliance on *Unit Owners' Ass'n v. Gillman*, 223 Va. 752, 292 S.E.2d 378 (1982) (*see* CANA Brief at 4, 76-79, 81, 124), but they misapply that decision. *Gillman* is a condominium association case. Such associations bear no resemblance to hierarchical organizations, whether religious or secular, and the law governing them has no bearing on this case. "The entire condominium concept, and all pertaining to it, is … a statutory creation." 223 Va. at 762, 292 S.E.2d at 383. "The Condominium Act provides the manner in which an association shall compel compliance with condominium instruments," *id.* at 763, 292 S.E.2d at 383; and those limits were decisive: "The statute does not purport to grant an association the power to secure compliance with its bylaws, rules, and regulations by the imposition of a fine or the exaction of a penalty." *Id.* at 764, 292 S.E.2d at 384. A church is not a statutory creation, and it certainly does not depend on statutory authorization to make and enforce its own rules. Nor is it correct to spin enforcement of those rules as a "penalty."

In addition, *Gillman* actually confirms the principle, in accordance with *Green* and *Norfolk Presbytery*, that associational rules have legal force. *Id.* at 766, 292 S.E.2d at 385 ("The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units").[10] But the specific issue presented in *Gillman* was a condominium owners' association's

[10] *Gillman* goes on to explain that when it is "adopted lawfully and reasonably," a regulation restricting the use of parking spaces and the weight of vehicles permitted to occupy such spaces "becomes a mutual agreement entered into by the condominium unit owners. A prospective purchaser of a unit is charged with notice of the contents of the master deed and of the bylaws and therefore has the option at the time of purchase to determine whether to sign an agreement and purchase a unit with such a restriction or limitation." 223 Va. at 766, 292 S.E.2d at 385. *Accord, e.g., Fairfax County Redevelopment and Housing Authority v. Shadowood Condominium Association*, 2011 Va. Cir. LEXIS 78, at *3, No. CL-2010-13282, letter op. at 2-3 (Fairfax Co. May 12, 2011), citing and quoting *Gillman* ("Condominium instruments define the

(footnote continued)

power to fine a member for violating association rules. The power to impose a fine is a "governmental power. The sovereign cannot be preempted of this power, and the power cannot be delegated or exercised other than in accordance with the provisions of the Constitutions of the United States and of Virginia." *Id.* at 764, 292 S.E.2d at 384. No similar issue is presented here.

The Congregations waste much ink arguing that there were no "implied consent[s]" to be bound by the Church's rules. *See* CANA Brief at 1, 9, 52, 82, 87. They are wrong on two grounds. First, this is not a case of *implied* consent. The churches' consents are express – in the Constitution of the Diocese, by which they were bound, and in governing documents and other records of the churches themselves. Second, they misapprehend the law. They emphasize *Norfolk Presbytery*, where the Supreme Court discussed implied consent only in the context of the "implied trust" doctrine of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *See Norfolk Presbytery*, 214 Va. at 504, 201 S.E.2d at 755-56. They all but ignore the later decision in *Green*, 221 Va. at 555-56, 272 S.E.2d at 186,[11] where the Court concluded "that those who constituted the original membership of Lee Chapel, and who established the church in the manner directed by the grantors in the deed, and those members who followed thereafter, united themselves to a hierarchical church, the A.M.E. Zion Church, with the understanding *and implied consent* that they and their church would be governed by and would adhere to the Discipline of the general church." *Id*. (emphasis added). Even if there were no express consents here, the facts necessarily lead to the same conclusion as in *Green*, as shown in our opening

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powers of a condominium association…. 'The power exercised by [an] [a]ssociation is contractual in nature and is the creature of the condominium documents …'"). The same principles apply to the contractual arrangements embodied in the Constitutions and Canons of the Diocese and the Church.

[11] *But cf.* CANA Brief at 86 (quoting the same holding in *Green* that is quoted in the text just below the footnote number to which this note is appended, except without emphasizing its reference to implied consent).

briefs.

In the end, the Congregations would have the Court write an opinion similar to the Circuit Court's opinion in *Green*, *i.e.*:

> The burden of proving that the congregation has violated either the express language of the deed to the church or contractual obligation to the general church is on the National Church. More than a hierarchical relationship must be established to declare property to be held for the benefit of the National Church.
>
> Only one member of the Church membership testified that [he] wished to stay connected with the [denomination]. Since the controversy has arisen no one attends the services conducted by the [continuing congregation]. All, except one, of the active members of the church wish to sever their ties with the National Church.
>
> …. There are no trust clauses in the deed for the benefit of the National Church. [The local church] has never received financial aid from the National Church. The local congregation always considered that it owned the church property. All costs, improvements and maintenance have been paid for by the local membership. The vote to withdraw was an unanimous decision of the entire local membership.
>
> The National Church has failed to meet its burden of proof [to] establish a proprietary interest in the church property. The Court will sustain the Defendants motion to strike the evidence and declare the Church property to be in the ownership of the local congregation. [The National Church] has no proprietary interest the property. The property is vested in the Trustees of [the local church].

PX-COM-277-175 - 176. The Supreme Court reversed that decision. And it entered final judgment for the national church. 221 Va. at 556, 272 S.E.2d at 186.

ARGUMENT

I. The Diocese and TEC have proprietary and contractual interests in the real and personal properties held and used by the churches, by application of neutral principles of law.

Even putting aside the Congregations' divide and conquer tactic, discussed *supra* at 1-2, their arguments that the four "neutral principles" factors stated in *Green v. Lewis* favor their position are not persuasive.

A. Statutes

The basic flaw in the Congregations' statutory analysis is their assumption that unless a specific statute (Va. Code § 57-7.1 or § 57-15) *grants* rights and interests to general churches, the Congregations prevail. *See* CANA Brief at 6, 7, 10, 13-14, 141-42. That is inaccurate. The Supreme Court did not look to statutes as the *source* of the general church's contractual or proprietary interest in *Norfolk Presbytery* or *Green*, and indeed a statute that purported to alter the parties' own arrangements would be constitutionally suspect (at best). Historically, however, Virginia statutes placed limitations on the ability of churches to enter into arrangements of their own choosing with respect to property, and that statutory policy informed the judicial analyses of former times. That no longer is the case; and it is less so today than it was even in 1974 and 1980, when *Norfolk Presbytery* and *Green* were decided. Today, Virginia public policy no longer embodies the "decided hostility of the legislative power to religious incorporations" and "jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions" (*Maguire v. Loyd*, 193 Va. 138, 149, 67 S.E.2d 885, 892 (1951), quoting *Gallego's Ex'rs* v. *Attorney General*, 30 Va. (3 Leigh) 450, 477 (1832)) that prevailed in times past.[12]

Modern Virginia statutes embody instead a policy of respect for the autonomy of churches, and for the governance and property arrangements made by churches, whatever they may be. Va. Code § 57-16.1, for example, makes clear that a religious corporation has the

[12] *See also, e.g.*, Thomas E. Buckley, "After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia," 61 *J. Southern Hist.* 445, 466-67, 478-80 (1995); 1 *Report of the Proceedings and Debates of the Constitutional Convention* (1901-02) at 751-55. (Those authorities were filed as exhibits to TEC's and the Diocese's Opening Brief Pursuant to August 11, 2008, Order, filed August 13, 2008. The Congregations also relied on the Buckley article. *See* Congregations' Opening Brief, filed August 13, 2008, at 3. And their expert, Dr. Curtis, emphatically endorsed Dr. Buckley as "an outstanding Virginia historian." Tr. 3577.)

powers permitted by its "laws, rules, or ecclesiastic polity" and may act with respect to property only in accordance with such rules. Section 57-8 looks to "the proper authorities" of a church with respect to trustee appointments. Section 57-15 looks to denominational authorities for approval of property transactions. *See Green*, 221 Va. at 553, 272 S.E.2d at 184, quoting *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755 ("in the case of a supercongregational church Code § 57-15 'requires a showing that the property conveyance is the wish of the constituted authorities of the general church'"). And § 57-7.1 does not do what its predecessors did with respect to church property – limiting particular groups and dictating particular purposes and uses. Instead, § 57-7.1 validates trusts for any religious group and, where the purpose is not clear, looks to "the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined appropriate by the authorities … under its rules or usages." The point need not be belabored. This Court must analyze the three other *Green* factors against the modern statutory backdrop, which respects the rights of churches to make the arrangements they deem appropriate, to resolve this dispute over whether the properties will remain with the denomination and loyal Episcopalians or leave with local congregational majorities.

Indeed, the *Green* Court found a proprietary interest to exist in the larger denomination even where no statute applied; the Court mentioned §§ 57-9 and 57-15 only to demonstrate the contrast between congregational and hierarchical churches on the matter of control of local property, a point that has equal weight here: "It is well settled in Virginia that it is the right of a majority of the members of a divided congregation to control the use of the church property if the church, in its organization and government, is a church or society entirely independent of any other church or general society…. [But] in the case of a supercongregational church Code

§ 57-15 'requires a showing that the property conveyance is the wish of the constituted authorities of the general church.'" 221 Va. at 552-53, 272 S.E.2d at 184 (quoting *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755).

Green's treatment of statutory law as only one of four factors to be considered is echoed in the decisions of courts in other states applying a four-factor "neutral principles" analysis similar to Virginia's approach. Like *Green*, a number of those cases have found the Church and its dioceses to have interests in local church property even where no statute provides the basis for such an interest. *See, e.g.*, *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 924-25 (N.Y. 2008) (finding trust in favor of the Church and the Diocese under "neutral principles" approach without reliance on statute); *Rector, Wardens and Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280 (Conn. 1993) (cited below as *Trinity-St. Michael's*) (same); *Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85 (Colo. 1986) (same); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916 (Mass. App.), *review denied*, 801 N.E.2d 803 (Mass. 2003) (same); *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76 (N.Y. App. Div. 1999) (cited below as *Gloversville*) (same); *Diocese of Central New York v. Rector, Church Wardens, and Vestrymen of the Church of the Good Shepherd*, No. 2008-0980, 2009 N.Y. Misc. LEXIS 32 (N.Y. Sup. Jan. 8, 2009) (cited below as *Good Shepherd I*) (same).

We address the Congregations' § 57-7.1 arguments (*see* CANA Brief at 10, 13-22) in Part II of the Argument, which discusses trust law issues, *infra* at 65-73.

B. Deeds

1. This dispute may not be decided based on deeds alone.

Virginia church property law is not limited to record title as expressed in deeds. This

point should not require reiteration, in light of the clear expression of applicable law in *Norfolk Presbytery* and *Green*; but the Congregations nevertheless argue that these property disputes must be resolved based on the deeds alone (unless plaintiffs establish "a proprietary interest under [Va. Code] § 57-15"). CANA Brief at 6, 143-44.

They are mistaken. Virginia law does not look at record title alone. *See Green*, 221 Va. at 555, 272 S.E.2d at 185-86 ("In determining whether [a general] Church has a proprietary interest in [local church] property, we look to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties"); *Norfolk Presbytery*, 214 Va. at 505, 201 S.E.2d at 756 ("We do not construe [*Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (cited below as *Hull Church*)] as requiring that courts apply neutral principles of law by considering only the record title to church property"). If the deed had been so central to *Green*, the Court would not have expended so much effort discussing the governing documents of the denomination and the dealings between the parties, nor would it have explicitly based its judgment in favor of the general church on not just the deed but also the other factors.[13]

2. The deeds should be read to favor TEC's and the Diocese's position.

According to the Congregations, *Green* is distinguishable because the AME Zion Church was the grantee in the deed in *Green*. CANA Brief at 10, 23. But under the law in effect at the time, the deed was ineffective to convey any title to the general church, as the Congregations themselves argue and as their own expert testified. *See, e.g.*, *id*. at 10 n.3, 137, 146; Tr. 3629-30

[13] An overwhelming majority of other state courts have taken the same view of deeds in Episcopal church property cases: in every one of the 25 cases from around the country cited in the Church's Opening Brief where local church property was held to belong in the hands of Episcopalians, the deeds at issue were in the name of the local entity. *See* cases cited in TEC Brief at 37-39.

(Dr. Curtis); *Norfolk Presbytery*, 214 Va. at 506, 201 S.E.2d at 757; *Brooke v. Shacklett*, 54 Va. at 309. As explained at length in *Brooke*, such a deed was construed as granting the property only for the benefit of the local congregation. The Congregations' attempted distinction fails.[14]

In the end, when it comes to deeds, the Court has only a few deeds that explicitly elaborate on the purpose or use of the conveyance. *See* TRU001.002; DSTS-013-063. The remaining deeds are to trustees of or for "Episcopal" churches (in most cases explicitly so), not to independent churches or churches of a different denomination. There is no clear extrinsic evidence of grantor intent; but the grantors (as well as generations of donors) had to have known that they were conveying property (or donating money) to Episcopal churches; and given the hierarchical nature of the Church, evident since its founding, and the equally-evident subordinate role of local Episcopal churches in that hierarchy, any reasonable grantor or donor had to have known that the local church to which he or she conveyed property or donated money was bound by the general Church's rules. Such deeds therefore cannot be construed as conveying property for the benefit of individuals or congregations that have left the Episcopal Church and wish to remove the local church and its property from the Church – as articulated, for example, in *Diocese of Southwestern Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497, 503 (Clifton Forge 1977), *pet. refused*, Rec. No. 780347 (Va. June 15, 1978), quoted in Diocese Brief at 2. *See also Cumberland Presbyterian Church v. North Red Bank Cumberland Presbyterian Church*, 430 S.W.2d 879, 882 (Tenn. App. 1968) ("Persons who contributed to the

[14] Even the Congregations acknowledge that two of the deeds in these cases expressly limit the use of the properties conveyed to the members and congregations of "Protestant Episcopal" churches. *See* CANA Brief at 33 n.24; *see also* Diocese Brief at 109, 142 (both briefs quoting 1874 deeds to Truro and St. Stephen's). Perhaps even more to the point, however, nearly all of the deeds at issue are so limited by implication if not by expression. *See* Diocese Brief at 26-27; TEC Brief at 34-35. The same conclusion therefore should follow.

purchase of the Mission property and caused it to be transferred to the Red Bank Church as a Cumberland Presbyterian Church, as well as those who have contributed to the substantial sums going into improvements later made, had every reason to expect their donations to remain under the government of the Cumberland Presbyterian Church and be used for the advancement of its faith and doctrine"); *Diocese of Central New York v. Rector, Church Wardens, and Vestrymen of the Church of the Good Shepherd*, No. 2008-0980, 2009 N.Y. Misc. LEXIS 969, at *6 (N.Y. Sup. April 22, 2009) ("while Good Shepherd may have abandoned the Episcopal faith, Mr. Branan [the testator] never did, and his intent was clearly to benefit a local *Episcopal* Church.… [T]here is simply no basis upon which to find that Mr. Branan would want his money to go to those former members of The Church of the Good Shepherd that abandoned the faith that he, apparently, held so dear"). The same principle applies here.[15]

3. TFC's pre-affiliation property argument fails.

Relying on *First Presbyterian Church of Schenectady v. United Presbyterian Church*, 464 N.E.2d 454, 463 (N.Y. 1984), the Congregations argue that "a denominationally-declared

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[15] *Cf. Episcopal Church Cases*, 198 P.3d at 84:

> Defendants state that, over the years, St. James Parish "purchased additional parcels of property in its own name, with funds donated exclusively by its members." They contend that it would be unjust and contrary to the intent of the members who, they argue, "acquired, built, improved, maintained, repaired, cared for and used the real and personal property at issue for over fifty years," to cause the local parish to "los[e] its property simply because it has changed its *spiritual* affiliation." But the matter is not so clear. We may assume that St. James Parish's members did what defendants say they did for all this time. But they did it for a local church that was a constituent member of a greater church and that promised to remain so. Did they act over the years intending to contribute to a church that was part of the *Episcopal Church* or to contribute to St. James Parish even if it later joined a different church? It is impossible to say for sure…. The only intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.

property interest cannot be applied to property that the congregation acquires prior to affiliation, even where that affiliation spans 200 years." CANA Brief at 24. At most, that argument applies only to TFC's "historic 2-acre parcel." *Id*. at 24 n.14. (All the other deeds post-date the Diocese's existence by decades and are either to established churches in the Diocese or to missions or churches developing as part of the Diocese.) But in any event, the pre-affiliation property argument is wrong. The cited passage in the *Schenectady* decision addressed only whether "association with the denominational body" created an implied trust.[16] The *Schenectady* court said nothing at all about acquisition of property prior to affiliation, and indeed its opinion does not even indicate when "the several parcels of realty" (464 N.E.2d at 461) at issue were acquired. Nor was there any "denominationally-declared property interest." *See id*. at 462-63 (the sentence *immediately preceding* the sentence cited in the CANA Brief): "not only does the Book of Order contain no provision of trust, but in 1929 [the general church] proposed an amendment to the church rules establishing a trust of all church properties for the denominational church and the amendment was voted down …."[17]

4. *Davis v. Mayo* does not support the Congregations' arguments.

The Congregations rely heavily on *Davis v. Mayo*, 82 Va. 97 (1886). They load far more weight on that case than it can bear, citing it inappropriately for numerous propositions. *Davis* does not stand for what the Congregations claim, for a number of reasons.

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[16] The Congregations rely on this sentence, which appears almost alone on the cited page: "The mere fact of First Church's association with the denominational body, even an association lasting 200 years, does not by itself support a finding that an implied trust was created."

[17] *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008), provides a more accurate reading of New York law than does the Congregations' mis-reading of *Schenectady*.

a. *Davis* is legally distinguishable on numerous grounds.

First, there was no final judgment in that case for the local group, which had separated from a general association. Rather, a judgment for representatives of the general association was reversed and the case was remanded for a new trial to determine who was entitled to possession of the property. 82 Va. at 106.

Second, *Davis* is not a church property case; and neither the Supreme Court nor any other court, as far as we can tell, has ever cited it in a church property case. *Davis* is fundamentally a case about the differences between unlawful detainer and ejectment; it says nothing about who is entitled to possess or control church property. As ,the Court explained at length that in that case, "[t]he action was unlawful detainer," which "was designed to protect the actual possession, *whether rightful or wrongful*, and to afford summary redress and restitution" – as opposed to an action of ejectment, in which "the title or right of possession is always involved." *Id*. at 99 (emphasis added). In an unlawful detainer case, "[i]f the defendant enter unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right of possession." *Id*. Thus, in an unlawful detainer case like *Davis*, "[t]he judgment has only the effect of placing the parties in *statu quo*; it settles nothing even between them in regard to the title or right of possession." *Id.* (citing authorities). Not surprisingly, later authorities (both in Virginia and elsewhere) consistently cite *Davis* only with respect to the nature of unlawful detainer and ejectment.[18]

Third, *Davis* does not address the question whether the rules of a voluntary association (or a church) are enforceable; it merely asserts the province of the judiciary to decide property

[18] *See, e.g., Benoit v. Baxter*, 196 Va. 360, 365, 83 S.E.2d 442, 445 (1954); *Town of Grundy v. Goff*, 191 Va. 148, 159, 60 S.E.2d 273, 278 (1950); *Shorter v. Shelton*, 183 Va. 819, 827, 33 S.E.2d 643, 647 (1945); *Allen v. Seventy-Seven Acres*, 48 Va. Cir. 318, 321 (Rockingham Co. 1999); *Cherokee Corp. v. Capital Skiing Corp. (In re: Cherokee Corp.)*, 222 B.R. 281, 286 (Bankr. E.D. Va. 1998); *Fisher v. Harman*, 68 S.E. 885, 887 (W. Va. 1910).

disputes, something which is not at all in controversy. The *Davis* Court "assum[ed] that the voluntary relation of superior and inferior existed … and that the action of Mayo [in revoking the local charter] was pursuant to a previous and regular order of the Grand Division," but it held that revocation of the charter was not effective "to transfer the title to the property in controversy from those in whom it was at that time vested; for the Grand Division, a mere voluntary association, possesses no judicial powers, and can confer none on its officers. The creation of judicial tribunals is one of the functions of sovereign power, and an adjudication of such officers, as such, on the rights of property, is not good, as a judgment, nor, it seems, as an award." *Id.* at 103 (citation omitted). The Diocese and the Church are not claiming judicial powers. We seek judicial recognition and enforcement of contractual, proprietary, and trust interests, as stated in the rules by which local Episcopal churches are bound and in modern, governing cases.

b. *Davis* does not support the Congregations' "deed" arguments.

Davis also does not require "deed language expressly restricting use of the property to persons affiliated with a general association" (CANA Brief at 6) in order for a general association to prevail over a local group in a property ownership dispute. Rather, in a case where the association's rules apparently did not contain any provisions regarding property held and used by subordinate units, the Court remanded for a fact-finder in civil court to determine whether the local group had been unlawfully dispossessed. *Davis* was, in fact, a case where *no one contended that the beneficial interest in the property belonged to the general association*.

The Congregations say that *Davis* rejected an argument "that the majority's decision to become independent and to change its name took them outside the scope of the deed." CANA Brief at 35. From that unexceptional proposition, they conclude that "express provisions in a deed clearly restricting use of property to those affiliated with a particular association" are

somehow necessary in this case and that "*Davis* disposes of plaintiffs' reading of the deeds here." *Id.* In that leap, the Congregations completely ignore contrary modern case law, greatly overstate *Davis*, and mischaracterize a statement in a 2008 brief of TEC and the Diocese.

First, modern case law makes clear that Virginia courts do not "conside[r] only the record title to church property" in church property disputes. *Norfolk Presbytery*, 214 Va. at 505, 201 S.E.2d at 756. Instead, courts are to examine the four factors of *Green*, a direction which the Congregations cannot avoid by citing *Davis*.[19]

Second, it is undisputed that merely changing a group's name does not alter legal or beneficial title, which was the defendants' argument in *Davis*. *See* 82 Va. at 105 (the local group changed its name and "this, it is contended, is decisive of the right of the plaintiffs to recover possession of the property which was conveyed for the benefit of the old division"). But no party in this case contends that the actions in December 2006 were the same as a mere name change (like Zion becoming Truro in 1934). Rather, as the Congregations' pleadings and testimony prove, their leaders and local majorities decided to sever all ties with the Episcopal Church. They have every right to separate themselves from the Episcopal Church if their principles demand it, but that does not give them the right to take away property that they themselves – and their Episcopalian predecessors – dedicated to furthering the mission of that Church. A question of "identity" may arise in the face of such separations, in that more than one group claims to be the entity mentioned in a deed (or its successor). In that case, both venerable and modern Virginia authority favor the Church's and the Diocese's claims. *See* Diocese Brief

[19] With respect to deed interpretation, it is true that only a couple of the deeds in question elaborate on the purposes and conditions of the conveyance and specifically subject the conveyance to the rules of the denomination. *See* TRU001.002; DSTS-013-063. But silence is hardly a one-way proposition – the property also was not conveyed, for example, to "the congregation of Truro Church, regardless of what denomination it might affiliate with."

at 42-46; TEC Brief at 47-55.[20]

And finally, our July 8, 2008, brief is consistent with our position today, contrary to the CANA Brief at 35. Courts adjudicate property disputes; and merely changing the name of an entity does not affect its property rights, as we said at the time. The Congregations' distortion of our past brief is consistent with their effort to obscure the fact that they are *not* the "entity" – the local Episcopal church to whose trustees the property was deeded. They are a current local majority of individuals who claim the right to take the local church entity and its property out of the Church and the Diocese for use in another denomination.

c. The holding of *Davis* on which the Congregations rely is no longer good law.

At the time *Davis* was decided, unlike today, Virginia law did not give legal recognition to unincorporated associations, whether religious or secular. *Compare* Tr. 3597, 3599 *with* Va. Code § 8.01-15. And Virginia law in the 1800s, unlike today, did not recognize trusts with indefinite beneficiaries. *Compare Brooke*, 54 Va. at 309 ("charitable bequests were to be treated as standing on the same footing with other bequests. If definite, they were to be treated as trusts which courts of equity would execute by virtue of their ordinary jurisdiction; but if indefinite, they were no longer recognized by law, and could not be enforced") *with* Va. Code §§ 55-544.05

[20] In what appears to be another misguided naming-centric argument, the Congregations invoke "the Yellow Pages" as proof "that churches of different denominations often bear the same name (*e.g.*, 'St. Paul's Church')." CANA Brief at 37. But invocation of the "Yellow Pages" does not remedy their failure to prove confusion regarding particular churches at trial. The Falls Church alone offered any colorable evidence on this issue, suggesting that "Episcopal" was added to recent deeds in reaction to a nearby Presbyterian church's name change in the 1950s. *See* CANA Brief at 37-38 n.27. The record is notably incomplete when it comes to that Presbyterian church; but TFC did *not* first identify itself as an Episcopal church "in the early 1960s," *id*. at 38 n.27. *See* DX-FALLS-198-002 (stipulation regarding deeds given in 1852 and 1918). Other churches did not claim any confusion. *See, e.g.*, Tr. 3757 (Cerar) (St. Stephen's Episcopal Church is the only other "St. Stephen's" church in Northumberland County). And in fact, the Diocese would have presented rebuttal evidence concerning telephone directories and other records had "the Yellow Pages" been offered in support of a naming confusion claim; but it was not.

and 55-544.09 (allowing charitable and non-charitable trusts with indefinite beneficiaries). It was in the light of those antiquated principles that the *Davis* Court determined that the deed must be construed for local members "'who … may be expected to use' the property for the purpose specified in the deed," because "[a]ny other construction would render the conveyance void for uncertainty …." *Id*. at 102 (citations omitted). It is hazardous (at best) to rely on a case that rests on legal principles which have been superseded.[21]

5. The Congregations' attempts to distinguish *Buhrman* fail.

The Congregations endeavor to distinguish *Buhrman* from this case by pointing to the St. Andrew's mission's petition for parish status in that case, which "solemnly engage[d] and stipulate[d] that all real estate consecrated as a church or chapel of which the said parish is or may become possessed, shall be secured against alienation from the Protestant Episcopal Church in the Diocese of Southwestern Virginia, *unless such alienation is in conformity with its Canons*." (Emphasis added.) *See* CANA Brief at 51-52. The distinction fails, because the petition simply incorporated the canons of the Church. *See* TEC Canon I.6 (as of 1973; now TEC Canon I.7.3, PX-COM-001-045), quoted in *Buhrman*, 5 Va. Cir. at 505:

> No vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for a Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.

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[21] Code §§ 55-544.05 and 55-544.09 are part of the Uniform Trust Code, which does not apply to trusts under Title 57 (*see id*. § 55-541.02(A)(4)); but Virginia statutes regarding trusts for religious entities also have evolved and now explicitly mention trusts for, *inter alia*, "diocese[s]." *See* Va. Code §§ 57-7.1, 57-11, 57-13, 57-14, and 57-15. *See also* Tr. 3589-90, 3596-97 (Dr. Curtis, eventually admitting that he viewed the *omission* of denominational entities like dioceses from the 1800s statutes as important to his understanding of those statutes as excluding such denominational entities from the benefits of those statutes).

And the *Buhrman* court stated expressly that *even absent* the explicit promises in the petition for parish status – the promises on which the Congregations' argument depend – "the contractual rights of the Diocese in the subject property are implicit in the Constitution and Canons of The Episcopal Church and in the Constitution and Canons of the Diocese. These constitutional and Canonical provisions are binding upon all units of The Episcopal Church, including St. Andrew's." *Id*. *Accord*, *Truro Church*, 280 Va. at 15, 694 S.E.2d at 559 ("Each congregation within a diocese … is bound by the national and diocesan constitutions and canons"). This Court should neither reject the *Buhrman* analysis nor accord the St. Andrew's mission's petition any greater status than the Canons of the Church, and the Supreme Court's decision in this case establishes that the Congregations' attempted distinction is bootless.

But even if the Congregations' distinction were valid, it would fail as to each of these churches because they made similar commitments long before this litigation or the controversies that led to it. For example:

- TFC's Vestry Manuals, PX-FALLS-226-005 and PX-FALLS-078-085, state that "[t]he Falls Church is subject to the constitution and canons of the national church (the Protestant Episcopal Church in the United States of America) and of the Diocese (the Protestant Episcopal Church in the Diocese of Virginia)."

- Truro executed and delivered to the Bishops "Instrument[s] of Donation" in 1934 and 1974, which, *inter alia*, "appropriate[d] and devote[d the buildings] to the worship and service of Almighty God … according to the provisions of the Protestant Episcopal Church in the United States of America" and "certif[ied] … that said building[s] and ground[s] are secured from danger of alienation from those who profess the Doctrine, Discipline and Worship of the said Church, except as provided by laws and canons in such case applicable." PX-TRU-003-001;

PX-TRU-004-001.

- St. Paul's Vestry by-laws, PX-STPAUL-002-001, state: "The Vestry and Trustees shall be agents and legal representatives of the Church in all matters concerning its corporate property and the relations of the Church to its Clergy, subject to these bylaws and the Constitution and Canons of the Episcopal Church and the Diocese of Virginia, and the Code of Virginia, amended."

- St. Stephen's Vestry minutes, PX-SSH-070-002, reporting discussion of adoption of bylaws, state, "[c]anons of the Episcopal Church or of the Diocese of Virginia must be adhered to."

- St. Margaret's petitioned the Diocese "for separate congregation status … in accordance with Canons IX and XI of the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia," PX-STMARG-451; and the Annual Council of the Diocese granted that petition, PX-COM-210-063. A series of St. Margaret's Constitutions provided that the church "is guided and directed by the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia." *See* Diocese Brief at 154; *see also id*. at 155 (quoting St. Margaret's Constitutions describing the purpose of "Parish Organization" as "[t]o comply with the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia …" and providing that "[n]o amendment contrary to canon law will be permitted to take effect"); *id.* at 155-56 (quoting St. Margaret's "Policies and Procedures" and "Organization and Policies").

- Apostles Rector David Harper unambiguously advised his congregation that "[p]arishes hold title to their buildings in trust for the diocese, which is the real owner." PX-APOST-033-002.

- Epiphany "petition[ed]" the Annual Council "for admission as Church under Canon 10,

Sections 1 and 2 of the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Virginia" and stated that the congregation was "a group of people which acknowledge and accept the doctrine, worship, and discipline of the Protestant Episcopal Church and the jurisdiction of the Bishop or Ecclesiastical Authority of the Diocese of Virginia," PX-EPIPH-001-001 - 002, -006; and its petition also was granted, PX-COM-227-122. *See* Diocese Brief at 174-75. Epiphany also went one step further and enacted bylaws which provide specifically that "All Parish property assets and funds shall be owned and held by the Parish in trust for the uses purposes and the benefit of the Diocese of Virginia …." PX-EPIPH-002-012.[22]

The Congregations also argue that TEC's and the Diocese's deed interpretation, which the court applied in *Buhrman*, is "foreclosed" by *Davis v. Mayo*. CANA Brief at 34. That argument must be rejected for the reasons stated in the previous section, which discusses *Davis*.[23]

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[22] In *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 255 P.3d 645 (Or. App. 2011), the local church argued, as the Congregations do here, that a denominational declaration of the existence of a trust is effective only if it is "embodied in some legally cognizable form," that a trust may be created only by written conveyance subscribed by the settlor, and there was no such written conveyance in that case. *Id*. at 660. The court rejected those arguments, on the ground that

> in 1983, after PCUSA amended the *Book of Order* to declare that local churches hold property in trust for the PCUSA, Hope Presbyterian amended its own bylaws by expressly including a provision stating that it is bound by the provisions of the constitution of the PCUSA. Simultaneously, the congregation and its leadership approved the amendment to Hope Presbyterian's corporate documents, declaring: "This corporation is a church congregation of and holds all property as trustee" for the PCUSA. Although the amended articles were never filed with the Secretary of State, they express the intention of the congregation and its leadership that all property held by the church is held in trust for PCUSA.

Id. at 661.

[23] The Congregations' articulation of the issue once again assumes the conclusion. *See* CANA Brief at 33: "plaintiffs rely principally on the fact that certain deeds at issue identify as 'Episcopal' *the congregation to whom the property is deeded*." (Emphasis added.) That is wrong. We rely on the fact – among many others – that the deeds are to trustees of *Episcopal churches*; not, as defendants would have it, that the deeds are to "congregation[s]." *Cf*. CANA Brief at 37, hypothesizing a deed to "WWTV, a local affiliate of the Fox Broadcasting

(footnote continued)

6. Miscellaneous "deed" arguments

The Congregations go on to argue by analogy to cases involving restrictive covenants and restraints on alienation. CANA Brief at 35-38. They are merely attempting to evade the issue by attacking a straw man. Unable to muster a persuasive argument that the Church and the Diocese have no contractual or proprietary interests under Virginia church property law as articulated in *Green* and *Norfolk Presbytery*, they try to steer the analysis into other channels. This litigation presents a dispute over who will "own" or control the property after a local majority's decision to leave, not a controversy over what an undisputed owner may do with the property.

C. The "constitution" of the general church

We have already addressed how this factor should be interpreted and applied. *See* Diocese Brief at 28-30 & n.10; TEC Brief at 21-32. In this section, we respond to the Congregations' multitude of misguided defenses and counterarguments.

1. Only the "Constitution"

The Congregations' principal "constitution" argument is that the trust canons are irrelevant because they are not stated in TEC's or the Diocese's "Constitutions." *See* CANA Brief at 39-44. They contend that only "Constitutional" provisions can evidence a proprietary or contractual interest in local church property and therefore that the Church's and the Diocese's Canons have no such effect. *Id*. at 39. We refuted that argument in the Diocese Brief at 29-30 & n.10, and we address the Congregations' additional reasons for that argument just below. Preliminarily, however, we note the obvious inconsistency between the Congregations' argument that in the Episcopal Church, only the "Constitution" is relevant, and their recognition that the

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Company." The problem with that analogy is that none of the deeds at issue in these cases is to a local church (*or* to its trustees) as "a local affiliate" of the Episcopal Church. The deeds are to trustees of *Episcopal churches*, and these congregations no longer belong to Episcopal churches.

Methodist and A.M.E. Zion "Disciplines" and the Presbyterian "Book of Order" are the "constitutions" of those churches for purposes of neutral principles analysis. *See id*. at 29, 31, 83, 84 n.50.

Green requires that the Congregations' argument be rejected. The Court in *Green* reviewed the general church's "Discipline" with no analysis of whether that document constituted a "Constitution." It simply described the Discipline as including "the rules, regulations, and doctrines, governing and controlling the operation of the church." *See, e.g.*, *Green*, 221 Va. at 549, 272 S.E.2d at 181. As the evidence in this case shows, the Episcopal Church documents fitting that description include the Church's Constitution and Canons as well as its *Book of Common Prayer*. Thus, as in *Green*, they are the documents applicable here. Furthermore, in the present case, the undisputed evidence shows that the General Convention actually adopted the Church's first Canons *before* it adopted the Constitution, which suggests that the Canons are equally as authoritative as the Constitution. *See* TEC-01-031 - 034 (Canons adopted on August 7, 1789); TEC-01-034 - 036 (Constitution adopted on August 8, 1789).

Not surprisingly, courts applying a four-factor "neutral principles" analysis similar to Virginia's approach have routinely considered the Canons of the Church and its dioceses. *See*, *e.g.*, *Episcopal Church Cases*, 198 P.3d 66, 79 (Cal. 2009) (requiring consideration of Church's "constitution, canons, and rules" under "neutral principles"); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d at 924-25; *Gloversville*, 684 N.Y.S.2d at 80-81; *Grace Church and St. Stephen's v. Bishop and Diocese of Colorado*, No. 07 CV 1971, Order at 17-19 (El Paso Co., Colo., Dist. Ct. March 24, 2009) (cited below as *Grace Church*); *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973 (Ohio Common Pleas Cuyahoga Co., April 15, 2011), slip op. at 12-15 (cited below as *Transfiguration*).

Moreover, given that the Diocese's Constitution explicitly binds the Congregations to the Diocese's Canons as well, looking to the Diocese's Constitution does not help the Congregations at all. *See* the 1815, 1836, 1850, 1890, 1904, 1940, 1962, 1983, and 2005 Diocesan Constitutions, quoted and cited in the Diocese Brief at 18. Application of the Constitution expressly requires application of the Canons.

2. Amendment processes, notice, and "waiting periods"

The Congregations ask the Court to disregard the Canons of TEC and the Diocese because Canons are amended more quickly than Constitutions. That argument is answered in the Diocese Brief at 30 n.10. As there stated, amendment procedures and time periods are ecclesiastical determinations, not proper for review or prioritization by a civil court.

But amendment procedures are relevant, say the Congregations, because amendment of TEC's or the Diocese's "Constitution" would have allowed them a "waiting period to decide whether to remain affiliated before the amendment takes effect." CANA Brief at 40. The only *authority* that they cite for that proposition is a New York statute and a New York case decided in 1917, which say nothing about a waiting period to allow for departures. *See id*. at 42 n.32. To state the obvious, this case is not governed by New York law.[24] But if New York law did apply, the Congregations would have to contend with a series of New York cases, decided in the last 12 years, which have applied the Dennis Canon – the very canon the Congregations complain about – to find that parish property is held in trust for the Church and its dioceses. *See Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d at 925 (finding Dennis Canon and diocesan trust

[24] The New York statute cited in the CANA Brief is, however, consistent with Va. Code §§ 57-15 and 57-16.1 in requiring compliance with denominational rules. *See* N.Y. Relig. Corp. Law § 5: trustees of every religious corporation shall administer the temporalities and property belonging to the corporation "in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject."

canon dispositive under "neutral principles"); *Gloversville*, 684 N.Y.S.2d at 81 (considering Dennis Canon under "neutral principles" and finding trust in favor of Church and Diocese); *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05 (N.Y. Sup. March 12, 2008), slip op at 30-33 (same). Nor does Virginia have a waiting period or prior notice statute or case law applicable here. There is *no* case, to our knowledge (and the Congregations cite none), which allows a local church to evade its canonical obligations of *any* nature based on a notice or "waiting period" analysis. Several courts have rejected similar arguments. *See, e.g.*, *In re: Church of St. James the Less*, 888 A.2d 795, 807-08 (Pa. 2005):

> Appellants argue that the Dennis Canon was improperly enacted because there is no evidence that (1) it was circulated to the local Episcopal churches before its adoption; or (2) members of St. James were present when it was adopted. The National Episcopal Church's canons, however, did not require that proposed amendments be circulated to local Episcopal churches or parish members to be present during the adoption of amendments….
>
> Nevertheless, Appellants also assert that the Dennis Canon was not properly enacted because it was enacted immediately following its adoption, instead of the following January, which was the usual practice. However, this argument is also unavailing because even though the National Episcopal Church may have typically enacted canons in the January following their adoption, its canons did not require that it do so….

See also, e.g., *Episcopal Church Cases*, 198 P.3d at 83-84:

> It is a bit late to argue that Canon I.7.4 was not effectively adopted, a quarter of a century later, and, in light of the consistent conclusions of the out-of-state cases that that canon is, indeed, part of the Episcopal Church's governing documents, the argument seems dubious at best. But, in any event, this is one of those questions regarding "religious doctrine or polity" (or … "religious doctrine and internal church governance") on which we must defer to the greater church's resolution. [Citation omitted.]

Other courts agree that church legislative processes are not subject to judicial scrutiny. In *Good Shepherd I*, 2009 N.Y. Misc. LEXIS 32, at *3, for example, the court held that

> even without [*Episcopal Diocese of Rochester v. Harnish*] as a controlling precedent, this court is prohibited from reviewing whether The Episcopal Church properly enacted the Dennis Canon in 1979. It is well-settled that this or any

> court can not intervene in "purely ecclesiastical or religious concerns such as church governance or polity" …. Suffice it to say, if Good Shepherd has an objection to the validity of the Dennis Canon, the remedy is not with the courts, but rather with the General Convention of The Episcopal Church. [Citations omitted.]

The Georgia Court of Appeals employed an identical analysis in *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 51 (Ga. App. 2010), *cert. granted*, 2011 Ga. LEXIS 53 (2011) (cited below as *Savannah*):

> [T]he First Amendment to the United States Constitution precludes this Court from questioning the validity of the process by which the church legislates. "As a matter of constitutional law, a hierarchical religious organization must be permitted to establish the rules and regulations by which it is governed." Thus, other courts have routinely refused to entertain attacks on the process by which the 1979 Trust Canon was adopted…. If Christ Church had an objection to the validity of the Dennis Canon, the remedy is not with the courts, but rather with the General Convention of the National Episcopal Church. [Footnotes and citations omitted.]

Accord, e.g., Episcopal Diocese of Rochester v. Harnish, 2007 N.Y. Misc. LEXIS 6635, at *4-5 (N.Y. Sup. Feb. 14, 2007), *aff'd*, 2007 N.Y. App. Div. LEXIS 10237(App. Div. 2007), *aff'd*, 899 N.E.2d 920 (N.Y. 2008); *Transfiguration*, slip op. at 15-16 n.9.[25]

The "waiting period" argument also rings hollow when it is asserted by separatist Congregations who claim the property of Episcopal churches after those churches remained part of and continued to participate in the Diocese and the Episcopal Church for more than two

[25] In Virginia, at least, the same rule also applies to secular voluntary associations. *See, e.g., Brotherhood of Locomotive Engineers v. Folkes*, 201 Va. 49, 58, 109 S.E.2d 392, 398 (1959) ("'the construction of the organic agreement, by-laws, rules and regulations of a benefit society or other unincorporated voluntary association belongs, not to the court, but to the board, council or other tribunal provided for the purpose in the organization, if any. So long as the body upon which this power of interpretation has been conferred does not substitute legislation for interpretation, nor transgress the bounds of reason, common sense, or fairness, nor contravene public policy or the laws of the land, in their conclusions and decisions, the courts cannot interfere with them'") (citation omitted). In church cases, of course, the First Amendment precludes operation of an "'arbitrariness' exception" such as that described in *Folkes*. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 712-15 (1976).

decades after passage of the Dennis Canon in 1979 and Diocesan Canon 15.1 in 1983 (not to mention the many more decades that elapsed since passage of earlier property canons nationally and in the Diocese), and without offering evidence that they even considered separation at any time in the years following those enactments. The silence is deafening. The local churches remained part of the Diocese and the Church, and they did so without so much as a word of protest or objection (much less any suggestion that the trust canons represented something new or different from what had always been the rule in the Church) before the Congregations' present attempt to carry Episcopal church property to a different denomination.

Numerous Episcopal church property cases emphasize local churches' remaining in the Church after enactment of the Dennis Canon, and without objection to that Canon, in contrast to the analysis that the Congregations are urging this Court to adopt. *See Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. App. 2003), and *In re: Church of St. James the Less*, 833 A.2d 319, 324-25 (Pa. Commw. 2003), *aff'd in relevant part*, 888 A.2d 795 (Pa. 2005), cited in the Diocese Brief at 30 n.10; *Savannah*, 699 S.E.2d at 53 ("Christ Church failed to take any steps to disavow the canon or attempted [*sic*] to remove itself from the reach of the Dennis Canon in the more than 30 years since the National Episcopal Church adopted the express trust provision. In addition, Christ Church has repeatedly sought the canonically-required consent of the Diocese of Georgia before alienating real property or incurring indebtedness, including two times after adoption of the Dennis Canon in 1979"); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d at 925 ("We find it significant, moreover, that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision"); *Good Shepherd I*, 2009 N.Y. Misc. LEXIS 32, at *2-3 (following *Harnish*); *St. James Church, Elmhurst*, slip op at 28;

Transfiguration, slip op. at 10, 15. *See also Crumbley v. Solomon*, 254 S.E.2d 330, 333 (Ga. 1979) (applying the same rationale in a case involving the Methodist Church); *Episcopal Church Cases*, 198 P.3d at 83-84, quoted *supra* at 30 ("It is a bit late to argue that Canon I.7.4 was not effectively adopted, a quarter of a century later ...").

In all events, the evidence demonstrates, and the Congregations acknowledge grudgingly, that they did receive advance notice of the proposed enactment of Diocesan Canon 15.1 in 1983; (and of course the six local churches that existed in 1983 participated directly in the Annual Council that adopted that canon). *See* PX-DEP-006-038 - 039, -046 - 048, -054 - 056, -058 - 060, -061 - 062, -064 - 065, -068 - 070; PX-COM-250-221 (pre-Council Journal for the 1983 Annual Council); CANA Brief at 42 n.32.[26] They dismiss Canon 15.1, however, on the ground that "the authority for that canon derives from the Dennis Canon." *Id*. It is remarkable – and revealing – that such a crucial element of their defense is buried in a footnote in a 160-page brief. The simple fact is that there is *no* reason why the Diocese could not have enacted the same Canon before enactment of the Dennis Canon; and there is nothing in Canon 15.1 that refers to the Dennis Canon, much less that makes its authority or effect dependent on the Dennis Canon. The only thing added by the "official" commentary cited in the Congregations' footnote is that the Dennis Canon authorized Dioceses to enact canons "differing from" the Dennis Canon. *Id*. (quoting Apostles_Ex_292.008).

The *Good Shepherd* court pointed to a similar diocesan canon as "a separate and distinct basis" for granting summary judgment in favor of the diocese in that case: "the Diocese has its

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[26] The CANA Brief actually refers to notice "provided for Diocesan Canon 15.4," but that appears to be a typographical error. It makes sense only as a reference to Diocesan Canon 15.1.

The Congregations fail to note that an amendment to a Diocesan Canon cannot be enacted at a single Annual Council unless two-thirds of the members present concur. *See* PX-COM-003-037 (Canon 30.1).

own Canon," which, like Diocesan Canon 15.1, provides in part "'that all real and personal property held by or for the benefit of any parish, mission, chapel, or congregation, located in the Diocese of Central New York is held in trust for the Episcopal Church and the Diocese ….'" The court observed that "[t]his Diocesan Canon was adopted in 1987 at a Convention attended by Good Shepherd and clearly establishes an express trust in favor of the Diocese for the same reasons stated by the Court of Appeals in *Harnish* relating to the Dennis Canon." *Good Shepherd I*, 2009 N.Y. Misc. LEXIS 32, at *3.[27]

3. Other churches' and other dioceses' practices are irrelevant.

The facts that other churches have adopted other methods to ensure denominational ownership and control and that other dioceses have addressed property issues in their Constitutions are irrelevant, as is the fact that the Diocese or its Bishop or trustees now hold some properties in their own names (as authorized by Code §§ 57-7.1 and 57-16). *See* CANA Brief at 24-33, 38-39, 43-44. The Court's task is not to survey how other churches or dioceses memorialize property arrangements. Its task is to apply Virginia law to the governing documents and other evidence before it.

We note, however, that the Congregations appear to have misunderstood Judge Mitchell's testimony regarding the two St. Aidan's deeds. They argue at 32 that "*the Diocese* … subjected [a] conveyance" to St. Aidan's to a proviso referring to the Canons of the Diocese and at 33 that "*the Diocese* modified its prior use restriction" in a later deed. Emphases added.

[27] The defendant argued that the diocesan canon "is, by its own words, 'in conformity and consistent with' the Dennis Canon" and that "[i]f there is no Dennis Canon, there is nothing for the local diocesan canon to track, and it too lacks validity." *See* "Attorney's Affirmation" in opposition to plaintiff's motions and in support of defendant's cross-motions for summary judgment at 2, attached as Exhibit 1. The court apparently was not impressed; it did not even bother to respond explicitly to that contention.

Compare Tr. 4157-58, 4161-62, 4165-66, 4170, 4173 (Judge Mitchell's testimony that he alone prepared the two deeds).

4. "Legally cognizable form"

The Congregations also argue that plaintiffs' Canons are not "embodied in some legally cognizable form" as contemplated by *Jones v. Wolf*, 443 U.S. at 606. CANA Brief at 45. But *Jones* itself does not permit that conclusion. *See* 443 U.S. at 604 ("[t]he neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms …"); *id*. at 607-08 ("any rule of majority representation can always be overcome, under the neutral-principles approach … by providing, in … the constitution of the general church … that the church property is held in trust for the general church and those who remain loyal to it"). It is only documents that require "'inquiry into religious doctrine'" that are not "legally cognizable." *See id*. at 603 (quoting *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368, 370 (1970) (Brennan, J., concurring); *id*. at 604 (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976), and *Hull Church*). *See also Transfiguration*, slip op. at 13 (responding to defendants' argument that *Jones* "contemplated an express trust only where the trust is established in the same manner as any commonplace secular trust" by adopting the Ohio Diocese's argument that "it could not be more plain than that Jones invited churches to incorporate such trust language into their constitutions precisely to ward off property disputes like the one before this Court"); *Hope Presbyterian Church of Rogue River*, *supra* n.22. And construing the canonical provisions at issue here requires no such inquiry; they are stated in purely secular terms and present no opportunity for

the Court to wade into religious doctrine. Indeed, the Church's and the Diocese's property canons could easily be provisions in the governing documents of a secular voluntary association with little or no alteration in their language (at most, such a scenario would require changing a term such as "rector" to "licensed leader" or some such). The Canons are "legally cognizable."

5. "Retroactivity"

The Congregations argue further that Canons enacted "between 1979 and 1983, long after many of the CANA Congregations acquired their properties, … may not be applied retroactively." CANA Brief at 11. That argument ignores the facts. Other property canons were passed many decades earlier, at both Diocesan and Church levels of the hierarchy. Moreover, as Bishop Jones and Professor Mullin testified at the trial, and as a number of courts have found, the Dennis Canon merely formalized, in trust language, a relationship that has always been understood as the rule in the Church and which the Supreme Court of Virginia has characterized as contractual or proprietary. *See* Tr. 289, 1213-14, 1231; *Episcopal Church Cases*, 198 P.3d at 81 ("a strong argument exists that Canon I.7.4 merely codified what had long been implicit"); *id*. at 82 (citing cases); *Bishop and Diocese of Colorado v. Mote*, 716 P.2d at 105 n.15 ("the 1979 amendment did nothing but confirm the relationships existing among PECUSA, the diocese and the parish"); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d at 924 n.21 ("it would appear that the Dennis Canon merely confirmed the preexisting relationship between PECUSA, its subordinate dioceses, and the parishes thereunder"; citing cases)[28]; *Graves*, 417 A.2d at 24 (Dennis Canon "reflects established customs, practices and usages of The Protestant Episcopal

[28] The Congregations cite *Sohier v. Trinity Church*, 109 Mass. 1, *23 (1871), for the proposition that the Canons of the Church are mere "matters of discipline" and do not affect "legal title" to property. CANA Brief at 11-12. *See also id*. at 69. The 2003 decision in *Episcopal Diocese v. DeVine* provides a surer-footed reading of Massachusetts law.

Church"); *Gloversville*, 684 N.Y.S.2d at 81 (Dennis Canon "expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the … Church"); *In re: Church of St. James the Less*, 888 A.2d at 810. *See also Savannah*, 699 S.E.2d at 51 ("The record is replete with uncontradicted evidence that the National Episcopal Church's policy and practice, included in canonical provisions of 1789, 1868, 1871, 1904, 1916, and 1940, has always required parish property to be held and used for the mission of the National Episcopal Church and its dioceses"). There is no evidence to the contrary; the Congregations ignore the above cases; they cite no cases to the contrary; and we are aware of none.

Indeed, both of the Episcopal property cases known to have been decided in Virginia concerned disputes that arose before the Dennis Canon was enacted, and both were decided in favor of the larger Church. *Buhrman*, 5 Va. Cir. 497; *Diocese of Southwestern Va. v. Wyckoff* (Amherst Co. Nov. 16, 1979) (PX-CTREC-021).

This, in short, is not a case of retroactive application. This is a case in which the Court must apply current law based on facts and events that include active participation by the churches at issue in enactment of the rules the Congregations now seek to avoid and decades of continued assent to the rules of the Church and the Diocese after 1979 and 1983.

6. Assent, ratification, and consideration

Next, the Congregations set out a laundry list of reasons why, in their view, the Church's and the Diocese's Canons fail to create "enforceable contract rights." *See* CANA Brief at 45-81 (citing lack of assent or ratification, lack of valid consideration, lack of mutuality of remedy, unenforceability, and Virginia law prohibiting associations from forfeiting their members'

property).[29] But the Congregations erroneously assume that conventional contract law principles apply to the types of contractual interests identified in *Norfolk Presbytery* and *Green*. Those authorities demonstrate that their assumption is false. Nowhere in *Norfolk Presbytery* or *Green* does the Supreme Court parse the contractual interests of the general church in terms of offer, acceptance, consideration, mutuality, conditions precedent or subsequent, or any other traditional aspects of the law of contracts involving parties other than churches. The Canons, the deeds, and the dealings between the parties evince a contractual, proprietary, and trust relationship without needing to produce an express, written contract or a proprietary or trust agreement. *See Green*. Nor would it be appropriate for this Court to embark on such an innovation in the law in these cases. Local churches are units of the hierarchy, taking their very identity from their association with the larger church; in no way can they be characterized as independent entities negotiating a commercial agreement at arm's length, which is the context in which these traditional contract principles typically arise.

The Congregations' focus also is too narrow. The local churches' contractual commitment, made when they became units of the Church and the Diocese, was to be governed by the Constitutions and Canons of the Church and the Diocese, both as then existing and as they might be amended over time. *See, e.g., Calvary Presbyterian Church*, 384 N.W.2d at 94-95 (quoted *supra* at 7); *Gear v. Webster*, 65 Cal. Rptr. 255, 258 (Cal. App. 1968) ("Unless the rules [existing at the time the individual became a member] placed a limitation upon the power of the association to make any change or amendment therein, any amendment or change adopted in accordance with the mode provided by the association therefor is binding upon each of the

[29] These arguments do not even colorably apply to Epiphany, which dates from 1986, well after each of the Canons at issue here was adopted.

members"); *Calabrese v. Policemen's Benevolent Ass'n*, 384 A.2d 579, 583 (N.J. Super. 1978) ("The constitution and by-laws of a voluntary association become part of the contract entered into by a member when he joined such association. By the same logic, any duly adopted additions or amendments to such constitution and by-laws during the continuance of such membership is equally binding on the member"). The same commitment was found in *Green*, where, after reviewing evidence showing the hierarchical structure of the general church and the local church's participation as a subordinate unit in that structure, the Supreme Court concluded that the local church's members had "united themselves to a hierarchical church … with the understanding and implied consent that they and their church would be governed by and would adhere to the [governing documents] of the general church." 221 Va. at 555-56, 272 S.E.2d at 186. As a result, the local church in that case was bound by the general church's anti-alienation canon, a canon much like the Church's and Dicoese's anti-alienations canons at issue here. *Id.* at 556, 272 S.E.2d at 186. The same rule is embodied in the provisions of Diocesan Constitutions discussed *supra* at 29. Here, the Congregations do not contest the fact that consideration was given for decades before 1979-83, nor could they, on the record in this case. They argue only that nothing "additional" was given after those dates.[30] But once the local churches' contractual commitment is understood, that argument is simply irrelevant.[31]

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[30] The Congregations' argument also ignores that the Diocese did provide new and different services after 1983. Group health insurance, for example, became available through a Diocesan program in the 1990s. *See* PX-COM-234-072, -077, -088 - 089; PX-COM-285-008 - 009.

[31] The same response applies equally to the Congregations' argument that they did not "assent" to a contractual relationship with the Diocese or the Church with "completeness and certainty." CANA Brief at 46-47. The Supreme Court did not conduct any such inquiry in *Green*. This Court should follow settled precedent and not follow the Congregations into a rabbit hole.

But even if the Court were to look for "completeness and certainty" in the relationships among the parties, it would find that the test is satisfied under the standard stated in *Smith v. Farrell*, 199 Va. 121, 98 S.E.2d 3 (1957), the case cited in the CANA Brief. (The "*Id.* at

(footnote continued)

Further, the Congregations are wrong on the law. Even outside the context of hierarchical organizations, Virginia courts have recognized that a continued relationship between parties can supply consideration for new contractual terms. For example, the Supreme Court of Virginia addressed the issue of covenants not to compete signed by persons who were already employed in *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 176, 380 S.E.2d 922, 926 (1989), and held that continuing the contractual relationship supplies the necessary consideration:

> the former employees argue that there was no consideration for their covenants not to compete because they were already employed when they signed the agreements. We have held that employees who continue their at-will employment after their employers offer severance pay, supply the necessary consideration for such promises by continuing their employment after the promises were made. *Dulany Foods v. Ayers*, 220 Va. 502, 510-11, 260 S.E.2d 196, 201-02 (1979); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 541-42, 53 S.E.2d 804, 808-09 (1949). That principle applies here. Even though Paramount could have terminated the employees at its will after they signed the non-competition agreements, Paramount continued to employ them and to give them access to valuable information. This supplied the consideration for their promise not to compete.

Likewise here, continued membership in the Diocese and the Church, with all of the benefits that such membership provided, "supplied the consideration" (even assuming that consideration was needed) for the 1979 and 1983 memorializations of the Diocese's already-existing contractual and proprietary rights in the language of "trust."

Severance pay cases provide another example. Where employers resisted enforcement of

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127-28" citation at the foot of page 46 of the CANA Brief appears to be directed to *Smith v. Farrell*, not to this Court's August 19, 2008, Letter Opinion as indicated.) *See Smith v. Farrell*, 199 Va. at 128, 98 S.E.2d at 7 ("reasonable certainty is all that is required. So where a contract is to some extent uncertain and ambiguous, it may be read in the light of surrounding circumstances, and if, reading it thus, its meaning may be gathered, the same will be enforced") (citation omitted). The terms of the Church's and the Diocese's various property canons are clear on their face, *see* TEC Brief at 26-32 (discussing property canons), and the continued conduct of each of the local churches as Episcopal churches over decades is equally clear.

their promises to pay, the Court applied the same principle, explaining that the employers received intangible consideration as a part of the continuation of the relationship. *See Dulany Foods* (cited in *Paramount Termite Control*), 220 Va. at 508, 260 S.E.2d at 200. *See also id*. at 511, 260 S.E.2d at 201-02 (quoting *Anthony v. Jersey Central Power & Light Co.*, 143 A.2d 762, 766 (N.J. Super. 1958) ("once defendant improved the terms of compensation for plaintiffs' work by announcing the institution of the severance pay plan it must be assumed that plaintiffs were thereafter working for that benefit as much as for any other benefit or item of compensation held out to them as compensation by the employer"). Here, if consideration were required to support the trust canons as part of the contractual relationship, it was provided by the Church's and the Diocese's continued recognition of the churches as members and the many benefits, tangible and intangible, that came with that continued relationship. Even setting aside the specific benefits discussed in the Diocese Brief (at, *e.g.*, 12-14, 36-37; 64-71, 74-75, 77 (TFC); 89-95, 98-99 (Truro); 119, 121-22, 123-24 (St. Paul's); 125, 130-32, 139-40 (St. Stephen's); 143 & n.46, 148-52, 160 (St. Mary's); 161, 164, 169-70, 171-72 (Apostles); 174, 176, 184, 185-86, 188-89, 193 (Epiphany)), "it must be assumed," as stated in *Paramount Termite Control*, that the Church's and the Diocese's continued recognition of the churches provided any necessary "consideration" as much as "any other benefit or item of compensation."

7. Mutuality

The Congregations' "lack of mutuality" argument (CANA Brief at 12, 58-67) suffers from two fundamental flaws. First, it erroneously assumes, like the other "contract" arguments, that traditional contract principles apply to hierarchical organizations like the Church, ignoring the body of case law holding that the governing rules of a hierarchical organization – even a secular one – are binding on its members. In such organizations, as we have just seen, the

preconditions for a valid contract are reflected in the nature of the organization itself and the continuing participation of the subordinate parts. Not surprisingly, the Congregations do not cite a single church property case, from Virginia or elsewhere, in support of their "mutuality" argument.

Second, the mutuality argument improperly invokes the First Amendment as both a sword and a shield in an attempt to avoid settled church property law. The Congregations contend that they have left the Church and tried to take their local churches with them because, *in their view*, the Church has breached its commitments by departing from doctrine. But, they cry, the First Amendment puts the alleged breach beyond the Court's purview to determine; and therefore, they argue, the Church and the Diocese cannot prove their contractual rights in the local church property. The Congregations are thus attempting to do indirectly what all parties agree cannot be done directly. By asserting that the Church and the Diocese have departed from doctrine and thereby breached ecclesiastical commitments, but at the same time arguing that the Court may not adjudicate that issue, they are effectively asking the Court to rely on *the Congregations' own judgment* that the Church and the Diocese have breached ecclesiastical commitments.[32]

If the Congregations' argument had any weight, then *none* of the Episcopal church property cases cited in the Church's and the Diocese's briefs – all of which arose after Episcopalians left the Church because of disagreements over doctrine – would have been resolved in favor of the Church and its Dioceses; but nearly all have been. The mutuality

[32] It is not clear whether the Congregations simply do not wish to use the ecclesiastical dispute resolution processes or believe that they have attempted to use them and not received the desired result. But regardless of which may be their current litigation position, the Congregations may not bring to a civil court doctrinal or governance matters that are exclusively the province of ecclesiastical authorities.

argument really is simply another attempt to deflect the Court from deciding this case under the governing law – that is, from determining whether, under the neutral principles test articulated in *Green*, the Church and the Diocese have contractual or proprietary interests in local church property. The existence or lack of mutuality is not a factor identified in *Green* or any other case applying neutral principles. The Congregations would like to make it so. But that is not the law of Virginia, nor is it the law of numerous other states that have developed neutral principles for deciding church property disputes. The Court should reject this gambit, with the others.

Finally, what the Congregations seek certainly is *not* application of a neutral principle. Virginia courts do not defer to one party's judgment about whether the other party breached a contract or other aspects of contractual disputes. (The Church and the Diocese do *not* agree with the Congregations' judgment about the doctrinal issues and whether there has been a departure.)

8. White and Dykman

The Congregations argue that the Church is bound by statements made in various treatises by Mr. White and, later, Mr. Dykman, discussing the legal effect of the Church's Canons. CANA Brief at 67-75. There are numerous flaws in that argument. First, the statements made in those treatises were never adopted by the General Convention, and as such they are not binding on the Church. Tr. 1340-41. Nor is there any evidence to support an argument that Mr. White, Mr. Dykman, or any other authors of or contributors to those treatises acted as "agents" of the Church in making the statements relied on by the Congregations. The fact that the General Convention authorized the project of drafting and editing the treatises did not grant the authors "authority to make such statements on behalf of the principal." Charles E. Friend, *The Law of Evidence in Virginia*, § 18-41 at 871 (6th ed. 2003).

Moreover, the statements to which the Congregations would like to bind the Church are

not statements of fact. They are are the authors' opinions about the legal effect of Church Canons; and Virginia law is clear: "[a] party can concede the facts but cannot concede the law." *Cofield v. Nuckles*, 239 Va. 186, 194, 387 S.E.2d 493, 498 (1990). Thus, even if Messrs. White and Dykman and their successors had been speaking as agents of the Church in the treatises they produced, they could not have bound the Church by their legal opinions.

Finally, it can hardly be ignored that Messrs. White and Dykman *got it wrong*. As the Church demonstrated in its opening brief, in case after case, courts around the country have found the governing documents of the Church and its dioceses – including their canons governing property – to be binding on local churches. *See* TEC Brief at 37-39. This Court should do the same.

9. State law governs these cases.

The Congregations accuse TEC and the Diocese of "press[ing]" the position "that the canons govern in *every* jurisdiction without regard to state law." CANA Brief at 72. That is another straw man, perhaps the flimsiest of them all. TEC and the Diocese *rely* on Virginia law. And under Virginia law, the "constitution" of a hierarchical church – its governing documents, however captioned – is one element of the neutral principles analysis applied under *Green*. It is the Congregations and not TEC and the Diocese that seek to avoid Virginia law, by (*inter alia*) arguing that the laws of the church must be disregarded.

D. The dealings between the parties

The Congregations misinterpret *Green* as holding that "'course of dealing' evidence" is relevant only where the church's governing documents make it so. CANA Brief at 12 ("*Green* considered 'course of dealing' evidence only because, unlike here, it was relevant under the denomination's constitution, which spelled out specific steps evidencing congregational consent

to a denominational proprietary interest. 221 Va. at 555"). *See also id*. at 9, 11, 81-87. Nothing in the Supreme Court's opinion supports that argument, and in fact the Court's analysis is completely inconsistent with it.

The Congregations' elaborate argument is built around the fact that some of the dealings between the parties described in *Green* are similar to those listed in ¶ 434 of the A.M.E. Zion Church Discipline as "indications" of the "intent and desire" of a local church to be bound by "its responsibility to the African Methodist Episcopal Zion Church." *See Green*, 221 Va. at 554 n.2; CANA Brief at 86. There are several holes in that argument:

- First and foremost, the *Green* Court said *nothing* relating or comparing the provisions of ¶ 434 of the Discipline to its analysis of the dealings between the parties. That connection is merely a product of creative lawyering. (The Congregations' repeated citations to page 555 of the *Green* opinion are utterly mysterious. The only possible basis for those citations, at least as far as we can tell, is the Court's reference to the dealings between the parties as one of the four neutral principles factors applied under Virginia law. The Court did not in any way relate that reference to the footnote, on the previous page, on which the Congregations rely.)

- Second, the text at page 554 of the *Green* opinion, to which footnote 2 (on which the Congregations rely, *see* CANA Brief at 83, 86) is appended, addresses a completely different issue. It has nothing to do with "course of dealing," and it does not even refer to the provisions of the Discipline on which the Congregations rely in this case. The issue at that point in the opinion was the local church's reliance on the absence of a trust clause in the Lee Chapel *deed*, which was contrary to "¶ 433 of the Discipline which requires that a trust clause be incorporated in all conveyances of churches and parsonages to the A.M.E. Zion Church." *Green*, 221 Va. at 554, 272 S.E.2d at 184. The Court responded to that argument by noting that "when the

conveyance was made in 1875 there was no rule or regulation in the Discipline of the church which required the inclusion of such a clause in the deed. Further, ¶ 434 of the Discipline expressly waives the requirement of a specific trust provision clause in deeds and conveyances executed prior to the adoption of the current Discipline." *Id*. The Court then quoted ¶ 434, Sec. 2 of the Discipline, in full, in footnote 2.[33]

- And third, while the Court's discussion of the dealings between the parties included some matters that were similar to those described in ¶ 434 of the A.M.E. Discipline – which is neither surprising nor probative – it also included numerous matters that were *not* described in ¶ 434 of the Discipline. Those include the local church's participation as "an integral part of the supercongregational or hierarchical structure" of the general church, by sending delegates to "various conferences … organized and held under the direction of the A.M.E. Zion Church" and otherwise; its use of Sunday School materials, hymnals, and other literature furnished by the general church; its conduct of religious services ("[b]aptisms, marriages, and funerals") from the Discipline; revival services; world missions and missionaries; colleges; scholarships, loans, and grants "made available when, in the discretion of the general church, they were needed"; the financial relationships between the general and local churches ("[t]he church owe[d] no funds, assessments or other monies to the A.M.E. Zion Church or its Annual Conference"); the local church's and its members' support of the general church, by "payment of their assessments and in numerous other supportive ways"; and the "presum[ed]" spiritual and other benefits to the local church resulting from the association. *See* 221 Va. at 550, 553-555, 272 S.E.2d at 182,

[33] The CANA Brief does likewise – it bases arguments on excerpts from various provisions that it quotes in text and then quotes those provisions in full, in footnotes (presumably to demonstrate the context or authenticity of the excerpts). *See* CANA Brief at 17 & n.8, 40 & n.29. *See also, e.g.*, *id*. at 26 & n.19, 40 & n.28, 41 & nn.30-31, 84 & n.50 (footnotes providing full quotations of passages argued in text without quotations).

184-85, 186, quoted in the Diocese Brief at 30. None of those matters is mentioned in ¶ 434 of the A.M.E. Discipline; but they were all pertinent to the Supreme Court's evaluation of the dealings between the parties.

The Congregations identify only three points derived from the Discipline (*see* CANA Brief at 83, 86); and one of those – the deed to the property – is not a course of dealing issue at all but a separate, independent element of the neutral principles test. If the Court's sole reason for reviewing the dealings between the parties had been to determine whether any or all of the three conditions set out in the Discipline had been satisfied, it would not have considered the other evidence. But the Court reviewed evidence of a broad range of dealings between the parties to determine the general relationship between the local and the general church. After summarizing that evidence, the Court did not determine whether the terms of the specific provision in the Discipline had been complied with. It concluded instead that "[i]t is reasonable to assume that … the original membership of [the local church] … and those members who followed thereafter, united themselves to a hierarchical church … with the understanding and implied consent that they and their church would be governed by and would adhere to the Discipline of the general church." 221 Va. at 555-56, 272 S.E.2d at 186.

The evidence of the dealings between the parties is likewise relevant in the present case to the determination of whether those dealings show that the members of the local churches "united themselves to a hierarchical church … with the understanding and implied consent that they and their church would be governed by and would adhere to the [governance] of the general church." *Id.* The Congregations' attempt to dismiss "course of dealing" evidence as irrelevant is an effort to make *Green* stand for something radically different from what it says. For all of these reasons, the argument must be rejected.

The Congregations also present lengthy, elaborate arguments ostensibly designed to support a claim that the weight of the course of dealing evidence favors their position. *See* CANA Brief at 89-123. Pages 30-38 and 56-194 of the Diocese Brief refute that contention, both generally and as to each of the seven Congregations. The following sections respond to some of the arguments that the Congregations assert in support of that overall position.

1. Dominion and control

The Congregations argue, quoting *Green*, that a "proprietary right" is one "customarily associated with ownership, title, and possession," and "a right of one who exercises dominion over a thing or property, of one who manages and controls," CANA Brief at 9; and that plaintiffs' evidence does not establish their ownership, title, possession, dominion or control of the properties in question, *id*. at 90-98, 102-14. But the Supreme Court did not find in *Green* that the general church possessed or exercised any dominion or control over Lee Chapel or its bank accounts (and it did not), and the deed was ineffective as a matter of law to convey title to the general church. To the extent that dominion or control is even a legitimate issue, it is clear that the general church here exercises a greater degree of dominion and control over local church properties, under its various canons, than A.M.E. Zion Church did in *Green*. *See* Diocese Brief at 3, 11, 23, 29, 35, 60, 83-85, 108-09, 115-16, 127, 146-47, 166, 179-80; TEC Brief at 25-31. The A.M.E. Zion Church's only source of dominion or control over local church properties was its "require[ment] that all property transfers be approved by the bishop." *Green*, 221 Va. at 556, 272 S.E.2d at 186. As discussed at length in the Diocese and TEC Briefs, the general church has the same requirement here (except with respect to unconsecrated property of a church) – and many others.

2. Selection of clergy and content of religious services

The Congregations argue that local authority over the choice of rectors and hymns to be sung on Sunday mornings demonstrates their "dominion over the properties." CANA Brief at 98; *see id*. at 98-116. Local church autonomy in the selection of clergy is extensively limited, however, by the Canons of the Church. The Canons require, *inter alia*, that the diocesan bishop review every candidate for rector and that all rectors be Episcopal priests. Episcopal priests must meet extensive standards and take oaths to adhere to the discipline of the Church and to follow the directions of their bishops, as discussed in the Diocese Brief at 31-32, in the TEC Brief at 8, 9, and *supra* at 5 & n.6. The facts further make clear that the Diocese played a significant role in clergy selection, including recommending candidates, review and in some cases approval of particular clergy, review and approval of parish profiles, and general guidance and problem-solving. *See* Diocese Brief at 66-67 (TEC), 91-95 (Truro), 121-22 (St. Paul's), 131-32 (St. Stephen's), 149-50 (St. Margaret's), 163-64, 171-72 (Apostles), and 185-86 (Epiphany). There is no evidence of the Diocese having rejected a church's choice of a rector, CANA Brief at 116, simply because no church ever went so far as to choose a rector despite the Bishop's disapproval. *See generally Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002) (upholding a diocesan bishop's authority to refuse to accept a priest elected by the vestry of an Episcopal church).

The churches were required to use the Church's Book of Common Prayer as a basis for worship, and they all did so. There were occasional exceptions (which understandably are highlighted in the CANA Brief at 99 and 101-02); but even there the Congregations did not show that what they were doing was contrary to the rules of the Church or outside the bounds of the broad canonical delegation to the Rector – who of course must be an Episcopal priest and therefore subject to the Church's rules and the direction of the Bishop. *See* PX-COM-001-084

(TEC Canon III.9.5(a)(1)) ("The Rector shall have *full authority and responsibility* for the conduct of the worship and the spiritual jurisdiction of the Parish, *subject to the Rubrics of the Book of Common Prayer, the Constitution and Canons of this Church, and the pastoral direction of the Bishop*") (emphases added). *See also* Tr. 277 (Bishop Jones' testimony that "in most instances, one gentle conversation with the bishop … will suffice to bring the clergy back into line with the Constitution and Canons of the Church and the practice of the Church," citing as an example his compliance with Diocesan Bishop's "pat on the back" instruction "to put the '28 Prayer Book away").

3. Compliance with Canons governing property transactions

Even if local Episcopal churches were given complete autonomy in the selection of clergy and conduct of religious services, that would not defeat plaintiffs' claims. Those are only two of the numerous course of dealing factors identified in *Green*, and none alone is dispositive. All of the numerous canonical provisions providing hierarchical control over local church affairs are pertinent, none more so than the Canons which assert denominational authority over property transactions.[34] *See* Diocese Brief at 28-29; *id*. at 60 (TFC), 83-85 (Truro), 115-16 (St. Paul's),

[34] Even the Congregations recognize that "evidence relat[ing] to specific interaction between the parties regarding ownership of the CANA Congregations' properties" is relevant. CANA Brief at 87. They also acknowledge that Diocesan Bishops "occasionally" visited each of the churches and "provided input on certain issues" (*id*. at 13); but they avoid making any reference to the property oversight aspects of such visitations. *See* Tr. 314, 1189-90; PX-COM-001-085.

The Rev. David Jones' testimony that Bishop David Jones stated that a Rector could deny a Bishop access to a church (*see* CANA Brief at 92) is contrary to Bishop Jones' testimony (*see* Tr. 205-07, 317-18, 344, 346-48) as well as the Canons of the Church (*see* PX-COM-001-103: "Each Diocesan Bishop shall visit the Congregations within the Diocese at least once in three years. Interim visits may be delegated to another Bishop of this Church") and reflects only an obvious misunderstanding. Indeed, the evidence shows that as the churches grew estranged from the Diocese, they had to ask its Bishops *not* to conduct their usual visitations. Tr. 347, 365.

127 (St. Stephen's), 146-47 (St. Margaret's), 161, 165-67 (Apostles), and 179-81 (Epiphany); TEC Brief at 25-32.

The Congregations disparage the significance of their consistent compliance with Canons requiring Diocesan consent to encumber consecrated property or to incur debt above certain thresholds. *See* CANA Brief at 96-97. They seemingly fail to recognize that similar requirements of general churches' laws were significant to the decisions in numerous cases, including *Green v. Lewis*. *See id.*, 221 Va. at 556, 272 S.E.2d at 186. Indeed, the evidence in this case goes a step beyond *Green*, where the general church proved only that "*the Discipline requires* that all property transfers be approved by the bishop." *Id*. (emphasis added). Here, the Church and Diocese proved that the churches actually complied with that requirement.[35] *See*

[35] Other cases, which refer to compliance with such requirements, include *Trinity-St. Michael's*, 620 A.2d at 1291-92 (history of church's obedience to Bishop's directions regarding relocation and sales of property reflected the church's "relationship with the Diocese and PECUSA that unqualifiedly and unambiguously manifests the acceptance of their role in, and relationship to, the Diocese and PECUSA within its hierarchical polity," and the evidence "overwhelmingly established that the Dennis Canon adopted in 1979 merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of PECUSA in 1789"); *Episcopal Church in the Diocese of Conn. v. Gauss*, 2010 Conn. Super. LEXIS 592, at *14 (Conn. Super. March 15, 2010) ("the Parish did not acquire, use, encumber or dispose of its properties in any independent manner separate and distinct from a consideration of the authority or interests of the general church…. [T]hese major property transactions … were completed with the Parish's recognition and appreciation that authorization first needed to be requested and acquired from the Diocese"); *Savannah*, 699 S.E.2d at 53 ("Christ Church has repeatedly sought the canonically-required consent of the Diocese of Georgia before alienating real property or incurring indebtedness, including two times after adoption of the Dennis Canon in 1979"); *Presbytery of Hudson River v. Trustees of First Presbyterian Church and Congregation of Ridgeberry*, 895 N.Y.S.2d 417, 430 (N.Y. App. Div. 2010) ("By seeking permission from the Presbytery of Hudson River to sell property devised to it, Ridgebury Church showed that it intended to create a trust or believed that a trust was already in existence such that the property to which it reportedly held legal title was properly under the control, and held for the benefit, of the Presbytery of Hudson River or PCUSA"); *From the Heart Ministries, Inc. v. Philadelphia-Baltimore Annual Conference*, 964 A.2d 215, 232 (Md. App.), *cert. denied*, 968 A.2d 1064 (Md. 2009); and *Mt. Olive African Methodist Episcopal Church of Fruitland, Inc. v. Board of Incorporators of the African Methodist Episcopal Church,*

(footnote continued)

also Va. Code § 57-15 (Circuit Court may approve petition to, *inter alia*, sell or encumber church property upon production of evidence that is the wish of "the constituted authorities" of the "church or religious denomination or society"); *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755 ("In the case of a super-congregational church … § 57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church"). Indeed, the Congregations' position now is inconsistent with their own argument, before trial, that such "course of dealings" evidence would be relevant. *See* CANA Congregations' Motion in Limine at 5.

But, say the Congregations, "in many instances" they "did *not* consult with the Diocese before taking such actions." CANA Brief at 95. That contention is answered by their own citation of the Rev. Harper's testimony:

> Q Is there a mortgage on the Braddock Road property?
> A Yes.
> Q Did Apostles seek consent from the Diocese for that mortgage?
> A It did not.
> Q Why not?
> A Because the threshold that the Diocese had set for needing to go to the Standing Committee to get permission to borrow, *our level of borrowing was below that threshold*. [Tr. 3140-41 (emphasis added).]

The Congregations also cite, *inter alia*, exhibits documenting a 1951 mortgage transaction by TFC in the amount of $80,000 (later reduced to $70,000). *See* CANA Brief at 96, citing DX-FALLS-016 through DX-FALLS-020B. It appears that they overlooked an April 13, 1951, letter printed in TFC's Vestry minutes book, which recites an April 12, 1951, congregational resolution which "authorized" the $80,000 mortgage and "resolved that the Bishop and Standing

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Inc., 703 A.2d 194, 203 (Md. 1997) (cited in CANA Brief at 52-53 n.39) (citing *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore*, 464 A.2d 1008 (Md. 1983)).

Committee be requested to permit the mortgaging of the church property." DX-FALLS-206-098. Nothing in the evidence cited at pages 95-96 of the CANA Brief demonstrates or supports an inference that any of the churches violated Church or Diocesan rules. The initial impetus for enactment of those rules (*see* CANA Brief at 96) does not impeach the fact that they represent an unambiguous assertion of general church authority and control over local church property which the churches unanimously and regularly accepted and obeyed.[36]

4. Financial support

The Congregations place great emphasis on disproportionate flows of money between the general and local churches, carefully avoiding any reference to the many spiritual benefits that they received as churches in TEC and the Diocese – even while admitting that "the spiritual components of the relationship between the parties predominates," CANA Brief at 45, and asserting that "[t]he contractual duties of the denomination ... were fundamentally spiritual," *id.*

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[36] The threshold for requiring Diocesan permission is debt exceeding 150% of average annual receipts during the previous three fiscal years (PX-COM-003-027; Tr. 290-91) or encumbrance of consecrated property. The Rev. Cerar testified that in 1967 St. Stephen's "vestry decided to take out a $15,000 mortgage ... to pay for the construction of the rectory" (an unconsecrated property), apparently without Diocesan permission. Tr. 3679-80, cited in CANA Brief at 95. He did not, however, testify regarding St. Stephen's annual receipts for the previous three fiscal years. The Rev. Jones similarly testified regarding a 1926 St. Paul's Vestry action (*see id.*, citing Tr. 1820 and DSTP-009-671), but he likewise did not compare the amount of the loan to the 150% threshold for Diocesan approval; and TEC Canon I.7.3, which requires written consent of the Bishop and Standing Committee of the Diocese to encumber any real property of a local church ("except under such regulations as may be prescribed by Canon of the Diocese"), did not exist until 1940. *See* Tr. 1211-13 and exhibits cited. Neither Congregation presented any relevant documentary evidence. Mr. Deiss's testimony, cited in the CANA Brief at 96, does not discuss Diocesan approval at all. But even if one (or more) of these churches had occasionally overlooked (or even defied) applicable Church or Diocesan rules, that would neither invalidate the canonical requirements nor negate the numerous other occasions on which these churches complied, as discussed in the Diocese Brief.

at 63.[37] But they cannot avoid the fact that *Green* forecloses their money flow arguments. After noting that the denomination did not contribute to reconstruction of the church or its current improvements, and after reciting the congregation's complaints of lack of support from the denomination (*see* 221 Va. at 550, 551-52, 272 S.E.2d at 182, 183), the Court stated that "it is not within the scope of this opinion to determine the validity of the grievances between the membership and the church." *Id.* at 552, 272 S.E.2d at 184. The Court revisited the point later in its opinion, making explicit that lack of financial support did not defeat a general church's claim: "The fact that the general church has made no loans or grants for the benefit of Lee Chapel and that, in fact, it may have refused to contribute to the remodeling program of the local church, is not dispositive. A proprietary interest or a contractual obligation does not necessarily depend upon a monetary investment." *Id.* at 556, 272 S.E.2d at 186.[38]

Buried in their voluminous proposed findings of fact, the Congregations acknowledge certain Diocesan contributions. *See* CANA Proposed Findings ¶¶ 177-78 (TFC); ¶¶ 290 n.13, 301 n.14 (St. Paul's); ¶ 327 n.20, 406 (Truro); ¶¶ 556 n.37, 560, 611 n.41 (St. Stephen's); ¶ 714 n.47 (St. Margaret's); ¶ 888 n.53 (Epiphany). Both their proposed findings and their arguments present an incomplete record, however, ignoring and minimizing historic assistance. Each of the older churches received assistance on multiple occasions over decades, for building and roof

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[37] The Congregations do concede that they "received occasional spiritual input from denominational bishops." CANA Brief at 89.

[38] The Congregations are forced to acknowledge that the Supreme Court held in *Green* that the absence of a financial contribution was "not dispositive"; but they try to evade that square holding, arguing that "[i]n the absence of a deed or written agreement with the congregation … the extent of financial contributions (or lack thereof) is instructive as to whether a denomination has a 'legally cognizable' interest in disputed church property." CANA Brief at 114, citing *Jones v. Wolf*, 443 U.S. at 606. But *Jones* says *nothing* to support that argument; it simply uses the quoted words "legally cognizable." The Congregations' argument that "the extent of financial contributions (or lack thereof) is instructive …" is simply, purely, *ipse dixit*.

repairs, clergy salaries, and the like. *See* Diocese Brief at 64-66 (TFC), 89-90, 91, 94 (Truro), 123-24 (St. Paul's), 130 (St. Stephen's). The Congregations' Proposed Findings and Brief contain numerous inaccurate and misleading statements regarding financial assistance.[39]

The record shows that Diocesan contributions were greater than admitted in the Congregations' Proposed Findings and Brief. *See* record citations in Diocese Brief at 64-66 (TFC), 89-90 (Truro), 123-24 (St. Paul's), 130 (St. Stephen's), 148-49 (St. Margaret's), and 176 & 184 (Epiphany). Dr. Bond – whose historical expertise the Congregations do not question, and who was the only expert qualified in regard to the history of the older local churches at issue – concluded that the assistance the older churches received was significant (Tr. 948-49, 981-82, 991, 1000, 1090). Those conclusions were both reasonable and uncontradicted (and supported by the many financial assistance citations provided in the Diocese Brief and referenced *supra*).

With respect to the newer churches, financial aid from the Diocese or its allies and the assistance of Diocesan staff aided St. Margaret's and Epiphany getting off the ground. *See* Diocese Brief at 142-43 & n.46, 148-49, 150-51, 176 (church site given to Epiphany by Episcopalians supportive of the Diocese, Glebe Properties, and the Diocese provided financial

[39] For example, St. Paul's claim that it "received no contributions of any sort from the Diocese," CANA Brief at 109, is based on the recollections of its current rector and a chart listing "Flow of Funds to/from DVA 1967-2005." That appears designed to avoid recognition of the fact that St. Paul's received money from the Diocese in 1961 and 1966. *See* Diocese Brief at 124 (citing PX-STPAUL-649 and PX-STPAUL-657). It also is contrary to Dr. Bond's expert testimony, which is based on recorded historical facts, not recollections, dating well before 1967, and historical documentation of assistance to St. Paul's. *See* Diocese Brief at 123-24. Uncontradicted evidence shows denominational contributions to the repair of St. Paul's facilities after the Civil War and subsequent improvements. *See* Diocese Brief at 124; Tr. 990-91; *compare* ¶ 232 of the Congregations' Proposed Findings.

assistance with its building program), 184.[40] DMS loans were "'made at *competitive* commercial rates,'" as the Congregations say (CANA Brief at 118 (quoting Tr. 715) (emphasis added)); but the terms of such loans were "less restrictive because [the DMS] is created to be a benefit for the churches of the Diocese."

> It is less restrictive than a commercial bank. Where a church may have trouble finding commercial lending, DMS typically would have rates that a church could work with, would have flexibility with payment on loans, offers five-year windows where a church could renew a loan, and the church -- the churches have found good flexibility with DMS's management in doing that.

Tr. 682. *See also* Tr. 681 (DMS is "designed to break even").

We do not suggest that more money flowed from TEC or the Diocese to the local churches than in the other direction. That was not true in *Green*, it is not true in this case, and it is simply not the inherent, fundamental nature of the relationship between a denomination and its component members (or of any other hierarchical institution, for that matter). Most money flows upward, from individuals to local churches to denominations. The benefits that member churches and individuals receive in return are largely intangible, but they are no less real.

Ironically, given their purported endorsement of general contract principles, the Congregations' arguments also ignore the elementary contract law principle that courts may not inquire into the "adequacy" of consideration; the proverbial "peppercorn" is enough. *See, e.g.*, *Dulany Foods*, 220 Va. at 511, 260 S.E.2d at 202 (quoting *Brewer v. First Nat'l Bank of Danville*, 202 Va. 807, 815, 120 S.E.2d 273, 279 (1961)) ("It matters not to what extent the promisor is benefited or how little the promisee may give for the promise. A very slight advantage to the one party or a trifling inconvenience to the other is generally held sufficient to

[40] The Diocese did not contribute any money directly to Apostles; but it sold the Picketts Road "Meeting Place" property to the church for reimbursement of its own investment, and even that reimbursement was initiated by Apostles, not by the Diocese. *See* PX-APOST-306-002.

support the promise").

5. Balancing of burdens and benefits of denominational affiliation

The Congregations claim that their affiliation with TEC and the Diocese "was more of a burden than a benefit." CANA Brief at 121. Their evidence in support of that argument relates almost entirely to the last few years of affiliation, from 2003 to 2006,[41] ignoring decades (even centuries) of history. *Cf. Grace Church*, Order at 26 ("the disposition of this parish property has been determined not by what has occurred in the parish and diocese in the last ten years, but what has been shown to be the general desires of all parish members since the time of the creation of this nonprofit church corporation"). The evidence and the Diocese Brief demonstrate that each of the churches whose formerly-Episcopal congregations are in possession of the properties at issue received many benefits, both temporal and spiritual, throughout the history of their affiliation – including even the few years on which the Congregations' argument focuses. *Cf. Green*, 221 Va. at 552, 272 S.E.2d at 184 ("The frustrations experienced by the membership of Lee Chapel and the complaints they voice are not uncommon. However, it is not within the scope of this opinion to determine the validity of the grievances between the membership and the church. The issue is legal, not ecclesiastical …").[42]

Spiritual benefits must be presumed, of course. *See Green*, 221 Va. at 554, 272 S.E.2d at 185; Diocese Brief at 5, 33-34. But such benefits also are proven, in this case, by the churches' own records. *See* Diocese Brief at 12, 70-71, 98-99, 151-52, 188-89. *See also id*. at 68, 162 (quoting references to "our beloved Bishop Goodwin" and "our beloved Bishop Baden"). The

[41] In fairness, the Congregations also cited testimony of two Apostles witnesses to adverse effects from affiliation as early as 1996, Tr. 3100, 3326-27, and one witness's testimony that St. Paul's had an "SPO" (St. Paul's only) option for contributions in "the early 90's," Tr. 2196-98.

[42] If there were any efficacy to the Congregations' various financial arguments, it is difficult to see how an hierarchical church would ever prevail in property litigation with a local church.

Congregations understandably say little about spiritual benefits; but their relentless focus on financial issues (*see* CANA Brief at 13, 78, 89, 94, 105-14, 117-21) can only be described as applying a thoroughly materialistic approach to an ecclesiastical and spiritual relationship – a relationship in which, as they elsewhere acknowledge, "the spiritual components … predominates" (*sic*). *Id*. at 45. *Cf*. Tr. 3979-80 (St. Margaret's witness Alan Clark) ("Q: Were you compensated for any of that work [primarily grounds and building maintenance]? A: No, I wasn't. *Not in terms of monetary compensation*, no") (emphasis added).

Perhaps even more to the point, the Congregations' argument necessarily invites the Court to weigh the benefits and burdens running in both directions, not merely to engage in the one-sided analysis that they advocate. But such an analysis would be highly inappropriate, and not only because courts do not inquire into the "adequacy" of consideration, as the Congregations urge the Court to do. The Congregations' argument necessarily invites the Court to weigh the *spiritual* benefits of denominational affiliation – a task which is not merely impossible but also constitutionally forbidden. *Green* lights the proper path: the churches and their members "*presumably benefitted* from the association, spiritually and otherwise." 221 Va. at 554, 272 S.E.2d at 185 (emphasis added). The Court may not and not need entangle itself in weighing spiritual benefits (or detriments). It need only recognize what is obvious (and proven in this case) – that it is analyzing relationships between units of a hierarchical church that have developed over many decades and that such relationships have mutual benefits.

6. Maryland precedents cited in the CANA Brief do not apply, but a later decision in one of those cases applies *a fortiori* here.

The Congregations rely on two Maryland cases, *From the Heart Ministries, Inc. v. African Methodist Episcopal Zion Church*, 803 A.2d 548, 570-71 (Md. 2002), *cert. denied*, 537 U.S. 1171 (2003), and *Mt. Olive African Methodist Episcopal Church of Fruitland, Inc. v. Board*

of Incorporators of the African Methodist Episcopal Church, Inc., 703 A.2d 194, 204 (Md. 1997). CANA Brief at 52-53 n.39. They neglect to state, however, that the reversal of a summary judgment in *From the Heart* was simply to allow for factual development. They also fail to acknowledge that the final decision in that case affirmed a summary judgment for the general church (with respect to all real property at issue, and for the local church with respect to personalty), following the remand ordered in the decision that they cite. *See From the Heart Ministries, Inc. v. Philadelphia-Baltimore Annual Conference*, 964 A.2d 215 (Md. App.), *cert. denied*, 968 A.2d 1064 (Md. 2009). Indeed, they do not even mention the second appeal.

The Congregations cite *Mt. Olive* and the earlier *From the Heart* decision for the proposition that a trust provision in a denominational constitution is ineffective without local church consent. That rule derives from a Maryland statute: "it is clear that incorporation under the General Religious Corporations Law … results in the trustees and the local congregation having ownership and control of the property of the local church." *From the Heart*, 803 A.2d at 562 (citations omitted). *See Mt. Olive*, 703 A.2d at 201 (quoting *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 241 A.2d 691, 696 (Md. 1968)). Thus "'Maryland law contemplates a congregational form of church government.'" *From the Heart*, 803 A.2d at 562 (quoting *Mt. Olive*, 703 A.2d at 201). And "[u]nder Maryland law …. the property of a local church is held in trust by the religious nonprofit corporation for the benefit of the local church congregation … unless the control of that property is modified by contract, express or implied…. This is the effect of incorporation under the General Religious Corporation Law." *Id.* at 567-68.

Virginia has no similar statute, and Virginia law incorporates no such "contemplat[ion]." Virginia law instead respects and enforces the "laws, rules, [and] ecclesiastic polity" that each

church chooses for itself. *See* Va. Code § 57-16.1 and other statutes cited at pages 12-13, *supra*. *See also, e.g., Truro Church*, 280 Va. at 15, 694 S.E.2d at 559 ("Each congregation within a diocese … is bound by the national and diocesan constitutions and canons").[43]

But even if the Maryland statutory rule applied, and if local church consent were necessary to validate a trust provision, such consents are fully manifested by the evidence as to each of the churches in this case. *See* citations in the footnote at the end of the previous paragraph. The final decision in *From the Heart* also is instructive in that regard. The court

> agree[d] with the circuit court on remand that "the procedure of the Discipline of the church was followed by From the Heart for seemingly all aspects of church life, except for the manner in which property was titled." We thus conclude that the circuit court did not err in finding no genuine dispute as to the fact that From the Heart consented to "be bound by the Discipline of ... A.M.E. Zion."

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[43] Maryland's "neutral principles" *criteria* are similar to those applied in Virginia. *See From the Heart*, 803 A.2d at, *e.g.*, 569 ("a court faced with a church property dispute must review all relevant documents and circumstances, to include the denomination's polity, its constitution and other authoritative sources, the Religious Corporations law, the relations between the parties, the local church's charter and other pertinent documents to determine the proper resolution"). But *application* of those criteria sometimes leads to a different result under Maryland law due to the different state statutory schemes.

Application of those criteria also can lead to results consistent with Virginia law, however, as even the Congregations acknowledge. *See* CANA Brief at 53 n.39, citing *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore*, 464 A.2d 1008 (Md. 1983). However, the court in *Mt. Olive*, which the Congregations cite, did not focus only on the local church charter's declaration in *Babcock* that it should "forever remain a Presbyterian Church in accordance with the Standards of the Presbyterian Church of the United States," as the Congregations do. The *Mt. Olive* court also cited (and more prominently) a local church by-law which provided, *inter alia*, "'These By-Laws shall be subordinate to the Constitution of the United Presbyterian Church and nothing contained herein shall be interpreted to the contrary,'" as forming "a contract adopting a presbyterial polity, thus giving the parent church an interest in the local church property." *Mt. Olive*, 703 A.2d at 202 (quoting *Babcock*). *Compare* local church governing documents cited in Diocese Brief at 63-64 (TFC), 81, 82-83 (Truro), 154-56 (St. Margaret's), 177-79 (Epiphany); *see also id.* at 116-18 (St. Paul's), 127-29, 133-35 (St. Stephen's), 161-62, 165-68 (Apostles). *See also Mt. Olive*, 703 A.2d at 203 ("In *Babcock*, the parent church's constitution prohibited the sale, mortgage or encumbrance of local church property without the consent of the Presbytery" – as of course Church and Diocesan Canons do in this case). And of course all of the lay and clerical leaders of these churches swore fidelity to the "discipline of the Church."

964 A.2d at 233-34 (court's brackets omitted). Many, though not all, of the subsidiary factors cited by the court in support of its finding of consent to be bound by the Discipline mirror those described in the Diocese's Brief:

- The local church was incorporated as "Full Gospel A.M.E. Zion Church, Inc.," and its "plan and purpose" included acting "in accordance with the Disciplines of the African Methodist Episcopal Zion Church." *Id*. at 229 (emphasis omitted).

- Local church bylaws, as amended in 1991, made it "the duty of the Board of Trustees to take charge of and protect the Church property with all its appurtenances in trust for the Membership"; but those bylaws also required that prospective members "be satisfactorily examined 'by the Pastor before the Church as required in Section 582 of the Discipline,'" which required the prospective member to affirm that he or she would "'cheerfully be governed by the Rules of the African Methodist Episcopal Zion Church ….' Consequently, even if the term 'Membership' referred to the members of From the Heart, the 1991 Bylaws subjected the Board of Trustees and the members to governance by A.M.E. Zion according to the Discipline." *Id*. at 230-31 (emphasis omitted).

- The 1991 Bylaws also "provided that the Board of Trustees include the Discipline's trust clause in deeds to real property acquired by From the Heart and that the absence of such clause did not relieve From the Heart of its responsibility to A.M.E. Zion under that clause." *Id*.

- After examining "the relations and correspondence between the parties for any additional evidence of consent," the court found "numerous documents evidencing From the Heart's use of 'A.M.E. Zion' as a part of its name in printed and published materials, in connection with its works, and on the deeds of real property it acquired." *Id*.

- "A.M.E. Zion had a presence not only in From the Heart's name but also in its services.

For instance, in a church dedication service," an A.M.E. Zion Bishop gave the communion sermon as well as a dedication/consecration service. "Also, as previously stated, every new member of From the Heart pledged his or her willingness to be governed by the Rules of A.M.E. Zion." *Id.* at 231-32.

- "The properties deeded to From the Heart were paid for by From the Heart's own funds …. No financial contribution was provided by A.M.E. Zion. From the Heart, however, consistently contributed to A.M.E. Zion financially …." *Id.* at 232.

- The pastor was appointed annually by the Philadelphia and Baltimore Conference of A.M.E. Zion as pastor in charge. The pastoral appointments authorized the pastor "'to perform all the Pastoral functions set forth in the Discipline.'" *Id.*

- "From the Heart kept A.M.E. Zion apprized [*sic*] of its status by sending reports of achievement to be included in written annual reports of the Philadelphia and Baltimore Conference …." *Id.*

- From the Heart made a "practice of seeking permission from A.M.E. Zion before selling church property in accordance with the Discipline." *Id.*

- "Various other documents … also show From the Heart's consent to be subject to the Discipline," including the minutes of a congregational meeting regarding the restructuring of the church, which "noted that the church was 'defined by the Discipline.'" *Id.* at 233.

- The pastor testified in his deposition "that he was expected to establish an A.M.E. Zion Church …, a church that he understood would be under the governing authority of the A.M.E. Zion Discipline…. He further testified that he committed himself to the Discipline during the period that he served as an A.M.E. Zion pastor." *Id.*

Those factors demonstrated From the Heart's consent to be bound by the Discipline of

the A.M.E. Zion Church, a consent that is established as to these Virginia churches as a matter of law. *See Truro Church*, 280 Va. at 15, 694 S.E.2d at 559. *A fortiori*, proof of most of the same factors, as to each of the churches at issue here, not only demonstrates their consent to be bound but also further establishes that the "dealings between the parties" element of the Virginia "neutral principles" test is satisfied.

7. The Truro Episcopal Church Instruments of Donation are (at minimum) a significant element of the dealings between the parties.

Our argument that the Instruments of Donation should be given effect is set out in the Diocese Brief at 110-12 and need not be repeated here. As expected, Truro argues that such instruments "ha[ve] only ecclesiastical significance," CANA Brief at 53, but its arguments do not reduce the importance of those instruments as an element of the dealings between the parties.

Truro simply ignores the fact that the instruments themselves devote the building to use "according to the provisions of the Protestant Episcopal Church in the United States of America, in its … Discipline" and "certify … that said building and ground are secured from danger of alienation from those who profess the Doctrine, Discipline and Worship of the said Church, except as provided by laws and canons in such case applicable." Diocese Brief at 110. Instead, Truro offers the red herring that the Bishop's remarks do not refer to the denomination. *See* CANA Brief at 54 (citing TEC-37-311). As we have already argued (*see* Diocese Brief at 112 & n.38), the Court is not being asked to and need not interpret religious language in the instruments, much less the Bishop's prescribed remarks in the *Book of Common Prayer*.

Truro also fails to note that the instruments are optional or that their form is *not* part of the consecration service. *See* Tr. 958; TEC-37-310 - 313. Truro's liturgical arguments and its selective quotes of Dr. Bond are misleading. *See* CANA Brief at 54-55 (omitting where Dr. Bond explained the quoted answer by stating that "the way it functions in the context of the

liturgy would be for someone who's an expert in the liturgy," Tr. 1121).

Furthermore, Truro blithely cites *Bjorkman v. Protestant Episcopal Church of Diocese of Lexington*, 759 S.W.2d 583 (Ky. 1988), but fails to recognize that there is no evidence at all here (unlike that case) that TEC or the Diocese considered the instruments to have no effect.[44] To the contrary, the evidence explains why the instruments having effect is fully consistent with there being no change in day-to-day operations. *See* Tr. 964; Diocese Brief at 111 n.37. Indeed, the evidence suggests that Truro's Vestry *did* view the 1974 instrument as having legal significance. *See* Diocese Brief at 112 (quoting Vestry minutes).

Truro admits that the instruments asked the Bishop to take the buildings under his "spiritual jurisdiction." CANA Brief at 54. He did; and Truro has no credible argument that the Bishop subsequently lost jurisdiction due to Truro's unilateral decision to leave the Church.

We do not contend that the instruments were a conveyance of legal title or would have legal effect with respect to a third party, although as we have argued they are effective between the parties as a gift of a contractual or property interest or a use restriction. But only by ignoring the plain language of the instruments can Truro claim that it may alienate the property "from those who profess the Doctrine, Discipline and Worship of [TEC]" by severing ties with TEC and the Diocese. The instruments are a notable recognition and assent by Truro that the property Truro used was to be used as part of TEC and the Diocese and according to their canons.

Our case against Truro obviously is not limited to and does not turn exclusively on the Instruments of Donation. Those instruments are significant evidence of the relationship between Truro and the Diocese, however, just as evidence of other unique facts and circumstances are

[44] As the *Bjorkman* passage that Truro quotes states, but Truro apparently fails to appreciate, unspecified evidence in the record of that case led the court to make those remarks. *See* CANA Brief at 53 (quoting 759 S.W.2d at 586).

relevant and significant with respect to other Congregations.

II. The real and personal properties held and used by the churches are held in trust for TEC and the Diocese, pursuant to Va. Code § 57-7.1 and applicable Canons of TEC and the Diocese.

A. Interpretation of § 57-7.1

The Congregations recognize (at least implicitly) that the 1924 and 1962 amendments to Va. Code § 57-15 ("to refer to religious denominations," CANA Brief at 143) were effective to provide "that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve … a [church] property transfer," *Norfolk Presbytery*, 214 Va. at 502, 201 S.E.2d at 755. *See* CANA Brief at 143 & n.106, citing *Norfolk Presbytery*, 214 Va. at 502 & n.2. But they nevertheless resist any recognition that the 1993 amendments to § 57-7.1 likewise should be given full effect according to their terms.

The Congregations refuse to come to grips with the plain language of Va. Code § 57-7.1 ("any … church diocese"), which is discussed in the Diocese Brief at 39-40. They say, however, that the Supreme Court found in *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152, 452 S.E.2d 847, 851 (1995), "that the trustees could *only* have been trustees for the congregation." CANA Brief at 15 (emphasis added). That just is not so. The Supreme Court held in *Asbury* that § 57-7.1 "validates transfers, including transfers of real property, for the benefit of local religious organizations," 249 Va. at 152, 452 S.E.2d at 851; but it did *not* hold that § 57-7.1 does *not* validate transfers for the benefit of denominational churches, and it had no occasion to reach that question. The only issue, as the Congregations admit (CANA Brief at 15), was whether the trustees had *standing to represent the congregation*.[45]

[45] Counsel have reviewed all of the briefs filed in the Supreme Court in the *Asbury* case. Not a single one cites either § 57-7.1 or *Norfolk Presbytery*. (TEC and the Diocese filed certified copies of those briefs by Praecipe dated November 18, 2008.)

The Congregations also argue that the repeal of § 57-7 and enactment of § 57-7.1 in its place changed nothing, citing a statement in the enacting Bill that the new statute was "declaratory of existing law." CANA Brief at 15.[46] That argument proves too much. "Declaratory of existing law" is an ambiguous phrase which does not necessarily mean that prior case law was correct; rather, it signals a clarification. *See* Black's Law Dictionary 1543 (9th ed. 2009) (a "declaratory statute" is "[a] law enacted to clarify prior law by reconciling conflicting judicial decisions or by explaining the meaning of a prior statute"). *See also Bryson on Virginia Civil Procedure* § 12.02 n.14 (4th ed. 2005), explaining that 1992 Va. Acts, ch. 564 – which stated that it was "declaratory of existing law" – was enacted "to clarify the law in the light of Lee v. Lee," 12 Va. App. 512, 404 S.E.2d 736 (1991). In fact, ch. 564 effectively overruled *Lee v. Lee*. Here, the clarification suggests that the prior statute was incorrectly limited; by deleting all modifiers and adding "church diocese," the General Assembly indicated that the words used to describe beneficiaries in § 57-7.1 encompass hierarchical as well as local religious groups.

To accept the Congregations' argument would be to hold that the 1993 legislation accomplished nothing, contrary to the settled rule that courts must "assume that the General Assembly's amendments to the law are purposeful and not unnecessary or vain." *Virginia-American Water Co. v. Prince William County Serv. Auth.*, 246 Va. 509, 517, 436 S.E.2d 618, 623 (1993) (citation omitted). "As a general rule, a presumption exists that a substantive change in law was intended by an amendment to an existing statute." *Id*., 436 S.E.2d at 622-23. And here we deal not with an amendment but the repeal of a prior statute (§ 57-7) and enactment of a new one in its place. *See also, e.g., Riverside Owner, L.L.C. v. City of Richmond*, 282 Va. 62,

[46] This Court noted the "declaratory of existing law" clause in its Five Questions Letter Opinion (at 13 n.12) but did not explain or rely on it as the Congregations imply (CANA Brief at 15).

69, 711 S.E.2d 533, 537 (2011) ("Because the words of a statute are chosen with care, 'we will not read a legislative enactment in a manner that renders any portion of that enactment useless'") (citation omitted); *Wisniewski v. Johnson*, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982) ("'[I]n the field of statutory construction, a presumption normally arises that a change in law was intended when new provisions are added to prior legislation by an amendatory act'") (citation omitted); *Cummings v. Fulghum*, 261 Va. 73, 79, 540 S.E.2d 494, 497-98 (2001):

> When a statute or a group of statutes has been revised, and the General Assembly has omitted provisions formerly enacted, the parts omitted may not be revived by construction, but must be considered as annulled…. A contrary holding would impute to the General Assembly gross carelessness or ignorance, which is wholly impermissible. Thus, to depart from the meaning expressed by the language of a revised statute or group of statutes is to change the statutes, to legislate and not to interpret…. [Citations omitted.]

The Congregations argue next that this Court is bound by the Attorney General's construction of § 57-7.1 as limited to property held for the benefit of a local congregation. CANA Brief at 16. Again, there are several holes in their argument.

First, Attorney General Opinions are not binding on courts – as the Opinion that they cite acknowledges. 1996 Va. Op. Att'y Gen. 194, 195 n.1, citing *Barber v. City of Danville*, 149 Va. 418, 141 S.E. 126 (1928), and an earlier Attorney General Opinion.

Second, the Attorney General did not express an opinion on the issue presented here. The issue in that Opinion was "whether the conveyance of property owned by a Virginia nonstock corporation is subject to § 57-14 or § 57-15 of the *Code of Virginia*," which arose from a proposed sale of property to Bath County by Lexington Presbytery, Inc. 1996 Va. Op. Att'y Gen. at 194. The Attorney General quoted § 57-7.1 simply as indicating that "[t]he provisions of Article 2 [of Title 57] relate to property held 'for the benefit of any *church*, church diocese, *religious congregation* or *religious society*.'" *Id*. (emphases in original). He then stated that "[w]hile these terms are not defined, *the Supreme Court of Virginia has held* that *Article 2* encompasses property

held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body." *Id*. (emphases added), citing *Norfolk Presbytery*, 214 Va. at 506, 201 S.E.2d at 757, and *Moore v. Perkins*, 169 Va. 175, 181-82, 192 S.E. 806, 809 (1937), "(both cases construing meaning of words 'church,' 'religious congregation,' 'religious society')"; a 1982 law review article; and Code § 57-16, as "providing for transfer of property held by ecclesiastical officers rather than by church trustees." 1996 Va. Op. Att'y Gen. at 195 n.7.

The Attorney General Opinion neither states nor implies that § 57-7.1 does *not* relate to property held "for the benefit of any … church diocese," *as the statute says*. The issue simply was not presented. Section 57-7.1 was cited merely as an indication of the scope of Article 2 of Title 57, and the Opinion states only that *the Supreme Court of Virginia has held* that *Article 2* encompasses property held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body – citing cases which construed § 57-7, since repealed. The Attorney General rendered an opinion on, at most, the meaning of the terms "church," "religious congregation," and "religious society," the terms that he emphasized in the passage quoted above and the terms that were construed in *Norfolk Presbytery* and *Moore*, as he stated. He did not touch on the inclusion of "church diocese" in § 57-7.1, its omission from the former § 57-7, or the full scope of § 57-7.1.

Third, the Congregations rely on the proposition that "[t]he legislature 'is presumed to have knowledge of the Attorney General's interpretation of statutes, and [its] failure to make corrective amendments evinces legislative acquiescence.'" CANA Brief at 16, quoting *Tazewell County School Board v. Brown*, 267 Va. 150, 163, 591 S.E.2d 671, 677 (2004). That proposition is merely a tool of statutory construction based on extrinsic evidence, and a statute that is plain and unambiguous neither requires nor allows construction. *See, e.g., Town of Blackstone v. Southside Electric Coop.*, 256 Va. 527, 533, 506 S.E.2d 773, 776 (1998). The "legislative acquiescence"

precept is cited in *Tazewell* (and in other cases where it is mentioned) only to bolster the Court's plain meaning reading of a statute, never to contradict or override it. Legions of cases confirm the elementary principle that "[w]hen considering a legislative act, a court may look only to the words of the statute to determine its meaning, and when the meaning is plain, resort to rules of construction, legislative history, and extrinsic evidence is impermissible." *Id*. Indeed, as far back as 1964 the Court observed that it had "many times said that where the language of a statute is free from ambiguity, its plain meaning is to be accepted without resort to the rules of interpretation. In that situation, we take the words as written and a resort to extrinsic facts to determine their meaning is not permitted." *City of Portsmouth v. City of Chesapeake*, 205 Va. 259, 269, 136 S.E.2d 817, 825 (1964). *See also, e.g.*, *Commonwealth v. Delta Air Lines*, 257 Va. 419, 426-27, 513 S.E.2d 130, 133-34 (1999) (rejecting Tax Department's interpretation of tax statute as contrary to its plain meaning); *School Board of Chesterfield County v. School Board of the City of Richmond*, 219 Va. 244, 251, 247 S.E.2d 380, 384 (1978) (error to admit extrinsic evidence to interpret a clear and unambiguous statute); *Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake*, 218 Va. 696, 702, 240 S.E.2d 819, 823 (1978) ("An erroneous interpretation of a statute by those charged with its enforcement cannot be permitted to override its clear meaning. Amendments of statutes can only be made by the legislature and not by the courts or administrative officers charged with their enforcement"). So even if the Attorney General had rendered an opinion that supported the Congregations' position, contrary to the plain language of the statute (which he did not do, as discussed above), it would not be binding on this Court.

Finally, any presumption in favor of the Congregations' proposed interpretation of § 57-7.1 would be countered by other presumptions. The legislature, for example, is presumed to have full knowledge of the law in matters on which it legislates, which in this case would include the

Supreme Court's statement in *Jones v. Wolf* that trusts expressed in denominational governing documents would be enforced, *see* 443 U.S. at 606, 607-08, as well as developments in constitutional law which make clear that general churches cannot be excluded from a right – such as the right to hold property in trust – that is extended to other religious groups and to any secular group. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244-46 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). In addition, the principle of constitutional avoidance, which presumes that the legislature did not intend an unconstitutional act, is plainly applicable. *See, e.g.*, *Virginia Society for Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57 & n.3, 500 S.E.2d 814, 816-17 & n.3 (1998). Particularly where the broadly-inclusive, plain language meaning of the statute would avoid any constitutional issue, it would be error to interpret a statute to exclude certain religious groups and thereby raise serious constitutional questions.

B. Retroactive application

The Congregations' argument that § 57-7.1 may only be construed and applied "prospectively" and not "retroactively to validate pre-1993 conveyances or canons asserting a denominational trust" (*see* CANA Brief at 20-22) also is wrong. First, the express function of § 57-7.1 is to confirm that trusts for "any" religious group "shall be valid." Validating commonly applies to existing matters or acts that already have occurred. *See, e.g.*, 2 Oxford English Dictionary 3586 (Compact Ed. 1971) (defining "validate," with citation to a reference by President Jefferson to validation operating "retrospectively"). Section 57-7.1 does not alter past arrangements. It simply validates any trust that "is" established, whether before or after its enactment. Retroactivity is not an issue because the parties' actions (whenever they occurred) are determinative. Second, § 57-7 applied to past and future trusts; and the obvious intent of § 57-7.1 was to eliminate limits on the validation, not to create them. Finally, the First

Amendment forbids discrimination among religious entities with respect to rights in property, as discussed just above, and judicial decisions interpreting federal law operate retroactively. *See, e.g.*, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94-97 (1993). "When [the U.S. Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, *regardless of whether such events predate or postdate our announcement of the rule*." *Id.* at 97 (emphasis added). The constitutional rule requiring Virginia to treat hierarchical churches equally and neutrally applies to pre-1993 events. Indeed, the principle stated in *Harper* should apply even more forcefully where a party (here the Congregations) seeks to benefit from an unconstitutional, not merely outdated, rule.[47]

C. There has been a conveyance or transfer for purposes of Va. Code § 57-7.1.

The Congregations attempt to distinguish the instant case from the numerous cases finding trusts in favor of the Episcopal Church by arguing that Va. Code § 57-7.1 requires a "conveyance" and that there was no "conveyance" of property establishing a trust in this case. CANA Brief at 20. Beyond the Congregations' failure to recognize that § 57-7.1 includes both "conveyances" *and* "transfers," that argument falls flat for at least two reasons.

First, the deeds given by the original grantors clearly constitute "conveyances" or "transfers" and satisfy the statute. The Congregations' argument again incorrectly presupposes that the local congregations (and not the Diocese or the Church) were given equitable title through those deeds without regard to whether they remained Episcopalian, such that an additional conveyance would be needed. Even if that were not true, however, the churches' subsequent declarations of trust in favor

[47] In all events, six of the seven Congregations use property pursuant (at least in part) to deeds that post-date § 57-7.1. *See* DX-FALLS-198-003; TRU010; PX-STPAUL-001-002; DSTS-013-056, -082 - 090; DSTM-042-317, -330 - 335; Apostles_Ex_034 and Apostles_Ex_035.

of the Episcopal Church and the Diocese – manifested by words and conduct – constitute "conveyances" or "transfers" within the meaning of § 57-7.1. *See* subsection D, *infra*.

"Conveyance" has a broad meaning: "[t]he voluntary transfer of a right or of property." Black's Law Dictionary 383 (9th ed. 2009). "Transfer" has an even broader meaning, which includes but is not limited to a conveyance:

> 1. Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method – direct or indirect, absolute or conditional, voluntary or involuntary – of disposing of or parting with property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. 2. Negotiation of an instrument according to the forms of law. The four methods of transfer are by indorsement, by delivery, by assignment, and by operation of law. 3. A conveyance of property or title from one person to another. [*Id*. at 1636.]

The Congregations cite no authority for their contention that "conveyance" as used in § 57-7.1 excludes the creation of an equitable interest in real estate by a declaration of trust, and they altogether fail to address whether it otherwise constitutes a "transfer" under § 57-7.1.[48]

Contrary to the Congregations' argument, a declaration of trust "*is* a conveyance of an equitable interest." George G. Bogert, *Trusts & Trustees* § 147 at 62 (2d ed. 1979) (emphasis added). In fact, the Supreme Court of Virginia has specifically referred to the declaration of an equitable interest in real estate as *both* a "conveyance" *and* a "transfer." *See Burns v. Equitable Assocs.*, 220 Va. 1020, 1033, 265 S.E.2d 737, 745 (1980) ("Given that Code § 55-2 does not bar the *establishment* of an oral trust in land or in a leasehold for more than five years, we see no reason

[48] It is, of course, a "settled rule of statutory construction that an enactment should be interpreted, if possible, in a manner which gives meaning to every word." *Monument Assocs. v. Arlington County Board*, 242 Va. 145, 149, 408 S.E.2d 889, 891 (1991). *See also, e.g.*, *Gallagher v. Commonwealth*, 205 Va. 666, 668-69, 139 S.E.2d 37, 39 (1964) (refusing to construe terms "drive" and "operate" in a drunken driving statute as synonymous, reasoning that "unless it was intended that [the statute] should cover an activity in addition to driving, the word 'operate' is useless baggage and serves no purpose").

why the statute should operate to bar the oral *transfer* of a beneficiary's interest in a trust. *A settlor's creation of an oral trust for the benefit of another is, like a transfer by a beneficiary, a conveyance of an equitable interest*") (final emphasis added). *See also Cox v. Cox*, 95 Va. 173, 176, 27 S.E. 834, 845 (1897) (referencing conveyance of equitable interest). Quite simply, neither a "conveyance" nor a "transfer" of an interest in property in Virginia requires a deed or the exchange of legal title. *See, e.g., Burns*, 220 Va. at 1033, 265 S.E.2d at 745. Because a trust can be established simply by the settlor's declaration that he holds property as trustee for a third party, there is no need for a formal deed or exchange of legal title. Indeed, "[i]f the settlor chooses to execute a conveyance of the property to himself or herself as trustee, it has no additional legal effect beyond the declaration." *Taliaferro v. Taliaferro*, 921 P.2d 803, 809-10 (Kan. 1996) (citing Bogert, *Trusts & Trustees* § 141 (2d ed. 1979) and *Restatement (Second) of Trusts* § 17 (1957)). *See also Miholland v. Whalen*, 43 A. 43, 43-44 (Md. 1899) ("A declaration of trust is considered in a court of equity as equivalent to an actual transfer of legal interest in a court of law").

D. The Diocese's and the Church's trust interests are valid under Virginia law.

The Congregations argue that even if § 57-7.1 allows trusts to be established for the benefit of hierarchical churches, the Church has failed to establish the existence of valid trusts and seeks instead unilaterally to impose a trust on the properties as a "would-be beneficiary." CANA Brief at 16-19. That argument ignores the local churches' longstanding agreements to abide by the Constitutions and Canons of the Church and the Diocese, misapplies basic Virginia trust law, and ultimately misses the mark.[49]

[49] In arguing that the Church failed to establish the existence of valid trusts, the Congregations cite to provisions of the Uniform Trust Code (the UTC), including Va. Code §§ 55-544.01 and 55-544.05. CANA Brief at 17 n.7. As noted *supra* at 23 n.21, the UTC does not apply to trusts under Title 57. The UTC therefore does not control here. However, the UTC also does not *limit*

(footnote continued)

As noted in the TEC Brief, numerous courts have found the Church and its dioceses to have trust interests in local church properties. In none of those cases were private trust law principles applied (they make no mention of "settlors," for example); rather, those that have applied "neutral principles" have looked for the terms of the agreement between the local and general Church in governing documents and dealing between the parties, as Virginia law does. In our view, the requirements of private trust law do not apply in these cases, including the present case. Nevertheless, as we show below, even if such principles were to apply, a trust in favor of the Church and the Diocese has been established here.

1. Virginia trust law

In addition to the contractual and proprietary interests described up to this point, the facts in this case also support the finding of a trust interest in the local church properties in favor of the Church and the Diocese. In Virginia, an express trust is created whenever there is "an affirmative intention to create it." *Peal v. Luther*, 199 Va. 35, 37, 97 S.E.2d 668, 669 (1957). No magic words are required to create an express trust; indeed, no words are required at all. The intention to create an express trust may be established by "either express language to that effect or circumstances which show with reasonable certainty that a trust was intended to be created." *Woods v. Stull*, 182 Va. 888, 902, 30 S.E.2d 675, 682 (1944). *See also, e.g.*, *Restatement (Second) of Trusts* § 24(2) (1959) ("No particular form of words or conduct is necessary for the manifestation of intention to create a trust"); *Kubota Tractor Corp. v. Strack (In re: Strack)*, 524 F.3d 493, 498-99 (4th Cir. 2008); *Mid-Atlantic Title & Escrow Servs., Inc. v. Tyler (In re: Dameron)*, 155 F.3d 718, 722 (4th Cir. 1998) ("The language of the parties' agreements and the

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trusts created for religious or other charitable purposes; and a restrictive interpretation of Va. Code § 57-7.1 would disadvantage denominations as compared to otherwise applicable law.

circumstances under which the Lenders advanced their funds to Dameron leave no doubt that the parties intended Dameron to act merely as intermediary").

The owner of an interest in property can create a trust simply by declaring that he holds his interest as trustee for another. *See Executive Comm. of Christian Educ. and Ministerial Relief of the Presbyterian Church in the U.S., Inc. v. Shaver*, 146 Va. 73, 80, 135 S.E. 714, 715-16 (1926); *Restatement (Second) of Trusts* § 17(a) (1959); *Restatement (Third) of Trusts* § 10(c) (2003). No consideration is necessary. *See Restatement (Second) of Trusts* § 28 (1959); *Restatement (Third) of Trusts* § 15 (2003). Moreover,

> an express trust may arise even if the settlor never actually intended to create one…. [T]he test is objective, rather than subjective. It is the manifestation of intention that controls, not the settlor's actual intention. An express trust may arise even if the settlor has never called it a trust, and even if the settlor does not understand what a trust is.

1 *Scott and Ascher on Trusts* § 2.1.8 (5th ed. 2006). *See also Restatement (Second) of Trusts* § 23 cmt. a (1959).

Further, "[t]he intention to create a trust may be sufficiently manifested by a settlor without handing an instrument evidencing that intention or otherwise communicating the intention to the trustee, the beneficiary, or any other person." *Restatement (Third) of Trusts* § 13 cmt. c (2003). In Virginia, no written instrument is required at all, because in Virginia, unlike many states, an express trust in real estate may be created and established by parol evidence. *See Peal*, 199 Va. at 37, 97 S.E.2d at 669-70; *Ingles v. Greear*, 181 Va. 838, 840, 27 S.E.2d 222, 223 (1943). *See also Hodges v. Phillips (In re: Randle)*, No. 02-69781, 2003 Bankr. LEXIS 2022, at *8-10 (Bankr. E.D. Va. Dec. 9, 2003) (finding express trust in real estate based on parol evidence). Determining whether an express trust exists under Virginia law thus requires an assessment of intent, as manifested by the settlor's words and conduct. *See, e.g., Holmes Envtl., Inc. v. Suntrust Banks, Inc. (In re: Holmes Envtl.)*, 287 B.R. 363, 377 (Bankr. E.D. Va. 2002).

The Congregations' argument concerning the lack of a trust agreement or references thereto in various filings and dealings with the courts (*see* CANA Brief at 18-20) therefore is essentially irrelevant. So too is their argument that there is no "evidence that the trustees told *plaintiffs* that the trustees were holding for the denomination's benefit" or ever "told the civil courts or notified the public via the land records that they served as trustees for TEC or the Diocese." *Id.* at 19.

A trust can be established with respect to any interest that the settlor holds. One who holds only equitable title to property may establish a trust in favor of a third party to the extent of his beneficial interest. *See* 19 *Michie's Jurisprudence, Trusts and Trustees* § 55 (2009) ("An equitable title is a sufficient title in the eyes of a court of equity to be the subject of a trust, sufficient to enable a court of equity to declare the right as to it; there can be a trust under a legal or an equitable estate in anything which a court of equity recognizes as a subject of property")[50]; *Restatement (Second) of Trusts* § 83 cmt. a (1959) ("If the beneficiary of a trust can transfer his interest … he can create a trust of his interest, either by transferring it in trust or by declaring himself trustee of it") (citation omitted); *Restatement (Third) of Trusts* §§ 51-53 (2003) ("a beneficiary of a trust can transfer his or her beneficial interest during life to the same extent as a similar legal interest" without consideration or any writing). As stated in a leading treatise on the law of trusts,

> it is clear that a trust beneficiary who is adult and competent can transfer the beneficial interest unless the terms of the trust or applicable law provides otherwise. A beneficiary can transfer an interest inter vivos or by will, in whole or in part, absolutely, as security, or in trust, to a third person, another beneficiary, or the trustee. A beneficiary can make such a transfer whether the interest is a present or a future interest, vested or contingent.

3 *Scott and Ascher on Trusts* § 14.1 (5th ed. 2006). "Courts of equity have long treated

[50] Citing, *inter alia*, *Bickers v. Shenandoah Valley Nat'l Bank*, 197 Va. 145, 88 S.E.2d 889 (1955) (life insurance policies may be subjects of trust).

equitable interests as interests in property, rather than as mere rights of action." *Id*.

Without having acknowledged this legal backdrop, the Congregations argue that the Church is seeking to unilaterally impose a trust interest from its position as "would-be beneficiary." CANA Brief at 16-18. That argument is flawed in at least two major respects. First, it incorrectly presupposes that the conveyances by the original grantors to the trustees were made for the benefit of the congregations, entirely without regard to their denominational affiliation, rather than for the benefit of TEC and the Diocese or for the benefit of *Episcopal* churches. Second, it ignores the fact that to the extent the local churches held equitable interests in the properties, they repeatedly declared, both by words and by conduct, that they held those properties for the mission of TEC and the Diocese.

2. The original grantors conveyed the properties to be held for the benefit of the Episcopal Church and the Diocese or local units thereof.

As explained in the Diocese Brief, most of the deeds are to trustees for "Episcopal" churches and should be read to create a trust that is either for TEC and the Diocese directly or for a local Episcopal church in the Diocese. Except for the 1746 TFC deed to an entity that was a unit of local government and that no longer exists (the "Truro Parish Vestry"), all of the deeds were for established Episcopal churches or for Episcopal churches in the process of formation within the Diocese. The grantors' intent to create express trusts for the mission of the Episcopal Church (or churches) was manifested by the deeds themselves and the circumstances under which those conveyances were made. Even the nine deeds that do not specifically use the word "Episcopal" to describe the beneficiaries were given to Episcopal churches and manifest an intent no different than the other deeds.

There is *no* evidence that the original grantors intended that the properties be held in trust for the benefit of congregations that were independent or part of another denomination, and the

deeds should be construed to the contrary. As noted in the Diocese Brief at 27, a deed to the trustees of "the Episcopal Church, known and designated as the 'Falls Church' …," for example, or to trustees of "St. Stephen's Parish of the Protestant Episcopal Church, Northumberland County, Virginia, for the use and benefit of St. Stephen's Protestant Episcopal Church of Heathsville, Virginia," cannot be construed as a conveyance to trustees for a group of persons that have severed all ties with the Episcopal Church. "[A] reasonable interpretation of these deeds leads inescapably to the conclusion that the trustees cannot hold title to the subject property for persons or groups who are withdrawn from and not under the authority of The Episcopal Church." *Buhrman*, 5 Va. Cir. at 503.

The Dennis Canon and Diocese Canon 15.1 clarify who holds the ultimate beneficial interest; but the two pre-Dennis Canon Episcopal property disputes in Virginia – both won by the diocese – show that the Congregations' assumption that they were the beneficial owners prior to 1979, without regard to their denominational affiliation, lacks merit. *See id*.; *Wyckoff* (PX-CTREC-021).

3. Alternatively, the Congregations conveyed their beneficial interests in the properties by manifesting their intent to hold those interests in trust for the Church and the Diocese, as provided by their rules.

The Congregations' argument that the Church is seeking unilaterally to impose an express trust on the properties as a "would-be beneficiary" is meritless. If there were any doubt that the properties were held for the Diocese or a unit thereof as a result of the original deeds, the Diocese's position as equitable owner was firmly established by the Congregations' subsequent declarations – manifested by words and conduct – that the properties were indeed held for the benefit and the mission of the Church.

> [The owner of an interest in] property may by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a

> trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of the beneficial ownership, and declare that he will hold it from that time forward in trust for the other person.

Shaver, 146 Va. at 80, 135 S.E. at 715-16. Here, the Congregations did that by complying with and assenting to TEC's and the Diocese's Constitutions and Canons, which limited their use and control of property and explicitly established an express trust on such property in favor of the Church and the Diocese; and by participating in Church and Diocesan governance.

The Supreme Court of Virginia has held in this case that "[e]ach congregation within a diocese [of the Episcopal Church] … is bound by the national and diocesan constitutions and canons." *Truro Church*, 280 Va. at 15, 694 S.E.2d at 559. *See also*, *e.g.*, *Reid v. Gholson*, 229 Va. at 188-89, 327 S.E.2d at 113 ("One who becomes a member of [a hierarchical] church, by subscribing to its discipline and beliefs, accepts its internal rules"); *Brooke*, 54 Va. at 320 ("To constitute a member of any church, two points at least are essential … a profession of its faith and a submission to its government").

The rules of a hierarchical church, like the rules of a secular voluntary association, are contractual in nature and binding on its members. *See, e.g.*, *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958) ("The constitution and by-laws adopted by a voluntary association constitutes a contract between the members"); *Bradley v. Wilson*, 138 Va. 605, 612, 123 S.E. 273, 275 (1924) (same); 3A *Michie's Jurisprudence, Beneficial and Benevolent Associations* § 6 at 172-73 (2010) (citing Virginia cases) ("The constitution and bylaws of fraternal societies, to which the members subscribe, by which and all changes of which they agree to be bound, are contracts, and will be enforced by the courts like all other contracts if not against public policy. It is the policy of the law and the aim of the courts to substantially uphold the rules and regulations prescribed by the constitution and bylaws of benevolent societies for the purpose of enabling them to attain the objects of which they are

organized"); 2A *Michie's Jurisprudence, Associations and Clubs* § 2 at 415 (2010) (citing *Bradley*, *Gottlieb*, and other Virginia cases) ("The articles of agreement adopted by a voluntary association, whether called its constitution, bylaws, rules and regulations or any other name," not only "constitute a contract between the members of such association which the courts will enforce, … but also constitute the contract between a member or members and other members").

By making the conscious decision to form as churches in the Diocese and to join the Episcopal Church, each of the churches at issue contractually bound itself to abide by the Church's and the Diocese's Constitutions and Canons. In addition to the Virginia authorities cited above, *see, e.g.*, *Trinity-St. Michael's*, 620 A.2d at 1284-86 ("the polity of the church represents the agreement of church members in a particular system of government, including the structural allocation of authority"), 1288 ("The canons of the Diocese … are indicative of the bilateral and consensual relationship between the Diocese and a parish"), 1292 (the congregation and its predecessors "had a relationship with the Diocese and PECUSA that unqualifiedly and unambiguously manifests the acceptance of their role in, and relationship to, the Diocese and PECUSA within its hierarchical polity"); *Episcopal Church Cases*, 198 P.3d at 81-82 (parish "agreed from the beginning of its existence to be part of a greater denominational church and to be bound by that greater church's governing instruments"); *Daniel v. Wray*, 580 S.E.2d at 718 (property canons "clearly established a form of governance impliedly assented to" by the congregation and precluded the seceding vestry from taking control of the property at issue).

As discussed in detail in the Diocese Brief, the evidence also shows numerous other manifestations of intent to conform to the discipline and rules of the Church and the Diocese, including the Vestry and clergy oaths, local governing documents, and compliance with the canonical requirements for Diocesan permission for certain property actions. Ongoing

participation in the representative governance of the Diocese and the Church, especially without any protest or attempt to change the property canons, also is an important manifestation of intent.

By entering into a contractual relationship binding the churches to abide by the Church's and the Diocese's Constitutions and Canons, the Congregations necessarily manifested an intention to do what the Constitutions and Canons required. Thus, the Congregations' manifested intention to abide by the Constitutions and Canons necessarily means that they manifested an intention to hold property in trust for the benefit of the Church. As discussed in detail in our opening briefs, those Canons have strictly governed use and disposition of property for many years, and they ultimately made explicit that "[a]ll real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for [the Episcopal Church] and the Diocese thereof in which such Parish, Mission or Congregation is located." PX-COM-001-045 (Canon I.7.4); *see also* PX-COM-003-027 (Diocese Canon 15.1).[51]

The Congregations argue, however, that local control of local church checkbooks is somehow inconsistent with a denominational trust. CANA Brief at 102, 104, 114. It is not. In any denomination, general and local churches work both separately and jointly to further the mission of the Church; and the entire purpose of the trust described by the Dennis Canon and Diocesan Canon 15.1 is to further the mission of the Church.

The instant case, in short, is no different from the numerous other church property cases around the country in which courts have found that Episcopal churches hold property in trust for the mission and benefit of the Church. *See* TEC Brief at 37-46.

[51] As discussed above, evidence and cases show that the Dennis Canon was merely a codification, not a change, of long established principles in the Church.

E. Court petitions and orders appointing trustees

The Congregations say that "the court petitions and orders appointing the trustees …. do not name any beneficiaries except the Congregations." CANA Brief at 18. They cite 15 exhibits in support of that statement, several of which comprise multiple documents. *Id*. at 18 n.9. In all but three of those documents,[52] the *only* indication of the identity of the trust beneficiary is *not* that it is the congregation but that it is the *church* – and with only a few exceptions, it is explicitly an *Episcopal* church.[53] Some of the cited documents provide no indication of the beneficiary's identity at all. *E.g.*, DX-FALLS-031, an Order entered on petition of "The Falls Church (Episcopal)," appointing William W. Goodrich, Jr. "as an additional Church Trustee" and "a Trustee of the real property of the Falls Church (Episcopal)." (So much for the Congregations' attack on Mr. Goodrich, at the trial, for not "tell[ing] the judge who approved [his] appointment as a trustee that [he was] really a trustee for three different entities" (Tr. 4312; *see also* CANA Brief at 19), which he was never required to do.)

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[52] The three exceptions are (1) DSTS-041-482, a petition for appointment of trustees and encumbrance of real property which represents that three named individuals "are trustees of the religious Congregation of St. Stephens Protestant Episcopal Church … holding the legal title to the church real estate" and that the property at issue "is held for the use, benefit, purposes and objects of the said religious Congregation as a rectory"; (2) TRU203.001, a petition by "the vestry of Truro Episcopal Church … to appoint Trustees to hold legal title to the congregation's real property"; and (3) TRU204.001, an essentially identical petition for appointment of substitute Trustees. (DSTS-041-462 and DSTS-041-469, which recite that certain lands are held by trustees "for the use and benefit of said congregation," also are included within a series of "Petitions and Orders" cited in the CANA Brief; but those documents are not court documents, merely a pair of congregational resolutions.) The two Truro petitions, like several others cited in the CANA Brief, refer specifically to the Constitutions and Canons of the Episcopal Church and the Diocese as providing authority for the requested action.

[53] The only exceptions are DCOE-523-001 - 006, a petition and Order submitted and entered in April 2004, after Epiphany had begun to distance itself from the Diocese and the Church; and DCOE-523-008 - 009, Orders entered in 1994 and 1998. *Cf*. DCOE-523-007 (a 1987 Order appointing "Trustees of The Church of the Epiphany (Episcopal)," submitted as an exhibit to the 2004 petition); DCOE-470-2435 (1988 Order permitting encumbrance of church land, entered on petition of "the Trustees of the Church of the Epiphany (Episcopal)").

In all events, court petitions and orders appointing trustees – unlike deeds – are not mentioned in *Green* as a factor considered in the application of neutral principles. Nor are such petitions and orders encompassed within the dealings between the parties, absent any evidence that the Diocese or the Church had any role in those transactions (and there is none). And they are not "trust agreement[s]," contrary to the clear implication of the CANA Brief at 18; nor is there any basis for the Congregations' statement that any such agreements "would be reflected in" petitions or orders, *id.*

Furthermore, the Supreme Court of Virginia has explained that petitions and orders appointing trustees merely convey legal title; they do not affect or resolve underlying rights in the property. The Court said this in a case that the Congregations otherwise trumpet, *Davis v. Mayo*. *See* 82 Va. at 103-04:

> it is equally clear that if Mayo and his associates were not authorized to act for the beneficiaries in the deed of January 12th, 1857, no title to the property conveyed by that deed was acquired by the order of the circuit court, made on the 18th of February, 1884. The circuit court undoubtedly had jurisdiction under the statute, when properly invoked, to change the trustees, but the effect of its order could extend no further than to confer upon the new trustees the legal title to such property only as those whom they represented were entitled to.

Indeed, *Davis* explains that this obvious point previously had been applied in a church context:

> As was said by this court in *Allen v. Paul*, [65 Va. (24 Gratt.) 332 (1874)], in respect to the appointment of trustees for certain church property, "the order of the circuit court appointing the defendants trustees was legal, and it was binding so far as it constituted them trustees. Nor could the regularity or validity of said order, or the appointment of the defendants as trustees thereunder, be inquired of in this suit; but the said order does not vest in them the legal title to the property in controversy for the time being, or for a single instant, unless the congregation which they represent are the owners of it. Only the legal title to the land *owned* by the congregation is vested in them by the terms of the order. *The question, whether the property is owned by the said congregation is not touched by the order*; consequently, it is not true that by reason of said order they cannot be disposed of as the property in controversy by this proceeding."

Id. at 104 (emphasis added). In sum, petitions and orders do not and cannot alter the underlying

ownership and rights in the property. The Congregations could not have overlooked the point when they read *Davis v. Mayo*, yet they omit it from their brief and argue the contrary.

F. Trusts and the Constitution

Finally, there is a strong constitutional component to this issue. TEC enacted the Dennis Canon in response to an invitation extended in *Jones v. Wolf*.[54] The Supreme Court held in *Jones* that civil courts may resolve church property disputes on the basis of "neutral principles of law." 443 U.S. at 604. Four dissenting Justices argued that "whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself,'" to protect constitutionally-guaranteed free exercise rights. *Id*. at 604-05 (quoting the dissent, *id*. at 614); *see id*. at 605-06 (quoting the dissent, *id*. at 618).[55] The Court responded to that argument as follows:

> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. *At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property*. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church*. The burden involved in taking such steps will be minimal. And *the civil courts will be bound to give effect to the result* indicated by the parties, provided it is embodied in some legally cognizable form.

Id. at 606 (emphases added). *See also id*. at 607-08. A church's ability to "ensure … that the faction loyal to the hierarchical church will retain the church property" (*id*. at 606), by amending

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[54] *See, e.g., Episcopal Diocese of Massachusetts v. DeVine*, 797 N.E.2d at 923 n.20; *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d at 924.

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

its governing documents, thus was essential to the Court's rejection of the dissenters' argument that the neutral principles rule would violate the First Amendment. To hold that church property disputes will be governed by neutral principles, on the one hand (*see Norfolk Presbytery*, 214 Va. at 504-05, 201 S.E.2d at 756-57), but that Virginia law does not recognize trusts stated in the Church's laws as specified in *Jones*, on the other, would be to defy the Court's holding that "the civil courts will be bound to give effect" to such provisions and to eviscerate the basis for the holding that the neutral principles approach does not "'inhibit' the free exercise of religion." Section 57-7.1 should be construed to avoid such constitutional infirmities, as noted *supra* at 69-70. But if it cannot be so construed, then the First Amendment nevertheless mandates the same result, whether authorized by state statutes or not.[56]

III. Alternatively, the continuing congregations and the Diocesan Executive Board are the legitimate representatives of local churches which hold beneficial title.

A. The Congregations' "standing" argument has no merit.

The Congregations argue that if the Diocese and the Church do not prevail on their contractual, proprietary or trust claims,[57] then they lack standing to contest the Congregations' continued occupancy and use of the properties at issue. *See* CANA Brief at 5-6, 141-42. They seek by that argument to evade litigation of the "identity" issue addressed in the Diocese Brief at 42-47 and the TEC Brief at 47-59. *See* CANA Brief at 5, 141. For a series of reasons, that argument must be rejected.

First, members of the continuing congregation of St. Stephen's Episcopal Church are

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[56] *See also Episcopal Church Cases*, 198 P.3d at 82: "Respect for the First Amendment free exercise rights of persons to enter into a religious association of their choice, as delineated in *Jones v. Wolf* …, requires civil courts to give effect to the provisions and agreements of that religious association."

[57] The CANA Brief actually refers only to a "proprietary interest." *Id.* at 5, 141.

plaintiffs in this action,[58] and the Congregations do not and cannot contest their standing to sue with respect to the property of that church. *See* Va. Code § 57-13.

Second, the Diocesan Executive Board – which is part of the government of the Diocese, not a separate entity – is the legitimate representative of Truro Episcopal Church, Church of the Apostles (Episcopal), and St. Paul's Episcopal Church, as discussed in the Diocese Brief at 46-47. And leaving aside the ultimate resolution of the "identity" issue, the Executive Board has the authority under the polity of TEC and the Diocese to see that property held or used by local churches in the Diocese continues to be used for the mission and ministry of the Church – authority that it specifically exercised to authorize the present litigation. *See* PX-COM-003-028 (Canon 15.3); PX-TRU-510; PX-FALLS-788; PX-APOST-477; PX-EPIPH-283; PX-STMARG-1128; PX-STPAUL-764; PX-SSH-485. The Diocese thus has standing to sue with respect to the properties of the other six churches

Third, it is beyond dispute that the First Amendment guarantees hierarchical churches the right to determine the identity of their leaders and members. *E.g.*, *Cha v. Korean Presbyterian Church*, 262 Va. 604, 610-13, 553 S.E.2d 511, 513-15 (2001). The Congregations' suggestion that the general Church lacks standing to enforce this fundamental right is absurd.

Finally, the Congregations' argument is difficult to take seriously in light of the Supreme Court's decision in *Philip Morris USA Inc. v. Chesapeake Bay Foundation, Inc.*, 273 Va. 564, 643 S.E.2d 221 (2007). The Court held in that case that the Bay Foundation had "representational standing" to vindicate its (unnamed) members' interests in the water quality of

[58] The St. Stephen's Episcopal Church plaintiffs are Sandra B. Kirkpatrick, William S. Kirby, Dawn B. Mahaffey, Nancy E. Gates, George C. Freeman, Jr., Anthony Rabalais, Margaret Horsmon, David G. Kilpatrick, Robert Reamy, Susan C. Stubbs, and W. Leslie Kilduff. (Mr. Kilduff is now deceased.)

the James River, applying federal Article III standing requirements as articulated in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977):

> The Court explained that an organization will have representational standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Philip Morris, 273 Va. at 577, 643 S.E.2d at 226 (quoting *Hunt*). Those requirements were satisfied in *Philip Morris*, and they are satisfied here as well. There can be no doubt that the continuing Episcopal churches of St. Margaret's, St. Stephen's, Epiphany, and Falls Church would be entitled "to sue in their own right," *id.*, and the Congregations do not suggest the contrary. It also cannot be doubted that restoration of those continuing Episcopal churches to the properties that they held and occupied, before congregational majorities voted to abscond with those properties to another denomination, is "germane to the ... purpose[s]" of the Diocese and the Church. *Cf. id*. at 580, 643 S.E.2d at 228 (the Bay Foundation "is an organization established to protect the waterways of the Chesapeake Bay, of which the James River is one. An action to protect the James River from wastewater discharge that may be harmful to the river and bay is within that organizational purpose"). And there is no reason why either the claims asserted or the relief requested requires the participation of those churches.

We recognize, of course, that the *Philip Morris* Court was careful to emphasize that its holding was "limited to instances where representational standing is provided for by a statute requiring Article III standing to seek judicial review of an action by a state agency under delegatory authority from the federal government." *Id*. It simply was "not called upon to consider under the facts of th[at] case whether Virginia would recognize representational standing under any circumstances other than those presented by the facts of th[at] case." *Id*. But there should be little or no doubt that the principles governing the *Philip Morris* decision would

apply in other contexts as well. Application of Article III standards was compelled by statute in that case, but our Supreme Court has employed Article III standards to resolve standing questions in numerous civil actions apart from statute. *See, e.g.*, *Wilkins v. West*, 264 Va. 447, 458-61, 571 S.E.2d 100, 106-07 (2002); *Goldman v. Landsidle*, 262 Va. 364, 372-74, 552 S.E.2d 67, 71-73 (2001); *Cupp v. Board of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984).

In addition, the statute that governed the standing issue in *Philip Morris* set out *only* the requirements for *individual* standing, as stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See Philip Morris*, 273 Va. at 577, 643 S.E.2d at 226 (citing *Lujan* and Va. Code § 62.1-44.29). The Court nevertheless adopted federal *representational* standing standards, as discussed above, reasoning that the General Assembly is presumed to act "with full knowledge of the law in the area in which it dealt"; that the General Assembly "intended to expand the availability of judicial review of permitting decisions to be coextensive with the federal requirements for judicial review of 'a case or controversy pursuant to Article III of the United States Constitution'" (quoting statute); and that "[r]epresentational standing essentially allows an organization to bring a suit on behalf of its members and was a well-established principle in federal law" at the time of a 1996 amendment which added Article III language to the statute. *Id.* at 576, 643 S.E.2d at 225-26. Representational standing was not mandated by the statute, in other words; but the Court adopted that principle nevertheless, because it construed the statute as incorporating Article III standards generally, beyond its precise terms – just as the Court itself has done in a variety of civil contexts. Standing should not be a serious issue in this case.

B. The continuing congregations and the Diocesan Executive Board are the legitimate representatives of local churches which hold beneficial title.

On the merits, the Congregations' "identity" arguments depend on the inaccurate assumptions (1) that Virginia law resolves church property disputes based on deeds alone and

(2) that they (and *not* the four remaining Episcopal congregations or the Diocesan Executive Board as representative of the three inactive Episcopal churches) are the legal and beneficial owners. *See* CANA Brief at 6, 143-46. All of those assumptions are addressed and rebutted in the Diocese Brief and elsewhere in this brief. Whatever the law may have been in the 1880s and earlier (*see id.* at 6, 143-44), church property disputes in Virginia are not decided on the basis of deeds alone; but even if the Congregations' "deeds alone" assumption were accurate, they could not escape the fact that all of the deeds in question (most of them explicitly) were to trustees of Episcopal churches and that the Congregations no longer belong to Episcopal churches.

In what appears to be an attempt to lend some weight to their foundational assumptions (and perhaps incidentally to further the false premise that they represent congregational churches as well), the Congregations argue that they "had a 'separate and distinct' existence from [TEC and the Diocese] under Virginia law." CANA Brief at 145. But the very authority that they quote for that proposition merely reflects TFC's admission into the Diocese "as a 'separate and distinct Church *from the Parish Church of Fairfax Parish*.'" *Id.* (quoting PX-COM-072-007) (emphasis added). This Court's December 19, 2008, letter opinion, also cited in the CANA Brief, says the same. *See In re: Multi-Circuit Episcopal Church Prop. Litigation*, Letter Opinion (Dec. 19, 2008) at 15. That obviously does *not* say that TFC was admitted *into* the Diocese as an institution "separate and distinct" *from* the Diocese, and the entire notion is fundamentally at odds with Episcopal polity and with the very nature of a hierarchical church.[59]

Incorporation of the CANA churches prior to disaffiliation, *see* CANA Brief at 146-48, did not alter either TEC's, the Diocese's, or the local Episcopal churches' interests in the

[59] As noted elsewhere, the Congregations' argument that a denomination could not hold property in the 19th century, CANA Brief at 146, is inconsistent with their argument that the 1875 deed in *Green v. Lewis* "granted the denomination proprietary rights," *id*. at 23.

properties. *See* Diocese Brief at 47-48; TEC Brief at 55-58. Incorporation obviously did not "result in the creation of two congregations," CANA Brief at 146; but the separation of majorities of the seven congregations (regardless of incorporation) did result in the creation in each case of a second, non-Episcopal, "Anglican" congregation existing in parallel to and claiming the rights of the continuing Episcopal congregations which remained.

As a final "identity" argument (although the connection is far from clear), the Congregations argue that the Diocese did not "acquir[e] ownership of the CANA Congregations' properties by declaring the properties 'abandoned' under [its] canons." CANA Brief at 150. They miss the point. The Executive Board's abandonment resolutions did not "create ownership rights," *id.* (caption). They did, however, serve to *enforce* proprietary and contractual rights that the Diocese and the Church already held, at least as an ecclesiastical matter. The Congregations' refusal to accept and abide by the Diocese's rules and ecclesiastical determinations – as they had long ago and many times agreed, pledged, and promised to do – forced the Diocese to seek a civil remedy to declare its rights and enforce its rules and ecclesiastical decisions.

The Congregations can no longer deny that they are (or were) "bound by the national and diocesan constitutions and canons." *Truro Church*, 280 Va. at 15, 694 S.E.2d at 559; *see* pages 2-3, *supra*. The Diocesan Executive Board's authority to declare abandonment of any local church property which "has ceased to be occupied or used by" "any congregation of the Episcopal Church in the Diocese of Virginia" is conferred by Diocesan Canon 15.3 (PX-COM-003-028); and the Executive Board's authority over inactive churches is conferred by Diocesan Canon 9.3 (PX-COM-003-019). Those Canons are binding on these Congregations. They also are part of the contractual relationship between the Diocese and its churches, to which these churches long assented and agreed. *See also Buhrman*, 5 Va. Cir. at 507 ("The Executive Board,

by a formal resolution, has determined that the St. Andrew's property has been abandoned within the context of church law, and it is most doubtful if that determination is subject to review by this court").[60]

IV. The Congregations' constitutional arguments have no merit.

The Congregations' First Amendment, Contracts Clause, and Equal Protection arguments (CANA Brief at 4-5, 123-40) are essentially their previous arguments dressed up in constitutional clothing, adding little to what came before. For the most part, they simply rehash the same tired claims that TEC and the Diocese have unilaterally declared a trust in others' properties, that we seek to enforce a contract that lacks mutuality or consideration, and that we are attempting to impose a penalty or a forfeiture. If those arguments had merit, they would not require a constitutional foundation. They have no merit, however, as discussed above, and they gain none from reassertion in constitutional coloration. The Congregations' "due process" argument (CANA Brief at 140-41) is even flimsier, as we discuss below.

"Plaintiffs' theory, if adopted," would violate a multitude of constitutional commands, according to the Congregations. CANA Brief at 125; *see id.* at 123-41. Their quarrel, however, is not with "[p]laintifs' theory." It is first with the decisions of our Supreme Court (particularly *Green*) and the enactments of the General Assembly (including but not limited to Va. Code § 57-7.1).[61] But ultimately, this Court's decision must be based on the rules and relationships

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[60] It is a huge stretch to conclude, as the Congregations do, that Va. Code § 57-15 in effect occupies the entire field and preempts any church legislation governing matters of abandonment that are not governed by that statute. *See* CANA Brief at 150-53. (We agree that § 57-15's abandonment provisions do not apply, because there has been no petition for leave to sell any of the properties at issue.)

[61] Our reading of § 57-7.1 remains unaddressed by appellate authority, to be sure; but to adopt the Congregations' arguments would be to hold squarely that *Green* (along with dozens of other cases) was wrongly decided.

established by the parties themselves over the years, as was the case in *Buhrman*, *Wyckoff*, and *Green*, and so the Congregations' constitutional arguments ultimately amount to a suggestion that this Court should find it unconstitutional for a court to apply the words and actions of the parties themselves to resolve a dispute that both the Virginia and United States Supreme Courts have held can be so resolved.

The Congregations hypothesize an "automobile owners' association" rule declaring that members' cars are held in trust for the association, and they cite *Gillman*, as proving that such a rule would not be valid. CANA Brief at 124. The hypothetical is far-fetched, to be sure, but the Congregations' conclusion does not necessarily follow. If the suggested associational rule were enacted through democratic processes, as the Dennis Canon and Diocesan Canon 15.1 were, and if its members assented to the enactment by joining or remaining and continuing to participate in the association, then a court would enforce it. *See, e.g.*, *Bradley v. Wilson*, 138 Va. at 612, 123 S.E. at 275 ("The constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts") (citation omitted); *Amalgamated Clothing Workers of America v. Kiser*, 174 Va. 229, 236, 6 S.E.2d 562, 564 (1939) (association's constitution "not only constitutes the contract between a member and the association but it also constitutes the contract between a member or members and other members"). *Cf. id.*, 6 S.E.2d at 565 ("a person who applies for membership in an association of this kind is just as much bound by the constitution and by-laws of the association as a full member") (citation omitted).[62] And the *Gillman*

[62] *Bradley*, *Amalgamated Clothing Workers*, and any number of other voluntary association cases which could be cited, like *Green* and other church property cases, do not inquire after the existence of "consideration," "mutuality," or other conventional contract law concepts. Those requirements are supplied implicitly in secular voluntary associations by the mutual engagements and relationships of the parties, just as they are in hierarchical churches.

reference proves nothing. As discussed *supra* at 9-10, the *Gillman* decision turned on the limitations of the Condominium Act and the fact that the condominium association in that case was attempting to exercise a "governmental power" by fining a member for violating associational rules. Churches are not subject to the limitations of the Condominium Act, and enactment of canons addressing property matters is not the imposition of a fine.[63]

Green v. Lewis also answers the Congregations' argument that the Diocese's approach requires evaluation of "'religious practices' such as bishops' performance of confirmations, and … the types of services the congregations perform." CANA Brief at 130-31. *See Green*, 221 Va. at 553, 555, 272 S.E.2d at 184-85, 186 (citing conduct of baptisms, marriages, funerals, revival services, and "religious services and ceremonies … by the pastors" following the general church's Discipline). The religious aspects of such services are nowhere in issue; it is the relational aspects, the dealings between the parties, which are relevant under *Green*. In short, there is no call for "'analysis or examination of ecclesiastical polity or doctrine.'" CANA Brief at 131, quoting *Jones v. Wolf*, 443 U.S. at 605. Nor does the inclusion of references to Holy Scriptures or other religious concepts in clergy and vestry oaths (CANA Brief at 131-32) alter the analysis. TEC and the Diocese do not in any way rely on religious expressions in those declarations; they rely on the affirmations of fidelity to the Church and its discipline and on the vestries' promises to faithfully execute their offices. The Court may, and it should, examine those commitments "in purely secular terms, and not … rely on religious precepts." *Jones v. Wolf*, 443 U.S. at 604. So too with the concept of "discipline," which has a well-defined

[63] There is a certain irony in the Congregations' argument that enforcement of modern Virginia law, as embodied in *Green* and § 57-7.1, grants "preferential treatment" to religious denominations. CANA Brief at 125. In fact, *Green* and § 57-7.1 go a long way toward granting denominational churches an *equal* status under the law that had long been denied them, as compared both to local churches and to other hierarchical institutions.

meaning that includes the Constitution and Canons of the Church (*see, e.g.*, PX-COM-001-164) – a meaning that can be applied without encroachment into religious precincts. *Cf. Green*, 221 Va. at 555, 555-56, 272 S.E.2d at 186 (religious services and ceremonies followed general church's Discipline, and members of local church "united themselves to a hierarchical church … with the understanding and implied consent that they and their church would be governed by and would adhere to the Discipline of the general church").

The Congregations' claim that "plaintiffs' approach" would "reduce our rich and varied world of religious denominations to two categories" – "independent" and hierarchical (CANA Brief at 133) – again asks this Court to disregard or rewrite settled law. Virginia courts did not create the two categories of churches – congregational and hierarchical – of course; but they have long recognized that the organizational and governmental structures adopted by churches themselves can be conveniently analyzed by those descriptions. *See, e.g.*, *Reid v. Gholson*, 229 Va. at 188-89 & n.13, 327 S.E.2d at 112-14 & n.12 (1985); *Green*, 221 Va. at 553, 272 S.E.2d at 184; *Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26-27 (1967). The General Assembly did likewise, in enacting separate subsections A and B of Code § 57-9. The Congregations also are asking this Court to ignore the Supreme Court's decision in this very case, which began by explaining that this is "a dispute concerning church property between a hierarchical church and one of its dioceses in Virginia and a number of the diocese's constituent congregations." *Truro Church*, 280 Va. at 12, 694 S.E.2d at 557; *see also id*. at 13, 694 S.E.2d at 558. Nor do property rights turn entirely on the distinction, as the Congregations imply. But if freedom of religion means anything at all, it surely means freedom to choose to join a hierarchical church, to "subscrib[e] to its discipline and beliefs," and thereby to "accep[t]" – and to be bound and

governed by – "its internal rules." *Reid*, 229 Va. at 188-89, 327 S.E.2d at 113. *See also Episcopal Church Cases*, 198 P.3d at 82, quoted in n.56, *supra*.

The Congregations' Contract Clause and "due process" arguments (CANA Brief at 5, 135-41) assume the conclusion, as discussed *supra* at 8. They also assume that the "trust" interests described in the Dennis Canon and Diocesan Canon 15.1 were new in 1979 and 1983, respectively; but the evidence and cases from Virginia and other states rebut that assumption, as discussed *supra* at 36-37. And finally, those arguments assume that the Diocese's and the Church's cases rise or fall solely on their trust claims, ignoring the fact that the Supreme Court in *Green* recognized a general church's contractual and proprietary interests in property conveyed to a church in 1875. There is nothing magical, in other words, about the years 1979, 1983, or 1993, as the Congregations' arguments erroneously assume (*see* CANA Brief at 135, 137, 138, 140). The Church's and the Diocese's contractual and proprietary interests arose long before that.

The Congregations' "due process" argument relies on a case (*Connecticut v. Doehr*, 501 U.S. 1 (1991)) which addressed the constitutional validity of an *ex parte* pre-judgment attachment. Page 15 of the Court's Opinion in that case – the very page cited in the CANA Brief at 141 – emphasized the absence of "a predeprivation hearing … in th[at] case" in holding the attachment procedure unconstitutional "as applied," 501 U.S. at 4. The Congregations cannot credibly suggest that they have been denied a hearing here. They have enjoyed the full panoply of procedural protections that Virginia's judicial system provides.

V. The members of the Vestry of The Falls Church (Episcopal) are the rightful electors of the Board of Directors of the Falls Church Endowment Fund.

The Falls Church Endowment Fund was incorporated by members of an Episcopal Church – The Falls Church (Episcopal) – and with the approval of the Vestry of that church.

DX-FALLS-367; DX-FALLS-369-001.[64] The Articles of Incorporation provide unambiguously that "Class A members" of the corporation – those with authority to elect the corporation's directors – "shall be those individuals who are members of the vestry of The Falls Church, Episcopal Church." DX-FALLS-367-002. And the corporate By-Laws limit Board membership to "members of The Falls Church, Protestant Episcopal Church, Falls Church, Virginia." DX-FALLS-368-001. That express limitation on eligibility for Board membership is confirmed in Vestry minutes cited in TFC's Endowment Fund Brief: "Mrs. Campbell asked whether directors must be members of The Falls Church (Episcopal). Mr. Stephenson said this is provided in the by-laws." DX-FALLS-369-001.

TFC tries to avoid the force of those very explicit terms in the corporate documents by postulating a choice between describing those provisions as a "*restriction*" or as a "*description.*" TFC's Endowment Fund Brief at 6. That is a false dichotomy. The "Episcopal" limitations in the corporate documents are properly understood as establishing the *identity* of the church whose Vestry members are corporate Board electors and whose parishioners are eligible for service on the Board.

Perhaps implicitly recognizing that point, TFC attempts to portray the continuing Episcopal entity – The Falls Church (Episcopal) – as "a new legal entity that did not exist prior to late January 2007" and a "new … congregation" that "did not exist in 1976," which "chooses to call itself 'Falls Church Episcopal.'" TFC's Endowment Fund Brief at 5, 8, 9, 10. That simply is not true. But in any event it implicates a purely ecclesiastical issue, which a civil court

[64] DX-FALLS-369 appears to be mis-described, in TFC's exhibit list, as "Minutes of November 10, 1976 Vestry Meeting." The first page of that exhibit is dated November 10, 1976, as stated; but the context and lack of continuity from page to page are strong indications that pages 2 and 3 of that exhibit are excerpts from minutes of later meetings.

may not adjudicate. *See* Diocese Brief at 42-46, 80. The Court must accept the findings and rulings of the ecclesiastical authorities, who have determined that The Falls Church (Episcopal) is *not* a "new … entity" but in fact the *continuation* of the Episcopal Church that has existed in Falls Church since at least 1873. *See* PX-COM-247A-075 (2007 Annual Council Journal): "There are at this council delegates of three congregations where majorities who voted chose to depart. These delegates were elected by vestries reconstituted in parish meetings in the last three weeks at St. Stephen's, Heathsville; St. Margaret's, Woodbridge; and The Falls Church."[65] Incorporation (*see* TFC's Endowment Fund Brief at 9 n.8) does not alter the fact that only church authorities may determine whether a group is a member or component of the church.

TFC avers that "the only testimony at trial about the use of these terms [in the corporate documents] was by Mr. Henneberg." TFC's Endowment Fund Brief at 7. That statement appears to have been carefully crafted to avoid literal inaccuracy, but it is misleading nevertheless. Harrison Hutson, an incorporator and initial Director of the Endowment Fund (Tr. 4253-54; DX-FALLS-367-001; DX-FALLS-369-001), testified as follows:

> Q. And am I correct that under the articles and the bylaws of The Falls Church endowment fund the vestry of the Fall Church's Episcopal [*sic*] elects the director[s] of The Falls Church endowment fund?
>
> A. That's correct.
>
> Q. In all the years, well, at the time that you helped found The Falls Church endowment fund, did it ever occur to you that directors of The Falls Church Endowment Fund would be appointed by non Episcopalians?
>
> A. No.

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[65] The citations to PX-COM-247A-074 at pages 42, 47, and 80 of the Diocese Brief should have included page -075. We regret the error.

TFC's repeated references to The Falls Church (Episcopal) as the "Fetsch congregation" are disrespectful, demeaning, and succeed only in reflecting discredit on the drafters. The church is in fact an active, full-fledged Episcopal church, and Mr. and Mrs. Fetsch are merely two prominent members of it. We do not refer to TFC (CANA) as the "Yates congregation." The Episcopal Church in Falls Church, a church created by pre-vote members to which many of the members of TFC (CANA) formerly belonged, is entitled to the same courtesy and respect.

Tr. 4256. TFC cannot evade the unambiguous terms of the corporate documents.

VI. The Court should grant plaintiffs' motion to strike the Congregations' counterclaims.

The Congregations allocate a mere six pages of their massive opening post-trial brief to arguments in support of their Counterclaims for unjust enrichment (Count II) and constructive trust (Count III). The Congregations posit that if this Court determines that the Diocese and the Episcopal Church have superior rights to the real and personal property, then the Diocese and the Church will be unjustly enriched by that determination. They seek compensation for contributions made to the value of the properties and ask the Court to impose a constructive trust on the real and personal property in favor of the Congregations to avoid any reaping of such unintended benefit by the Diocese. Those claims have no legal or factual merit whatever.

In Virginia, "the elements of a cause of action for unjust enrichment are: (i) the plaintiff conferred a benefit on the defendant; (ii) the defendant knew of the benefit and should reasonably have expected to repay the plaintiff; and, (iii) the defendant accepted or retained the benefit without paying for its value." *Kirchner v. McAninley*, 2011 Va. Cir. LEXIS 27, at *15 (Fairfax Co. March 14, 2011) (citing *Schmidt v. Household Finance Corp.*, 276 Va. 108, 116, 661 S.E.2d 834 (2008)). *See also* Diocese Brief at 48-49 (citing *Schmidt v. Household Finance* and *Sevilla v. Del Castillo*, 28 Va. Cir. 164, 166 (Fairfax 1992)).

To recover in unjust enrichment, there must be some reasonable expectation of repayment. Indeed, "[t]he heart of an unjust enrichment claim is the implied promise that a defendant would pay for a benefit that he received: 'One may not recover under a theory of implied contract simply by showing a benefit to the defendant, without adducing other facts to raise an implication that the defendant promised to pay the plaintiff for such benefit.'" *In re: Chinese Drywall Cases*, 80 Va. Cir. 69, 84 (Norfolk Mar. 29, 2010) (quoting *Nedrich v. Jones*,

245 Va. 465, 476, 429 S.E.2d 201, 207 (1993)); *see also Poindexter v. Jolliff*, 2001 Va. App. LEXIS 22, at *6 (Jan. 23, 2001) ("Unjust Enrichment is defined as, 'the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected'") (citing Black's Law Dictionary 1536 (7th ed. 1999)); *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628, 631 (E.D. Va. 2010) ("Even where a defendant benefited from the plaintiff's services, the plaintiff cannot recover for an unjust enrichment claim unless he can show sufficient additional facts which imply that the defendant promised to pay the plaintiff for the benefit received") (applying Virginia law).

The court in *In re: Chinese Drywall Cases* expounded on this principle as follows:

> The failure to plead anything about Defendants' reasonable expectation to pay Plaintiffs for some benefit that they received is fatal to this claim. While builders, developers, manufacturers and suppliers all perhaps expect to face a claim for damages in the event of some breach of duty on their part, they have no reason to expect to repay the benefit that they realized from the transaction. Profits realized from business transactions often bear no relationship to reasonably foreseeable damages that might flow from a breach of duty. Return of profits, as opposed to liability for foreseeable damages, would almost certainly be an inferior remedy to customers adversely affected by defective products. The bare allegation that a defendant should be expected to repay whatever profits it realized from a sale to an unhappy customer does not state a claim for unjust enrichment.

80 Va. Cir. at 84.

The Congregations have presented, and therefore they cite, no evidence that the Diocese expressly or impliedly undertook to pay or reimburse the Congregations for improvements or contributions to real and personal property. Indeed, the Church's and the Diocese's property canons make it impossible for the Congregations to prove that there was any expectation or implied promise to pay for such alleged benefits. Those Canons placed all parties on notice that the Diocese and the Church expected exactly the opposite – that all local church property was held in trust for the national church and would be used only for the mission and ministry of the Church. Given that the entire trial record is devoid of any testimony or documentary evidence

supporting a claim of expected reimbursement, this Court need not consider or review further any of the evidence submitted by the Congregations on their claim for recompense.

Moreover, the "benefit" conferred will result from the Court's judgment awarding the property to the Diocese. If the Court makes such a ruling, it will be an adjudication that the Diocese has contract, trust and/or proprietary rights in the real and personal property, and the outcome of the case will not effectuate an inequitable or unjust benefit. To counsel's knowledge, no court has ever found unjust enrichment as a result of its own ruling or judgment.

The Congregations similarly cannot obtain the remedy of a constructive trust. A constructive trust is a remedy against unjust enrichment. *See* authorities cited in Diocese Brief at 50. Because the unjust enrichment claim fails, it follows that there can never be a holding that imposition of a constructive trust is warranted.

The arguments advanced by the Congregations are specious, and no Court considering a church property dispute has ever gone down their path. In fact, considering the counterclaims at all could thrust this Court into the constitutional "thicket." The Congregations try to cast this case in purely monetary terms, arguing that the relationship was a one way street and that they received little if anything in return for their contributions to the Diocese. It cannot in fairness be denied, however, that the Congregations received many benefits from their association with the Diocese, both institutional and spiritual as well as tangible. Such benefits are immeasurable; adjudication of whether the Diocese has been benefitted "unjustly" by the Congregations' monetary contributions cannot be decided without consideration and inquiry into issues of faith, pastoral and spiritual oversight, church polity, doctrine, and sacramental relationships.

Even if the Congregations otherwise were entitled to recovery on their counterclaims, those claims would have to be dismissed for failure to prove their damages with sufficient

certainty. *See* Diocese Brief at 51-54; *Little v. Cooke*, 274 Va. 697, 714, 652 S.E.2d 129, 139 (2007) ("'To recover damages in any case, a plaintiff must prove with reasonable certainty the amount of his damages and the cause from which they resulted.' … 'speculation and conjecture cannot form the basis of the recovery'") (citations omitted).

Finally, this Court cannot resolve the issue of donative intent. The Congregations assert blithely that it would be unjust for this Court to award the Diocese any portion of the bank accounts and investment funds on deposit at the time of the vote, on the ground that monies on deposit came from members who had expressed their intention to separate from the Diocese and the Episcopal Church. CANA Brief at 159-60. Monies on deposit are fungible, and there was no evidence presented tracing the deposits and funds in the accounts to particular donors. There also was no proof of whether and what amounts of those deposits and funds were contributed by persons who opposed separation from the Diocese and the Church and who remained Episcopalian after the split. *See also* pages 16-17 & n.15, *supra*, and cases cited. Nor have the Congregations presented any legal authority that would give them the right to reclaim contributions made to Episcopal churches. To award properties acquired by Episcopal churches from the contributions of generations of faithful, loyal Episcopalians, to a current group of members who have repudiated the doctrine, discipline and worship of the Episcopal Church, would be to give the current members a windfall.

The Congregations argue that this Court has wide latitude to fashion equitable relief. That is true; but they are asking this Court to grant remedies that no court has ever considered (much less awarded) in a church property dispute, and they are making a blatant appeal to sympathy, not to equity. Members of what Mr. Deiss called a "club," who refuse to follow its rules, have earned no sympathy. The invitation should be declined.

Respectfully submitted,

Dated: September 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent by electronic mail to all counsel, including those named below, on this 16th day of September, 2011, pursuant to the Stipulated Amended Pretrial Scheduling Order and post-trial briefing/procedures Order:

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SUPREME COURT STATE OF NEW YORK
COUNTY OF BROOME

The Diocese of Central New York,
Plaintiff,

– against –

The Rector, Church Wardens, and Vestrymen of the Church of the Good Shepherd,
Defendant.

ATTORNEY'S AFFIRMATION

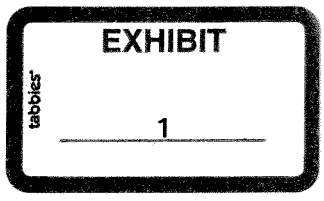
Index No. 2008-000980

Raymond J. Dague, admitted to the practice of law in the State of New York, with an office for the practice of law located at Suite 620 Empire Building, 472 South Salina Street, Syracuse, New York, 13202 hereby makes this affirmation pursuant to CPLR § 2106 under the penalties of perjury.

1. I am the attorney for the defendant herein and am familiar with the facts underlying this action and the pleadings and proceedings to date, and I make this affirmation is in opposition to plaintiff's motions and in support of defendant's cross-motions.

2. This action was commenced by the service of summons and complaint on the defendant on Good Friday, April 15, 2008 and the defendant thereafter interposed an answer on or about July 24, 2008. A copy of the complaint is annexed to a part of plaintiff's moving papers on their motion, to wit, the affidavit of Jonathan B. Fellows sworn to November 20, 2008, as Exhibit "A", and the answer of the defendant is annexed to that same affidavit, as Exhibit "C".

PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGEMENT ON THE FIRST THREE CAUSES OF ACTION AND DEFENDANT IS ENTITLED ON THE CROSS-MOTION TO DISMISS UNDER CPLR §3211 AND FOR SUMMARY JUDGMENT UNDER CPLR §3212



SUMMARY OF DEFENDANT'S REASONS TO DISMISS AND FOR SUMMARY JUDGEMENT AND TO OPPOSE SUMMARY JUDGEMENT OF PLAINTIFF

3. Plaintiff's entire claim for the property of the defendant hangs on what has become known as the "Dennis Canon" which is alleged by plaintiffs to be an internal canon (ecclesiastical law) of the Episcopal Church, more formally known as Canon I.7.4 and Canon I.7.5 of the Canons of the General Convention. The recent case from the Court of Appeals rests almost solely on the "Dennis Canon" as the basis for why an Episcopal Diocese can seize the property of a parish which leaves the Episcopal Church pursuant to the "express trust" of as contained in that canon.

4. Notwithstanding the recent decision of the New York State Court of Appeals in *Diocese of Rochester v. Harnish*, there is no Dennis Canon. The so-called Dennis Canon was never adopted by the General Convention of the Episcopal Church in 1979.

5. Canon XXIII of the Canons of the Diocese of Central New York is, by its own words, "in conformity and consistent with" the Dennis Canon. If there is no Dennis Canon, there is nothing for the local diocesan canon to track, and it too lacks validity.

6. The issue of the adoption of the Dennis Canon was not before the Court of Appeals in this recent case. Since the plaintiff is asking this court to assert property rights as against the title of the property of the Church of the Good Shepherd based on this Dennis Canon trust claim of theirs, it is incumbent on the court to determine, *ab initio*, whether the Dennis Canon was in fact a duly adopted canon of the Episcopal Church. Is there a Dennis Canon or not? This is a fact which must be proved by the plaintiff before the court can assess plaintiff's claims against the defendant.

7. This line of inquiry is not precluded by the recent Court of Appeals case *Episcopal Diocese of Rochester v. Harnish*. That issue was not raised in the pleadings in that case, and was not referenced in any of the three decisions of the Supreme Court, 17

Misc. 3d 1105A (S. Ct. Monroe Co. 2006) (slip opinion not published in the official reporter and annexed hereto as Exhibit "A") , the Appellate Division, 43 App. Div. 3d 1406, 841 N.Y.S.2d 923 (4th Dept. 2007), or the Court of Appeals, (No. 2008-07991 *dec'd* October 23, 2008) (Annexed hereto as Exhibit "B"). A review of the record in the Court of Appeals likewise is devoid of any reference to this issue.

8. In fact, as the unpublished decision by special term in Monroe Supreme Court clearly states, the defendant in that case argued that the Dennis Canon was adopted in 1979, and hence the courts at all levels took the facts as presented to them by the parties. Hence it is not surprising that the Court of Appeals in FN5 of its opinion recites that "the 'Dennis Canons' were adopted in 1979 by the General Convention of the National Church." The Court of Appeals found the facts as provided to them by the litigants in that record, including the defendant's own admission in that case of the Dennis Canon's adoption. In this litigation, however, Church of the Good Shepherd denies that the Dennis Canon was so adopted.

9. Not only was this issue which we are raising in this litigation never addressed by the litigants or by the court at any level of that case in *Episcopal Diocese of Rochester v. Harnish*, but is has not been raised in *any* other case in this state. Since the issue of the non-adoption of the Dennis Canon was not before the court in *Episcopal Diocese of Rochester v. Harnish*, or elsewhere, we may thus assert this defense in the instant proceedings.

10. Defendant has properly raised this issue in ¶5 of the defendant's answer and in ¶6 of its answer when it "DENIES any trust relationship of any kind whatsoever between plaintiff and defendant, or between plaintiff and the Episcopal Church, as alleged in ¶¶ 15, 16 and 17 of plaintiff's complaint." Unless the plaintiff can assert fact refuting the facts brought forth by the Church of the Good Shepherd here, dismissal or summary judgement should be denied to plaintiff and granted to defendant on the first three causes of action.

NEUTRAL PRINCIPLES OF LAW SHOULD BE USED TO DETERMINE WHETHER A RELIGIOUS BODY ADOPTED A CANON WHICH IS DISPUTED

11. The Court of Appeals in its recent decision *Episcopal Diocese of Rochester v. Harnish* noted that they were "applying the neutral principles of law approach to the case at bar." This is the legal standard which the United States Supreme Court authorized in *Jones v. Wolf*, 443 U.S. 595 (1979), as opposed to the hierarchical deference approach which preceded that case. Neutral principles of law is the standard to which the Court of Appeals subscribed in *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States,* 63 N.Y.2d 676, 479 N.Y.S.2d 1028 (1984), and this is the legal approach to be taken here by this court in analyzing whether there is an alleged Dennis Canon trust on defendant's property.

12. The plaintiff alleges in its complaint in ¶15 that there is a Dennis Canon of the Episcopal Church, and in ¶16 that they have a local canon based on the Dennis Canon, and in ¶17 that "the trust relationship between local churches and their diocese has implicitly existed throughout the history of the Episcopal Church."

13. These are facts which are disputed by the defendant. Paragraph 6 of defendant's answer to the complaint denies them. See also, the accompanying affidavit of Matt Kennedy. The Court should not merely accept the contention of the plaintiff that this is so, but must test the truth of these allegations at a trial at which time the both parties may seek to prove the facts of the case.

14. To merely take the word of the diocese on these allegations would be to retreat from applying "neutral principles of law" the in favor of a deference to the hierarchy–the very thing which our courts eschew, as most recently articulated by our Court of Appeals in *Episcopal Diocese of Rochester v. Harnish* as recently as October 23,

2008.

PRINCIPLES OF STATUTORY CONSTRUCTION AND THE COMMON LAW OF PARLIAMENTARY PROCEDURE DETERMINE WHETHER A LEGISLATIVE BODY HAS ADOPTED A LAW

15. When deliberative assemblies meet and take action, the actions taken by them should be memorized and preserved in a written record which is usually called "minutes" or in the case of legislative bodies, the "journal." *Roberts Rules of Order Newly Revised*, §48, p.451, lines 22-25 (10th Ed. 2000). The record so generated should contain the "wording in which each motion was adopted" as well as all amendments and secondary motions considered as the motion was considered and either passed or defeated. *Id.* at §48, p.452, line 24, *et seq.*

16. The Episcopal Church's triennial convention is mandated by its own canons to maintain an official record of the actions of its General Conventions in a Journal. Canon I.1.5(f) of the General Convention. *See*, FN2, *infra*, for the text of this canon. The church's official publishing house published under the authority of the 1979 General Convention its official Journal which consists of a 2½" thick yellow paperback book. This Journal purports to set forth what motions and resolutions were considered and acted upon by the two houses of the convention in September of 1979.

17. In order to ascertain whether a deliberative assembly took any alleged action, the courts look to the official documents of the deliberative assembly, and sometimes to the underlying records of original notes and minutes which went into generating those official documents.

18. The General Convention of the Episcopal Church is a bicameral legislature,

but with no executive necessary for legislation to be passed.[1] Legislation is adopted by the General Convention by both houses of that legislature, the House of Bishops and the House of Deputies, passing an identical resolution. If so adopted and authenticated, legislation changing or adopting a canon is said to have passed the convention and thus become part of church canon law.

19. There is a wide variety of practice among legislative bodies through custom, legislative rule, and legal provision as to what constitutes the official pronouncement that a law has been enacted by that legislative body, and these rules differ from jurisdiction to jurisdiction. In most all governmental legislative bodies, the process is for the production of an enrolled or engrossed bill as evidence of proper adoption by the two houses of a bicameral legislature, and such process is accomplished when it bears the certifying signature of the presiding officer of the two houses which adopted it. Such certification in some jurisdictions is conclusive evidence that the procedural requirements for passage has been met, but some jurisdictions have looked behind a enrolled bill with its certification to determine proper adoption to permit the enrolled bill's certification to be impeached. The official Journals of the legislative body, and sometimes the underlying documents such as original minutes, and sometimes other extrinsic sources, have been examined by courts to determine whether an enrolled bill had become law. See, N. Singer, *Sutherland Statutes and Statutory Construction,* §15 (6th Ed. 2002), E. Crawford, *The Construction of Statutes*, §35-46 (1940).

20. When the respective houses of a legislative body pass what purports to be the same bill and the contents differ substantially, the enrollment of the bill as finally passed is not conclusive, and the bill does not become law. *Sutherland Statutes and*

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[1] Article I, §1 of the Constitution of the Protestant Episcopal Church of the United States of America, reads as follows: There shall be a General Convention of this Church, consisting of the House of Bishops and the House of Deputies, which Houses shall sit and deliberate separately; and in all deliberations freedom of debate shall be allowed. Either House may originate and propose legislation, and *all acts of the Convention shall be adopted and be authenticated by both Houses. (emphasis supplied)*

Statutory Construction, §15:16. A resort to the Journal is the manner in which a court may settle the matter. *Id.*, at §15:17.

21. The Episcopal Church has no such thing as the creation of an enrolled bill with its certifications to proclaim the adoption of a canon by both of its legislative houses, and its canons contain only the most cursory instructions as to the generation of documents by the secretaries and registrars of the General Convention.[2]

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[2] See, Canon I.1 which describes the duties of the secretaries and registrars of the General Convention as follows:

1(d) The Secretary shall keep full minutes of the proceedings of the House; record them, with all reports, in a book provided for that purpose; preserve the Journals and Records of the House; deliver them to the Registrar, as hereinafter provided; and perform such other duties as may be directed by the House. The Secretary may, with the approval of the House, appoint Assistant Secretaries, and the Secretary and Assistant Secretaries shall continue in office until the organization of the next General Convention, and until their successors be chosen.

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2(j) At every regular meeting of the General Convention, the Secretary elected by the House of Deputies shall, by concurrent action of the two Houses of the General Convention, also be made the Secretary of the General Convention, who shall have responsibility for assembling and printing of the Journal of the General Convention, and for other matters specifically referred to the Secretary.

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5 (a) The House of Deputies, upon the nomination of the House of Bishops, shall elect a Presbyter, to be known as the Registrar of the General Convention, whose duty it shall be to receive all Journals, files, papers, reports, and other documents or articles that are, or shall become, the property of either House of the General Convention, and to transmit the same to the Archives of the Church as prescribed by the Archivist.

(b) It shall also be the duty of the said Registrar to maintain suitable records of the ordinations and consecrations of all the Bishops of this Church, designating accurately the time and place of the same, with the names of the consecrating Bishops, and of others present and assisting; to have the same authenticated in the fullest manner practicable; and to take care for the similar record and authentication of all future ordinations and consecrations of Bishops in this Church. Due notice of the time and place of such ordinations and consecrations shall be given by the Presiding Bishop to the Registrar; and thereupon it shall be the duty of the Registrar to attend such ordinations and consecrations, either in person or by deputy.

(c) The Registrar shall prepare, in such form as the House of Bishops shall prescribe, the Letters of Ordination and Consecration in duplicate, shall have the same immediately signed and sealed by the ordaining and consecrating Bishops, and by such other Bishops

assisting as may be practicable, shall deliver to the newly consecrated Bishop one of the said Letters, shall carefully file and retain the other, and shall make a minute thereof in the official records.

(d) The Registrar shall also be Historiographer, unless in any case the House of Bishops shall make a separate nomination; and in this event the House of Deputies shall confirm the nomination.

(e) The necessary expenses incurred under this Section shall be paid by the Treasurer of the General Convention.

(f) It shall be the duty of the secretaries of both Houses, within thirty days after the adjournment of the General Convention, to deliver to the Registrar the manuscript minutes of both Houses, together with the Journals, files, papers, reports, and all other documents of either House. The manuscript minutes of both Houses shall remain filed until after the adjournment of the second Convention following that at which such minutes shall have been taken; Provided, however, that any part of such minutes, for any reason unpublished in the Journal, shall remain filed in the Archives. The Secretary of the House of Deputies shall also deliver to the Registrar, when not otherwise expressly directed, all the Journals, files, papers, reports, and other documents specified in Canon I.6. The Secretaries shall require the Registrar to give them

22. Given the lack of an enrollment process in the Church, how would one determine whether a particular piece of legislation has passed both houses of the General Convention in identical format so as to constitute an authenticated action to adopt a canon of the church? The closest analogue to enrollment is the list of Concurrent Actions as set forth in the Journal which is generated after the conclusion of each convention. This is a listing of the actions which purport to have been adopted by both houses in identical format.

23. The importance of Journal entries has been pointed out by one commentator who noted that in jurisdictions where adherence to a constitutional requirements is essential to the validity of a statute, the failure to make the prescribed entry in the journal will invalidate the law. *Id.*, *The Construction of Statutes*, §46, p. 76, FN141.

24. The Episcopal Church has an Archive which is mandated to keep the records of the church including the original records of each General Convention. Canon I.5 of the Canons of the General Convention. It was this resource which George Conger consulted in connection with his accompanying affidavit in this matter.

25. Hence in seeking to determine whether the Episcopal Church adopted the Dennis Canon by "neutral principles of law" the court should consider the pertinent entries in the Journal, and the underlying archival records of the convention.

THE OFFICIAL JOURNAL OF THE GENERAL CONVENTION DOES NOT SUPPORT THE PLAINTIFF'S CONTENTION THAT THE EPISCOPAL CHURCH HAS A DENNIS CANON

26. The question as to whether the Dennis Canon was adopted was not generally noticed until 2005 (apart from a passing reference in the official commentary on

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receipts for the Journals and other papers.

the canons discussed, *infra*). An internet columnist by the name of David Virtue pointed out the defect in 2005, and then canon lawyers in the Episcopal Church began to note the problem.

27. The so-called Dennis Canon was purported to have been adopted at the General Convention of the Episcopal Church which met in September of 1979, as alleged by the plaintiff in their moving papers. The text of the Dennis Canon is as follows:

Canon I.7:

Sec. 4. All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Sec. 5. The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

28. This "Dennis Canon" is found in the printed edition of the Constitution and Canons of the Episcopal Church as Canon I.7.4 and Canon I.7.5.

29. In order to ascertain whether the Dennis Canon trust provisions were adopted in 1979, one must review the Journal of the General Convention 1979.

30. Since the Dennis Canon is alleged to have been adopted at the General Convention of 1979, an examination of that Journal is necessary to establish the record of what that General Convention did, or did not adopt.

31. The 1979 Journal is a 2½" thick book which contains several parts and an index, and appendices. Part B of the 1979 Journal contains the proceedings of the House of Bishops. Part C of the 1979 Journal contains the Concurrent Actions adopted by both Houses. Part D of the 1979 Journal contains the proceedings of the House of Deputies. A copy of the title page of the 1979 Journal of the General Convention and all pages cited in this or in any of the other accompanying affidavits, or any other part of defendant's motion

papers, are annexed hereto as Exhibit "C"

32. In the index to the 1979 Journal at I-17 under "Parish" there is a subcategory denominated "Property," where the following references are found: "B-33, B-60, B-61, B-63, C-150, D-154".

33. At the beginning of the index at I-1 the capital letter abbreviations which precede these numbers are explained as follows:

"Section B contains the Roster and Minutes of the House of Bishops,..."; and

"Section C contains the Concurrences–the development of legislation which was enacted in both houses, arranged topically," and

"Section D contains the Roster and Minutes of the House of Deputies."

34. The first place where this matter is found is, B-33, which mentions the House of Bishops proceedings of September 11, 1979. According to the reference at B-33 of the Journal a vote on Resolution D-24 was deferred to allow the "Bishops time to counsel with their respective diocesan chancellors where litigation is currently in process." Resolution D-24 is neither quoted nor summarized at B-33 of the Journal.

35. The second place where the Dennis Canon is mentioned is B-60, which continues on the top of B-61. The entry here reflects the adoption of Resolution D-24 by the House of Bishops. This resolution, if followed by adoption in the House of Deputies, would amend Title I, Canon 6 by adding new sections 4 and 5. Resolution D-24 is quoted in full at this point in the proceedings of the House of Bishops in the Journal minutes of that house. The adoption by the House of Bishops of Resolution D-24 was designated "HB Message #76". According to the Journal this happened on Sept. 13, 1979. *See*, date at the top of B-61. The text of this canon change is identical to that which now appears in the published Canons, and as cited, *supra*, and has become what we call the Dennis Canon. This is the only place in the entire Journal where the text of the Dennis Canon is to be found.

36. The third place where parish property is mentioned is, B-61, reflects the adoption by the House of Bishops on September 13, 1979, of "Resolution, Report #13 (D-24)" to amend Title II, Canon 7. This resolution, if followed by adoption in the House of Deputies, would add a new section 3 to Title II, Canon 7, and it is quoted verbatim at the top of B-61. The adoption of this resolution, as distinct from "HB Message #76" discussed in the previous paragraph and which preceded it in the Journal, was designated "HB Message #75".

37. HB Message #75 found at B-61 is not the Dennis Canon itself. The Dennis Canon is contained only in HB Message #76. HB Message #75 pertains to a canon which, if adopted, will refer to the Dennis Canon. This canon, as can be seen from its text at B-61, deals with "any dedicated and consecrated Church or Chapel" and declares them to be subject to the Dennis Canon which the House of Bishops passed in HB Message #75 to be sent on to the House of Deputies for their consideration.

38. The fourth place in the Journal dealing with church property is at B-63, which really begins at the bottom of B-62. Here is found "Resolution D- 101" which sought to amend Title II, Canon 7, by restoring a section relating to consecrated church property that had apparently inadvertently been deleted from that Canon in the 1973 General Convention. Significantly, this amendment *does not create any trust interest in parish property*. The adoption of this third resolution was designated "HB Message #78".

39. The fifth reference to this matter is C-150. This is the portion of the 1979 Journal, entitled "Concurrent Actions." This part of the Journal is supposed to reflect action which was taken by both houses of the General Convention, and thus in accordance with Article I, §1 of the Constitution, becomes the action of the General Convention. Since the particular legislation cited as C-150 is a canon amendment, this canon thus becomes a canon of the General Convention.

40. C-150 does *not* contain the Dennis Canon. Instead it contains what is set

forth as HB Message #78. This is a report of concurrent approval of the technical correction amendment to Title II, Canon 7, *i.e.*, the amendment that restored the section that had been inadvertently deleted by the 1973 Convention.

41. There is no reference on page C-150 to the Dennis Canon, nor does the text of the Dennis Canon appear there. The text of the correction amendment for Title II, Canon 7 does appear there. For that matter, on none of the 173 pages of Concurrent Actions, neither on page C-150, nor on any other page of the Concurrent Actions, is there so much as a hint of concurrent approval of any amendments to Title I, Canon 6, the so-called Dennis Canon placing a trust on parish property.

42. The sixth and final reference in the index to parish property is found at D-154. The D portion of the Journal refers to actions of the House of Deputies. This entry is for the September 19, 1979 proceedings in the House of Deputies. The entry on this page of the journal of the House of Deputies proceedings (D-154) reads in its entirety as follows:

Retention of Parish Property
The Committee on Canons presented its Report #32 on
Resolution D-24, and recommended concurrence with
House of Bishops Messages #75 and #76.
The House concurred
(See pg. C-150)

43. This entry, when compared with C-150, the place it references, creates a problem as noted, *supra*: the Dennis Canon is nowhere to be found! The above-quoted entry does not contain the text of what they adopted in the House of Deputies on that date. Were amendments made? Did one or more committees alter the text of the resolution from the House of Bishops? What was the text of the resolutions from the House of Bishops? Was the language identical to what the House of Bishops adopted? What in fact did they adopt that day, if anything? The record is silent on these points. With no text of the resolution set forth in these printed minutes of the House of Deputies, and no summary of the resolution, all of these questions are left open, and we can only

speculate as to the answers. But one thing is indisputable: when we look at the reference cited at D-154 "(See pg. C-150)" we find no Dennis Canon, but rather something quite different.

44. The quoted reference in parentheses to C-150 (the citation to the report of concurrent actions of both Houses) as indicated, *supra*, shows concurrent action only as to the technical correction amendment (HB # 78) which contains no trust provision, as mentioned. Only HB # 76 and HB# 75 had any reference to the trust provision of the Dennis Canon, and that is absent from the "concurrent actions" recorded at C-150 of the 1979 Journal.

45. The Dennis Canon placing a trust on church property is, for that matter, set forth nowhere else in the 1979 Journal except in the verbatim recitation of B-60.

46. Given the cross reference to the adoption of a wholly different amendment and the fact that the actual language before the House of Deputies is not quoted in the journal of the House of Deputies proceedings at D-154 or anywhere else, the official record of the General Convention of 1979 supports the conclusion that the House of Deputies never adopted the Dennis Canon.

47. An official record cannot prove the negative. Indeed one can never prove the negative. It is impossible to ever prove that something did *not* happen, but we can state with certainty that the evidence of this canon passing both houses of the General Convention is *not* contained in the Journal of that General Convention.

48. This apparent defect in the convention Journal is noted in passing in a brief comment in the Annotated Canons of the Church published by the official publishing house of the church. I White & Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church in the United States of America,* p. 296 (1981) comments on this problem that, "The account of this legislation [the Dennis Canon] does not appear under "Concurrent Actions." The reference in the index is to a related

action."

49. How does one decide whether this canon was properly adopted? The official Journal of the convention is the authoritative source of what happened there. The fact that the "Dennis Canon" is in the latest published copy of the canons says nothing about its validity. If it never was adopted by both Houses, it is not a canon of the church. The official Journal of the convention's proceedings does not show it as having been adopted as a concurrent action of both Houses. Hence, the conclusion to draw is that the published book of the canons contains two proposed canons, which were never adopted according to the official Journal of the convention.

THE RECORDS OF THE 1979 GENERAL CONVENTION AS CONTAINED IN ARCHIVES OF THE CHURCH GIVE NO EVIDENCE OF THE ADOPTION OF THE DENNIS CANON

50. Fr. George Conger in his affidavit made a part of this motion delved into the documents of the 1979 General Convention contained in the Episcopal Church archives to investigate the controversy over the disputed adoption of the Dennis Canon.

51. According to his affidavit, he visited the Archives on August 1, 2007 and did his research.

52. After an exhaustive search, he discovered no original records to support the concurrent adoption of the Dennis Canon by the House of Deputies. As he notes in his affidavit, many minutes are simply missing from the archives, including all of the minutes of the House of Deputies, the house whose summary of the minutes in the Journal refer to a different canon in Concurrent Actions, and not to the Dennis Canon.

53. Not only are the minutes of both houses of the General Convention missing, the resolutions which these houses adopted are likewise not in the Archives, as indicated

by Fr. Conger.

54. The documents which he found and which formed the basis of his affidavit were a part of a committee report that dealt with the Dennis Canon, and even the actions of the House of Bishops in adopting the Dennis Canon cannot be demonstrated from the original records in the archives, since those original minutes, like the original minutes of the House of Deputies, are missing.

55. The documents which he did locate do not give any additional information to support the view that the House of Deputies adopted the resolution.

56. His findings would seem to support the statement of the Journal which speaks by way of omission. Absent a positive statement in the official record showing that it was adopted, the official archival record of the Episcopal Church appears to buttress the silence of the Journal indicating a lack of concurrent adoption of this disputed Dennis Canon.

DEFENDANT HAS RAISED A FACTUAL QUESTION, WHICH IS UNREFUTED BY THE PLAINTIFF, THAT THE EPISCOPAL CHURCH NEVER ADOPTED THE DENNIS CANON AND THUS HAS NO TRUST ON DEFENDANT'S PROPERTY

57. The plaintiff asserts the Dennis Canon as the basis for their claim that when Church of the Good Shepherd left the Episcopal Church that they may seize its property from the parish. The Church of the Good Shepherd denies that there is such a Dennis Canon. Defendant has made a factual showing that there is no such canon; plaintiff has not made any factual showing that there is such a thing. The Plaintiff has the burden of doing so on a motion for summary judgement.

58. Fr. Matt Kennedy in his accompanying affidavit denies that the church is subject to a trust and denies that the Dennis Canon was adopted.

59. Absent a factual refutation of these facts, the motion of the Diocese for summary judgement must fail. Summary judgement should be granted to the Church of the Good Shepherd on the first three causes of action of plaintiff's complaint, unless the plaintiff can in reply allege something by way of facts which we have overlooked to demonstrate the due and proper adoption of the Dennis Canon, and so as to raise a triable question of fact.

60. It will not be sufficient to defeat our cross-motion to dismiss and for summary judgement by bald conclusions and assertions that they have a Dennis Canon as they have asserted in their complaint and in their motion papers, or that the Court of Appeals has previously referred to the Dennis Canon in litigation where its existence was not controverted. It matters not whether those asserting the existence of the Dennis Canon are bishops, chancellors, or seminary professors of the Episcopal Church. Absent facts, such assertions from supposed experts are mere puffery, and will not defeat summary judgement.

61. In the alternative to dismissal or a grant of summary judgement to the Church of the Good Shepherd as to the first three causes of action in Plaintiff's complaint, the court should deny their motion for summary judgement.

62. At best, the Episcopal Church in 1979 claims that it adopted this church law on which the claim of the diocese to the parish property turns, and this is a factual question. Did the Episcopal Church adopt the Dennis Canon or not? This is not a question of law, but of fact. Since as Fr. Kennedy in his affidavit notes that there are no courts of any kind in the Episcopal Church to determine or adjudicate this question, only this court can do so.

63. Hence plaintiff's motion for summary judgement should be denied.

CROSS-MOTION TO DISMISS UNDER CPLR §3211 AND FOR SUMMARY JUDGMENT UNDER CPLR §3212 ON PLAINTIFF'S 4TH CAUSE OF ACTION

64. The plaintiff in its moving papers here indicated that they will bring a motion at some later date with respect to the 4th Cause of Action, apparently ignoring the scheduling order of the court. See, ¶2 of Fellow's affidavit, whereby plaintiff says that "the fourth cause of action relates to a trust of which defendant is a beneficiary, and will be the subject of a *separation* motion." (*emphasis supplied*) It appears that the word "separation" here is a typographical error for "separate." If that be so, apparently plaintiff intends to make some other dispositive motion concerning this cause of action at a later date.

65. Irrespective of plaintiff's intentions, the plaintiff in its 4th cause of action is asking this court to direct that the income from this estate be paid to the plaintiff, or in the alterative be paid to Christ Church Binghamton. However in doing so plaintiff has neglected to name the executor of the estate, the trustee of the trust, and Christ Church Binghamton as necessary parties to this litigation. See, the affidavit of Fr. Matt Kennedy.

66. Plaintiff in its 4th cause of action is asking that the court direct the trustee of the trust established by Mr. Branan's will (the trustee neither being named nor served in this proceeding) to direct the moneys of that trust to go to Christ Church Binghamton (also not a party to this proceeding). A copy of the Will of Robert A. Branan is annexed to the affidavit of Matt Kennedy as Exhibit "E"

67. Plaintiff on the face of these pleading shows no legal interest in this estate for itself, and shows no reason why plaintiff should be permitted to litigate this matter on behalf of Christ Church Binghamton . Upon information and belief, Christ Church Binghamton is still a going concern and fully capable of asserting its own legal interest, if any, with respect to this trust.

68. The 4th Cause of Action should be dismissed under CPLR §3211(3) because

the plaintiff is "the party asserting the cause of action [which] has not legal capacity to sue" on behalf of Christ Church Binghamton.

69. The 4th Cause of Action should also be dismissed under CPLR §3211(7) because it is unclear under any theory of law that plaintiff can make out any cause of action against defendant and thus the plaintiff's 4th Cause of Action "fails to state a cause of action."

70. And the 4th Cause of Action should also be dismissed under CPLR §3211(10) because "the court should not proceed in the absence of a person who should be a party," to wit, the executor of the estate, the trustee of the trust, and Christ Church Binghamton.

71. Further, the Branan Estate was probated in surrogate's court, and that is the appropriate forum in which to bring any action or motion with respect to the disposition of the income of the estate, the construction of the will, or any directions to the trustee with respect to the trust which is established in the will.

72. As the accompanying affidavit of Matthew Kennedy sets forth in greater detail, the Branan will was for the benefit of the defendant, and no other party, and hence, in addition to the grounds for dismissal under CPLR §3211, summary judgement is appropriate under CPLR §3212 pursuant to the affirmative defenses EIGHTH through TWELFTH inclusive.

MOTION FOR PRECLUSION AND REMEDIES FOR FAILURE TO PRODUCE

73. The court in a letter by way of a scheduling order dated July 15, 2008 directed the parties to complete depositions on or before October 31, 2008 and for the plaintiff to file a trial not of issue on or before November 17, 2008. A copy of the letter of the court dated July 15, 2008 is annexed to a part of plaintiff's moving papers on their

motion, to wit, the affidavit of Jonathan B. Fellows sworn to November 20, 2008, as Exhibit "B".

74. The discovery is not complete in this action due in no fault to the defendant. The plaintiff was, according to the court's scheduling order, to have filed a trial note of issue by November 17, 2008. The plaintiff admits that discovery is not finished when Mr. Fellows says in his affidavit in ¶19 states that "it is quite possible that the Diocese will need a deposition of a representative of Good Shepherd familiar with its finances in connection with the cause of action for an accounting."

75. The plaintiff has not complied with the discovery demands of the defendant and the plaintiff did not object to any of these demands.

76. Plaintiff also in response to these demands produced a box containing 2602 Bates numbered pages. Much of that material is not responsive to our demand. Like the fat 4" thick stack of diocesan journals attached to Bishop Adams moving papers as their the two volume Exhibit "G" most of this material adds nothing to this case.

77. In the plaintiff's answer to our demand for these records, the plaintiff said in its answer to the request in ¶3 that "defendant will produce documents of its bodies, located after a reasonable search of its records, related to the assertion of an ownership interest by the Diocese in properties of parishes of the Diocese." Likewise in answer to Demands 4, 17, 25, 29, 30, 31, 33, 34, 36, 39, 40, 44, 46, and 49 the plaintiff similarly indicates that they will produce materials in the future. This has not been done to date.

78. In a chambers conference on November 26, 2008 at which we requested more time for additional discovery, plaintiff's counsel told the court that 2602 Bates numbered pages in a box delivered to us is their answer to this request. This does not appear to be so. The transmittal letter with these 2602 Bates numbered pages in a box did not so indicate that it was in response to our Demands 4, 17, 25, 29, 30, 31, 33, 34, 36, 39, 40, 44, 46, and 49, and a review of the documents reveals these to be not

responsive. Plaintiff has attached numerous letters between the lawyers as exhibits in this motion, for little apparent purpose, but none of this correspondence tells the court or the defendant what if any response the plaintiff has to Demands 4, 17, 25, 29, 30, 31, 33, 34, 36, 39, 40, 44, 46, and 49.

79. Much of the 2602 pages are copies of pages of financial data or copies material from the diocesan journal, much like the two volume 4" thick Exhibit "G" which accompanies the affidavit of Gladstone Adams. This bulk of extraneous exhibits attached to plaintiff's motion papers add nothing to this case other that to increase the size of the record, and of course the legal cost and time needed to deal with this material.

80. Depending on the court's ruling with respect to summary judgement on the Dennis Canon as to whether there is a question of fact as to its adoption constituting a complete or partial defense to this action by plaintiff, the defendant will need additional discovery of church records and persons who will claim on plaintiff's behalf that the Dennis Canon was adopted.

81. This additional discovery was requested with respect to the depositions of church officials, specifically Katherine Jefferts-Schori, (Presiding Bishop of the Episcopal Church), David Booth Beers, Esq. (Chancellor to the Presiding Bishop of the Episcopal Church), and Stacy Sauls (Chairman of the Property Task Force of the Episcopal Church) which were requested when defendant served its discovery demand for EBTs, and in the Demand to Produce for which the plaintiff indicates that they will produce materials in the future, as set forth, *supra*, and in the discovery demand for the plaintiffs's expert witnesses. None of this relevant discovery has been furnished to the defendant.

MOTION TO STRIKE THE TRIAL NOTE OF ISSUE

82. The plaintiff on December 4, 2008 signed a statement of readiness and filed

with the court a trial note of issue, albeit past the court's scheduling order deadline of November 17, 2008.

83. If one party files the trial note of issue prematurely when discovery is not complete and the case is not ready for trial, the other party may move to strike that note of issue within 20 days of the service of the note of issue. Siegel, *New York Practice*, (4th Ed. 2005) p. 616.

84. For the reasons set forth in the preceding part of these motion papers for preclusion and remedies for failure to produce, we request the court vacate the note of issue until such time as discovery is complete.

WHEREFORE, your deponent respectfully requests that this Court grant an Order to deny plaintiff's motion for summary judgement as to the first three causes of action, to dismiss all of plaintiff's causes of action, for summary judgement on all of plaintiff's causes of action, to compel discovery or be precluded and for presumptions and inferences against the plaintiff by virtue of the failure to furnish discovery, to strike the note of issue, plus costs and disbursements on the action and motion together, and for any and all such further relief as this Court deems just and proper.

Dated: December 9, 2008

RAYMOND J. DAGUE